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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

Tortfeasors are liable for all damages caused in fact and proximately caused by their negligence, Mont. Code Ann. § 27-1-317, including reasonably certain future damages. Mont. Code Ann. § 27-1-203. To recover for medical expenses, plaintiff need only prove that the expenses were medically reasonable and necessary and caused by the claimed event. *Johnson v. United States*, 510 F. Supp. 1039 (D. Mont. 1981), *rev'd on other grounds*, 704 F.2d 143. *See also* Montana Pattern Instruction, MPI2d 25.07, instructing as an element of damages "the reasonable value of necessary care, treatment and services received and those reasonably probable to be required in the future."

2. Future Medical Expenses

Future medical expenses require testimony of a physician that the expenses are reasonably certain to occur, and that testimony need be stated only to a "reasonable degree of medical certainty." Future damages need only be reasonably certain, including claimed future medical expenses. *Frisnegger v. Gibson*, 598 P.2d 574, 583 (Mont. 1979); *Burk Ranches, Inc. v. State*, 790 P.2d 443 (Mont. 1990). The Montana Pattern Instruction states that an element of damages are the value of "necessary care, treatment and services . . . reasonably probable to be required in the future." MPI2d 25.07.

B. Collateral Source Rule and Exceptions

The statute regarding collateral source reductions provides as follows:

> **Collateral source reductions in actions arising from bodily injury or death – subrogation rights.** (1) In an action arising from bodily injury or death when the total award against all defendants is in excess of $50,000 and the plaintiff will be fully compensated for his damages, exclusive of court costs and attorney fees, a plaintiff's recovery must be reduced by any amount paid or payable from a collateral source that does not have a subrogation right.

Mont. Code Ann. § 27-1-308.

Thus, two requirements are necessary – a total award "against all defendants" in excess of $50,000 and that the plaintiff will be "fully compensated" by the award, exclusive of court costs and attorney fees. In *Shilhanek v. D-2 Trucking, Inc.*, 994 P.2d 1105 (Mont. 2000), the Montana Supreme Court held that the plaintiff must have received payment before he or she can be considered to have been "fully compensated," noting that an award against a judgment-proof defendant cannot result in the plaintiff being "fully compensated." *Id.* at 1111.

There are other requirements prior to reduction of an award based on an insurance policy payment under Section 27-1-308. The following amounts must be deducted from the amount of the insurance policy payment being offset from the award: 1) the amount the plaintiff paid for the policy for the 5 years prior to the date of injury; and 2) the amount the plaintiff paid for the policy from the date of injury to the date of judgment. Mont. Code Ann. § 27-1-308(2).

The jury shall determine an award in a tort case without consideration of any collateral sources. After the jury determines its award, reduction of the award must be done by the trial judge at a hearing and upon a separate submission of evidence relevant to the existence and amount of the collateral sources. *See Liedle v. State Farm Mut. Automobile Ins. Co.*, 938 P.2d 1379 (Mont. 1997) regarding procedure for application of collateral source statute.

C. Requirement to Pay Medical Expenses Prior to Settlement or Judgment.

A crucial issue relating to handling of medical expenses in personal injury claims and litigation arises from the Montana Supreme Court case of *Ridley v. Guaranty National Insurance Company*, 951

P.2d 987 (Mont. 1997), which held that an insurer has an obligation to pay an injured third party's medical expenses until final settlement when liability is reasonably clear. Those medical expenses must, however, be causally related to the accident in question. The failure of an insurer to know this rule will lead to serious adverse consequences, particularly potential bad faith exposure.

1. Treatment of Write-downs and Write-offs

There are no appellate decisions on the issue of whether the tortfeasor obtains the benefit of negotiated write-downs or write-offs of either Medicare and Medicaid reductions or reductions negotiated through private insurers. There are, however, unpublished state trial court decisions refusing to grant the tortfeasor the benefit of those reductions.

Payments made to an injured party under a medical payments provision of the insurance policy owned by the tortfeasor are not credited against the judgment under the "voluntary payments" statute providing for credits against judgments of prior voluntary payments, Mont. Code Ann. § 26-1-706. *O'Hern v. Pankratz*, 19 P.3d 807 (Mont. 2001).

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

A. Scope of Physician-Patient Privilege and Waiver

The physician-patient privilege is codified in Mont. Code Ann. § 26-1-805. Other privileges established by statute include speech pathologists and audiologists (§ 26-1-806), psychologist-client (§ 26-1-807) and psychology teachers and who thereby observe privileged communications (§ 26-1-808). Rule 501 of the Montana Rules of Evidence extends evidentiary privilege by rule to the codified privileges.

