ARKANSAS

Paul D. Morris
WRIGHT, LINDSEY & JENNINGS LLP
903 North 47th Street, Suite 101
Rogers, Arkansas 72756
Telephone: (479) 986-0888
Facsimile: (479) 986-8932
PMorris@wlj.com
www.wlj.com

I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

Pursuant to the Arkansas Model Jury Instructions, an injured party is entitled to the reasonable expenses of any necessary medical care, treatment and services. AMI Civil 2009, 2204. With respect to an injured minor, a parent can recover any reasonable and necessary medical care expenses incurred in the past and the present value of such expenses reasonably certain to be incurred until the child reaches majority while the minor (or rather the minor's estate) can recover the present value of such expenses reasonably certain to be incurred by the child after he or she reaches majority. AMI Civil 2009, 2212-2213. Medical expenses are an element of the plaintiff's case and must be affirmatively proven. *See Auto Transp., Inc. v. May*, 224 Ark. 704, 275 S.W.2d 767 (1955).

1. Past Medical Expenses

To recover past medical expenses, a plaintiff must establish that the wrongful conduct of the defendant was a proximate cause of the medical expenses and that the medical care and treatment provided was reasonable and necessary. *Davis v. Davis*, 313 Ark. 549, 856 S.W.2d 294 (1993). The reasonableness and necessity of medical expenses are questions of fact to be decided by the fact-finder, but those damages will only be allowed if the plaintiff provides a sufficient evidentiary foundation. *See* Howard W. Brill, Law of Damages, § 4-5, at 54 (5th ed. 2004) (citing *Roy v. Atkins*, 276 Ark. 586, 637 S.W.2d 598 (1982)). Expert medical testimony is not essential in every case to prove the reasonableness and necessity of medical expenses. *Shelter Mut. Ins. Co. v. Tucker*, 295 Ark. 260, 748 S.W.2d 136

(1988). Identification of each medical bill and testimony that it was incurred for treatment of injuries resulting from the wrongful act may be a sufficient foundation for admissibility. *Kay v. Martin*, 300 Ark. 193, 777 S.W.2d 859 (1989).

2. Future Medical Expenses

Arkansas Model Jury Instruction 2204 permits recovery for the present value of future medical expenses if they are reasonably certain to be required in the future. AMI Civil 2009, 2204. *See also Davis v. Ford Motor Co.*, 128 F.3d 631 (8th Cir. 1997). To prove a claim for future medical expenses, testimony from a medical expert should be offered and that testimony should represent the expert's "professional judgment as the most likely or probable result." *E-Ton Dynamics Indus. Corp. v. Hall*, 83 Ark. App. 35, 39, 115 S.W.3d 816, 819 (2003) (citing *Jacuzzi Bros., Inc. v. Todd*, 316 Ark. 785, 875 S.W.2d 67 (1994)). Consistent with the model instruction, showing a "degree of medical certainty" bolsters recovery of future medical expenses. *West Union v. Vostatek*, 302 Ark. 219, 222, 788 S.W.2d 952, 954 (1990).

Future medical expenses need not be proven with the same specificity as past medical expenses. *Matthews v. Rodgers*, 279 Ark. 328, 651 S.W.2d 453 (1983). It is not speculation and conjecture to calculate future medical expenses where a jury has before it a history of medical expenses that have accrued as of the date of trial. *Williams v. Gates*, 275 Ark. 381, 630 S.W.2d 34 (1982). Without direct proof, the necessity of future medical expenses may be inferred from the seriousness of the injury. *See Willson Safety Prods. v. Eschenbrenner*, 302 Ark. 228, 788 S.W.2d 729 (1990). While no Arkansas appellate court has specifically held that future medical monitoring damages are recoverable, the Arkansas Supreme Court has, on several occasions, casually mentioned a plaintiff's recovery or attempted recovery of such damages without any suggestion that such a recovery was inappropriate. *See, e.g., BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000); *Baker v. Wyeth-Ayerst Labs. Div.*, 338 Ark. 242, 992 S.W.2d 797 (1999); *Angle v. Alexander*, 328 Ark. 714, 945 S.W.2d 933 (1997).

