THE "THRESHOLD" BATTLE : USING THE DEFENSE DOCTOR TO YOUR ADVANTAGE

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Unlike other states like Ohio, Kentucky is a No-Fault State and has the benefit of the Kentucky Motor Vehicle Reparations Act (MVRA). While we can debate the pros and cons of the MVRA, what can be improved, what should be changed, etc., it's still a pretty good set of laws that govern car wreck cases. There's an unpublished Kentucky Court of Appeals opinion that can help you overcome the MVRA's "threshold" obstacle – routinely requested by the defense at trial to be included in the jury instructions.

The "threshold" language and instruction comes straight out of KRS 304.39-060(2) of the Kentucky Motor Vehicle Reparations Act. It states:

> *"In any action of tort brought against the owner, registrant, operator or occupant of a motor vehicle with respect to which security has been provided as required in this subtitle, or against any person or organization legally responsible for his acts or omissions, a plaintiff may recover damages in tort for pain, suffering, mental anguish and inconvenience because of bodily injury, sickness or disease arising out of the ownership, maintenance, operation or use of such motor vehicle only in the event that the benefits which are payable for such injury as "medical expense" or which would be payable but for any exclusion or deductible authorized by this subtitle exceed one thousand dollars ($1,000), or the injury or disease consists in whole or in part of permanent disfigurement, a fracture to a bone, a compound, comminuted, displaced or compressed fracture, loss of a body member, permanent injury within reasonable medical probability, permanent loss of bodily function or death. Any person who is entitled to receive free medical and surgical benefits shall be deemed in compliance with the requirements of this subsection upon a showing that the medical treatment received has an equivalent value of at least one thousand dollars ($1,000)."*

In other words, has the Plaintiff incurred at least $1,000 in medical expenses that are causally related to the car wreck in question? (the threshold is also met if the Plaintiff has a permanent injury, fracture, etc. – however, this article focuses on the $1,000 threshold question). Many times at trial the jury will be instructed to determine whether or not the Plaintiff has incurred charges in excess of $1,000 as a result of the subject accident. If the jury answers "No," then case over.

In today's world of medical treatment, it's difficult to have less than $1,000 in medical expenses. If there's an ambulance transport and emergency room treatment, the threshold is usually met. If there's family doctors visits and physical therapy, the threshold is usually met. Our office doesn't even take a car wreck case where the medical expenses are under $1,000 – so why is the MVRA "threshold" even an issue? Because, despite the Plaintiff having well over $1,000 in medical expenses in most cases, the defense still wants to argue that the treatment was unnecessary, unreasonable and unrelated. Therefore, they request the threshold instruction in an attempt to have another "bite at the apple" for a low verdict or zero defense verdict.

So, how can we overcome this defense strategy? Use the defense medical doctor's report and opinions to defeat the threshold instruction from even being given to the jury. In the unpublished opinion of *Smallwood v. Schneider*, 2006-CA-719 (Ky. App. 7/27/07), the jury was instructed on threshold despite the Plaintiff's family doctor, Plaintiff's chiropractor, and the Defense Medical Doctor agreeing that normal recovery time for the Plaintiff's type of injuries is within two months of the accident. Within two months of the accident, the Plaintiff had treated with her family doctor and undergone physical therapy – again, which the Defense doctor agreed was reasonable and related. (he just took issue with the chiropractic care as being unnecessary and excessive). Based on the medical testimony, it was clear that the Plaintiff sustained over $1,000 in medical expenses in her first two months of treatment after the accident (the time period agreed to by the Defense doctor).

However, despite this testimony the trial court still gave a "threshold" instruction to the jury. Because the jury answered "Yes" agreeing that the Plaintiff incurred more than $1,000 in related medical expenses, the Court of Appeals ruled that it was harmless error as the jury did not return a threshold verdict. But it is clear that had the jury returned a threshold verdict, that the Court of Appeals would have found reversible error and remanded the case for a new trial without a threshold instruction.

Use the rationale of *Smallwood* case to your advantage in future cases. Carefully read the Defense Medical Doctor's report to see if they give a time frame for reasonable treatment (in soft tissues cases, this is usually stated as being 2-3 month or 8-12 weeks). Then, using the Defense doctor's accepted length of treatment, total up your client's medical bills for this time period. Assuming your client's medical bills exceed $1,000 based on the range given by the Defense doctor, get their doctor to agree that at least this amount in medical bills is causally related to the car wreck. If the Defense doctor agrees that this amount is related (which they will have to concede based upon their report to maintain credibility with the jury), and with your client's treating doctors agreeing that this amount is related (and hopefully that all treatment rendered is related), you can file a Motion in Limine with the trial court removing the "threshold" issue from consideration by the jury.

Remember, now you can utilize unpublished opinions in Kentucky, such as the *Smallwood* case, based on the amendment to Kentucky Rule of Civil Procedure 76.28(4)(c). The rule, as amended, now states:

> *Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court. Opinions cited for consideration by the court shall be set out as an unpublished decision in the filed document and a copy of the entire decision shall be tendered along with the document to the court and all parties to the action.*

As long as there is not a published opinion that "would adequately address the issue", you are now permitted to cite unpublished opinions issued after January 1, 2003. On the threshold question, I am not aware of any published opinion that "adequately addresses the issue" and therefore, the *Smallwood* case is now a very important tool in all car wreck cases!