NEBRASKA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

"Damages, like any other element of a plaintiff's cause of action, must be pled and proved, and the burden is on the plaintiff to offer evidence sufficient to prove the plaintiff's alleged damages." *J.D. Warehouse v. Lutz & Co.*, 263 Neb. 189, 195 (2002).

1. Past Medical Expenses

The rule on recovery of past and future medical expenses in Nebraska is that "[a] plaintiff, injured by another's negligence, is entitled to recover the reasonable value of medical expenses incurred as the result of the negligently caused injury and to recover the value of future medical expenses that are reasonably certain to be incurred as the result of the injury." *Renne v. Moser*, 241 Neb. 623, 634 (1992).

"A plaintiff's evidence of damages may not be speculative or conjectural and must provide a reasonably certain basis for calculating damages." *Shipler v. General Motors Corp.*, 271 Neb. 194, 231 (2006). "[U]ncertainty as to the fact of whether damages were sustained at all is fatal to recovery, but uncertainty as to the amount is not if the evidence furnishes a reasonably certain factual basis for computation of the probable loss." *Id.* "The proof is sufficient if the evidence is such as to allow the trier of fact to estimate actual damages with a reasonable degree of certainty and exactness." *Id.* "The amount of damages to be awarded is a determination solely for the fact finder, and the fact finder's decision will

not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved." *Id.* at 232.

"The question of whether the evidence of damages is reasonably certain is a question of law, and not a matter to be decided by the trier of fact." *Id.* at 231. "The trial court must first determine whether the evidence of damages provides a basis for determining damages with reasonable certainty, i.e., is not speculative or conjectural. If such a basis is provided, the issue of damages can be submitted to the jury." *Shipler*, 271 Neb. at 231. "The jury is instructed that the plaintiff must prove the nature and extent of the damages by the greater weight of the evidence, not whether the evidence of damages is reasonably certain." *Id.*

2. Future Medical Expenses

Like past medical expenses, "the amount of future medical expenses is not required to be established with mathematical certainty before the plaintiff may recover their value." *Renne*, 241 Neb. at 634. The nature of future medical expenses "requires consideration of future events that can only be reasonably predicted, but not conclusively proved, at the time of trial." *Pribil v. Koinzan*, 266 Neb. 222, 229 (2003). However, "conjecture or possibility regarding future medical expenses is insufficient to submit to a fact finder the issue of future medical expenses." *Id.* "The need for future medical services and the reasonable value thereof may be inferred from proof of past medical services and their value." *Schaefer v. McCreary*, 216 Neb. 739, 743 (1984). "Before a trial court may submit to a jury any question concerning permanency of a plaintiff's injury and future medical expense, the plaintiff must have presented sufficient relevant evidence for the jury to determine whether the plaintiff has sustained permanent injury and will incur future medical expenses as a result of the injury." *Renne*, 241 Neb. at 635. If the plaintiff makes this showing, "the jury should be instructed . . . that the plaintiff may recover damages for injuries 'reasonably certain' to be incurred in the future." *Shipler*, 271 Neb. at 232, *quoting Pribil*, 266 Neb. at 229.

In *Shipler*, a case where a motor vehicle accident rendered the plaintiff passenger a quadriplegic, the jury's general verdict awarded the plaintiff $19,562,000 in damages, based on consideration of the following factors:

> The reasonable value of medical care and supplies actually provided and reasonably certain to be needed in the future, lost wages, the reasonable value of the earning capacity [the plaintiff] was reasonably certain to lose in the future, the reasonable monetary value of the physical pain and mental suffering she had experienced and was reasonably probable to experience in the future, and the reasonable monetary value of her loss of enjoyment in the past and which she is reasonably probable to experience in the future.

