

## KANSAS

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### I. Medical Expenses

#### A. Requirements for Recovery of Medical Expenses

##### 1. Past Medical Expenses

Past medical expenses are categorized as economic damages under Kansas law. *Shirley v. Smith*, 933 P.2d 651, 657 (Kan. 1997)(citation omitted). A plaintiff is entitled to recover the reasonable value of medical care and expenses for the treatment of his or her injuries, as well as the cost of those reasonably certain to be incurred in the future. *Bates v. Hoag*, 921 P.2d 249, 253 (Kan. App. 1996), superseded in part by statute, K.S.A. §§60-226(b), (e), - 237(c) (2005), as recognized in *Frans v. Gausman*, 6 P.3d 432, 440 (Kan. App. 2000). As such, plaintiffs are required to present evidence of the reasonable value of his or her medical expenses.

##### 2. Future Medical Expenses

Future medical expenses, like past medical expenses, are also categorized as economic damages under Kansas law. *Shirley*, 933 P.2d at 657. A plaintiff in a negligence action, may recover future medical expenses “only where there is evidence showing with reasonable certainty the damage was sustained as a result of the negligence.” *McKissick v. Frye*, 876 P.2d 1371, 1389 (Kan. 1994)(citation omitted). No recovery is warranted where the damages are too conjectural or speculative to form a basis for measurement. *Id.* Plaintiff must demonstrate some reasonable basis for computation that will enable the trier of fact to arrive at an estimate of the amount of loss. *Id.* If expert testimony is used to establish

recovery of future medical expenses, the testimony must be sufficient to establish with reasonable certainty that a plaintiff will need future medical care. *Id.*

## **B. Collateral Source Rule and Exceptions**

In Kansas, the admission into evidence of expenses that have been paid by a third party is governed by the common law collateral source rule. The rule generally dictates that “benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.” *Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205, 208 (Kan. 2010)(citations omitted). The application of the collateral source rule to the payment of medical expenses by third-parties will be discussed in depth below.

## **C. Treatment of Write-Downs and Write-offs**

### **1. Medicare, Medicaid and Private Insurance**

In *Martinez v. Milburn Enterprises, Inc.*, 233 P.3d 205 (Kan. 2010), the Kansas Supreme Court considered the issue “whether in a case involving private health insurance the collateral source rule applies to bar evidence of (1) the amount originally billed for medical treatment or (2) the reduced amount accepted by the medical provider in full satisfaction of the amount billed, regardless of the source of payment.” *Id.* at 208. The court held that evidence of (1) the original amount billed and (2) the amount accepted by the hospital in full satisfaction of the amount billed was admissible *Id.* at 229. “However, evidence of the source of any actual payments is inadmissible under the collateral source rule.” *Id.* “The finder of fact shall determine from these and other facts the reasonable value of the medical services provided to plaintiff.” *Id.* In reaching its holding, the court reasoned as follows.

First, the court rejected plaintiff’s argument that it should apply a benefit of the bargain approach on the basis that it would effectively create categories of plaintiffs and that distinguishing among patients with Medicare, Medicaid, and private insurance could potentially cause the court to discriminate among plaintiffs based on their ability to obtain certain types of health care coverage. *Id.* 220-22. Second, the court found that “the reasonable value approach to medical expenses remains valid, including when the medical services are self-administered or gratuitously provided by family members.”

*Id.* at 222. Third, the court found that “the charges ‘actually made’ or billed by the health care provider for the plaintiff’s medical treatment expenses are not conclusive as to their reasonable value: other evidence shall be admissible.” *Id.* (citation omitted). Fourth, the court found that “other evidence relevant to determining the reasonable value of medical expenses may include write-offs or other acknowledgements that something less than the charged amount has been satisfied, or will satisfy, the amount billed.” “Accordingly, neither the amount billed nor the amount actually accepted after write-off conclusively establishes the ‘reasonable value’ of medical services.” *Id.* In short, the court embraced the following rationale:

When medical treatment expenses are paid from a collateral source at a discounted rate, determining the reasonable value of the medical services because an issue for the finder of fact. Stated more completely, when a finder of fact is determining the reasonable value of medical services, the collateral source rule bars admission of evidence stated that the expenses were paid by a collateral source. However, the rule does not address, much less bar, the admission of evidence indicating that something less than the charged amount has satisfied, or will satisfy, the amount billed.

