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

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

SEAN M. CROCKER
CHRISTOPHER E. DENNIS
SARAH E. EGAN
JONATHAN D. EICHELBERGER
JOSHUA T. FRICK
SUSAN R. FULLER
PAUL B. FULMER
JANNINE C. GALVEZ
ELISE J. GEIBEL
CHRISTOPHER A. HANSON
JEFFREY J. KERLEY
VICTORIA S. LUNA
LAURA F. LYTLE
DARIEN M. MCMILLAN
ERIC F. OCHOTORENA
KARISSA L. OWENS
JEREMY T. PALMA
JEFFREY M. PATNEAUDE
WENDY L. PEPPER
JONATHAN K. POLK
D. BLAKE REHBERG
KELLEY A. RICHARDS
JUAN A. RUIZ
BRYAN R. SNYDER
JILL M. SPEARS
LARRY D. SPENCER
MEREDITH M. STEPHENS
ELIZABETH M. STUART
F. PAUL TIPTON
NICOLETTE E. TSAMBIS
JASON R. URBANOWICZ
CHRISTINE V. ZHAROVA

FLORIDA LAW WEEKLY

AUGUST 20, 2010

WRONGFUL DEATH – MEDICAL MALPRACTICE – HOSPITAL – ARBITRATION AGREEMENT SIGNED BY DECEDENT'S WIFE UPON ADMISSION, NOT ENFORCEABLE WHERE DECEDENT WAS CONSCIOUS, ALERT AND ABLE TO SPEAK

Stalley v. Transitional Hospitals Corporation of Tampa, Inc., 35 Fla. L. Weekly D1804 (Fla. 2d DCA August 11, 2010)

Douglas Stalley as personal representative of the estate of Roderic L'Aine appealed a trial court order staying a lawsuit for wrongful death and negligence, compelling arbitration of the dispute. The estate contends that Roderic L'Aine's wife, JoAnne, did not have the authority to bind him to an arbitration agreement.

L'Aine was admitted to the hospital on a non-emergency admission, although was transported by ambulance. His wife JoAnne arrived slightly before him and upon meeting with the admission clerk signed what she believed to be "just normal

paperwork." She did not read the paperwork. JoAnne did not have power of attorney to act for Roderic. Upon Roderic's arrival, he was conscious, alert and able to speak. No one from the hospital ever asked Roderic whether JoAnne was authorized to sign paperwork on his behalf.

Subsequently, Roderic passed away in the hospital. The estate brought suit based on allegations of negligent treatment. The hospital filed a motion to dismiss asserting the arbitration agreement.

As a general rule, only the actual parties to the arbitration agreement can be compelled to arbitrate. An exception to the general rule exists when the signatory of the arbitration agreement is authorized to act as the agent of the person sought to be bound. An agency relationship can arise by written consent, oral consent or by implication from the conduct of the parties.

In this case, there is no dispute that Roderic did not sign the arbitration agreement himself. In addition, there is no dispute that JoAnne did not have power of attorney or written consent authorizing her to act as Roderic's agent. The last option is apparent agency. The hospital did not present evidence that would establish one of the required elements for proving apparent agency, that of representation by Roderic that JoAnne was his agent. In fact, the evidence presented by the hospital did not establish that Roderic was ever informed, much less fully informed, of the arbitration agreement signed by JoAnne. The hospital failed to establish any "intelligent act or conduct" by Roderic that would show his intention to be bound by the arbitration agreement.

The 2d DCA held that JoAnne had no authority to bind Roderic to the arbitration agreement.

INSURANCE – PERSONAL INJURYPROTECTION – 2008 AMENDMENT TO THE "PIP" STATUTE REGARDING REIMBURSEMENT FOR NON-EMERGENCY,NON-HOSPITAL SERVICES DOES NOT APPLY RETROACTIVELY

GEICO Indemnity Company v. Physicians Group, LLC, 35 Fla. L. Weekly D1850 (Fla. 2d DCA August 13, 2010)

GEICO claimed that a 2008 amendment to the personal injury protection statute, F.S. § 627.736 (2008), allowed GEICO to reduce payment to Physicians Group, LLC. The GEICO policy at issue provided PIP coverage that was in effect from August 23, 2006 to February 23, 2007. The trial court held that the 2008 statute did not apply retroactively.

