WASHINGTON

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I. MEDICAL EXPENSES

Plaintiffs may recover the reasonable value of necessary past medical care, treatment, and services. Wash. Pattern Instruction 30.07.01. The burden of proving the reasonableness and necessity of medical expenses rests with plaintiff. *Patterson v. Horton*, 84 Wash. App. 531, 543, 929 P.2d 1125 (1997). Plaintiff must establish both that the expenses were necessary and that they were reasonable. *Carr v. Martin*, 35 Wash. 2d 753, 761, 215 P.2d 411 (1950); *Patterson*, 84 Wash. App. at 543. The amount of damages for past medical expenses is a question of fact for the jury. *Hawkins v. Marshall*, 92 Wash. App. 38, 44, 962 P.2d 834 (1998); *Maurer v. Grange Ins. Ass'n*, 18 Wash. App. 197, 203, 567 P.2d 253 (1977). Medical expenses are not recoverable where the expenses are attributable to a separate cause or where the injuries are exaggerated. *Kadmiri v. Claassen*, 103 Wash. App. 146, 151, 10 P.3d 1076 (2000).

Similarly, plaintiffs may recover the reasonable value of necessary future medical care, treatment, and services that is shown with reasonable probability to be required in the future. Wash. Pattern Instruction 30.07.02; *Stevens v. Gordon*, 118 Wash. App. 43, 55, 74 P.3d 653 (2003). Plaintiff must first establish that the future medical care will be necessitated by the injury suffered. *Erdman v. Lower Yakima Valley, Wash. Lodge No. 2112 of B.P.O.E.*, 41 Wash. App. 197, 208, 704 P.2d 150 (1985); *Leak v. U.S. Rubber Co.*, 9 Wash. App. 98, 103, 511 P.2d 88 (1973). Determining whether future medical expenses are necessary is a question for the jury. *Fox v. Mahoney*, 106 Wash. App. 226, 230, 22 P.3d 839 (2001). Once liability for damages is established, a more liberal rule is applied to determinations of the

amount of damages, and mathematical exactness is not required. *Erdman*, 41 Wash. App. at 208. Past medical bills are admissible to prove costs of future treatment. *Patterson*, 84 Wash. App. at 543. The cost of future medical expenses may be discounted to present cash value, taking into account the reasonable rate of interest and the cost of inflation, provided the proper evidentiary basis is laid. Wash. Pattern Instruction 34.02; *see also Kellerher v. Porter*, 29 Wash. 2d 650, 674, 189 P.2d 223 (1948); *Mendelsohn v. Anderson*, 26 Wash. App. 933, 939-40, 614 P.2d 693 (1980); *Sadler v. Wagner*, 5 Wash. App. 77, 486 P.2d 330 (1971). While Washington state appellate courts have not squarely addressed the issue of future medical monitoring, a federal district court held that Washington law would allow recovery of future medical monitoring costs as a remedy for an existing tort claim. *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601, 606 (W.D. Wash. 2001).

Washington recognizes the collateral source rule in personal injury actions. This allows plaintiffs to recover damages from a tortfeasor without regard to compensation received for the same injury from an independent source, such as plaintiffs' insurer's payments of medical expenses. *Cox v. Spangler*, 141 Wash. 2d 431, 439, 5 P.3d 1265, 22 P.3d 791 (2000); *Johnson v. Weyerhaeuser Co.*, 134 Wash. 2d 795, 798, 953 P.2d 800 (1998); *see also Ciminski v. SCI Corp.*, 90 Wash. 2d 802, 804, 585 P.2d 1182 (1978) (Part A Medicare payments are collateral source); *see also* Wash. Pattern Instruction 2.13. Evidence of collateral source payments may be inadmissible even when otherwise relevant to prevent the evidence from being improperly used by the jury to reduce plaintiff's damages. *Cox*, 141 Wash. 2d at 440-41.