Rule 35(b) of the Montana Rules of Civil Procedure states that by "commencing an action or asserting a defense which places in issue the mental or physical condition of a party to the action, the . . . party to the action waives any privilege the party may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental

or physical condition. . . ." The waiver does not extend to mental or physical conditions "not related" to the pending action.

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

There are no appellate decisions on this issue. Note, however, that the Montana Constitution contains an explicit constitutional right of privacy, and Montana courts generally protect the privacy rights of patients or persons claiming personal injury. Montana has its own Uniform Health Care Information Act enacted to govern use and disclosure of health care information. Mont. Code Ann. § 50-16-501, *et seq.*

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

The Plaintiff has the right to communicate *ex parte* with his or her physician, and there is no case suggesting any limitation on that right. The communications, however, may or may not be privileged dependent upon their content and the extent of any waiver of the physician-patient privilege.

Plaintiff's counsel is generally regarded as having a right to communicate *ex parte* with the plaintiff's treating physician. Routine practice is for those conferences to be held prior to depositions or other testimony of the physician. The privileged nature of such communications is measured not by the physician-patient privilege but, rather, the attorney work-product privilege. *See* Rule 26(b)(3) of the Montana Rules of Civil Procedure.

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

The Montana Supreme Court has explicitly held that the trial court "does not have power, under the rules of discovery, to order private interviews between counsel for one party and possible adversary witnesses, expert or not, on the other." That rule was explicitly applied, in that case, to private interviews between defense counsel and plaintiff's treating physician. *Jaap v. District Court of the Eighth Judicial District*, 623 P.2d 1389 (Mont. 1981). The United States District Court for the District of Montana has stated the rule quite simply: "It is impermissible for the defendant's lawyers to have *ex parte* contact with any of the [plaintiff's] treating doctors." *Hampton v. Schimpff*, 188 F.R.D. 589, 590 (D. Mont. 1999).

E. Local Practice Pointers

It should also be noted that the general rule (and practice) is that plaintiff's counsel is entitled to be present during the history-taking portion of a Rule 35 independent medical examination, though not during the physical examination portion. *Mohr v. District Court*, 660 P.2d 88 (Mont. 1983). That rule often becomes difficult in the context of a psychiatric or psychological examination, and court involvement is sometimes necessary to clarify the procedures for conducting such examinations.

The Montana Supreme Court has made it clear that in contemplating Rule 35 motions to compel an independent medical examination, the court must balance the defendant's right to obtain a physical or mental examination with the plaintiff's right to privacy. *Winslow v. Montana Rail Link, Inc.*, 38 P.3d 148, ¶ 5 (Mont. 2001).

It is common for plaintiff's counsel to challenge the "independent" nature of the examiner retained by defense counsel, and the Montana Supreme Court has made it clear that such challenges are cognizable. For example, in *Simms v. Montana Eighteenth Judicial Dist. Court*, 68 P.3d 678, ¶ 33, the Montana Supreme Court noted that Rule 35 "does not empower a defendant to seek out and employ the most favorable 'hired gun' available no matter the inconvenience to the plaintiff and without regard to the plaintiff's rights." Plaintiff's counsel sometimes seek to videotape an entire examination or conduct detailed discovery into the examiner's IME work and money paid to perform IME work. *See, e.g.*, *Hegwood v. Montana Fourth Judicial District Court*, 75 P.3d 308 (Mont. 2003).

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Depositions of non-party treating physicians are generally taken by agreement without additional procedures required. If, however, normal procedures are not followed, the party wishing to conduct the examination serves a notice of deposition on all counsel and serves a Rule 45 subpoena on the treating physician. The subpoena will usually contain a requirement, pursuant to Rule 45(c) of the Montana Rules of Civil Procedure, that the subpoenaed party (i.e., the physician) produce all documents relating to the

patient. Other documents can be requested such as a CV and list of cases in which the physician has testified. *See* discussion regarding local custom and practice in Section III. C. below.

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

The witness fee for attending trial or deposition of $10 plus mileage expenses is set forth in Mont. Code Ann. § 26-2-501. Payment of expert witnesses for time spent responding to discovery is dealt with under Rule 26(b)(4)(C), Montana Rules of Civil Procedure, which states that "unless manifest injustice would result," the expert shall be paid a "reasonable fee" for time spent responding to discovery.

C. Local Custom and Practice

Non-party physician witnesses are generally compensated their usual charges by the party taking the deposition. The general wisdom is that there is little long-term value in refusing to pay a physician anything but the statutorily-required witness fee. Montana is a small state, in population, and loss of cooperation from physicians and their staff can create difficult problems.

There are occasional issues involving compensation of non-party physician witnesses and even experts regarding their preparation time as distinguished from actual time spent in deposition. Those are issues that should be agreed upon in advance between counsel.