THOMAS KIM, ESQ. (ID. No. 038422012)
The Law Offices of Thomas T. Kim
Hudson Professional Building
45 Hudson Street
Hackensack, New Jersey 07601
Tel: (201) 489-6644
Fax: (201) 489-3575
Attorneys for Appellant Vivienne I. Allen

VIVIENNE I. ALLEN,	:	
Plaintiff-Appellant,	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**APPELLATE DIVISION**
	:	
	:	
	:	
	:	
v.	:	**Civil Action**
	:	
	:	**On Appeal from the**
JOSEPH KANE,	:	
Defendant- Respondent	:	**Superior Court of New Jersey**
	:	**Bergen County, Law Division**
	:	
	:	**A-003842-22T4**
	:	**Docket No.: BER-L-5209-21**
	:	
	:	**Sat below:**
	:	**Hon. Gregg A. Padovano, J.S.C.**
	:	
	:	

APPELLANT VIVIENNE I. ALLEN'S BRIEF IN SUPPORT OF AN APPEAL

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PRELIMINARY STATEMENT

In this Appeal, the Appellant-Plaintiff, Vivienne I. Allen (herein referred to as the "Appellant-Plaintiff") challenges two Law Division Orders. The first Order was an entry of Summary Judgment dismissing the matter with prejudice against the Respondent-Defendant Joseph Kane (herein referred to as the "Respondent-Defendant"). The second Order was a denial of a Motion for Reconsideration and affirming the first Order.

This is an action brought by the Appellant-Plaintiff in the Superior Court of New Jersey, Bergen County, in connection with a motor vehicle accident ("MVA") that occurred on or about August 14, 2019 between her and the Respondent-Defendant. As a result of the MVA, the Appellant-Plaintiff sustained severe and permanent injuries, including injuries to her neck, mid back and lower back resulting in pain, spasms and restrictions. The Appellant-Plaintiff also sustained a fractured sternum as a result of the MVA.

Following the accident, the Appellant-Plaintiff underwent extensive medical treatment from various providers, including Dr. Andrew Rodgers D.C. Upon the treatment and observation, Dr. Rodgers provided a report, dated March 29, 2021, that included a certificate of permanency. The report also found that "[t]here is a direct relationship between Mrs. Allen's present condition and the accident of August 14, 2019." The report addendum from Dr. Rodgers, dated June 27, 2022, confirms the finding that the Appellant-Plaintiff

"severely injured her sternum resulting in a fractured sternum from the motor vehicle accident."

The Plaintiff has sufficiently established by the requisite "credible objective medical evidence" that she has sustained a permanent injury. The Appellant-Plaintiff has provided evidence of injuries which would satisfy the requirements of the verbal threshold statute, N.J.S.A. 39:6A-8a.

Thus, the central issues to be raised in Appeal include:

a. Whether the objective evidence finding that the Appellant-Plaintiff "has sustained a significantly permanent injury from her accident of said date" is sufficient to satisfy the requirements of the verbal threshold's limitation on lawsuit as per the Automobile Insurance Cost Reduction Act ("AICRA")?

b. Whether the Trial Court erred by not considering the significance of probative, competent evidence from Dr. Rodger's report that was based on his review of the MRI studies?

c. Whether the Trial Court erred in finding that the Appellant-Plaintiff has failed to establish the requisite credible "objective medical evidence" of permanency to qualify as a Category 6 permanent injury under the AICRA?

PROCEDURAL HISTORY

The Appellant-Plaintiff filed a Complaint on August 4, 2021 (Docket No. BER-5209-21)(Pa1-Pa7). The parties completed discovery, including exchanging all medical records and reports, and conducting a deposition of the Appellant-Plaintiff on June 22, 2022.

On March 2, 2023, counsel for the Respondent-Defendant filed a Motion for Summary Judgment, pursuant to R. 4:46, for a find finding of the "plaintiff's failure to satisfy the AICRA verbal threshold requirements." (Pa8-Pa10). As such, they sought to have "the Plaintiff's Complaint be dismissed with prejudice based upon plaintiff's failure to satisfy the AICRA verbal threshold requirements." The Appellant-Plaintiff filed an Opposition on March 17, 2023 and the Respondent-Defendant filed their Reply on March 23, 2023. Oral arguments were conducted telephonically on March 31, 2023. The Order of the Trial Court, dated March 31, 2023, granted the Summary Judgment. (Pa92).

On April 19, 2023, the counsel for Appellant-Plaintiff timely filed a Motion for Reconsideration, under R. 4:49-2 and was returnable on May 12, 2023. The counsel for Defendant-Respondent filed their Opposition on May 2, 2023. A Reply to the Opposition was filed by the counsel for the Appellant-Plaintiff on May 8, 2023. On July 3, 2023, almost three months after the original return date, the Trial Court entered its Order denying the Motion for Reconsideration. Said Order and the Summary Judgment Order of March 31, 2023 are the subject of this Appeal. (Pa100-Pa104).

STATEMENT OF FACTS

This is an action brought by the Appellant-Plaintiff in the Superior Court of New Jersey, Bergen County, in connection with an MVA that occurred on or about August 14, 2019 between her and the Respondent-Defendant. As a result of the MVA, the Appellant-Plaintiff sustained severe and permanent injuries, including injuries to her neck, mid back and lower back resulting in pain, spasms and restrictions. The Appellant-Plaintiff also severely injured her sternum resulting in a fractured sternum from the MVA.

