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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

The plaintiff is entitled to recover the reasonable value of medical care and expenses incurred for the treatment of injuries sustained as a result of the defendant's negligence. The plaintiff must prove that the claimed expenses were reasonably necessary and proximately caused by the defendant's negligence. *Connecticut Judicial Branch, Civil Jury Instructions* § 3.4-1.

2. Future Medical Expenses

A jury's determination as to future medical expenses must be based upon an estimate of reasonable probabilities, not possibilities. *Marchetti v. Ramirez*, 240 Conn. 49, 54 (1997). Future medical expenses may not be based merely on speculation or conjecture. *Id.* However, because future medical expenses do not require the same degree of certainty as past medical expenses, it is not speculation or conjecture to calculate future medical expenses based upon the history of medical expenses that have accrued as of the trial date when there is also a degree of medical certainty that future medical expenses will be necessary. *Id.* at 55. Accordingly, "[t]he evidence at trial must be sufficient to support a reasonable likelihood that future medical expenses will be necessary." *Calvi v. Agro*, 59 Conn. App. 732, 736 (2000). "Whether an expert's testimony is expressed in terms of a reasonable probability . . . does not depend upon the semantics of the expert or his use of any particular term or phrase, but rather, is

determined by looking at the entire substance of the expert's testimony." *Peatie v. Wal-Mart Stores, Inc.*, 112 Conn. App. 8, 22 (2009).

B. Collateral Source Rule and Exceptions

Connecticut's collateral source rule is codified at Conn. Gen. Stat. § 52-225a and requires the trial court to reduce the entire amount of the economic damage award by the collateral sources. Collateral sources are defined as "any payments made to the claimant, or on his behalf, by or pursuant to: (1) Any health or sickness insurance, automobile accident insurance that provides health benefits, and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by him or provided by others; or (2) any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the costs of hospital, medical, dental or other health care services." Conn. Gen. Stat. § 52-225b. Collateral sources do not include amounts received by a claimant as a settlement. *Id.*

The statute also provides for two exceptions: there is to be no reduction for 1) any collateral source for which a right of subrogation exists and 2) the percentage of the plaintiff's own negligence. Conn. Gen. Stat. § 52-225a(a). In addition, voluntary write-offs by medical providers are not collateral sources. *Hassett v. City of New Haven*, 49 Conn. Supp. 7 (2004), aff'd, 91 Conn. App. 245 (2005).

C. Treatment of Write-downs and Write-offs

As previously mentioned, voluntary write-offs are not collateral sources and therefore may not be deducted from an economic damage award. *Id.*; *McInnis v. Hospital of St. Raphael*, 2008 Conn. Super. LEXIS 2094 (Conn. Super. Aug. 15, 2008). However, where a plaintiff's medical bills are written off involuntarily, i.e., pursuant to the requirements of an insurance arrangement or any contract or agreement, such write-offs do qualify as collateral source payments. *Id.*

1. Medicare and Medicaid

It is generally held that Medicare write-offs are collateral sources because they are statutorily required. *McInnis*, *supra*. However, at least one Connecticut Superior Court has held to the contrary. *See Zhuta v. Zhuta*, 2007 Conn. Super. LEXIS 1945 (Conn. Super. July 27, 2007).

2. Private Insurance

There are no special rules regarding write-offs by private insurers. Rather, whether such write-offs are collateral sources depends upon whether they were forgiven voluntarily or pursuant to a contract or agreement.

