

NEVADA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses:

Nevada case law simply requires with all medical expenses that they be supported by sufficient and competent evidence. *K-Mart Corp. v. Washington*, 866 P.2d 274, 285 (Nev. 1993) overruled on other grounds by *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005). Courts have traditionally looked to the treating physician's testimony as competent evidence supporting expenses. *See, e.g., Yamaha v. Arnoult*, 955 P.2d 661 (Nev. 1998); *Hall v. SSF, Inc.*, 112 Nev. 1384, 1390 (Nev. 1996).

2. Future Medical Expenses:

In order to recover future medical expenses in Nevada, a plaintiff must produce competent evidence that establishes the expenses as reasonably necessary. A successful plaintiff is entitled to compensation for all the natural and probable consequences of a defendant's tortious conduct, including past and future medical expenses. *Lerner Shops v. Marin*, 423 P.2d 398 (1967). In order to establish that the future medical expenses are a natural and probable consequence of defendant's tortious conduct, the plaintiff must establish that such expenses are reasonably necessary *Hall v. SSF, Inc.*, 112 Nev. 1384, 1390 (Nev. 1996). The reasonable necessity of medical expenses must be supported by sufficient and

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competent evidence. *K-Mart Corp. v. Washington*, 866 P.2d 274, 285 (Nev. 1993). Courts have traditionally looked to the treating physician's testimony as competent evidence supporting expenses. *See, e.g., Yamaha v. Arnoult*, 955 P.2d 661 (Nev. 1998); *Hall v. SSF, Inc.*, 112 Nev. 1384, 1390 (Nev. 1996).

B. Collateral Source Rule

The collateral source rule provides that where "an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Proctor v. Castelletti*, 911 P.2d 853, 854 (Nev. 1996) (quoting *Hrnjak v. Graymar, Incorporated*, 484 P.2d 599, 602 (Cal. 1971)). Nevada has adopted a *per se* rule that bars the admission of a collateral source of payment for a loss or injury into evidence for any purpose. *Proctor*, 911 P.2d at 854. The purpose of the collateral source rule is to prevent "the jury from reducing the plaintiff's damages on the ground that he received compensation for his injuries from a source other than the tortfeasor." *Bass-Davis v. Davis*, 134 P.3d 103, 110 (Nev. 2006).

The Nevada legislature has carved out a small exception to the collateral source rule with regards to worker's compensation payments. The statute required that in all cases involving injuries incurred through third person parties at the workplace specific jury instruction were to be supplied. The instruction informs the jury that an injured employee would be required to repay any SIIS benefits received.

In *Cramer v. Checker Cab*, the Nevada Supreme Court explored the impact *NRS 616C.215(10)* had on the collateral source rule. *Cramer*, 3 P.3d 665, 669 (Nev. 2000). The Court noted the legislature's concern for injured workers. They explained that cases involving SIIS benefits are unique from other insurance cases because the jury already knew that the plaintiff had received SIIS benefits when the injury was work related. The legislature considered evidence that the jury was usually under the mistaken belief that the plaintiff was not required to repay SIIS from any damage award. Thus, the legislature instituted *NRS 616C.215(10)* to dispel erroneous jury speculation that may ultimately cause them to reduce an award.

Accordingly, *NRS 616C.215(10)* cannot be used by the defense to imply that the plaintiff has already been compensated, or will receive a double recovery if awarded a judgment.

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

Nevada has not addressed the issue

2. Private Insurance

Nevada has not addressed the issue

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Nevada provides statutory protection for communications between doctor and patient. See *NEV. REV. STAT. § 49.225* (doctor-patient privilege); *NEV. REV. STAT. § 49.2009* (psychologist-patient privilege); *NEV. REV. STAT. § 49.247* (therapist-patient privilege). These statutes protect confidential communications between doctor and patient from disclosure to a third person or party. See *NEV. REV. STAT. § 49.225*; *NEV. REV. STAT. § 49.215(1)*.

Nevada holds that privileged communication is not intended to assist the fact-finding process. *Diaz v. Eighth Judicial Dist. Court*, 993 P.2d 50, (Nev. 2000) (Citing with approval John W. Strong, *McCormick on Evidence*, § 72, at 268-69 (4th ed. 1992)). The privilege exists to maintain legitimate expectations of privacy, and encourage socially useful communications. *Hetter v. Eighth Judicial Dist. Court*, 874 P.2d 762, 763 (Nev. 1994). However, Nevada does permit waiver of the physician-patient privilege privileged by the source of the confidential information. *Id.* at 770.

