

INDIANA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In Indiana, an injured plaintiff is entitled to recover damages for past medical expenses that were both "reasonable" and "necessary." *Stanley v. Walker*, 906 N.E.2d 852, 855 (Ind. 2009), *re'hrg denied*; *Childress v. Buckler*, 779 N.E.2d 234 (Ind. Ct. App. 2002). One method of proving the "reasonableness" of medical expenses is statements of charges for medical, hospital, or other health care expenses caused by the injury. *See* Ind. R. Evid. 413. Indiana Evidence Rule 413 provides that such statements "are admissible into evidence . . . [and] shall constitute *prima facie* evidence that the charges are reasonable." *Id.* Thus, Rule 413 eliminates the need for testimony on the often uncontested issue of whether past medical expenses are reasonable. *Stanley*, 906 N.E.2d at 856; *Cook v. Whitsell-Sherman*, 796 N.E.2d 271, 277 (Ind. 2003). Moreover, a statement for past medical charges is "at least some evidence that the charge is normal for the treatment involved, and it was necessary to be performed." *Cook*, 796 N.E.2d at 278.

Where the reasonable value of medical expenses is contested, the opposing party may produce contradictory evidence, including expert testimony, to challenge the reasonableness of the proffered medical bills. *Stanley*, 906 N.E.2d at 856. If the plaintiff paid the medical bill, however, that may prove, in part, that the medical expense was reasonable. *Id.* This is grounded in the principle that a person

would not pay an unreasonable bill. *Id.* Thus, given the complexity of health care pricing, making it difficult to discern whether the amount paid, the amount billed, or some amount in between constitutes a reasonable charge for medical care, Indiana focuses on the *reasonable* value of medical expenses *necessarily* incurred by the plaintiff. *Id.* Neither the amount charged to a plaintiff, nor the amount actually paid by him or her, are conclusive on whether the charge was reasonable and necessary, but those charges and payments may tend to prove the reasonable and necessary value of the services rendered. *Id.* (citing *Chemco Transp., Inc. v. Conn.*, 506 N.E.2d 1111, 1115 (Ind. Ct. App. 1987)).

2. Future Medical Expenses

A plaintiff may recover the reasonable cost of necessary future medical expenses. *Indianapolis Street Ry. Co. v. Ray*, 78 N.E. 978 (Ind. 1906); *Cook*, 796 N.E.2d at 277. Unlike past medical expenses, medical bills are not admissible to prove the cost of reasonable or necessary future medical care. *Cook*, 796 N.E.2d at 277. Medical expenses already incurred are not relevant because they are debatable both as to the necessity of future treatment and reasonableness of future cost. *Id.* at 278. Even if past medical bills survive a relevancy objection, they are likely inadmissible hearsay. *Id.* Indeed, estimates of future medical expenses are not business records of an event that already occurred, nor do they help refresh a person's past recollection. Thus, statements of past medical charges do not fall within recognized hearsay exceptions. *Id.* (citing Indiana Evidence Rules 803(5), (6)). Accordingly, to prove the value and necessity of future medical care, the plaintiff must proffer evidence other than estimates based on past medical bills. That evidence may constitute expert testimony, or other concrete evidence, such as medical records, of the necessity of future medical care. *See Kaminski v. Cooper*, 508 N.E.2d 29, 31 (Ind. Ct. App. 1987) (citing expert medical testimony concerning possible future medical complications and expenses, and x-ray evidence showing that the plaintiff would suffer permanent joint pain).

B. Collateral Source Rule and Exceptions

Indiana's collateral source statute provides for the admissibility of collateral source payments, except for the following:

- (A) payments of life insurance or other death benefits;

- (B) insurance benefits for which the plaintiff or members of the plaintiff's family have paid for directly;
- (C) or payments made by:
 - (i) the state or the United States;
 - (ii) or any agency, instrumentality, or subdivision of the state or the United States.

Ind. Code § 34-44-1-2 (1999). The purpose of Indiana's collateral source statute is to determine the actual amount of a plaintiff's monetary loss and to prevent a plaintiff from recovering more than once from all non-exempt sources for each item of loss sustained in a personal injury or wrongful death action. *Stanley*, 906 N.E.2d at 855. Indiana retains the common law principle that collateral source payments should not reduce a damage award if the payment resulted from the plaintiff's own forethought, such as insurance purchased by the plaintiff or government benefits that the plaintiff has paid for through taxes. *Id.*

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

Indiana has not squarely addressed whether discounts from the cost of originally billed medical services afforded by Medicare or Medicaid are admissible as collateral source payments. As explained below, however, to the extent that a plaintiff can introduce evidence of a discount without referencing payments made by Medicare or Medicaid, it is likely that Indiana courts will admit such evidence to determine the reasonable value of medical services. *See Stanley*, 904 N.E.2d at 858 (noting that discounts negotiated by government agencies are valuable to the determination of the reasonable value of medical services).

