GEORGIA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In any civil action seeking recovery for injury or disease, Georgia courts will allow plaintiffs, plaintiff's family member, or the person responsible for the care of the plaintiff to identify the medical bills and to prove the charges were reasonable and necessary. *Hart v. Shergold*, 295 Ga.App. 94, 96, 670 S.E.2d 895, 898 (2008); Ga. Code Ann., § 27-7-9. The plaintiff need not produce an expert witness to prove the reasonableness and necessity of the charges. *Hart v. Shergold*, 295 Ga.App. at 96. While she may identify the bills and testify to the reasonableness and necessity of the expenses, the plaintiff must segregate out the unrelated expenses from the medical expenses that were the necessary result of the tort or risk having them excluded in their entirety. *See CFUS Properties, Inc. v. Thornton*, 246 Ga.App. 75, 79, 539 S.E.2d 571, 576 (2000).

2. Future Medical Expenses

The Georgia Code reads that "necessary expenses consequent upon an injury are a legitimate item in the estimate of damages." Ga. Code Ann., § 51-12-7. To warrant future medical expenses, there must be evidence that the injury will require that future medical attention. *Massie v. Ross*, 211 Ga.App. 354, 354, 439 S.E.2d 3, 3 (1993).

The plaintiff must provide competent evidence to guide the jury in arriving at a reasonable value for such expenses. *Hart v. Shergold*, 295 Ga.App. 94, 96-97, 670 S.E.2d 895, 898 (2008). While courts require competent evidence, they will allow some degree of speculation as to the reasonable value. *See generally White v. Jensen*, 257 Ga.App. 560, 560-561, 571 S.E.2d 544, 545 – 546 (2002) (the testimony of a physician, wherein he "guessed" as to the cost of a future surgical repair but listed some specific costs in the estimated figure given, was sufficient to authorize an award for future medical expenses). Future medical expenses should be reduced to present cash value. *Hughes v. Brown*, 109 Ga.App. 578, 579, 136 S.E.2d 403, 404 (1964).

B. Collateral Source Rule and Exception

Georgia's Collateral Source rule, like many other states', prevents a defendant from presenting any evidence as to payments by a third party for the expenses of a tortious injury and prevents the defendant from taking any credit toward his liability and damages for such payments. *Hoeflick v. Bradley*, 282 Ga.App. 123, 124, 637 S.E.2d 832, 833 (2006). The collateral source rule applies to payments made insurance companies to their insured. *Wardlaw v. Ivey*, 297 Ga.App. 240, 244, 676 S.E.2d 858, 863 (2009); *Hoeflick v. Bradley* 282 Ga.App. at 124, *supra*.

1. Exceptions

In Georgia, the common law held that there were no exceptions to the collateral source bar. *Olariu v. Marrero*, 248 Ga.App. 824, 825-826, 549 S.E.2d 121, 123 (2001)(physical precedent only)(citing *Candler Hosp. v. Dent,* 228 Ga.App. 421, 491 S.E.2d 868 (1997)). However, Georgia courts, as an exception to the collateral source rule, will allow evidence of an insurer's payments to its insured when insured has assigned his cause of action to the insurer. *Wardlaw v. Ivey*, 297 Ga.App. at 244, *supra*.

C. Treatment of Write-downs and Write-offs

The Georgia Court of Appeals has established that a write-off of medical expenses is a collateral source of payment. *Olariu v. Marrero*, 248 Ga.App. at 825-826, *supra*; *Candler Hosp. v. Dent,* 228 Ga.App. at 422, *supra*. However, if a plaintiff recovers a special verdict that awards damages for medical expenses previously written off by the defendant, the defendant is entitled to a set-off against the award of

medical expenses in the verdict prior to the entry of the judgment in the amount of any write-off that the defendant made to the total medical expenses. *Candler Hosp. v. Dent,* 228 Ga.App. at 422, *supra*. Based on *Olariu* and *Candler Hospital*, Georgia courts would exclude evidence of write-downs and/or write-offs by Medicare, Medicaid or private insurance.

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

A. Scope of Physician-Patient Privilege and Waiver

Georgia does not recognize an evidentiary privilege for physician-patient communications, *National Stop Smoking Clinic-Atlanta, Inc. v. Dean*, 190 Ga.App. 289, 289, 378 S.E.2d 901, 902 (1989), but, however, does recognize privileged communication in the psychiatrist-patient relationship. *See* Ga. Code Ann., § 24-9-21(5).[66] Even in circumstances where communications *are* privileged, such as within the psychiatrist-patient relationship, evidence showing the *fact* of employment of or treatment by a psychiatrist is not privileged. *National Stop Smoking Clinic-Atlanta, Inc. v. Dean*, 190 Ga.App. at 289, *supra*.