Several statutory exceptions also limit the scope of the physician-patient privilege. *Nevada Revised Statute section 49.245*, as amended by the Nevada Legislature in 1987, provides that "[t]here is no privilege under *NRS 49.225* or *49.235* . . . [a]s to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense." *NEV. REV. STAT. § 49.245(3)*.

Although no Nevada Supreme Court case has clarified the scope of *NRS 49.245* and the physician-patient privilege, a 2009 Nevada Federal District Court opinion explored the topic. *See Parker v. Upsher-Smith Labs., Inc.*, 3:06-cv-518-ECR-VPC. In *Parker*, the District Court reviewed a magistrate judge's discovery findings, including the admittance of *ex parte* communication with treating physicians. Due to the suit's diversity status, the district court noted it would apply Nevada substantive law. *Id.* at 9.

The court probed the legislative history of *NRS 49.245* to define its scope. They noted the 1987 amendment deleted the word "communication" from *subparagraph 3* and inserted the words "written medical or hospital records." *Id.* at 10. (citing Assemb. B. 809, 1987 Leg., 64th Sess. (Nev. 1987)). The court explained that the legislature eliminated "communication" because they feared the word opened the door to any kind of *ex parte* contact with a physician. However, the court refused to so narrowly interpret the scope of *NRS 49.245* that it only provides for access to "written or hospital records." Instead, the court interpreted the statute to require a middle ground approach that disallows *ex parte* examinations, while permitting depositions and other normal channels of discovery to obtain information from the non-party treating physician.

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

Parker also addressed HIPAA's impact on *NRS 49.245*. The court noted that nothing in HIPAA directly prohibits defense counsel from having *ex parte* communications with plaintiff's treating physicians. However, as previously ruled in *Parker*, Nevada law extends the physician-patient privilege to include protection from proposed informal interviews of Plaintiff's treating physicians. *See NEV. REV. STAT. § 49.245(3)*. Thus, according to *Parker*, Nevada actually provides more express privacy protection than HIPAA. Therefore, Nevada law controls.

Whether the Nevada Supreme Court accepts *Parker's* interpretation of *NRS 49.245* remains to be seen. However, *Parker* offers a fairly conservative interpretation of *NRS 49.245* that seems unlikely to be deemed over-protective. Therefore, the case presents persuasive insight as to the direction of Nevada law on physician-patient privileges and HIPAA.

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

No controlling case law. See *Palmer* analysis *supra*

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

No controlling case law. See *Palmer* analysis *supra*

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

A. Requirements to Obtain testimony of Non-party Treating Physicians.

No Nevada Supreme Court case law directly addresses the requirements to obtain testimony of non-party treating physicians. However, the Nevada Rules of Civil Procedure provide the general rule that a party may through subpoena, “command each person to whom it is directed to attend and give testimony.” Nev.R.Civ.P. 45(a)(1)(C).

This rule is subject to specific protection afforded persons summoned by subpoena. See, Nev.R.Civ.P. 45(c)(1). This rule allows the court on timely motion to quash or modify a subpoena if it: “requires a person who is not a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person. Nev.R.Civ.P. 45(c)(A)(ii). It provides further protection to “unretained expert’s opinion or information not describing specific events or occurrences in dispute and resulting from the expert’s study made not at the request of any party.” Nev.R.Civ.P. 45(c)(B)(ii).

Still, a court may order appearance, if a party can demonstrate a substantial need for the testimony and assures the court that the witness will be reasonably compensated. Nev.R.Civ.P. 45(c)(B)(ii).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Nevada Rule of Federal Procedure 30(h) governs Expert Witness Fees. The rule provides that the deposing party “shall pay the reasonable and customary hourly or daily fee for the actual time consumed in the examination of that expert. If any other attending party desires to question the witness, that party shall be responsible for the expert’s fee for the actual time consumed in the party’s examination...Any party identifying an expert whom that party expects to call at trial is responsible for any fee charged by the expert for preparing for and reviewing the deposition.” Nev.R.Civ.P. 30(h)

If the deposing party deems the hourly, or daily rate for the expert providing deposition testimony is unreasonable, the party may move for an order setting the compensation of that expert. *Id.* The motion must be supported by an affidavit stating facts that show a “reasonable and good faith attempt at an informal resolution.” *Id.* Notice of the motion must be provided to the expert. If the court determines the expert fee unreasonably high it shall set the fee for providing deposition. *Id.* The court may also impose a sanction pursuant to Rule 37 against any party who does not prevail. *Id.*

2. Case Law

No relevant Nevada Supreme Court Case Law