The 2d DCA agreed and held that the 2008 version of F.S. § 627.736 was not retroactive. It is generally accepted that the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract. The Florida Supreme Court in ***Menendez v. Progressive Express Insurance Company,*** 35 So. 3d 873 (Fla. 2010) outlined a two-part test to determine whether a statute that was enacted should be retroactively applied to an insurance policy. First, the court must determine whether the Legislature intended the statute to apply retroactively. Second, if the intent is clearly expressed, the court must determine whether the retroactive application would violate any constitutional principle.

In this case, the 2008 PIP statute specifically stated "any personal injury protection policy in effect on or after January 1, 2008 shall be deemed to incorporate the provisions of the Florida Motor Vehicle No-Fault Law, as revived and amended by this act."

WRONGFUL DEATH – PRODUCT LIABILITY – EXPERT TESTIMONY CALCULATING DECEDENT'S ANTEMORTEM FENTANYL BLOOD LEVEL USING POSTMORTEM REDISTRIBUTION IS NOT NEW OR NOVEL SCIENTIFIC EVIDENCE

Janssen Pharmaceutical Products, L.P. v. Hodgemire, 35 Fla. L. Weekly D1855 (Fla. 5th DCA August 13, 2010)

Janssen Pharmaceutical Products advertises, manufactures and distributes Duragesic. Duragesic is a prescription transdermal patch that delivers a time-released dose of Fentanyl. Fentanyl is an exceptionally potent synthetic opiate.

Mrs. Hodgemire was initially prescribed 175ug[2] Duragesic patch following a spinal infusion. Her doctors subsequently doubled the dose after she continued to experience pain. Several nights after the dosage was increased Mrs. Hodgemire woke complaining of nausea and vomiting over several hours. Her physician was contacted and she was told to take anti-nausea medication and follow-up with her family doctor on the following Monday. Mrs. Hodgemire complied with the instructions and returned to bed and fell asleep. Mr. Hodgemire repeatedly checked on his wife throughout the morning but ultimately discovered his wife dead in the early afternoon. The autopsy concluded Mrs. Hodgemire died from Fentanyl toxicity.

The primary issue at trial was whether Mrs. Hodgemire's postmortem Fentanyl blood level could have been caused by a properly working Duragesic patch. Mrs. Hodgemire's blood Fentanyl level was measured after death, and the experts accounted for postmortem redistribution. Postmortem redistribution is the process by which drugs stored in the body's tissue are released back into the bloodstream upon death. It is calculated by measuring the amount of a drug in central (heart) blood and femoral blood. Under the theory that femoral blood more accurately represents the antemortem level of a drug in a person's body, the central blood level is then compared to the femoral blood level to develop a ratio. The ratio represents the amount a drug redistributes after death.

Janssen Pharmaceutical Products attempted to exclude expert testimony that calculated Mrs. Hodgemire's antemortem Fentanyl blood level from her postmortem blood. They challenged the testimony on the basis of it not meeting the ***Frye*** standard of admissibility. A party may preserve a ***Frye*** challenge by making a specific objection at trial. The objection may not be a general objection and must challenge the expert testimony on the basis that the "novel scientific evidence is unreliable."

As long as ***Frye*** concerns are met that the underlying theory, methodology and principles are generally accepted, ***Frye*** does not require an expert's opinion to be generally accepted. The parties in this case conceded that the theory underlying postmortem redistribution is generally accepted. The parties also conceded that postmortem redistribution for Fentanyl is generally accepted. There was also no dispute that the methodology for determining how the postmortem redistribution ratio is calculated is generally accepted.

The 5th DCA held that none of the science underlying postmortem redistribution was challenged. Therefore, the expert opinions concerning the amount of redistribution did not have to be generally accepted as well.

JLH/PBF/tog/smm/tsr