Following the accident, the Appellant-Plaintiff underwent extensive medical treatment from various providers, including Dr. Andrew Rodgers D.C. Dr. Rodgers reviewed the MRI studies from of the Appellant-Plaintiff for her cervical, lumbar and thoracic regions, and they showed multiple herniated and bulging discs. Upon Dr. Rodgers' treatment and observation, he provided a report, dated March 29, 2021 that included a certificate of permanency. The report also found that "[t]here is a direct relationship between Mrs. Allen's present condition and the accident of August 14, 2019." (Pa83) The report addendum from Dr. Rodgers, dated June 27, 2022, confirms the finding that the Appellant-Plaintiff "severely injured her sternum resulting in a fractured sternum from the motor vehicle accident." (Pa87)

Dr. Rodger's report also concluded that the Appellant-Plaintiff "suffered a substantial limitation of the cervicothoracic and lumbosacral spinal region of the musculoskeletal system." (Pa87) Further, there were "objective signs of spastic musculature of the

involved area tested, thus collaborating the patient's pain and restriction." (Pa87)

Dr. Rodger's report summarized the Appellant-Plaintiff's disability in connection with the MVA, wherein she was "under permanent disability for approximately 16 weeks back to work December 2019 . . . Thereafter, she is on partial disability. Mrs. Allen returned to employment due to financial responsibilities, thus working with pain and stiffness." (Pa80)

On June 22, 2022, the Appellant-Plaintiff appeared for her deposition that was conducted virtually via Zoom. A transcript of the deposition is presented annexed hereto as an Appendix to the Appellant's Brief. The Appellant-Plaintiff was questioned about her injuries and treatment. Towards the end of her deposition, the questions were focused on the Appellant-Plaintiff's subjective observations of pain. An excerpt of this exchange is as follows:

Q: Do you still experience any pain?
A. No.
Q. You have no more pain?
A. No more pain from my chest. no. and my back, no.
Q. Okay. So as we sit here right now. you have no more pain as a result of this accident?
A. No, not that I can say.
Q. When is the last time you had chest pain?
A. From the accident? I don't remember.
Q. Have you had any neck pain as a result of this accident on 2022?
A. Not that I can say, no.
Q. Okay. And no back pain cither?
A. No. No.
Q. Okay. Anything that's difficult to do because of the accident now?
A. No. Only when I pass that area, but otherwise. No. I get-

(Simultaneous speaking)

Q. Sorry. I didn't understand.

A. It's okay.
Q. You were saying?
A. don't have any physical that I can say its because of the accident.
Q. Okay.
A. No. It's been three years almost.
Q. Okay. And the chiropractic care seems to have helped you.
A. Yes.

(Pl.'s Dep. Tr. 50:2-25 and 51:1-20)

The excerpt of the above statements from the deposition was the primary focus of the Respondent-Defendant's Motion for Summary Judgment. In their moving papers, the following were stated:

> "[The Appellant-Plaintiff] she is not having any pain or restrictions as a result of the motor vehicle accident. As an injury shall only be considered permanent when the body part or organ has not healed to function normally and will not heal to function normally with further medical treatment, its [sic] clear that Plaintiff Allen cannot pierce the verbal threshold. As a result, Defendant Joseph Kane is entitled to Summary Judgment under AICRA."

Oral arguments were conducted on March 3, 2023. In granting the Summary Judgment, the Court made the following finding:

> Although the "[t]he Court does recognize that there was a March 29th, 2021 report submitted from plaintiff's treating doctor which concludes that quote, 'This patient has sustained a significant permanent injury from her accident of the said date. And, that this permanent injury is in the form of a significant limited use of this once normal bodily function, a loss of range of motion accompanied by pain.' [t]he Court also recognizes that the plaintiff herself has testified during deposition that she is not suffering pain. She's not willing to lie to get money. That she has resumed her normal functions. The Court concludes that based upon the information presented. The plaintiff has not satisfied the verbal threshold here, that has not provided legitimate evidence of a permanent injury. And, has in fact, provided information that indicates she doesn't have a permanent injury resulting from this accident."

> "The physician's findings or notations, the Court finds is merely a parroting of the language of the statute. And, as the Court has repeatedly held, that does not sustain a verbal threshold, or plaintiff's ability to vault the verbal threshold as established under the statute. The Court finds nothing in the record that indicates the plaintiff has any objective findings of a permanent injury. And, in fact, quite the opposite is what the record shows. So, I am going to grant the motion as filed and grant summary judgment dismissing the matter. The plaintiff has not satisfied the criteria and statutory under the verbal threshold statute."

(Ct. Tr. 10:9-25 and 11:1-15)

The Appellant-Plaintiff timely filed a Motion for Reconsideration on April 17, 2023. By way of this application, we sought for the Court to re-consider certain probative evidence, which included the competent evidence from the report of Dr. Rodgers' report and affidavit of permanency, dated March 29, 2021. Additionally, in connection with Dr. Rodger's report, the Appellant-Plaintiff submitted a Certification reflecting her injuries. She stated in relevant part, the following:

> 1. I have reviewed Dr. Rodgers' report, dated March 29, 2021, which is attached hereto as Exhibit A. The report is consistent with my permanent injuries.
>
> 2. The continued complaints of pain that I experience include:
>
> a. Neck pain, spasm and stiffness
> b. Low back restriction, spasm, and pain
> c. Pain in legs
> d. Numbness, weakness, pain, and abnormal sensation in my hands and arms
> e. Fatigue
> f. Difficulty sitting and lifting
> g. Significant difficulty breathing from the sternum area of the chest

> 3. These complaints are described in Dr. Rodgers' report and are consistent with my chief complaints of pain. These pains come and go; therefore there are days when the pain is more noticeable compared to other days.
>
> 4. To the best of my recollection, on the date of the deposition, June 22, 2022, the pains were not as noticeable compared to other days when the pain is more excruciating.
>
> 5. I still suffer and experience excruciating pain on a regular basis. I still have significant difficulty breathing due to the fractured sternum. Additionally, when going to sleep, I am unable to sleep while laying down flat on my back. Instead, I have to turn sideways (either on my left or right side) to fall asleep. This makes it very difficult because I have always preferred to sleep while laying down flat on my back.
>
> 6. The limits and restrictions to my range of motion include cervical muscle, tendons and ligaments. This is consistent with Dr. Rodgers' findings in his report.
>
> 7. In fact, Dr. Rodgers states that "there will be permanent and significant decrease in all ranges of cervical, thoracic and lumbosacral spinal regions due to the injuries sustained" from the MVA.