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

A. Scope of Physician-Patient Privilege and Waiver

The scope of physician-patient privilege and waiver and the interaction of waiver, physician patient privilege and HIPAA are largely governed in Connecticut by Conn. Gen. Stat. § 52-146o. Prior to the enactment of this statute, a common law privilege for communications made by a physician had never been recognized in this state. *Edelstein v. Department of Public Health and Addiction Services*, 240 Conn. 658, 662 (citations omitted) (1997). In 1990, the legislature created a broad physician-patient privilege when it enacted Public Acts 1990, No. 90-177, codified at Conn. Gen. Stat. § 52-146o. *Id.*

Conn. Gen. Stat. § 52-146o entitled "Disclosure of patient communication or information by physician, surgeon or healthcare provider prohibited," provides in pertinent part:

> (a) Except as provided in ... subsection (b) of this section, in any civil action or any proceeding preliminary thereto …, a physician or surgeon, as defined in subsection (b) of section 20-7b, shall not disclose (1) any communication made to him by, or any information obtained by him from, a patient or the conservator or guardian of a patient with respect to any actual or supposed physical or mental disease or disorder or (2) any information obtained by personal examination of a patient, unless the patient or his authorized representative explicitly consents to such disclosure.
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> (b) Consent of the patient or his authorized representative shall not be required for the disclosure of such communication or information (1) pursuant to any statute or regulation of any state agency or the rules of the court, (2) by a physician, surgeon or other licensed healthcare provider against whom a claim has been made, or there is a reasonable belief will be made, in such action or proceeding, to his attorney or professional liability insurer or such insurer's agent for use in the defense of such action or proceeding, (3) to the Commissioner of Public Health for records of a patient of a

> physician, surgeon, or health care provider in connection with an investigation of a complaint, if such records are related to the complaint, or (4) if child abuse, abuse of an elderly individual, abuse of an individual whom is physically disabled or incompetent or abuse of an individual with mental retardation is known or in good faith suspected.

Since its enactment, the scope and breadth of this statute has been applied in a variety of scenarios. A sample of some of these cases follows. In *Hackley v. Popp*, 2008 Conn. Super. LEXIS 3048 (Conn. Super. Nov. 28, 2008), the Court held that a motorist could not invoke Conn. Gen. Stat. § 52-146o to bar the other driver and vehicle owner from obtaining information in the insurance company's possession concerning a subsequent auto accident. The other driver and vehicle owner, who were being sued by the motorist regarding a separate, earlier auto accident, were seeking information from the motorist's insurance company and not from a physician or surgeon.

The plaintiff in a personal injury action whom placed his medical condition in issue, was not entitled to the use the protections of Conn. Gen. Stat. § 52-146o and, as such, was not entitled to a broad protective order preventing disclosure of his medical records. He was entitled to limit the time frame for which records could be released pursuant to Conn. Gen. Prac. Book, R. Super. Ct § 13-28(e) (1). *Schramm v. Stelly*, 2001 Conn. Super. LEXIS 1718(Conn. Super. June 25, 2001).

Connecticut Courts have also held that the protections of Conn. Gen. Stat. § 52-146o do not apply in the following circumstances either because the statute was not applicable or an exclusion applied: (1) if medical records are disclosed by a patient's medical expert in the course of a judicial proceeding, the exception found in Conn. Gen. Stat. § 52-146o(b) applies. *Alexandru v. W. Hartford Obstetrics & Gynecology, P.C.*, 78 Conn. App. 521 (2003), appeal denied 266 Conn. 912 (2003); (2) Trial Court did not err in admitting medical evidence and a doctor's testimony without the victim's consent during a criminal trial because Conn. Gen. Stat. § 52-146o does not apply to criminal proceedings; (3) in the investigation of a physician by the Department of Public Health and Addiction Services for improper billing, Conn. Gen. Stat. § 52-146o(b)(3) authorized the department to subpoena medical records that were relevant to the investigation. *Edelstein v. Department of Public Health and Addiction Services*, 240 Conn. 658, 662 (citations omitted) (1997).

B. Interaction of Waiver and Physician Patient Privilege and HIPAA

See response to Section A immediately above.