B. Collateral Source Rule and Exceptions

Arkansas' collateral source rule provides that a trial court must "exclude evidence of payments received by an injured party from sources 'collateral' to ... the wrongdoer, such as private insurance or government benefits...." *Bell v. Estate of Bell*, 318 Ark. 483, 490, 885 S.W.2d 877, 880 (1994). *See also Green Forest Pub. Sch. v. Herrington*, 287 Ark. 43, 696 S.W.2d 714 (1985). Recoveries from collateral sources "do not redound to the benefit of a tortfeasor, even though double recovery for the same damage by the injured party may result." *Bell v. Estate of Bell*, 318 Ark. at 490, 885 S.W.2d at 880; *Green Forest v. Herrington*, 287 Ark. at 49, 696 S.W.2d at 718. The rule is based on the rationalization that the claimant should benefit from the collateral source recovery rather than the tortfeasor, since the claimant has usually paid an insurance premium or lost sick leave, whereas to the tortfeasor it would be a total windfall. *East Texas Motor Freight Lines, Inc. v. Freeman*, 289 Ark. 539, 713 S.W.2d 456 (1986). A plaintiff may testify as to the medical bills incurred even though they have been paid by a collateral source. *Patton v. Williams*, 284 Ark. 187, 680 S.W.2d 707 (1984).

Arkansas courts recognize four exceptions to the general rule of inadmissibility of collateral source payments: (1) to rebut the plaintiff's testimony that he or she was compelled by financial necessity to return to work prematurely or skip required medical care; (2) to show that the plaintiff had attributed his or her condition to some other cause, such as sickness; (3) to impeach the plaintiff's testimony that he or she had paid his medical expenses himself; and (4) to show that the plaintiff had actually continued to work instead of being out of work, as claimed. *Wal-Mart Stores, Inc. v. Kilgore*, 85 Ark. App. 231, 148 S.W.3d 754 (2004)(citing *Evans v. Wilson*, 279 Ark. 224, 650 S.W.2d 569 (1983)). *See also* Howard W. Brill, Law of Damages, § 9-4, at 79 (5th. ed. 2004). Arkansas courts have also allowed evidence of a collateral source payment when the plaintiff opens the door to his or her financial condition. *See Babbitt v. Quik-Way Lube & Tire*, Inc., 313 Ark. 207, 853 S.W.2d 273 (1993); *Younts v. Baldor Elec. Co.*, 310 Ark. 86, 832 S.W.2d 832 (1992).

C. Treatment of Write-downs and Write-offs

The Supreme Court of Arkansas recently addressed the treatment of "write-downs" and "write-offs" in *Johnson v. Rockwell Automation, Inc*. 2009 Ark. 241, __ S.W.3d __ (2009 WL 1218362) In the *Rockwell* decision, Ark. Code Ann. § 16-55-212(b), which limited the evidence of damages for costs of necessary medical care and treatment only to "those costs actually paid by, or on behalf of, the plaintiff or which remain unpaid for which the plaintiff or any third party shall be legally responsible", was declared unconstitutional. *Johnson v. Rockwell Automation, Inc.*, *supra*.; Ark. Acts 2003, No. 649 § 15(a).

Presumably, Arkansas courts will regress back to the former rule that gratuitous or discounted medical services are a collateral source not to be considered in assessing the damages due a personal-injury plaintiff. *Montgomery Ward & Co., Inc. v. Anderson,* 334 Ark. 561, 976 S.W.2d 382 (1998). The collateral-source rule applies unless the evidence of the benefits from the collateral source is relevant for a purpose other than the mitigation of damages. *Id.* at 564, 976 S.W.2d at 383. "It is the rule recommended by the Restatement (Second) of Torts, and it is consistent with the Court's oft-stated policy of allowing the innocent plaintiff, instead of the tortfeasor defendant, to receive any windfall associated with the cause of action." *Id.* at 566-67, 976 S.W.2d at 385.