In denying the Motion for Reconsideration, the Trial Court concluded that it "finds that it did not overlook over fail to give enough weight to any fact or argument previously submitted when rendering the March 31, 2023 order." The Trial Court further concluded that the "Plaintiff had not provided evidence of a permanent injury through both objective and subjective evidence. In fact, the court previously noted that the Plaintiff's medical expert, chiropractor, Andrew M. Rodger [sic], provided a report which merely parroted the statutory requirements under N.J.S.A. 39:6A-8A and memorized the subjective complaints of Plaintiff."

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT-PLAINTIFF'S COMPLAINT BECAUSE IT APPLIED AN INCORRECT STANDARD UNDER AICRA IN RELYING ON THE LACK OF SUBJECTIVE COMPLAINTS OF PAIN, RATHER THAN CONSIDERING THE OBJECTIVE MEDICAL EVIDENCE THAT WAS THE BASIS OF THE PLAINTIFF'S EXPERT REPORT AND THE CERTIFICATE OF PERMANENCY. (Raised Below, Pa29)

Under the Automobile Insurance Cost Reduction Act ("AICRA"), the verbal threshold's limitation on lawsuit threshold bars a recovery for pain and suffering unless the plaintiff suffers an injury that results in the following: 1) death; 2) dismemberment; 3) significant disfigurement or significant scarring; 4) displaced fractures; 5) loss of a fetus; or 6) a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement. N.J.S.A. 39:6A-8(a). Pursuant to N.J.S.A. 39:6A-8(a), an insured who makes this selection may maintain an action for noneconomic losses only if she "has sustained a bodily injury which results in death; dismemberment; significant disfigurement or significant scarring; displaced fractures; loss of a fetus; or a permanent injury within a reasonable degree of medical probability, other than scarring or disfigurement." (*emphasis added*).

Under N.J.S.A. 39:6A-8(a), it requires a plaintiff seeking to recover noneconomic losses to file "a certification from the licensed treating physician or a board- certified licensed physician to whom the plaintiff was referred by the treating physician." Under penalty

of perjury, the certification must state that the plaintiff has sustained at least one of the injuries described above. Ibid. The physician's certification must be based on objective clinical evidence, which may include medical testing, but this testing cannot be "dependent entirely upon subjective patient response." Ibid. The physician must file the certification within sixty days following the date of the answer to any complaint filed by the plaintiff, although an extension of up to sixty days may be granted by the trial court upon a finding of good cause. Ibid.

The correct procedure for verbal-threshold cases follows the "summary-judgment" model; that is, the court decides whether the injury alleged would, if proven, meet the requirements of one of the verbal-threshold categories, and the jury decides factual disputes about the nature and extent of the plaintiff's injuries. See generally, Oswin v. Shaw, 129 N.J. 290, 294, 609 A.2d 415, 419 (1992). The provisions in the AICRA explain that "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." See generally, DiProspero v. Penn, 183 N.J. 477, 483, 874 A.2d 1039, 1045 (N.J. 2005). All of these findings must be based on "objective clinical evidence." N.J.S.A. 39:6A-8(a). "To vault AICRA's verbal threshold, an accident victim need only prove an injury as defined in the statute. Davidson v. Slater, 189 N.J. 166, 181 (2007). As such, there is no requirement that a plaintiff must demonstrate any continued or persistent subjective observation of pain.

In the case at bar, the report from the Appellant-Plaintiff's doctor, Dr. Rodgers, finds that based on objective evidence, including the MRI studies from of the Appellant-Plaintiff's cervical, lumbar and thoracic regions, they showed multiple herniated and bulging discs. Dr. Rodger's narrative report contained a certificate of permanency based on his review of the MRI studies. Regrettably, the Trial Court, during the oral arguments on March 3, 2023, found that "the physician's findings or notations, the Court finds is merely a parroting of the language of the statute." Based on this erroneous interpretation, the Trial Court found that the Appellant-Plaintiff did "not sustain a verbal threshold, or plaintiff's ability to vault the verbal threshold as established under the statute."

In denying the Motion for Reconsideration, the Trial Court once again concluded that the "Plaintiff had not provided evidence of a permanent injury through both objective and subjective evidence. In fact, the court previously noted that the Plaintiff's medical expert, chiropractor, Andrew M. Rodger [sic], provided a report which merely parroted the statutory requirements under N.J.S.A. 39:6A-8A and memorized the subjective complaints of Plaintiff." (Pa19).

The record below clearly demonstrates to the contrary, as the Appellant-Plaintiff "has sustained a significantly permanent injury from her accident of said date." This permanent in jury is in the form of a significant limited use of this once normal bodily function a loss of range of motion, accompanied by pain. This is consistent with Dr. Rodger's report which made the following findings: the Appellant-Plaintiff had "suffered a substantial limitation of the

cervicothoracic and lumbosacral spinal region of the musculoskeletal system." Further there were "objective signs of spastic musculature of the involved area tested, thus collaborating the patient's pain and restriction." Other limitations include: pain and limitation during athletic events, household work and chores; pain during sleep, resulting in loss of sleep; sitting or standing for extended periods of causes pain and joint stiffness."

