

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

David Robinson,	:	
Appellant	:	
	:	
v.	:	No. 918 C.D. 2009
	:	SUBMITTED: August 7, 2009
David DiGugliemo, Superintendent,	:	
Sue Mathea, Nurse, Commonwealth	:	
Employees at State Corrections Institute	:	
at Graterford, PA, and Wexford Health	:	
Sources, Inc., Wexford Utilization	:	
Review	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER**, President Judge
 HONORABLE JAMES R. KELLEY, Senior Judge
 HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEADBETTER**

FILED: October 15, 2009

David Robinson appeals *pro se* the order of the Court of Common Pleas of Montgomery County denying his motion to open judgment of *non pros*. Discerning no error in the trial judge’s conclusion that Robinson failed to meet any of the requirements for obtaining relief from the judgment, we affirm.

On July 6, 2004, Robinson filed his medical malpractice action, alleging, *inter alia*, that negligent injection of a hepatitis vaccine by Nurse Sue Mathea resulted in nerve damage to his right arm, and that Wexford Health Services negligently refused as unnecessary a recommended EMG

(electromyogram).¹ He averred that by refusing the EMG, Wexford delayed the diagnosis and treatment of the nerve damage, prolonged his suffering, and caused his injury to evolve into a chronic condition. Robinson sought compensatory and punitive damages. On October 4, 2004, Wexford Health Services filed a praecipe for entry of judgment of *non pros* as to less than all defendants pursuant to Pa. R.C.P. No. 1042.7 and certified that Robinson failed to file a certificate of merit. The Prothonotary entered judgment of *non pros* the same day. On October 7, 2004, Robinson filed a certificate of merit, certifying that expert testimony was not necessary for prosecution of his claim against Wexford.

On October 26, 2004, Robinson filed a motion to strike Wexford's praecipe for entry of judgment of *non pros*. Almost four years later and after a period of prolonged docket inactivity, on August 28, 2008, Robinson moved for disposition of his motion to strike. By order dated November 26, 2008, the trial court denied the motion and indicated that the matter was ended by judgment of *non pros* entered on October 4, 2004. On December 16, 2008, Robinson filed a motion to open judgment of *non pros*, which motion the trial court denied by order dated December 19, 2008. Robinson filed a notice of appeal of the trial court's order.²

¹ Electromyography is the recording electrical activity in muscle for diagnosis. *Stedman's Medical Dictionary*, 27th Edition. Robinson alleged that Wexford-employed physicians recommended the test to determine the cause and extent of the alleged nerve damage.

² As to the other named defendants, the record reflects that Sue Mathea could not be located at the address provided by Robinson, and thus she was never served with a copy of the complaint. Superintendent DiGuglielmo filed preliminary objections to the complaint, and by order entered on October 15, 2005, DiGuglielmo was dismissed.

On appeal,³ Robinson argues that the trial court abused its discretion in denying his motion to strike/open judgment of *non pros* because he was not aware of the need to file a certificate of merit, and that the trial court erred when it concluded that Robinson required an expert to prosecute his malpractice claims.⁴

We have reviewed the record and the parties' briefs, and we conclude that the trial court properly considered and denied Robinson's motion to open judgment, and its opinion thoroughly addressed the issues Robinson advanced in support of his appeal. Accordingly, we affirm on the basis of the opinion of the Honorable Bernard J. Moore, in *Robinson v. DiGugliemo*, Montgomery County Docket No. 04-19661, filed February 3, 2009.

BONNIE BRIGANCE LEADBETTER,
President Judge

³ An order denying a petition to open and/or strike a judgment of *non pros* for failure to file a timely certificate of merit is appealable as a matter of right. *Mumma v. Boswell, Tintner, Piccola & Wickersham*, 937 A.2d 459 (Pa. Super. 2007), *petition for allowance of appeal denied*, 599 Pa. 683, 960 A.2d 456 (2008). An appellate court may reverse such a decision only if the trial court abused its discretion. *Shon v. Karason*, 920 A.2d 1285 (Pa. Super.), *petition for allowance of appeal denied*, 594 Pa. 705, 936 A.2d 41 (2007).

⁴ As part of his argument that expert testimony was unnecessary to prosecute his claims, Robinson, in his brief, references trade secrets and peer review protection as examples of impediments to his ability to obtain the written statement of an appropriate licensed professional as required by Pa. R.C.P. No. 1042.3(a)(1). From the record it does not appear that Robinson advanced these considerations or any others before the trial court as an explanation for his failure to file a timely certificate of merit. Robinson never claimed that he was prevented from obtaining an expert, and he never sought an extension of time to file the certificate of merit. Robinson argued only that he was unaware of the requirement, and later, after the entry of judgment of *non pros*, that expert testimony was not necessary for prosecution of his claims.

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ORDER

AND NOW, this 15th day of October, 2009, the order of the Court of Common Pleas of Montgomery County, No. 04-19661, filed February 3, 2009, is hereby AFFIRMED.

BONNIE BRIGANCE LEADBETTER,
President Judge