II. *EX PARTE* COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Arkansas law regarding the physician-patient privilege is contained in Rule 503 of the Arkansas Rules of Evidence. The "General Rule of Privilege" provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing his medical records or confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition, including alcohol or drug addiction, among himself, physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

Ark. R. Evid. 503(b). "Unquestionably, society has an interest in safeguarding the unique and confidential nature of the physician-patient relationship." *Bulsara v. Watkins*, 2009 Ark. App. 409, __ S.W.3d __, 2009 WL 1405859 (2009) (citing *Harlan v. Lewis*, 141 F.R.D. 107 (E.D. Ark. 1992), aff'd 982

F.2d 1255 (8th Cir.1993)). However, Rule 503(b) does not grant a privilege to "any information," only "communications" between the patient and doctor, and confidential ones at that. *Kraemer v. Patterson*, 342 Ark. 481, 487, 29 S.W.3d 684, 687 (2000) (citing *Baker v. State*, 276 Ark. 193, 637 S.W.2d 522 (1982)). The physician-patient privileged is waived when a party relies on their physical, mental or emotional condition as an element to their claim. *See* Ark. R. Evid. 503(d)(3)(A).

"[E]ven though the privilege is partially waived through the filing of a lawsuit, Arkansas citizens retain some control over the manner in which information concerning their medical records and treatment is released." *Harlan*, supra. Specifically, and pertinent to topic, section (d) of Rule 503 of the Arkansas Rules of Evidence states:

> Any informal, ex parte contact or communication with the patient's physician or psychotherapist is prohibited, unless the patient expressly consents. The patient shall not be required, by order of court or otherwise, to authorize any communication with the physician or psychotherapist other than (i) the furnishing of medical records, and (ii) communications in the context of formal discovery procedures.

Ark. R. Evid. 503(d)(3)(B). Similar language can be found in Rule 35 of the Arkansas Rules of Civil Procedure. Interpreting this rule, courts in Arkansas have ruled that a defense attorney may not contact a plaintiff's treating physician after suit has been filed to inquire about hiring the physician as an expert witness. *Kraemer*, supra. Moreover, Arkansas courts have sanctioned a defense attorney who tried to discourage a plaintiff's treating physicians from testifying for or cooperating with the plaintiff during litigation. *Harlan*, supra.

B. Interaction of Waiver of Physician-Patient Privilege and HIPAA

Arkansas courts have not specifically addressed the interaction of waiver of the physician-patient privilege and HIPAA. The only Arkansas case discussing the privilege and HIPAA in any context is *White v. State*, which, despite defendant's objection, held that HIPAA did not preclude a nurse practitioner from disclosing defendant's HIV status during the defendant's prosecution for exposing another person to HIV and that nothing within HIPAA was to be construed to limit a state's authority to investigate crimes. 370 Ark. 284, 259 S.W.3d 410 (2007). More importantly, however, is the fact that HIPAA and Arkansas law plainly permit *ex parte* communication only when the plaintiff/patient

expressly consents to the communication by issuing a valid authorization. 42 C.F.R. § 164.502(a). *See also* Ark. R. Evid. 503(d)(3)(B). Presumably, Arkansas courts would interpret Arkansas law as enforcing the HIPAA prohibition of *ex parte* communication and only the plaintiff/patient would have the authority to waive such physician-patient privilege and expressly allow any *ex parte* communication.

C. Authorization of *Ex Parte* Physician Communication by Plaintiff

Arkansas courts have not addressed whether a plaintiff may authorize *ex parte* communication with a non-party treating physician. In all probability, plaintiffs have the choice of whether or not to sign an authorization allowing *ex parte* communications with their treating physicians. Likewise, plaintiffs would be free to execute authorizations allowing *ex parte* communications between their treating physicians and any other person the plaintiff authorizes to have *ex parte* communications with about their medical care or medical condition.