*Id.* at 222-23.

**II. Ex Parte Communications with Non-Party Treating Physicians**  
**A. Scope of Physician-Patient Privilege and Waiver**

In Kansas, the physician-patient privilege does not apply to confidential communications between a physician and patient “in an action in which the condition of the patient is an element or factor of the claim or defense of the patient.” K.S.A. § 60-427(d). “Confidential communications between physician and patient” means:

such information transmitted between physician and patient, including information obtained by an examination of the patient, as is transmitted in confidence and by a means which, so far as the patient is aware, discloses the information to no third persons other than those reasonably necessary for the transmission of information or the accomplishment of the purpose for which it is transmitted.

K.S.A. § 60-427(a)(4). Accordingly, under Kansas law, defendants to actions in which the condition of the patient is an element or factor of the claim or defense of the patient may seek discovery of plaintiff’s medical records and communications that would otherwise be considered confidential. *See* K.S.A. § 60-427(d); *State v. Campbell*, 500 P.2d 21, 33-4 (1972)(“[T]here is no privilege under...60-427(d)(physician-patient privilege) in an action in which the condition of the patient is an element or factor of the claim or defense of the patient.”). In short, where a plaintiff’s medical condition is an element or factor of his or her claim or defense, the physician-patient privilege is waived.

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

*Ex parte* communications with a plaintiff’s treating physician are permissible in Kansas even after the passage of HIPAA. 45 C.F.R. § 164.512(e) provides:

(1) Permitted Disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:

(i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order; or

(ii) In response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court or administrative tribunal, if:

(A) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iii) of this section, from the party seeking the information that reasonable efforts have been made by such party to ensure that the individual who is the subject of the

protected health information that has been requested has been given notice of the request;  
or

(B) The covered entity receives satisfactory assurance, as described in paragraph (e)(1)(iv) of this section, from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order that meets the requirements of paragraph (e)(1)(v) of this section.

45 C.F.R. § 164.512(e)(1)(i) & (ii).

In short, there are two instances in which the disclosure of medical information by a healthcare provider without an authorization by the patient is permitted under HIPAA: (1) the provider is served with a court order authorizing the disclosure, or (2) by use of a formal subpoena or discovery request accompanied by the procedural safeguards and assurances set forth in the regulation. Kansas courts at the both the state and federal level have concluded that as long as the appropriate procedural safeguards and assurances are utilized, HIPAA permits *ex parte* communications with plaintiff's treating physicians. See *Hyzer v. Higgenbotham*, District Court of Crawford County, Kansas, Case No. 05CV220P; *Hill v. Hoehn*, District Court of Johnson County, Kansas, Case No. 05-CV-8979; *G.A.A. v. Pratt Regional Medical Center, Inc.*, U.S. District Court Case No. 05-1267-JTM; *G.D., et. al. v. Monarch Plastic Surgery, P.A., et. al.*, U.S. District Court No. 06-2184-CM; *McCloud v. The Board of Directors of Geary Community Hospital*, U.S. District Court Case No. 06-1002-MLB; and *Smith v. Hunkeler*, U.S. District Court Case No. 07-2257-JPO.

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

As noted above, a plaintiff who brings a cause of action in which the condition of the plaintiff is an element or factor of the claim or defense of the plaintiff, waives the physician-patient privilege. K.S.A. §60-427(d). Because the physician-patient privilege is waived, the defendant is entitled to seek discovery of plaintiff's medical records and confidential physician-patient communications. The patient, not the physician, is the holder of the privilege. As such, the plaintiff may authorize the disclosure of his or her medical records and confidential physician-patient communications by executing a written authorization that complies with Kansas state law and HIPAA. Typically, these authorizations are

provided to the plaintiff by the defendant by way of discovery. It is not uncommon, however, for plaintiff to draft his or her own authorization in lieu of executing an authorization provided by the defendant.