While it does not recognize a privilege between them, Georgia law did not require aa doctor to release information concerning a patient unless required to do so by subpoena or other appropriate court order. Ga. Code Ann. § 24-9-40. However, while it uses the language of privilege, section 24-9-40 does not create a statutory privilege. HIPAA, though, does provide a more robust protection.

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

Under section 24-9-40 a plaintiff waived her right to privacy with regard to medical records that were relevant to a medical condition the plaintiff placed in issue in a civil or criminal proceeding. *See* Ga. Code Ann. § 24-9-40(a). Recently, though, the Georgia Supreme Court determined that HIPAA

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[66] Ga. Code Ann., § 24-9-21 also protects: (6) Communications between [a] licensed psychologist and patient as provided in Code Section 43-39-16; (7) Communications between patient and a licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, or licensed professional counselor during the psychotherapeutic relationship; and (8) Communications between or among any psychiatrist, psychologist, licensed clinical social worker, clinical nurse specialist in psychiatric/mental health, licensed marriage and family therapist, and licensed professional counselor who are rendering psychotherapy or have rendered psychotherapy to a patient, regarding that patient's communications which are otherwise privileged by paragraph (5), (6), or (7) of this Code section.

preempted section 24-9-40 in this area. *See Moreland v. Austin*, 284 Ga. 730, 670 S.E.2d 68 (2008). In *Moreland* the Georgia Supreme Court found that HIPAA preempts Georgia law with regard to ex parte communications between defense counsel and plaintiff's prior treating physicians. *Id*. at 732. The *Moreland* Court noted that HIPAA regulated the methods by which a physician may release a patient's health information. *Id*. at 734. These methods, the Court wrote, include a court order, compliance with 45 CFR § 164.512(e)(1), or authorization from the plaintiff/patient. *See Moreland v. Austin*, 284 Ga. at 732.

C. Authorization of Ex Parte Physician Communication by Plaintiff

In a recent Georgia Court of Appeals case, the plaintiff signed a medical authorization that read, in relevant part, "the defendants' attorneys [have] the 'right to discuss the care and treatment of Plaintiff [] with all of [her] physicians.'" *Hamilton v. Shumpert*, 299 Ga.App. 137, 139, 682 S.E.2d 159, 162 (2009)(internal punctuation retained and omitted). The *Hamilton* plaintiff argued that they should not be bound by the authorization in light of *Moreland v. Austin*, *supra*. *Hamilton v. Shumpert*, 299 Ga.App. at 139. The Court of Appeals noted that the authorization did not restrict in anyway discussions between Defense counsel and the Plaintiff's former treating physician and, thus, no sanctions for ex parte communications were warranted. *See Id*. The *Hamilton* authorization would appear to comply, also, with 45 CFR § 164.512(e)(1), upon which the *Moreland v. Austin* relied heavily. *See Moreland v. Austin*, 284 Ga. 730, 734, 670 S.E.2d 68, 71 (2008).

D. Authorization of Ex Parte Physician Communication by Courts

Based on *Moreland v. Austin*, Georgia courts should follow 45 CFR § 164.512(e)(1) with respect to *ex parte* communications ordered by the court. Section 164.512(e)(1) allows a physician to disclose protected health information pursuant to a court order, "provided that the covered entity discloses only the protected health information expressly authorized by such order." 45 CFR § 164.512(e)(1)(i). Further, the *Moreland v. Austin* Court noted that "HIPAA requires a physician to protect a patient's health information, unless the patient is given reasonable notice and an opportunity to object." *Moreland v. Austin*, 284 Ga. 730, 733, 670 S.E.2d 68, 71 (2008).

E. Local Practice Pointers

The *Moreland v. Austin* Court recognized the trial courts broad discretion in fashioning sanctions for HIPAA violations. *See Moreland v. Austin*, 284 Ga. at 734-35. While HIPAA allows for civil monetary penalties to remedy violations, *see* 42 U.S.C.A. § 1320d-5, it does not allow for such penalties in the context of a civil suit. *Moreland v. Austin*, 284 Ga. at 734. To avoid HIPAA violations, defense counsel should, early in the litigation, initiate the process of obtaining an authorization from the plaintiff that allows contact with the plaintiff's treating physicians. Further, based on Section 164.512(e)(1) and the Georgia Supreme Court's reasoning in *Moreland v. Austin*,[67] defense counsel should provide the plaintiff notice of their intent to communicate with the plaintiff's treating physician, which allows them the opportunity to object or be present during the physician's interview with defense counsel. Of important note, a plaintiff may restrict the use and amount of information disclosed by her treating physicians. *See* 45 CFR § 164.522(a).