271 Neb. at 234.

B. Collateral Source Rule and Exceptions

Nebraska's "collateral source rule provides that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer," such as payments from Medicare, Medicaid, and private insurance, "will not diminish the damages otherwise recoverable from the wrongdoer." *Burns v. Nielsen*, 273 Neb. 724, 736 (2007). As a general rule, "presenting evidence of a pension or disability benefits is inappropriate for purposes of determining damages." *Mahoney v. Nebraska Methodist Hospital*, 251 Neb. 841, 848 (1997). "The underlying theory of the collateral source rule is designed to prevent a tort-feasor from escaping liability based on the actions of a third party, even if it is possible that the plaintiff may be compensated twice." *Shipler*, 271 Neb. at 233.

In *Mahoney*, the Supreme Court of Nebraska addressed "the application of the collateral source rule in a situation in which there are two separate injuries." 251 Neb. at 848. The plaintiff suffered a knee injury while performing her duties as a police officer. As a result, the plaintiff underwent multiple procedures at the defendant hospital, some of which were negligently performed and thus exacerbated the initial knee injury. The combination of the plaintiff's initial knee injury and the hospital's negligent medical treatment forced her to retire as a police officer. Following her retirement, the plaintiff received a disability pension from her former employer. The plaintiff also sued the defendant hospital to recover monetary damages for the injury to her knee. "The district court sustained [the plaintiff's] motion in limine preventing [the defendant] hospital from introducing evidence that she was currently receiving an

early retirement pension." *Id.* at 845. On appeal, the defendant hospital "argue[d] that the pension is paid to [the plaintiff] because of the . . . injury to her knee and is therefore not a collateral source regarding the injury she suffered to her knee as a result of the [negligent medical treatment]." *Id.* at 847. The Supreme Court of Nebraska rejected the defendant hospital's argument, rendering inadmissible the evidence of the plaintiff's disability pension. The court reasoned that the plaintiff's "pension is, in fact, a 'collateral' and 'independent' source of income from [her] injuries suffered because of the [defendant] hospital's negligence." *Id.* at 849.

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

The Supreme Court of Nebraska recently addressed the treatment of write-downs in *Fickle*. "Evidence at trial suggested that [the plaintiff] had been receiving Medicaid payments and that [the residence care facility where he lived] was charging him at the Medicaid rate, which was lower than the rate paid by private parties." *Fickle*, 274 Neb. at 268. On appeal, "[t]he [defendant] argue[d] that the lower Medicaid rate should have been considered in calculating damages instead of the private-party rate." *Id.* The Supreme Court of Nebraska bluntly concluded the defendant's "argument ha[d] no merit," reasoning that "[t]he private-party rate, not the Medicaid rate, is the proper rate to use in calculating [the plaintiff's] future medical expenses." *Id.* "Social legislation benefits, including payments by Medicare and Medicaid, are excluded by the collateral source rule." *Id.* The court further explained that once the plaintiff received the judgment awarded in this case, he "may no longer be eligible for Medicaid . . . because eligibility standards take into account the resources available to a Medicaid applicant or recipient." *Id.* at 269.

Shipler represents another recent application of Nebraska's collateral source rule. The plaintiff testified at trial "that her medical bills were paid by Medicaid, her rent and household expenses were paid by disability and Social Security benefits . . . and all her medical care and living expenses were provided by either the state or the federal government." *Shipler*, 271 Neb. at 233. The jury was instructed that if it found either of the defendants liable, "it could not reduce the damages by the amount paid by these other

sources because if [the plaintiff] recovered, she might be required to reimburse the funds paid by the other sources." *Id.* On appeal, the Nebraska Supreme Court held "this instruction was not erroneous and was not prejudicial," reasoning that the "law prevents a wrongdoer from escaping paying damages because of the actions of [external] sources." *Id.*

2. Private Insurance

Nebraska's collateral source rule treats private insurance the same as social welfare benefits. "[T]he fact that the party seeking recovery has been wholly or partially indemnified for a loss by insurance or otherwise cannot be set up by the wrongdoer in mitigation of damages." *Fickle*, 274 Neb. at 268, *citing Mahoney*, 251 Neb. 841.