The Respondent-Defendant, in their brief, improperly and erroneously asserted, that the "Plaintiff has further failed to establish that her injuries have not healed to function normally under AICRA." Further, they assert that the "Plaintiff has made it clear that she no longer feels any pain or restrictions." Seeking a dismissal by way of a Summary Judgment based on subjective "no longer feels any pain" or any "restrictions" is contrary to the requirements of the AICRA and the relevant case laws. Thus, any purported "failure to establish whether the injuries have healed" is not the proper criteria to the verbal threshold/limitation.

As stated in *supra*, the Appellant-Plaintiff, through her doctor's treatment, evaluation and the expert report, demonstrated that she has sustained a "permanent injury" based on objective medical evidence. This was confirmed in the Certification of Permanency. The Appellant-Plaintiff's Certification under a penalty of perjury, dated April 12, 2023, stated with specificity that the "report is consistent with my permanent injuries." Further, the Certification stated that "[t]he continued complaints of pain that I experience include: a) [n]eck

pain, spasm and stiffness; b) [l]ow back restriction, spasm, and pain, c) [p]ain in legs; d) [n]umbness, weakness, pain, and abnormal sensation in my hands and arms; e) [f]atigue; f) [d]ifficulty sitting and lifting; and g)[s]ignificant difficulty breathing from the sternum area of the chest." Given that the Certification of Appellant-Plaintiff is consistent with Dr. Rodger's findings based on the objective medical evidence, including that of the prior MRI studies, the Certification should warrant a significant consideration.

CONCLUSION

For the foregoing reasons, we respectfully request this Court to find that the Trial Court erred in: 1) granting the Motion for Summary Judgment and 2) denying the Motion for Reconsideration. As such, we respectfully request that this matter be reinstated and remanded back to the Trial Court with further instructions that are consistent with the mandates of the AICRA and the relevant case laws.

Respectfully submitted,

By: */s/ Thomas Kim*
THOMAS KIM, ESQ.
Attorney for Appellant-Plaintiff

Dated: April 13, 2024

THOMAS KIM, ESQ. (ID. No. 038422012)
The Law Offices of Thomas T. Kim
Hudson Professional Building
45 Hudson Street
Hackensack, New Jersey 07601
Tel: (201) 489-6644
Fax: (201) 489-3575
Attorneys for Appellant Vivienne I. Allen

VIVIENNE I. ALLEN,	:	
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	:	**APPELLATE DIVISION**
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	:	**Hon. Gregg A. Padovano, J.S.C.**
	:	
	:	

APPELLANT'S APPENDIX

VIVIENNE I. ALLEN,

Plaintiff

vs

JOSEPH KANE and JOHN DOES 1-5 (fictitious designations)

Defendants

And

JOSEPH KANE,

Third Party Plaintiff,

vs.

AJAY PATEL,

Third Party Defendant.

APPELLATE DIVISION

DOCKET NO.: A003842-22

CIVIL ACTION

ON APPEAL FROM FINAL ORDER OF THE SUPERIOUR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY DOCKET NO.: BER-L-5209-21

SAT BELOW:
HONORABLE Gregg A. Padovano J.S.C.

AMENDED BRIEF AND APPENDIX OF DEFENDANT/RESPONDENT, JOSEPH KANE

Voss Nitsberg DeCoursey & Hawley
Mallary R. Hollander, Esq.
Bar #: 029042011
485 Route 1 South
Building A, Suite 200
Iselin, NJ 08830
Attorneys for Defendant/Respondent, Joseph Kane

Of Counsel and on the Brief:
Mallary R. Hollander, Esq.
mallary_r_hollander@progressive.com

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[1] This report is being submitted as non-confidential document.

[2] This report is being submitted as non-confidential document.

[3] This report is being submitted as non-confidential document.

PRELIMINARY STATEMENT

This appeal arises out of the entry of two Court Orders. The first, an Order granting Summary Judgment to Defendant/Respondent, Jospeh Kane dated March 31, 20233 and the second, an Order denying the Plaintiff/Appellant's Motion for Reconsideration dated July 3, 2023. This matter arises out of a motor vehicle accident which occurred on August 14, 2019 wherein the Plaintiff/Appellant alleges she sustained permanent injuries as a result. Plaintiff/Appellant was subject to the verbal threshold per the terms of her automobile insurance policy issued by New Jersey Manufacturers Insurance Group.

While the Appellant-Plaintiff claims she sustained severe and permanent injuries, she failed to prove through "credible objective medical evidence" that her "injury will not heal to function normally with further medical treatment" pursuant to the verbal threshold status, N.J.S.A. 39:6A-8a. The Trial Court heard the evidence by way of briefs and oral argument on March 31, 2023, and properly concluded that the Appellant-Plaintiff did not pierce the verbal threshold.

PROCEDURAL HISTORY

Plaintiff/Appellant filed a Complaint on August 4, 2021 bearing Docket NO.: BER-L-5209-21 against Defendant/Respondent, Joseph Kane. Da01-Da07. An Answer on behalf of Defendant/Respondent, Joseph Kane was filed on September 15, 2021. Da08-Da15. Discovery took place thereafter and expired on March 23, 2023.

On March 2, 2023, Defendant/Respondent filed a Motion for Summary Judgment on the basis that Plaintiff/Appellant failed to provide objective medical evidence of a permanent injury(ies) which would overcome the verbal threshold. Da16-Da34. Following Oral Argument, the Motion for Summary Judgment was granted on March 31, 2023. Da35-Da36. On April 19, 2023, Plaintiff/Appellant filed a Motion for Reconsideration. Da37-Da47. Same was denied on an Order dated July 3, 2023. Da48-Da53. The Order granting Summary Judgment and the Order denying the Motion for Reconsideration are the basis of this Appeal.