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Defense counsel may obtain the testimony of a non-party treating physician through a court order, compliance with 45 CFR § 164.512(e)(1), or authorization from the plaintiff/patient. *See Moreland v. Austin*, 284 Ga. at 732. If done pursuant to a court order, though, the treating physician may disclose only that information expressly authorized by the order. *See* 45 CFR § 164.512(e)(1)(i). Where counsel proceeds pursuant to 45 CFR § 164.512(e)(1), the plaintiff must be given sufficient notice of a request or counsel must obtain a protective order. 45 CFR § 164.512(e)(1)(ii). While the *Moreland v. Austin* appeared to require a heightened notice requirement for non-oral discovery from a non-treating physician, the same should not be true for obtaining testimony for two notable reasons. *See Moreland v. Austin*, 284 Ga. at 734 and section II, E, n.2 *supra*. First, rather obviously, testimony pursuant to a notice of

[67] *Moreland v. Austin* Court noted that a service of a request for production of documents was insufficient to satisfy HIPAA protections because, although it gave plaintiff notice and an opportunity to object to the production of written documents, it did not give plaintiff an opportunity to object to the ex parte oral contact and the discovery of the physicians' recollections and mental impressions. *Moreland v. Austin*, 284 Ga. at 734.

deposition or a subpoena at trial would not be done *ex parte*. Second, testimony pursuant to a notice of deposition or a subpoena at trial would afford the plaintiff an opportunity to object and/or seek the protection of limited disclosure pursuant of 45 CFR § 164.522(a).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

To obtain a non-party treating physician's testimony at trial, the defendant need only pay the physician a witness a fee of $25.00 *per diem*. Ga. Code Ann., § 24-10-24. However, as noted below, counsel typically pay non-party treating physician's more than the statutory minimum. *See* Section III, C, *infra*. The physician cannot demand the witness fee as a condition to their attendance. *See Id*. If the physician resides outside the county where the testimony is to be given the, service of the subpoena must be accompanied by the fee for one day's attendance plus mileage of 20¢ per mile for traveling expenses to and from the court house. *Id*.

However, to obtain deposition testimony, or other discovery, from a non-party treating physician the defendant "must pay a reasonable fee for the time spent in responding to discovery by that expert, subject to the right of the expert or any party to obtain a determination by the court as to the reasonableness of the fee so incurred," Ga. Code Ann., § 9-11-26(b)(4)(A)(ii), even if the physician is not expected to be called as a witness at trial. Ga. Code Ann., § 9-11-26(b)(4)(B) & (C).

2. Case Law

A non-party treating physician, called to testify at trial, may receive only the statutory witness fee and is not entitled to extra compensation as an expert witness. *See Kent v. Brown*, 238 Ga.App. 607, 608-09, 518 S.E.2d 737 (1999) *reconsideration denied, certiorari denied*, *overruled on other grounds by*, *Styles v. State*, 245 Ga.App. 90, 537 S.E.2d 377 (2000). However, where the counsel asks the physician to conduct a preliminary review of evidence to better give his opinion as expert she may be entitled to demand extra compensation. *See Kent v. Brown*, 238 Ga.App. at 609.

With respect to deposition testimony, the Georgia Court of Appeals in *Polston v. Levine* held that the trial court could compel payment of a reasonable expert-witness fee for a treating physician pursuant

to OCGA § 9-11-26(b)(4). *Polston v. Levine*, 71 Ga.App. 893, 893, 321 S.E.2d 350, 352 (1984). The *Polston v. Levine* Court went on to note that section 9-11-26(b)(4)(A)(ii) applies to all discovery obtained from an expert as an expert in anticipation of litigation or trial. *Id*. at 897.

C. Local Custom and Practice

Georgia has a somewhat obscure statute, Ga. Code Ann. § 24-10-4, which is entitled "Excessive claim by witness; forfeiture." "A witness who claims more than is due to him shall forfeit all his fees and shall pay to the injured party, in addition thereto, four times the amount so unjustly claimed." In the authors' experience, this statute is sometimes useful as a tool to threaten compliance, but is rarely invoked and rarely litigated. The Georgia Court of Appeals, in *Nationwide Mut. Ins. Co. v. Glaccum*, noted the best reason for section 24-10-4's rare use: "if an expert is required to testify for the usual witness fee of [$25.00] a day, you are likely to get about [$25.00] worth of testimony." 186 Ga.App. 148, 150, 366 S.E.2d 772, 774 (1988)(citing Agnor's Ga. Evidence 195, § 9-5). In reality, medical doctors may command fees upwards of $1000 an hour for their testimony, usually by deposition for preservation of evidence.