RISSMAN, BARRETT, HURT, DONAHUE & MCLAIN, P. A.

ATTORNEYS AT LAW

STEVEN A. RISSMAN
ROBERT C. BARRETT
JENNINGS L. HURT III
ROBERT A. DONAHUE
JOHN E. McLAIN III
RICHARD S. WOMBLE
JOHN P. DALY
STACIE B. GREENE
THEODORE N. GOLDSTEIN
RAYMOND A. LOPEZ
VANCE R. DAWSON
RICHARD B. MANGAN JR.
HENRY W. JEWETT II
DANIEL M. POLLACK
ART C. YOUNG
NICOLE D. RUOCCO
DANIEL T. JAFFE
BEATRIZ E. JUSTIN
J. GREGORY GIANNUZZI
DAVID K. BEACH
F. DEAN HEWITT
EDWARD M. COPELAND IV
DAVID R. KUHN
G. WILLIAM LAZENBY IV
R. CLIFTON ACORD II
ROBERT D. BARTELS
JILL M. SPEARS
JEFFREY J. KERLEY
KARISSA L. OWENS

OF COUNSEL
ROBERT J. JACK

EXECUTIVE DIRECTOR
W. SCOTT PETERSON

201 EAST PINE STREET
15TH FLOOR
P.O. BOX 4940
ORLANDO, FLORIDA 32802-4940
TELEPHONE (407) 839-0120
TELECOPIER (407) 841-9726
ORLANDO@RISSMAN.COM

TAMPA COMMONS
ONE NORTH DALE MABRY HIGHWAY
11TH FLOOR
TAMPA, FLORIDA 33609
TELEPHONE (813) 221-3114
TELECOPIER (813) 221-3033
TAMPA@RISSMAN.COM

207 S. 2nd STREET
FT. PIERCE, FLORIDA 34950
TELEPHONE (772) 409-1480
TELECOPIER (772) 409-1481
FTPIERCE@RISSMAN.COM

WWW.RISSMAN.COM

PLEASE REPLY TO: ORLANDO

AMY L. BAKER
AMANDA L. BRUS
STEVEN B. BURRES
DEREK J. BUSH
SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JAMES E. FAVERO III
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
VICTORIA S. LUNA
LAURA F. LYTLE
ERIC F. OCHOTORENA
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
MEGHAN C. REDDY
D. BLAKE REHBERG
KELLEY A. RICHARDS
RICHARD B. ROBBINS
JUAN A. RUIZ
GREG R. SCHMITZ
BRYAN R. SNYDER
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

September 19, 2011

CONTESTING MEDICAL CARE IN LITIGATION

Traditional tort principles limit a defendant's ability to contest the reasonableness of medical care received by a plaintiff. This principle is intended to protect the rights of innocent claimants against tortfeasors even if an innocent plaintiff received negligent medical care.

Our society accepts a broader range of treatments as reasonable medical care than it did in the past. Passive care by chiropractors, injections from pain specialists, multiple diagnostic tests and other alternative treatments are now common. As a result, courts have now began to reassess the traditional standards of medical care principles in tort litigation.

Across the U.S., courts differ in their treatment of the necessity of medical care. In ***Ponder v. Cartmell***, 784 S.W 2d 758 (1990), plaintiff was injured in a bus accident. She claimed injuries to her back, neck and left breast. During trial, plaintiff's treating physician testified that she had degenerative disc disease in her neck which was aggravated by the accident. The physician performed two surgical procedures and testified that the treatment was necessary. Defendant's expert witness testified that the accident did not cause or aggravate plaintiff's degenerative disc disease and that plaintiff's

treating physician misdiagnosed her symptoms which led to unnecessary surgery. Plaintiff argued that the portion of the expert's testimony regarding unnecessary surgery should not have been admitted into evidence.

The court stated that plaintiff's recovery should not be diminished due to her treating physician's misdiagnosis, as long as she used reasonable care in selecting a physician. Thus, plaintiff was entitled to recover for the full extent of her injuries.

Other jurisdictions place more limits on contesting medical care. In ***Spangler v. Wal-Mart Stores, Inc.*** 673 So. 2d 676 (La. Ct. App. 1996), plaintiff was involved in a slip and fall. Her family doctor diagnosed a fractured tailbone. Plaintiff saw a second doctor who performed an anterior cervical fusion, a bilateral sacroiliac joint fusion, a posterior cervical fusion and a lumbar fusion. Plaintiff saw a third doctor who determined that the previous lumbar and posterior cervical fusions had not been successful and revised the lumbar fusion.