COUNTER STATEMENT OF FACTS

The within cause of action stems from an automobile accident which occurred on August 14, 2019. Da54-Da56. Plaintiff/Appellant was at the time of the accident insured with New Jersey Manufacturers Insurance Group with the verbal threshold. Da57. Plaintiff/Appellant allegedly sustained permanent personal injuries to her low back, mid back, neck, and wrist, in addition to a fractured sternum as a result. Da58-Da64. An X-ray of the chest was performed on August 14, 2019 which showed a sternal fracture. Da65-Da66. The fracture was not displaced and therefore does not immediately pierce the verbal threshold. Da65-Da66.

On November 8, 2022, Plaintiff presented for an Independent Medical Evaluation with defense expert, Dr. Stephen J. Mcllveen. Dr. Mcllveen noted that the Appellant/ Plaintiff had degenerative disc disease in her neck, mid back, and low back, and that as a result of this accident, she sustained soft tissue injuries. Da67-Da75. Plaintiff/Appellant's expert, Dr. Andrew Rodgers has provided a narrative report dated March 29, 2021. Dr. Rodgers' diagnosis was cervical and lumbar radiculopathy. Da76-Da84. Further in his addendum report, Dr. Rodgers notes that the Plaintiff has age related degenerative disc disease. Da76-Da84.

On June 22, 2022 Plaintiff/Appellant was deposed. At her deposition, she testified that she longer experienced any pain in her chest or her back. Da86 (T50:2-9).

> *Q. Okay, as we sit here right now, you have no more pain as a result of this accident?*
>
> *A. No, not that I can say.*

Da86 (T50:2-9). Further:

> *Q. From the first accident you claimed you injured your— you fractured your sternum, your neck and back, the fractured sternum causing the most pain.*
>
> *A. Yes. Yes Yes. Yes.*
>
> *Q. And the neck and back pain healed completely, correct?*
>
> *A. As far as I know, yes. Yes. It was a lot back then, but I'm not going to lie and say it's still happening. No, it's not. I would be lying and I'm not going to lie for money. It's not worth it.*

Da87 (T67:8-18). Plaintiff/Appellant confirmed that at the time of her deposition, she did not have any physical restrictions. Da86 (T51:4-17).

The granting of Summary Judgment was appropriate as the Plaintiff/Appellant has failed to establish the requisite credible "objective medical evidence" of permanency to qualify as a Category 4 and/or Category 6 permanent injury. Pursuant to N.J.S.A. 39:6A-8a Plaintiff/Appellant has failed to establish the existence of a "displaced fracture" as required for a Category 4 injury. In addition, for Category 6, the statute provides that "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." N.J.S.A. 39:6A-8(a).

LEGAL ARGUMENT

POINT I

Plaintiff-Appellant has failed to prove that the trial court erred in dismissing the -Plaintiff-Appellant's Complaint.

"[A]n appellate court should not disturb the `factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).

In the instant action, Plaintiff-Appellant argues the Trial Court erred by relying on the lack of subjection complaints of pain instead of considering the objective medical evidence of the chiropractor's expert report. However, it is abundantly clear from the transcripts of oral argument that the Trial Judge did consider all the evidence, including the certification of the chiropractor. Plaintiff-Appellant now brings the instant action simply because they do not agree with the Trial Court's decision. They fail to establish the Court's error.

POINT II

There is insufficient evidence in the record that Plaintiff suffered a permanent injury as described in N.J.S.A.39:6A-8.

Discovery in this matter has disclosed that there is insufficient objective medical evidence on the record that would support a reasonable jury's determination that Plaintiff/Appellant as a result of the August 14, 2019, motor vehicle accident, suffered a permanent injury as that term is described in N.J.S.A.39:6A-8. Under N.J.S.A. 39:6A-8(a) as amended by AICRA, a plaintiff seeking non-economic damages from an alleged automobile tortfeasor must show that his or her bodily injuries fall within one of the following categories to sustain such an action:

(1) death;

(2) dismemberment;

(3) significant disfigurement or significant scarring;

(4) displaced fractures;

(5) loss of fetus;

(6) a permanent injury within a reasonable degree of medical probability other than scarring or disfigurement. N.J.S.A. 39:6A-8(a).

Furthermore, the undisputed language of the statute provides, "(a)n injury shall be considered permanent when the body part or organ, or both, has *not* healed to function normally and will not

heal to function normally with further medical treatment." *Ibid.* (emphasis added.)

At the time of the accident, Plaintiff/Apellant was insured under an automobile policy issued by New Jersey Manufacturers Insurance Group with verbal threshold standard and is therefore subject to the verbal threshold. The Trial Court properly granted summary judgment, in that the Plaintiff/Appellant failed to meet said burden, and a result her Complaint has been dismissed.

Plaintiff/Appellant has failed to establish the existence of a "displaced fracture" as required by N.J.S.A. 39:6A-8a for a Category 4 injury. Plaintiff/Appellant has also failed to establish the existence of a Category 6 injury, for which the statute provides: "[a]n injury shall be considered permanent when the body part or organ, or both, has not healed to function normally and will not heal to function normally with further medical treatment." N.J.S.A. 39:6A-8(a).

By Plaintiff/Appellant's own admissions through her deposition testimony, we clearly see that her alleged injuries were not permanent in nature as she has been able to function normally, and no longer has pain. The plaintiff testified as follows:

Q: Do you still experience any pain?
A: No.
Q: You have no more pain?
A: No more pain from my chest. No. and my back, no.