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

A. Scope of Physician-Patient Privilege and Waiver

Nebraska's physician-patient privilege, set forth in statute, provides:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purposes of diagnosis or treatment of his or her physical, mental, or emotional condition among himself or herself, his or her physician, or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.

Neb. Rev. Stat. § 27–504(2). The privilege also extends to patients seeking professional counseling services. *Id.* Although the statute refers only to "confidential communications," "[t]he physician-patient privilege protects . . . statements made by the patient to the physician" and "facts obtained by the physician by observation or examination." *Branch v. Wilkinson*, 198 Neb. 649, 656 (1977).

Where applicable, the physician-patient privilege is strong medicine for litigants seeking to avoid discovery of sensitive or potentially damaging medical information. The privilege "does not terminate with the cessation of the protected relationship, but continues thereafter." *Clark v. Clark*, 220 Neb. 771, 774 (1985). "The privilege may be claimed by the patient or the client, by his guardian or conservator, or by the personal representative of a deceased patient or client. The person who was the physician or professional counselor may claim the privilege but only on behalf of the patient or client." Neb. Rev.

Stat. § 27–504(3). Moreover, "[t]he physician-patient privilege extends not only to physicians but to their agents as well." *Branch*, 198 Neb. at 656.

The physician-patient privilege is personal in nature and "may be waived by the patient." *Id.* at 663. However, "[a] waiver of the physician-patient privilege in Nebraska requires "voluntary and intentional relinquishment of a known right, claim, or privilege." *Id.* This rule is illustrated by *Branch*, where the plaintiff contended that "the defendant waived the privilege when, in his presence and the presence of his counsel, [the] county attorney, read into the record during the coroner's inquest into the death of [the plaintiff's decedent] the result of the blood alcohol test conducted on the blood sample obtained from the defendant." *Id.* The Supreme Court of Nebraska noted that "the blood alcohol test results of [the defendant] were known to numerous people," but no evidence indicates "the defendant had any control over the dissemination of this information, opportunity to halt or prevent it, or that he approved it." *Id.* Nor did any evidence suggest "that the defendant ever made the results of the test known to third persons." *Id.* The court held "[t]his was not a waiver." *Branch*, 198 Neb. at 663.

The scope of Nebraska's physician-patient privilege is limited by exceptions set forth in statute. *See* Neb. Rev. Stat. § 27–504(4). For example, Nebraska recognizes the "patient-litigant exception," such that filing a personal injury claim waives the physician-patient privilege for all information specifically related to the plaintiff's health and medical history at issue in the lawsuit. Neb. Rev. Stat. § 27–504(4)(c); *Vredeveld v. Clark*, 244 Neb. 46, 58 (1993). The physician-patient privilege also is waived "[i]f the judge orders an examination of the physical, mental, or emotional condition of the patient," but such privilege is only waived for "the particular purpose for which the examination is ordered." Neb. Rev. Stat. § 27–504(4)(b).

The breadth of the physician-patient privilege also is limited in the way it is applied by Nebraska courts. The Supreme Court of Nebraska has held that "the statute granting the [physician-patient] privilege should be strictly construed, being in derogation of common law." *Branch*, 198 Neb. at 655. "To be privileged, information obtained during the existence of a physician-patient relationship must be necessary to enable the physician to properly discharge his duties." *Id.* at 658. Consultation "for some

purpose other than that of ultimate curative or alleviative treatment is not privileged; nor is a communication made at some time when the professional relationship is not pending." *Garska v. Harris*, 172 Neb. 339, 342 (1961). "Where the information provided the physician does not pertain to the treatment or diagnosis of the patient, the policy underlying the physician-patient privilege is not violated by allowing disclosure, and the privilege should not be employed to remove from the jury's consideration otherwise probative and admissible evidence. *State v. Irish*, 223 Neb. 578, 585 (1986). Furthermore, "the party asserting the existence of the privilege has the burden of proving that the documents sought are protected." *State ex. rel. Amisub, Inc. v. Buckley*, 260 Neb. 596, 610 (2000).