C. Authorization of Ex Parte Communication by Plaintiff

In *Valentino v. Gaylord Hosp.*, 1992 Conn. Super. LEXIS 456 (Conn. Super. Feb. 19, 1992), the conservator filed a malpractice action against defendants, a hospital and others. In the course of the case, the conservator authorized the plaintiff's treating physician to disclose treatment information to defendants. Thereafter, defendants filed an order that the authorization included the right to conduct ex parte interviews. The Court noted that Conn. Gen. Stat. § 52-146o does not explicitly authorize ex parte communications and there were no cases which discussed the issue .*Id.* at 2. The Court held that the traditional discovery tools such as depositions and medical reports permitted adequate discovery. The Court also noted that ex-parte communications may place the physician in a position which may jeopardize the privilege. *Id.* at 2-3. Based on the above analysis, the Court denied the request for ex parte communication with a physician.

Although as a practical matter, there is nothing to prevent a plaintiff from expanding his consent to allow an ex parte communication, from a practical perspective, it is not done. As was noted by the *Valentino* Court, if a defendant wants to speak with a treating physician, he can schedule the deposition of the plaintiff.

C. Authorization of Ex Parte Communication by Courts

See Section C immediately above.

D. Local Practice Pointers

In everyday practice, it varies from case to case as to whether counsel provides authorizations to obtain medical records and/or the attorneys obtain them on behalf of their clients and then provide them to opposing counsel. The practice is more heavily weighted in obtaining the records on behalf of one's own client. In those circumstances in which authorizations are provided, it is usually with an agreement that opposing counsel will provide copies of all records received with the authorizations. Sometimes, disagreements arise over whether defendant's counsel should be limited to the records provided by

plaintiff's counsel. For example, a standard inquiry during discovery is whether the plaintiff has had a similar or related condition. This inquiry allows for some degree of discretion by counsel. To resolve the dispute, the issue can be raised with the Court through a Motion to Compel authorizations. The rulings in these disputes have been split. Some attorneys choose to avoid the risk from the outset and insist on authorizations from the commencement of the action.

Finally, most attorneys have a template for a HIPAA compliant consent form. Most often, however, hospitals will require that a patient execute a specific authorization. Although this is more prevalent from larger institutions such as hospitals, it is not uncommon that a physician's office may also require the execution of its own authorization. These requirements cannot be circumvented by the service of a subpoena. Even when serving a subpoena, if medical records are being sought, an authorization is required.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

To obtain the testimony of a Non-party treating physician, Conn. Gen. Stat. §§ 52-143(a) and (f) provide in pertinent part:

> (a) Subpoenas for witnesses shall be signed by the clerk of the court or a commissioner of the Superior Court and shall be served by an officer, indifferent person, … The subpoena shall be served not less than eighteen hours prior to the time designated for the person summoned to appear, unless the court orders otherwise.
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> (f) Any subpoena summoning a physician as a witness may be served upon the office manager or person in charge at the office or principal place of business of such physician who shall act as the agent of the physician named in the subpoena. Service upon the agent shall be deemed to be service upon the physician.

The subpoena can be a subpoena summoning the physician to trial or to a deposition. As a practical matter, the depositions of non party treating physicians are often arranged without the use of a subpoena. The deposition can either be set up through the attorney's office representing the patient or by contacting the physician's office directly with the understanding that the only communication with the doctor's office will be in regard to scheduling. If a deposition is scheduled via a subpoena, it is usually a subpoena duces tecum requesting the original record to ensure that the physician's complete records have

been provided. Along with the subpoena, a notice of deposition is sent to the remaining parties so that they have notice that the physician has been summoned to appear and testify. Ordinarily, a subpoena is issued for trial testimony.

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Procedure

2. Case Law

Witness fees for non party treating physicians are governed by Conn. Gen. Stat. § 52-260(f) and Conn. Gen. Prac. Book, R. Super. Ct § 13-4(c)(2). It is important to note that both of the aforementioned sections refer to experts. As a practical matter, in most cases the treating physicians are disclosed as experts.