2. Private Insurance

Where arrangements between a plaintiff's private health insurance company and a medical service provider result in a discount from the amount of medical expenses originally billed, a defendant may introduce the discounts to determine the reasonable value of medical services, so long as the discounts are introduced without referencing insurance. *Stanley*, 904 N.E.2d at 853. As explained above, under Indiana law, an injured plaintiff is entitled to recover damages for medical expenses that

were both reasonable and necessary. *Id.* at 855. To assist a jury in this regard, a defendant may cross-examine a plaintiff's witness called to establish reasonableness, or introduce its own witnesses to testify that amounts actually billed are not reasonable. *Id.* at 858. To the extent that discounts, such as write-downs or write-offs negotiated by a private insurer, can be introduced without referencing insurance, evidence of those discounts are not barred by the collateral source statute to determine the reasonable value of medical services. *Id.*

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Under Indiana statute, physicians shall not be required to testify to "matters communicated to them by patients, in the course of their professional business, or advice given in such cases." Ind. Code § 34-46-3-1 (1998). The privilege is not absolute, however, and may be expressly or impliedly waived. *Ley v. Blose*, 698 N.E.2d 381, 384 (Ind. Ct. App. 1998). Implied waiver may occur when a plaintiff places their mental or physical health at issue. *Id.* Implied waiver applies only to those matters "causally and historically related to the condition put in issue and which have direct medical relevance to the claim." *Vargas v. Shepherd*, 903 N.E.2d 1026, 1030 (Ind. Ct. App. 2009).

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

Indiana courts have not fully addressed HIPAA's interaction with the physician-patient privilege, but have provided some general guidance. In federal court, the Seventh Circuit has stated that HIPAA does not give rise to any new physician-patient privilege, but instead provides specific procedures for "obtaining authority to use medical records in litigation." *U.S. v. Bek*, 493 F.3d 790, 802 (7th Cir. 2007) (quoting *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 926 (7th Cir. 2004)). Specifically, information may be released with authorization or in certain other circumstances, including "court order or court-ordered warrant, or a subpoena or summons issued by a judicial officer." 45 C.F.R. § 164.512(f)(1)(ii)(A). Further, Indiana state courts have recognized HIPAA's preemptive effect on state law. *See, e.g., In re Involuntary Termination of Parent Child Relationship of A.H.* 832 N.E.2d 563, 568 (Ind. Ct. App. 2005). Accordingly, to the extent that the physician-patient privilege is waived under

state law, *i.e.*, a plaintiff putting their medical condition at issue, a defendant nevertheless must comply with HIPAA's procedure for obtaining protected medical records. Apart from this general guidance, little insight has been provided by Indiana state and federal courts to date.

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

Indiana case law surrounding plaintiffs' authorization of *ex parte* physician communications by a defendant is somewhat unclear. The Indiana Supreme Court has clearly stated that a court may not order *ex parte* physician communications. *Cua v. Morrison*, 626 N.E.2d 581, 586 (Ind. Ct. App. 1993) (adopted by the Indiana Supreme Court at 636 N.E.2d 1248 (Ind. 1994)). At face value, the language of *Cua* appears to broadly prohibit *ex parte* communications with plaintiffs' physicians. *Id.* However, in the *Cua* case, and others, the plaintiff had not previously consented to or authorized *ex parte* communications. Given that the physician-patient privilege may be expressly waived, it is therefore likely that plaintiffs can legally provide such consent. Given the language in *Cua*, however, Indiana law is somewhat unclear regarding plaintiffs' ability to consent to *ex parte* physician communications.

Federal case law, though still vague, is somewhat clearer on this issue. As discussed below, Indiana federal courts have allowed *ex parte* physician communication in certain circumstances. *Shots v. CSX Transp., Inc.*, 887 F. Supp. 206, 208 (S.D. Ind. 1995); *Everhart v. Nat'l Passenger R.R. Corp.*, Cause No. IP01-1221-C-H/K, 2003 WL 83569, *2 (S.D. Ind. Jan. 9, 2003). In both cases, the court compelled the plaintiff to sign a consent/waiver allowing *ex parte* communication. *Id.* Further, the *Shots* court stated that it preferred parties to agree to informal discovery methods, including *ex parte* interviews, when appropriate and in the interests of justice. *Shots*, 887 F.Supp. at 208. Therefore, given that courts have directed and encouraged plaintiffs to consent to *ex parte* communication, it follows logically that plaintiffs likely can legally consent to *ex parte* communications with their physicians.

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

State and federal law in Indiana differ on the ability of courts to authorize *ex parte* physician communications. The Indiana Supreme Court held that a court may not order *ex parte* physician communications and, arguably, that such communications are barred outright. *Cua*, 626 N.E.2d at 586.

While this position may be somewhat limiting to defendants, the *Cua* court stated that this prohibition did not substantively alter the universe of discoverable information, but merely changed the method of discovery. *Id.* at 583.