Defendant's orthopedic expert was permitted to testify that the surgeries were inappropriate and unnecessary. The jury entered an award for plaintiff. Plaintiff appealed. She argued that the trial court erred by allowing testimony from defendant's expert that her doctors performed unnecessary treatment.

The Louisiana Court of Appeals stated that a tortfeasor is liable for unnecessary treatment or overtreatment unless the tortfeasor can show plaintiff underwent treatment in bad faith. The court noted that the jury awarded the full amount of medical expenses. Had they determined that plaintiff acted in bad faith, they would not have awarded the full amount of medical expenses.

Wisconsin takes a different approach as seen in ***Hanson v. Am. Family Ins. Co.***, 716 N.W.2d 866 (Wis. 2006). In that case, the plaintiff was injured when her car was hit from behind by a truck. Plaintiff was diagnosed with posttraumatic cervical dorsal strain and underwent surgery to remove the C4, C5, and C6 discs. At trial, defendants argued that plaintiff's surgery was unnecessary.

The jury awarded pre-surgery medical expenses, past lost earning capacity and no future medical expenses. Plaintiff filed a post-verdict motion requesting an award of all past medical expenses or a new trial. The court denied the motions and plaintiff appealed. On appeal the court granted plaintiff all past medical expenses and a new trial on the issues of future pain and suffering and loss of earning capacity.

The Wisconsin Supreme Court discussed the *Sellek* rule which states that when a tortfeasor causes an injury to another person who then undergoes unnecessary medical treatment despite having exercised ordinary care in selecting a doctor, the tortfeasor is responsible for all of that persons damages arising from any mistaken or unnecessary surgery. The court concluded that the *Sellek* rule applied to the ***Hanson*** case.

Defendants argued that the jury verdict which solely awarded pre-surgery medical expenses demonstrated that the jury had concluded that the surgery was not causally related to the accident. The court stated that the jury's award of pre-surgery medical expenses demonstrated that they believed that plaintiff had been injured in the accident. The court concluded that plaintiff was entitled to all past medical expenses because she had used ordinary care in selecting her physicians.

On March 4, 2010, the Indiana Supreme Court made a decision on causation and contesting damages of medical expenses in ***Sibbing v. Cave***, 992 N.E. 2d 594 (Ind. 2010). In ***Sibbing,*** after a motor vehicle accident, plaintiff went to the hospital and received minimal treatment. Two weeks later, plaintiff underwent a nerve conduction study and an MRI, which showed a bulging disc at L5-S1. She subsequently underwent chiropractic treatment 40 times over the next six months. During trial, her chiropractor testified the care she received was reasonable and necessary.

The defense offered a medical expert who testified that plaintiff's chiropractic care was unnecessary. The trial court barred the defense expert's opinion on the chiropractic care. The jury subsequently awarded plaintiff $71,675. Defendant appealed, and the Indiana Court of appeals affirmed the verdict. On March 4, 2010 the Indiana Supreme Court affirmed the decision.

The ***Sibbing*** court held that excluding the opinions of the defense expert who believed that the claimant had unnecessary medical tests and chiropractic care had been proper. The court stated they did not want to place innocent plaintiffs in the position of second-guessing their physicians.

The ***Sibbing*** court did limit its holding. The court stated that a plaintiff's recovery may be reduced if he fails to obey his physician's instructions and aggravates his injury. The ***Sibbing*** court explained that future defendants could also refute a plaintiff's claim that medical bills were reasonable and necessary by (1) contesting that amount as unreasonable, (2) showing that the defendant's actions were not the cause-in-fact of the care and (3) showing that damages were not within the scope of liability as limited by the principle that the decision of medical professionals would not be subject to contest.

The ***Sibbing*** court failed to appreciate the amount of system abuse. If they do not have to affirmatively demonstrate the reasonableness of incurred medical expenses, unscrupulous care providers will have no limits on expenses or treatment. A system where defendants cannot contest all of plaintiff care providers' charges can lead to abuse.

Furthermore, the ***Sibbing*** court did not seem to consider situations involving disagreement among treating doctors about appropriate care. Often a claimant goes to many providers who suggest conservative care before finding one who suggests aggressive care. ***Sibbing*** seems to eliminate defendants' option to question care through testimony of independent medical witnesses. It is unclear if it eliminates introducing opinions from treating doctors questioning other treating doctors' care.

The trend to limit a defense from contesting medical care treatment is troubling. Defense counsel must prepare so that during a trial they can make appropriate records and offers of proof so that appellate courts can address unscrupulous personal injury-mill practitioners. Courts should not shield claimants from taking responsibility for their own medical care, particularly when they can profit from it.

JLH/MMS/tsr

*This is a summary of an article that appeared in the September 2010 issue of *For the Defense*.