Q: Okay. So as we sit here right now, you have no more pain as a result of the accident?
A: No, not that I can say.
Q: When was the last time you had chest pain?
A: From the accident? I don't remember.
Q: Have you had any pain as a result of this accident in 2022?
A: Not that I can say, no.
Q: Okay. And no back pain either?
A: No. No.
Q: Okay. Anything that's difficult to do because of the accident now?
A: No. Only when I pass that area, but otherwise.
No. I get –

(Simultaneous Speaking)

Q: Sorry. I didn't understand.
A: It's okay.
Q: You were saying?
A: don't have any physical that I can say it's because of the accident.
Q: Okay.
A: No. It's been three years almost.
Q. Okay. And the chiropractic care seems to have helped you.
A: Yes

Da86(50:2-25 and 51:1-20)

This testimony alone establishes that any injury suffered by the plaintiff has resolved such that the plaintiff can function normally in all aspects of her life. Plaintiff had many opportunities to allege any sort of pain or restrictions and chose to, under oath, answer at least ten times that she had no more pain or restriction.

The Trial Court discussed this during oral argument conducted on March 3, 2023:

> [T]he Court does recognize that there was a March 29, 2021 report submitted from plaintiff's treating doctor which concludes that quote, "This patient has sustained a significant permanent injury from her accident of the said date. And, that this permanent injury is in the form of a significant limited use of this once normal bodily function, a loss of range of motion accompanied by pain." [T}he Court also recognizes that the Plaintiff herself has testified during her deposition that she is not suffering pain. She's not willing to lie to get money. That she has resumed her normal functions. The Court concludes that based upon the information present, the plaintiff has not satisfied the verbal threshold here, that has not provided legitimate evidence of a permanent injury. And, has in fact, provided information that indicates she does not have a permanent injury resulting from this accident.
>
> 1T (T10:9-25).

Here, the Trial Court clearly weighs the evidence in the record and finds that the Plaintiff herself admitted that her body has resumed functioning normally in direct contradiction to the chiropractor's report. And while Plaintiff may have been experiencing these restrictions at the time of the chiropractor's certification, dated March 29, 2021, by the time of the deposition on June 22, 2022, Plaintiff no longer had those continued complaints of pain and had resumed normal function.

The above argument was made during the original Motion for Summary Judgment before Judge Padovano. However, in an attempt to correct this testimony, Plaintiff's counsel submitted a new certification of the Plaintiff with the Motion for Reconsideration, dated April 19, 2023.

The new certification, signed April 12, 2023 by Ms. Vivienne Allen, alleges that Plaintiff has pain that comes and goes, including neck pain, low back restriction and pain, pain in the legs, numbness and weakness in the hands and arms, as well as difficulty standing and lifting and breathing from the sternum area. Da88-Da91. This certification was properly disregarded by the Trial Court, as the Plaintiff was seeking to supplement the record during a Motion for Reconsideration, contrary to R. 4:49-2. The Plaintiff was in essence trying to create a genuine issue of material fact by producing competing evidence which was not in the record at the time of the Summary Judgment Motion.

POINT III

Granting Summary Judgment to the Respondent/Defendant is consistent with the goals of the Verbal Threshold legislation.

Due to the history and legislative intent behind AICRA, the verbal threshold standard must not be read liberally to allow the threshold to be easily met. Rather, the verbal threshold must be viewed as an important barrier designed to keep insurance costs down. Insureds selecting the verbal threshold experience significant savings in insurance premiums because of the limitation on their right to sue for non-economic injury.

One way AICRA seeks to keep the cost of premiums down is by limiting the right of people injured in motor vehicle accidents to

sue for non-economic injuries. The insured has the option of electing a no threshold (the unlimited right to sue for non-economic injury), or a verbal threshold (where the right to sue for non-economic loss is limited). N.J.S.A. 39:6A8. With respect to the verbal threshold, the legislation's preamble states: "this legislation...provides for a revised lawsuit threshold for suits for pain and suffering which will eliminate suits for injuries which are not serious or permanent, including those for soft tissue injuries...." N.J.S.A. 39:6A1.1.

The Supreme Court has stated that, in enacting AICRA, the Legislature, "adopted Oswin's interpretation of the 1988 threshold requiring a plaintiff to prove a threshold injury by objective credible evidence." DiProsopero v. Penn, 183 N.J. 477, 495 (2005). See also, Serrano v. Serrano, 183 N.J. 508, 514 (2005) ("The new threshold has incorporated Oswin's requirement that the injury be proven by objective credible evidence"); Juarez v J.A. Salerno & Sons, 185 N.J. 332, 334 (2005) (The plaintiff was required to "prove by objective credible evidence that she suffered a permanent injury").

In the instant action, granting Summary Judgment in favor of the defendant is consistent with the goals of AICRA. A physician's findings that "amount to little more than a paraphrasing, in the most conclusory language, of the [verbal threshold] requirements," that is, those which merely "parrot the statute," are insufficient

to satisfy the objective standard. Oswin v. Shaw, 129 N.J. 290, 294 (1992). A physician's "expert opinion needs supporting objective data and discussion where the expert claims a cause and effect relationship between a patient's subjective complaints and a traumatic event." Polk v. Daconceico, 268 N.J. Super. 568, 575 (App. Div. 1993) (citing Buckelew v. Grossbard, 87 N.J. 512, 524 (1981).

POINT IV

The Trial Court's order granting Summary Judgment was appropriate and based on the evidence in the record.

The New Jersey Supreme Court has held the correct procedure for deciding cases where the injuries are challenged as being insufficient to meet the lawsuit threshold will follow the summary judgment model. Oswin at 294. The Oswin court reached the conclusion that under the 1988 version of N.J.S.A. 39:6A-8, the plaintiff was required to demonstrate through "credible, objective medical evidence," a material dispute as to the existence of an injury that would fall under one of the threshold categories. Id.