At least two federal courts have reached conclusions contrary to the Indiana Supreme Court's opinion in *Cua*. *Shots*, 887 F.Supp. at 208; *Everhart*, 2003 WL 83569, *2. In these cases, the judge ultimately compelled the plaintiff to allow defendants to conduct informal *ex parte* interviews with the relevant plaintiff's physician. *Id.*

The rationale for this decision can be seen in the *Shots* opinion. *Shots*, 887 F.Supp. at 207-208. First, the court determined that, while the underlying physician-patient privilege is statutory and therefore substantive, the means of conducting discovery, including discovery via *ex parte* physician communications, are procedural. *Id.* at 207. Consequently, federal procedural rules govern. *Id.* Having determined that the issue was procedural, the court set forth specific factual grounds allowing it to compel *ex parte* physician communication. *Id.* at 207-208. First, the court determined that the plaintiff had clearly put his mental and/or physical condition at issue in the underlying action. *Id.* Second, the plaintiff had not indicated that he had any condition "which [has] not related to his accident, or any condition that is 'potentially embarrassing or ruinous.'" *Id.* Therefore, an *ex parte* interview was unlikely to lead to the disclosure of any privileged information. Consequently, the court compelled the plaintiff to agree to *ex parte* communication. *Id.*

While the *Shots* court did compel *ex parte* physician interviews on the facts of the case, the court indicated that its decision was fact specific and that an opposite conclusion could be reached given different circumstances. *Id.* at 208. For instance, if the plaintiff had indicated another "embarrassing or ruinous" medical condition wholly unrelated to the claims at issue, the compulsion of *ex parte* interviews might be inappropriate. *See id.*

E. Local Practice Pointers

Given the current state of the law, the following general guidelines should be followed. First, in areas where HIPAA may apply, Indiana law is likely to evolve and research should be updated regularly.

Second, in Indiana state courts, alternative methods to *ex parte* interviews of the opposing party's physician should be used, such as non-party requests for records, formal depositions, or informal interviews with opposing counsel present. Third, in Indiana federal courts, *ex-parte* interviews with the opposing party's physician may be an option, but consent should still be obtained to avoid running afoul of physician-patient privilege or HIPAA.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

A treating physician who will testify about facts relevant to the issues at trial is treated in the same manner as any "ordinary" witness. *State v. Bailey*, 714 N.E.2d 1144, 1150 (Ind. Ct. App. 1999); *Buchman v. State*, 59 Ind. 1 (1877). Accordingly, there are no particular requirements to obtain testimony of a non-party treating physician, and such witnesses may be compelled to testify as any other witness. *Bailey*, 714 N.E.2d at 1150. As explained below, however, if the physician is to be examined as to their professional opinions and impressions, they are required to be compensated accordingly. *Id.*

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Indiana statute provides that an ordinary witness is entitled to five dollars (\$5) per day for attendance in court plus roundtrip mileage at the rate paid to state officers. Ind. Code § 33-37-10-3 (2007). Rule 45 of the Indiana Rules of Trial Procedure states that a subpoena compelling attendance at deposition or trial requires a simultaneous tender of "the fees for one day's attendance and the mileage allowed by law." Ind. R. Tr. P. 45(G). Accordingly, if it is necessary to subpoena a treating physician to attend a deposition or trial to testify as an ordinary witness, the subpoena must be accompanied by five dollars (\$5) plus the cost of mileage. Otherwise, the physician would not be obligated to attend. *See* 3 WILLIAM F. HARVEY, INDIANA PRACTICE SERIES, 397 (3d ed. 2002). If the physician is called to testify as to their professional opinions and impressions, however, the witness is entitled to a "reasonable fee" as a professional. *Buchman*, 59 Ind. at 7; *Bailey*, 714 N.E.2d at 1150; Ind. Tr. R. 26(B)(4)(c).

2. Case Law

If a third-party treating physician is examined as to their professional opinions and impressions, they would need to be compensated as a professional. *Buchman*, 59 Ind. at 7-8 (citing IND. CONST. of 1851, art. 1, § 21); *Bailey*, 714 N.E.2d at 1150. This rule is "more easily stated than applied." *Bailey*, 714 N.E.2d at 1150. Indeed, in the context of a treating physician, "facts" may depend upon the evaluation of the physician's expertise to become "facts." *See id.* For example, "[w]hether or not a person has the physical conditions that constitute 'cancer' does not depend upon a physician saying so, but for that to be a fact for a jury, a physician will have to testify to his opinion as to that fact." *Id.* Because of the difficulty in determining whether a physician will testify only on factual matters, and not on matters calling for expertise, such questions are within the court's discretion, subject to an abuse of discretion standard of review. *Id.*

C. Local Custom and Practice

Given the difficulty in deciphering whether a treating physician will testify as an ordinary witness or on matters calling for expertise, it is customary to pay third-party treating physicians a reasonable fee in excess of the one day attendance fee. This custom also makes practical sense, as a physician may become hostile if he or she is compelled to testify with only nominal compensation. However, Indiana law does allow a party to compel a third-party physician to testify as an ordinary witness, subject to the statutes and rules that govern such compelled attendance.