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

Nebraska courts have not addressed the interaction of waiver of the physician-patient privilege and the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). The only Nebraska case discussing HIPAA in any capacity is *Adams County Historical Society v. Kinyoun*, which held that HIPAA did not prohibit a state mental hospital from disclosing the records of people buried at a cemetery adjoining the mental hospital to the county historical society. 277 Neb. 749, 757 (2009).

C. Authorization of Ex Parte Physician Communication by Plaintiff

Nebraska courts have not addressed whether a plaintiff in a personal injury case may authorize ex parte communication with a treating physician. Presumably, however, the plaintiff could authorize ex parte communication with their treating physician via a signed HIPAA release.

D. Authorization of Ex Parte Physician Communication by Courts

The Supreme Court of Nebraska has "not yet decided whether one party can, without permission, meet ex parte with an opposing party's treating physician." *Olson v. Sherrerd*, 266 Neb. 207, 214 (2003). Nor have Nebraska courts addressed whether and to what extent a litigant may call upon the power of courts to compel ex parte communication with a treating physician. In the context of workers' compensation claims, the Court of Appeals of Nebraska held that, under the comprehensive statutory scheme governing workers' compensation clams, "[w]hen an injured worker is seeking compensation for an injury from his employer and the employer seeks relevant information from the injured worker's

treating physician regarding that injury, that information is not privileged." *Scott v. Drivers Management*, 14 Neb. App. 630, 647, 714 N.W.2d 23, 35–36 (2006), citing Neb. Rev. Stat. § 48–120(4). Outside the realm of workers' compensation, it is unclear whether Nebraska courts would authorize a defendant's ex parte communication with the plaintiff's treating physician or admit such evidence already obtained without imposing discovery sanctions.

E. Local Practice Pointers

Information from a treating physician is best obtained through a HIPAA release, or a subpoena duces tecum accompanying a deposition notice.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

The testimony of a non-party treating physician is generally obtained via the defendant's issuance of a subpoena, and the plaintiff's release of his or her medical records and reports. *Hayden v. Neville*, 2007 WL 1191908, 3 (Neb. App. 2007) (Evidence of the plaintiff's injuries were obtained "in the medical records and reports which were supplied to [defendant] as part of [plaintiff's] discovery responses and were also obtained by [defendant] through medical records subpoenas").

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Nebraska's statutory witness fee provision states that witnesses before the district court and county court shall receive $20 "for each day actually employed in attendance on the court or grand jury." Neb. Rev. Stat. § 33–139. If the witness resides more than one mile from the courthouse, such witness shall receive mileage reimbursement for each mile necessarily traveled. *Id.*; Neb. Rev. Stat. § 81–1176. Beyond these basic statutory provisions, Nebraska courts have yet to address more intricate aspects of witness fee requirements and limits, such as whether there is a limit to the amount of fees a physician may charge for his or her testimony.

2. Case Law

"[A] witness who testifies as an expert on a subject requiring special knowledge and skill is, in the absence of a contract for those services, entitled only to the statutory witness fee." *Lockwood v. Lockwood*, 205 Neb. 818, 821 (1980). The only limitation on the amount of money a lawyer can pay an expert witness arises from the Nebraska Rules of Professional Conduct, which prohibit procuring falsified evidence and improperly influencing witnesses. Neb. Ct. R. of Prof. Cond. § 3–503.4(b). The comments to the Rules recognize the rule in most jurisdictions is that "it is improper to pay an expert witness a contingent fee." *Id.* § 3–503.4 at cmt 3.

C. Local Custom and Practice

As a practical matter, the expert witness fee is non-negotiable and paid, whether happily or unhappily, by the party needing the discovery. Although some fees are high, most are reasonable given the inconvenience caused to the physician's schedule by a deposition.