R. 4:46-2 provides that a court should grant Summary Judgment if "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a

matter of law." Brill v. Guardian Life Insurance Company of American, 142 N.J. 520, 528–529 (1995). Moreover, an issue of fact is only genuine if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inference therefrom favoring the non–moving party, would require submission of the issue of the trier of fact. R. 4:46–2; Brill, 142 N.J. at 538.

The less stringent standard set forth in Brill represented a departure from the prior Summary Judgment standard applied pursuant to Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67, 73–35 (1954).

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non–moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non–moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Liberty Lobby, supra, 477 U.S. at 249, 106 S. Ct. at 2511, 91 L. Ed. 2d at 212. Credibility determinations will continue to be made by a jury and not the judge. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46–2. Liberty Lobby, supra, 477 U.S. at 250, 105 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one–sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct.

> at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.

Brill, 142 N.J. at 540.

As the Court stated, "To send a case to trial, knowing that a rational jury can reach but one conclusion is indeed 'worthless' and will 'serve no useful purpose.'" Id. at 541.

Plaintiff has failed to demonstrate that she has suffered a permanent injury(ies) under AICRA. At her deposition, Plaintiff testified that she no longer has pain as a result of this accident. Plaintiff has failed to establish the existence of a "displaced fracture" as required by N.J.S.A. 39:6A-8a for a Category 4 injury. Plaintiff has also failed to show an injury(ies) under Category 6, which provides that "[a]n injury shall be considered permanent when the body part or organ, or both, has ***not*** healed to function normally and will not heal to function normally with further medical treatment." (emphasis added) N.J.S.A. 39:6A-8(a). It is clear from her testimony that any pain or discomfort from the accident has healed to function normally. As a result, Respondent/Defendant, Joseph Kane was appropriately granted Summary Judgment on Plaintiffs claims for non-economic damages as a matter of law.

The Court discussed this during the March 3, 2023 oral argument. Judge Padovano found:

> The physician's findings or notations, the Court finds is merely a parroting of the language of the statue. And,

> as the Court has repeatedly help, that does not sustain a verbal threshold, or plaintiff's ability to vault the verbal threshold as established under the state, The Court finds nothing in the record that indicates the plaintiff has any objective findings of permanent injury. And, in fact, quite the opposite is what the record shows.
>
> 1T(T11:1-15)

Therefore, the objective credible evidence did not support a finding of permanency. Here, within the four corners of the discovery at the time of the Motion, there is no sufficient evidence of a permanent injury as is required by the statute. Therefore, granting Summary Judgment in favor of Defendant/Respondent, Joseph Kane was appropriate.

CONCLUSION

The Honorable Gregg A. Padavano properly decided the Defendant/Respondent's Motion for Summary Judgment, as the Plaintiff/Appellant's injuries are simply not sufficient to establish "permanent injury within a reasonable degree of medical probability" such that the "injury will not heal to function normally with further medical treatment" within the meaning of N.J.S.A. 39:6A-8(a). Plaintiff/Appellant has therefore failed to establish any Trial Court error (a)and therefore Judge Gregg A. Padavano's decision should be affirmed.

VOSS NITSBERG DECOURSEY & HAWLEY
Attorneys for Defendant/Respondent,
Joseph Kane

Dated: June 24, 2024

Mallary R. Hollander, Esq.

THOMAS KIM, ESQ. (ID. No. 038422012)
The Law Offices of Thomas T. Kim
Hudson Professional Building
45 Hudson Street
Hackensack, New Jersey 07601
Tel: (201) 489-6644
Fax: (201) 489-3575
Attorneys for Appellant Vivienne I. Allen

VIVIENNE I. ALLEN,	:	
Plaintiff-Appellant,	:	**SUPERIOR COURT OF NEW JERSEY**
	:	**APPELLATE DIVISION**
	:	
	:	
	:	
v.	:	**Civil Action**
	:	
	:	**On Appeal from the**
JOSEPH KANE,	:	
Defendant- Respondent	:	**Superior Court of New Jersey**
	:	**Bergen County, Law Division**
	:	
	:	**A-003842-22T4**
	:	**Docket No.: BER-L-5209-21**
	:	
	:	**Sat below:**
	:	**Hon. Gregg A. Padovano, J.S.C.**
	:	
	:	

APPELLANT'S REPLY BRIEF

On the brief:
Thomas Kim, Esq.

Dated: July 8, 2024

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PRELIMINARY STATEMENT

The Respondent's brief in opposition fails to address that there were multiple new findings in the Appellant's MRIs following the 2019 motor vehicle accident ("MVA"). These new findings were not observed in the Appellant's previous MRIs completed prior to the 2019 MVA. The new findings included herniated disc at C5-C6, a disc bulge that is now a herniated disc at C3-C4 and a new disc bulge at C6-C7, new disc bulge at T12-L1 and a disc bulge that is now a herniated disc at L4-L5. (Da80). These findings were causally linked to the 2019 MVA by the Appellant's expert, Dr. Andrew Rodgers, in his report. (Da82). This is objective evidence of a Category 6 permanent injury that has been causally linked to the accident and should have been sufficient within itself to overcome the verbal threshold. Thus, the lower court erred by only generally discussing the existence of these facts, even though these facts alone, would have been dispositive of the issue.

ARGUMENT

I. Because the new findings in the Appellant's MRIs following the 2019 MVA were causally linked by the expert, Dr. Andrew Rodgers in his report, there is objective evidence of a Category 6 permanent injury that has been causally linked to the accident and should have been sufficient within itself to overcome the verbal threshold.