The collateral source rule is applied broadly, with relatively few exceptions. One exception is that the collateral source rule does not apply to sources of compensation that are not independent of the tortfeasor. *Maziarski v. Bair*, 83 Wash. App. 835, 841 n.8, 924 P.2d 409 (1996) (payments made by defendant's Personal Injury Protection carrier). It also does not apply if the compensation is for a different injury. *Wheeler v. Catholic Archdiocese of Seattle*, 124 Wash. 2d 634, 641, 880 P.2d 29 (1994). In addition, there is a statutory exception for injuries occurring as a result of health care. Wash. Rev. Code § 7.70.080. This statute allows an offset for all sources of compensation other than plaintiff's assets, plaintiff's representative, or plaintiff's immediate family. *Id.*

Under Washington's scheme, write-downs or write-offs of medical expenses would be, at the most, evidence going to the reasonable value of medical services. Plaintiff can not recover either the amount billed by the medical provider or the total paid by or on behalf of plaintiff unless those amounts represent the reasonable value of the medical services. *Torgeson v. Hanford*, 79 Wash. 56, 58-59, 139 P. 648 (1914); *Patterson*, 84 Wash. App. at 543. Plaintiffs must offer some evidence of the reasonableness of any medical expenses claimed and defendants may counter that with evidence of their own or arguments as to the credibility of plaintiffs' evidence. Ultimately, the reasonableness of the amount of medical expenses is an issue of fact for the jury. *Hawkins*, 92 Wash. App. at 44.

In cases involving injuries to children, Washington has created a statutory cause of action for parents allowing recovery of "damages for medical, hospital, [and] medication expenses." Wash. Rev. Code § 4.24.010. Parents may recover expenses incurred as a result of medical treatment, both past and future, of their children. *Schurk v. Christensen*, 80 Wash. 2d 652, 657, 497 P.2d 937 (1972); *Lofgren v. Western Wash, Corp. of Seventh Day Adventists*, 65 Wash. 2d 144, 150, 396 P.2d 139 (1964). However, even where the parent is not a plaintiff in their individual capacity but is acting solely as guardian ad litem for the child, Washington courts will allow the minors to recover medical expenses. *Nagala v. Warsing*, 36 Wash. 2d 615, 637, 219 P.2d 603 (1950); *Ball v. Pacific Coast R. Co.*, 182 Wash. 221, 222, 46 P.2d 391 (1935); *Donald v. City of Ballard*, 34 Wash. 576, 577, 76 P. 80 (1904). This is based on the theory that the parent has assigned the medical expense claim to the minor. *Id.*

II. EX PARTE COMMUNICATIONS WITH NONPARTY TREATING PHYSICIANS

The physician-patient privilege in Washington covers any information acquired by a physician in attending a patient that was necessary for the physician to prescribe or act for the patient. Wash. Rev. Code § 5.60.060(4). This privilege is in derogation of common law and therefore to be strictly construed and limited to its purposes. *Carson v. Fine*, 123 Wash. 2d 206, 213, 867 P.2d 610 (1994).

Under Washington law, the privilege is automatically waived 90 days after filing an action for personal injury or wrongful death. Wash. Rev. Code § 5.60.060(4)(b). Waiver of the privilege as to one physician or condition waives the privilege as to all physicians and conditions "subject to such limitations

as a court may impose pursuant to court rules." *Id.*; *see also Carson*, 123 Wash. 2d at 214. Washington courts have held that the waiver is limited by court rules to medical information relevant to the litigation. *Loudon v. Mhyre*, 110 Wash. 2d 675, 678, 756 P.2d 138 (1988) (citing Civil Rule 26(b)(1)). The waiver applies to both facts and opinions held by the physician. *Carson*, 123 Wash. 2d at 216.

There is no reported case law in Washington specifically discussing the interaction between the physician-patient privilege and the Health Insurance Portability and Accountability Act ("HIPAA") or its state law equivalent, Washington's Health Care Information Access and Disclosure Act, Wash. Rev. Code § 70.02 ("HCIADA"). While there are specified mechanisms under both regimes for obtaining medical information,[644] at least one federal court has indicated that those mechanisms are independent of the physician-patient privilege and any waiver thereof. *E.g.*, *Lloyd v. Valley Forge Life Ins. Co.*, 2007 WL 906150, at *4 (W.D. Wash. Mar. 23, 2007).