D. Authorization of *Ex Parte* Physician Communication by Courts

Trial courts in Arkansas do not have the authority to issue an order authorizing the defense to conduct *ex parte* communication with a plaintiff's treating physicians. *Kraemer v. Patterson*, 342 Ark. 481, 29 S.W.3d 684 (2000). Both Rule 503(d)(3) and Arkansas Rule of Civil Procedure 35 provide that a party may not be required by order of court or otherwise to authorize "any communication" with his or her physician other than the furnishing of medical records and communications in the context of formal discovery procedures. Ark. R. Evid. 503(d)(3)(B); Ark. R. Civ. P. 35(c). As the *Kraemer* court stated "[w]here the rule specifically prescribes the manner of disclosure to which a patient must consent, we cannot read the plain language of the rules to permit disclosure in *ex parte* interviews. The strict requirements of consent are antithetical to the authorization of non-consensual *ex parte* interviews." *Id.* at 490, 29 S.W.3d at 689 (quoting *Harlan v. Lewis*, 982 F.2d 1255, 1263 (8th Cir. 1993)). In other words, in compliance with the privilege, the plain language of Rule 503(d)(3)(B) forbids *ex parte* communication with the patient's physician in the absence of the patient's consent, and the Rule also disallows Arkansas courts the authority to compel the patient's consent. *Id.* at 491, 29 S.W.3d at 690.

E. Local Practice Pointers

Arkansas lawyers are not allowed to conduct *ex parte* communication with a plaintiff's treating physician absent express consent from the plaintiff (which is rarely, if ever, given). Any attempts to do so would violate HIPAA and/or Arkansas law and could lead to sanctions from the court. Any information to be obtained from a treating physician should be obtained by HIPAA release, subpoena duces tecum or discovery deposition.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

A. Requirements to Obtain Testimony of Non-party Treating Physician

Arkansas courts do not have the authority to force a physician to engage in *ex parte* communications. *See Kraemer*, *supra*. To obtain testimony from a non-party treating physician, lawyers should use traditional discovery methods such as interrogatories or formal discovery depositions. *See* Ark. R. Civ. P. 26 and 45.

B. Witness Fee Requirements and Limits

Rule 45 of the Arkansas Rules of Civil Procedure states that a subpoena must be accompanied by a tender of a witness fee calculated at the rate of $30.00 per day for attendance and $0.25 per mile for travel from the witness' residence to the place of the deposition. Ark. R. Civ. P. 45(e). However, Rule 26 of the Arkansas Rules of Civil Procedure provides that unless manifest injustice would result, the party seeking discovery from an expert witness shall pay the reasonable amount of the expert's fee. Ark. R. Civ. P. 26(b)(4)(C). Arkansas courts have not addressed whether or not a non-party treating physician is considered an expert for purposes of payment of a witness fees nor have they addressed fee requirements and limits. Arkansas courts are, however, allowed a wide latitude of discretion in setting a "reasonable" amount for expenses. *65th Ctr., Inc. v. Copeland*, 308 Ark. 456, 468,825 S.W.2d 574, 581 (1992).

C. Local Custom and Practice

As a practical matter, non-party treating physicians are paid much more than the statutory witness fee by the party requesting the discovery. Given the inconvenience caused to the physicians schedule,

coupled with the information that may be gained from his or her deposition or appearance in court, the fees are viewed as necessary and reasonable.

With regard to issuing a subpoena on a physician, lawyers should make arrangements which take into consideration the professional demands upon the physician's time. Reasonable notice of the intention to call the physician as a witness and advising him or her of the approximate time of their required attendance should also be given to the physician.

Authors:

Paul D. Morris is a partner in and the managing attorney of the Northwest Arkansas office of Wright, Lindsey & Jennings. His practice focuses on product liability, professional negligence and insurance defense. He is a member of the American Bar Association, the Arkansas Bar Association, DRI and the Arkansas Association of Defense Counsel.

Kristen A. Sluyter is an associate in the Little Rock office of Wright, Lindsey & Jennings. Her practice focuses on product liability, professional malpractice, insurance defense and appellate advocacy. She is a member of the American Bar Association, the Arkansas Bar Association, the Pulaski County Bar Association, Defense Research Institute and the Arkansas Association of Defense Counsel.

Carson Tucker is an associate in the Little Rock office of Wright, Lindsey & Jennings. His practice is primarily focused on the areas of medical malpractice defense and products liability. He is a member of the American Bar Association, the Arkansas Bar Association, the Pulaski County Bar Association, Defense Research Institute and the Arkansas Association of Defense Counsel.