One of the six categories under the Automobile Insurance Cost Reduction Act ("AICRA") required to satisfy the verbal threshold is "permanent injury" or Category 6 under N.J.S.A. 39:6A-8. Thus, a plaintiff must prove by "objective credible evidence" Juarez v. J.A. Salerno Sons, Inc., 886 A.2d 178, 185 N.J. 332 (2005) (citing N.J.S.A. 39:6A-8(a)).

In this matter, there were five new findings in the Appellant's MRI studies following the 2019 MVA (Da80). They include the following:

1. A new herniated disc at C5-C6;
2. A disc bulge that is now a herniated disc at C3-C4;
3. A new disc bulge at C6-C7;
4. A new disc bulge at T12-L1; and
5. A disc bulge that is now a herniated disc at L4-L5.

(Da80).

These findings did not exist in the previous MRI studies that were completed prior to the Appellant's 2019 MVA.

An Independent Orthopedic Evaluation completed by Dr. Stephen J. McIlveen in 2022, reviewed the prior MRI reports dated May 18, 2013, March 13, 2014, April 1, 2017, and December 26, 2018. (Da71). These four MRI studies were completed in various years prior to the 2019 MVA. A summary of the findings from Dr. McIlveen's review of the prior MRI studies is as follows:

1. According to Dr. McIlveen's review of the MRI studies, dated April 1, 2017, at C3-C4, he observed that "there was a posterior disc bulge causing pressure on the anterior thecal sac. There was no canal stenosis. Facet joint degenerative changes were present, but there was no foraminal stenosis present." (Da71 - Da72).
2. At C4-C5, Dr. McIlveen, upon his review of the same MRI report, dated, April 1, 2017, observed that "[t]here was a posterior complex of an osteoarthritic spurt and a herniated disc causing pressure on the aterritorial thecal sac." (Da72). However, this is a different herniated disc mentioned in Dr. Rodger's report,

suggesting that the new herniation was as a result of the 2019 MVA.

3. At C6-C7, Dr. McIlveen, upon his review of the same MRI report, dated, April 1, 2017, observed that "[t]here was no evidence of any herniated disc or canal stenosis." (Da72).
4. At L4-L5, Dr. McIlveen, upon his review of the same MRI report, dated, May 18, 2013, observed that "there was a disc bulge posteriorly causing some pressure on the anterior thecal sac, but there was no can stenosis or neuroforaminal stenosis present." (Da73).
5. At T12-L1, there was no mention of a new disc bulge in the prior MRI studies.

Based on the findings from the prior MRI results, as reviewed and summarized in from Dr. McIlveen's report (Da67 - Da75) and the MRI results after the 2019 MVA, there are new findings that were causally linked to the accident in Dr. Rodgers' report. This is objective evidence of a Category 6 permanent injury that has been causally linked to the 2019 MVA and should have been sufficient within itself to overcome the verbal threshold. The lower court erred by only generally discussing the existence of these facts, even though these facts

alone would have been dispositive of the issue presented in the summary judgment.

II. **It was improper for the lower court to dismiss the matter on a summary judgment because the Appellant's proofs were not solely based on subjective complaints of pain.**

The legislative objective of AICRA was "to guard against a finding of 'serious injury' when plaintiff's proofs are based solely on subjective complaints of pain." Oswin v. Shaw, 129 N.J. 290, 319, 609 A.2d 415, 444 (N.J. 1992). Further, subjective complaints of pain may suffice if "verified by physical examination and observation." Id. At 320. In order to satisfy the AICRA's verbal threshold, an accident victim need only prove an injury as defined in the statute. As such, there is no requirement that a plaintiff must demonstrate any continued or persistent subjective observation of pain. See generally, Davidson v. Slater, 914 A.2d 282, 297; 189 N.J. 166, 181 (2007).

In the case at bar, the Appellant's subjective complaints were noted by the Defendant's expert in the Independent Orthopedic Evaluation completed by Dr. Stephen J. McIlveen in 2022. The Appellant's "Current Complaints" included the "low back pain with prolonged sitting." (Da68).

The Appellant's Certification, dated April 12, 2023, stated that there were "continued complaints of pain that I experience include: a) [n]eck pain, spasm and stiffness; b) [l]ow back restriction, spasm, and pain, c) [p]ain in legs; d) [n]umbness, weakness, pain, and abnormal sensation in my hands and arms; e) [f]atigue; f) [d]ifficulty sitting and lifting; and g)[s]ignificant difficulty breathing from the sternum area of the chest." (Allen Cert. ¶ 7, April 12, 2023). Given that the Certification of Appellant is consistent with Dr. Rodger's findings based on the objective medical evidence, including that of the prior MRI studies, the Certification should warrant some, if not significant, consideration.

Even if the lower court was correct to consider the subjective complaints as a factor when determining if summary judgment was warranted – which the Appellant is adamantly insistent that it was not – the Appellant's subjective complaints when examined by the Defendant's expert and her affidavit are sufficient to create a dispute as to this material facts to warrant putting this issue in front of a jury.

CONCLUSION

In summary, the Appellant satisfied Category 6 permanent injury that has been causally linked to the 2019 MVA and it should have been sufficient within itself to overcome the verbal threshold. The lower court erred by only generally discussing the existence of these facts even though these facts alone would have been dispositive of the issue. Additionally, because the Appellant's subjective complaints were examined and noted by the Defendant's expert and given that some weight of consideration should be given to the Appellant's affidavit, they are sufficient to create a dispute as to the material facts to warrant putting this issue in front of a jury.

Respectfully submitted,
Attorneys for Appellant

By: */s/ Thomas Kim*
THOMAS KIM, ESQ.

Dated: July 8, 2024