Even though the physician-patient privilege is automatically waived 90 days after a personal injury action is filed, defense counsel may not engage in ex parte contacts with plaintiff's treating physicians. *Loudon*, 110 Wash. 2d at 677. Instead, defense counsel is limited to formal discovery methods for discovering information held by plaintiff's physicians. *Id.*; *Smith v. Orthopedics Int'l, Ltd., P.S.*, 149 Wash. App. 337, 341-42, 203 P.3d 1066, *review denied*, 166 Wash. 2d 1024, 217 P.3d 337 (2009); *see also* Civil Rule 26(b)(6) (discovery from treating health care providers); Wash. Rev. Code § 70.02.060 (statute governing discovery request for health care information). It was held to be error for a trial court to permit an ex parte contact to allow defense counsel to prepare a physician's trial testimony even though the trial court ordered that "[c]ounsel for defendants shall not discuss patient confidentialities or privileged matters undisclosed through prior discovery with these former treating physicians." *Ford v. Chaplin*, 61 Wash. App. 896, 898, 812 P.2d 532 (1991). Ex parte communication between defense

[644] The HCIADA authorizes providers to deliver medical records to third parties who comply with its provisions, primarily obtaining compulsory process and providing notice to the patient in time for the patient or provider to seek a protective order from the court. Wash. Rev. Code § 70.02.060(1). Meanwhile, in order to comply with HIPAA, disclosure is permitted pursuant to a discovery request when the health care provider "receives satisfactory assurance" from the party seeking the information that reasonable efforts have been made by such party to secure a protective order with certain specified provisions. 45 C.F.R. § 164.512(e).

counsel and plaintiff's physician can result in an order for a new trial. *Rowe v. Vaagen Bros. Lumber, Inc.*, 100 Wash. App. 268, 278, 996 P.2d 1103 (2000).

Given the *Loudon* rule against ex parte contacts, defense counsel should limit their contacts with treating physicians to formal discovery requests and plaintiff's counsel should be copied on even the most mundane communications. Even where a treating physician will be called as a defense witness, ex parte communications are prohibited. In one reported case, defense counsel sent copies of pleadings and publicly available testimony to a treating physician who was going to be a defense witness. The appellate court found no violation of the *Loudon* rule because defense counsel had not solicited any information in response, but still advised that "the better course of contact would have been to copy [plaintiff's] counsel" on the communications. *Smith*, 149 Wash. App. at 343.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

Under Washington's HCIADA, testimony of a health care provider can only be obtained if defense counsel complies with the HCIADA's notification provisions. Defense counsel must first provide advance notice to both the health care provider and the patient indicating (a) the provider from whom information is sought; (b) the information being sought; and (c) the date by which a protective order must be obtained to prevent the health care provider from complying. Wash. Rev. Code § 70.02.060(1). The notice must provide adequate time to obtain a protective order, no less than 14 days after the date of service of delivery to the patient and the health care provider. *Id.* After this period has expired, the deposition notice and/or compulsory process can then be served on the provider. *Id.* If the notice provisions are complied with and no protective order has been obtained, the requested information shall then be provided by the provider. *Id.* at § 70.02.060(2).

The fees available to health care professionals for testifying in Washington differ depending on whether the testimony is at a deposition or at trial. For a deposition, a treating health care provider is entitled to "a reasonable fee" for the provider's time spent in responding to the discovery. Civil Rule 26(b)(6). If the parties and the physician are unable to agree on a reasonable fee in advance of the

deposition, the deposition will go forward and the provider and parties may later seek an order fixing the amount of the fee. *Id.*

In contrast, physicians and other experts can be compelled to testify at trial upon payment of the nominal statutory witness fees that apply to non-experts. 14A Karl B. Tegland, Wash. Prac.: *Civil Procedure*, § 28.12, at 171 (2009). Testifying witnesses receive the same witness fee compensation per day and per mile as jurors. Wash. Rev. Code § 2.40.010. The juror fee typically is currently $10 per day plus mileage.

In order to compel the attendance of a nonparty deponent, such as a physician, the deponent must be served with a subpoena. Civil Rule 30(b)(1). Absent agreement or court order, a deposition of a nonparty witness who resides in Washington must occur in the county where the person resides or is employed or transacts business in person. Civil Rule 45(e)(2). A subpoena for trial has statewide reach and is effective if served on a Washington resident anywhere within the state of Washington, although the trial subpoena may need to be issued by the court if the witness is non-cooperative and lives outside the county or more than 20 miles from the site of the trial. Wash. Rev. Code § 5.56.010.