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

*Ex parte* communications with non-party treating physicians are permitted pursuant to local rule in the Third, Eleventh, Fourteenth, Eighteenth, and Twenty-Ninth Judicial Districts of Kansas.<sup>193</sup> These local rules generally provide that lawyers have the right to interview treating physicians once the physician-patient privilege is waived by the filing of a lawsuit, provided the physician is supplied with written consent waiving the privilege by the person holding the privilege or by order of the Court. These local rules further provide that the treating physician may be interviewed outside the presence of parties or other counsel provided the treating physician consents to the interview. In judicial districts where *ex parte* communications with non-party treating physicians are not provided for by local rule, defendants should move the court to enter a qualified protective order allowing *ex parte* communications with plaintiff's treating physicians. This practice, while not proscribed, has yet to be directly addressed by the Kansas appellate courts.

#### **E. Local Practice Pointers**

Defendants seeking discovery of medical records and confidential physician-patient communications should include a provision in the authorization that the information to be disclosed is not limited only to medical records, but all information transmitted between the patient and the physician. Plaintiffs' attorneys, however, will attempt to limit the language in the authorization to allow disclosure of medical records only and to prohibit the defendant's lawyers from talking to plaintiff's treating physicians without plaintiff present. The best practice, therefore, is to file a motion for the entry of a qualified protective order permitting the inspection, reproduction, and disclosure of medical records and protected health information.

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<sup>193</sup> For the Third Judicial District see local rule DCR 3.212, for the Eleventh see Rule No. 28, for the Fourteenth see Rule Number Thirty-Eight, for the Eighteenth see Rule 208; and for the Twenty-Ninth see Rule 103.

### **III. Obtaining Testimony of Non-Party Treating Physicians**

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

K.S.A. § 60-230(a)(1) provides that a party may take the testimony of any person, which would include a non-party treating physician, by deposition upon oral examination. The attendance of a non-party treating physician may be compelled by subpoena as provided in K.S.A. 60-245. The party desiring to take the deposition must give reasonable notice in writing to every other party to the action stating the time and place, the name and address of the person to be examined, and if a subpoena duces tecum is to be served on the person to be examined, a designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice. K.S.A. § 60-230(b)(1).

A party may also subpoena the business records of a non-party pursuant to K.S.A. § 60-245a. K.S.A. § 60-245a(b)(1) provides that not less than 14 days before the issuance of a non-party business records subpoena, the requesting party must give notice to all parties of the intent to request a subpoena. A copy of the proposed subpoena must also be served upon all parties along with such notice. *Id.* To ensure full compliance with the Kansas Rules of Civil Procedure regarding depositions, subpoenas, and the subpoenas of business records of a non-party, see K.S.A. §§ 60-230, 60-245, and 60-245a, and all applicable local district court rules.

#### **B. Witness Fee Requirements and Limits**

##### **1. Statutes and Rules of Civil Procedure**

K.S.A. § 28-125(a)(1)-(3) provides that witness should receive a fee of \$10 per day for attending before any court or grand jury, or before any judge, referee, or commission or for attending an inquest and further provides that for each mile necessarily and actually traveled to and from the place of attendance at the rate prescribed by law if the distance is more than one mile.

##### **2. Case Law**

In *Grant v. Chappell*, following a jury verdict in favor in his favor, plaintiff sought to have charged as costs the fees charged by his own treating physicians, who testified at trial, for their appearances. 916 P.2d 723, 724 (Kan. App. 1996). Because the fee of an expert witness may not be

charged to the losing party unless specifically authorized by statute, the Kansas Court of Appeals held that fees charged by treating physicians for appearance and testimony at trial may not be assessed against the losing party as costs. *Id.* at 725 (citing *Divine v. Groshong*, 679 P.2d 700 (1984)). Note, however, the Kansas Court of Appeals' holding in *Diggs v. McCann*, where the court held that where the plaintiff's treating physician testified as a fact witness and not an expert, the treating physician was not entitled to an expert witness fee and was entitled only to the witness fee and mileage as contemplated by K.S.A. § 28-125. 2003 WL 21948221 (Kan. App. 2003).

### **C. Local Custom and Practice**

Although K.S.A. § 28-125(a) provides for witness fees in general, many treating physicians require payment of an estimated lump sum based upon their hourly rate for giving testimony prior to his or her appearance at a deposition or trial. It is common practice for the deposing party to forward this payment to the treating physician prior to the deposition or trial.