Just What The Doctor Ordered

Wednesday, January 04, 2012

Ringing in the New Year's been a might slow. Not too much shaking loose in the Drug/Device law area it seems. There were some pretty hideous Daubert rulings in Yazmin/Yaz, but not all that much reasoning to support them. It seems to be a judicial settlement pressure tactic - aimed at defendants - since we read this morning that, immediately after issuing all these bad rulings, the court cancelled the bellwether trial that had prompted the motions in the first place, and required mediation instead. Anyway, we noted the worst of the bunch in our bottom ten post a week ago, so we'll leave them at that.

One new case we've seen is Roberts v. Albertson's LLC, ___ Fed. Appx. ___, 2011 WL 6807608 (9th Cir. Dec. 28, 2011) (non-precedential), where the combination of a corner-cutting lawyer and his not-so-bright client resulted in a nice defense win. Roberts involved a medical device, a blood pressure monitor. The plaintiff claimed it didn't work right and gave deceptively low readings. Allegedly that caused, or was a substantial factor in, the plaintiff having a stroke.

We say allegedly because – well, we're defense lawyers – but more because plaintiff didn't have any expert to explain why that was. Usually that kind of thing happens where: (1) causation is pretty darn obvious, or (2) the plaintiff has lost the product and has no other choice. That doesn't seem to be the case in Roberts. How a mere monitoring device can cause a stroke is anything but obvious, and there's no mention of a lost product in the case, so we chalk the absence of any plaintiff experts up to the other side not willing to invest anything in the case.

So much the better for us.

So to the client. Plaintiff was prescribed blood pressure medication after the one time he had his blood pressure tested by a doctor, it was elevated. He also bought the home BP monitor that was at issue in the case. It gave him consistently normal readings – plaintiff claims improperly. Supposedly, due to those readings, the plaintiff decided, contrary to doctor's orders to stop taking his medication and to use a "homeopathic" regimen of his own concoction (fish oil and something called "Co-Q 10") instead. After abandoning real drugs for that garbage, he had a stroke.

And he didn't have any experts.

The district court granted summary judgment, and now the Ninth Circuit affirmed, albeit on somewhat different grounds, those being:

• Although there was a discrepancy between the home readings and the one doctor's reading, "that single discrepancy does not establish that the monitor gave inaccurately low readings." 2011 WL 6807608, at *2. The directions warned that readings could vary, and any comparison to a single in-office reading wasn't valid without some kind of expert proof.

• There was no "substantial factor" causation because nothing in the monitor's directions made it any more, or less, likely – in the absence of any affirmative evidence – that the plaintiff would have stopped taking his prescribed drugs, contrary to doctor's orders. Id.

• There was no proximate cause. Plaintiff had no evidence that it was "foreseeable" that a malfunction in a home monitor would cause a reasonable man to stop taking prescribed drugs, contrary to doctor's orders, and go homeopathic. Id. at *2-3

The court didn't say it in quite this fashion, but we will – product liability is not free insurance against a plaintiff's own stupid behavior involving drugs or medical devices. A would-be plaintiff who simply stops taking his/her prescribed drugs on his/her own volition has only him/herself to blame.