Conn. Gen. Stat. § 52-260(f) provides in pertinent part:

> (f) When any practitioner of healing arts, as defined in section 20-1, dentist, registered nurse, advanced practice registered nurse or licensed practical nurse, as defined in section 20-87a, psychologist or real estate appraiser gives expert testimony in any action or proceeding, including by means of a deposition, the court shall determine a reasonable fee to be paid to such practitioner of the healing arts, dentist, registered nurse, advanced practice registered nurse, licensed practical nurse, psychologist or real estate appraiser and taxed as part of the costs in lieu of all other witness fees payable to such practitioner of the healing arts, dentist, registered nurse, advanced practice registered nurse, licensed practical nurse, psychologist or real estate appraiser.

Conn. Gen. Prac. Book, R. Super. Ct § 13-4(c)(2) provides in pertinent part:

> (c)(2) Unless otherwise ordered by the judicial authority for good cause shown, or agreed upon by the parties, the fees and expenses of the expert witness for any such deposition, excluding preparation time, shall be paid by the party or parties taking the deposition. Unless otherwise ordered, the fees and expense s hereunder shall include only (A) a reasonable fee for the time of the witness to attend the deposition itself and the witness's travel time to and from the place of deposition; and (B) the reasonable expenses actually incurred for travel to and from the place of deposition and lodging, if necessary. If the parties are unable to agree on the fees and expenses due under this subsection, the amount shall be set by the judicial authority, upon motion.

The above section was recently amended to clarify the issue of who is responsible for the payment of an expert's preparation time. As is now clearly stated, the preparation time of an expert for a deposition is paid by the party who retained the expert.

This issue is not as clear for witnesses who testify at trial. Unlike, which specifically addresses this issue, Conn. Gen. Stat. § 52-260(f) does not expressly specify what a reasonable fee includes. Thus there has been a split in authority as to whether preparation time for trial testimony by an expert has been allowed.

If a treating physician has not been disclosed as an expert, there is support that the physician would not be entitled to costs for the deposition as the testimony would be that of a fact witness. *Mayne v. Hindin*, 2007 Conn. Super. LEXIS 3177 (Conn. Super. Nov. 29, 2007)(Costs for dentist deposition testimony could not be recovered under Practice Book Section 13-4(3) because the dentist testified only as a fact witness). There is also support for the proposition that a treating physician should be paid a "reasonable fee" in the manner of an expert even if he was not disclosed as an expert. *Kauther Badr v. Liberty Mutual Group, Inc.* , No. Civ. 1208(AHN), 2007 U.S. Dist. LEXIS 73437(D. Conn 2007). Plaintiff argued that the plaintiff's treating psychologist was entitled to a reasonable fee for deposition testimony as opposed to the $40.00 fee set forth in 28 U.S.C. Section 1821 for lay witnesses. The Court acknowledged a split of authority on this issue but ultimately agreed with the plaintiff and permitted a reasonable fee.

Finally, in determining what a reasonable fee is, Connecticut Courts have looked for guidance to the federal courts interpretation of Fed. R. Civ. P. 26(b)(4)(C) which is the federal counterpart to Conn. Gen. Prac. Book, R. Super. Ct § 13-4(3). The federal statute considers the following: (1) the witness's area of expertise; (2) the education and training required to provide the expert insight that is sought; (3) the prevailing rates of other comparably respected available experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee actually charged to the party who retained the expert; (6) fees traditionally charged by the expert on related matters; and (7) any other factor likely to assist the court in balancing the interest implicated by Fed. R. Civ. P. 26. Ultimately, however, it is within the court's discretion to determine what it deems a reasonable fee. *Deyanira Engleman v. Madhuri Bakhru*, CV 03 0082610S, 2007 Conn. Super. LEXIS 960 (Conn. Super. J.D. of Ansonia-Milford at Milford).

C. Local Custom

See Section B immediately above.