# WEST VIRGINIA

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## I. MEDICAL EXPENSES

### A. Requirements for Recovery of Medical Expenses

With regard to Medical Expenses, West Virginia has adopted the general rule that " . . . the proper measure of damages is not simply the expenses or liability incurred, or that which may be incurred in the future, but rather the *reasonable value* of medical services made *necessary* because of the injury proximately resulting from the defendant's negligence." *See Jordan v. Bero*, 210 S.E. 2d 618, 637 (W.Va. 1974).

#### 1. Past Medical Expenses

In order to recover for medical, hospital, and nursing services the evidence must show that the services were both reasonable and necessary. *Konopka v. Montgomery Ward and Co.*, 58 S.E. 2d 128, Syl pt. 4 (W.Va. 1950). The West Virginia Supreme Court has held that held that evidence that medical expenses were actually paid is not necessary, specifically holding that "[t]he award of special medical expenses in a personal injury case is predicated on proof of the reasonable value of such expenses necessarily incurred by reason of the defendant's negligence, and not upon the actual expenses paid." *See Long v. City of Weirton*, 214 S.E. 2d 832 Syllabus Point 14. (W. Va. 1975). In that case the trial court permitted the jury to consider the bills from plaintiff's doctor and hospital, although there was no direct evidence of payment of those bills. *Id.*

### 2. Future Medical Expenses

The West Virginia Supreme Court has held that the same "reasonable and necessary" rule applies to recovery of future medical expenses. *Jordan*, 210 S.E. 2d at 637. The Court went on to hold that in order "[t]o support a relevant instruction on the recovery of future medical expenses, the plaintiff must offer proof to a reasonable certainty which will indicate costs within an approximate range as well as the necessity and reasonableness of such prospective medical charges." *See Id.*

"A cause of action exists under West Virginia law for the recovery of medical monitoring costs, where it can be proven that such expenses are necessary and reasonably certain to be incurred as a proximate result of a defendant's tortuous conduct." *See Bower v. Westinghouse Electric Corp.*, 552 S.E. 2d 424, 425 Syllabus Point. 2 (W.Va. 1999). In order to sustain a medical monitoring claim, a plaintiff must prove the following six factors:

> (1) he or she has been significantly exposed; (2) to a proven hazardous substance; (3) through the tortuous conduct of the defendant; (4) as a proximate result of the exposure, plaintiff has suffered an increased risk of contracting a serious latent disease relative to the general population; (5) the increased risk of disease makes it reasonably necessary for the plaintiff to undergo periodic diagnostic medical examinations different from what would be prescribed in the absence of the exposure; and (6) monitoring procedures exist that make the early detection of a disease possible.

*See Id.* Syllabus Point 3. In this opinion, the West Virginia Supreme Court specifically held that a claim for future medical expenses no longer requires the existence of a present physical harm. *Id.*, at 430.

### B. Collateral Source Rule and Exceptions

The West Virginia Supreme Court has held that money a plaintiff has received from a collateral source is not admissible. *Pack v. Van Meter*, 354 S.E.2d 581 (W.Va. 1986). The collateral source rule normally operates to preclude the offsetting of payments from health and accident companies and other collateral sources against the damages claimed by the injured party. *Ratlief v. Yokum*, 280 S.E. 2d 584, 589-590 (W.Va. 1981). The Court held that "[t]he collateral source rule as established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant." *Id.* at 590. The Court has applied the harmless

error rule where evidence of a collateral source was introduced, but the jury found against the plaintiff on liability therefore it never addressed the issue of damages. *Id.*

### C. Treatment of Write-downs and Write-offs

The West Virginia Supreme Court has not specifically addressed the issue of write-downs or write-offs, however West Virginia law does not require that a plaintiff actually have paid medical expenses in order to recover them. *Long*, 214 S.E. 2d 832 Syllabus Point 14. (W. Va. 1975).

### D. Scope of Minors' and Parents' Rights to Recover

So long as a defendant is not required to pay twice for the same injury, both the minor and parents have the right to recover for a minor plaintiff's pre-majority medical expenses. *State ex rel. Packard v. Perry*, 655 S.E. 2d 2d 548, 561 (W.Va. 2007).

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

### A. Scope of Physician-Patient Privilege and Waiver

There is no physician-patient privilege in West Virginia. *Keplinger v. Virginia Electric and Power Company*, 537 S.E. 2d 632, 644 (W.Va. 2000). West Virginia Code § 27-3-1 does, however, provide that communications obtained in the course of treatment or evaluation of mental health patients are deemed confidential information, though this information may be obtained if the court finds that the information sought is sufficiently relevant to outweigh the importance of confidentiality. *Nelson v. Ferguson*, 399 S.E. 2d 909 (1990).

West Virginia does recognize that there is a fiduciary relationship between a physician and a patient. *State ex rel. Kitzmiller v. Henning*, 437 S.E. 2d 452 Syllabus Point 1 (W.Va. 1993). The Court explained in that "information is entrusted to the doctor in the expectation of confidentiality and the doctor has a fiduciary obligation in that regard." *See Id.*, at 454. The Court went on to hold that "the absence of a privilege contemplates the release of medical information only as it relates to the condition a plaintiff has placed at issue in a lawsuit; it does not efface the highly confidential nature of the physician-patient relationship that arises by express or implied contract." *See Id.* The Court has pointed out that the

plaintiff may choose to allow a broader disclosure of medical records through a duly authorized release which specifies the records to be disclosed. *Keplinger*, at 645.

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

The West Virginia Supreme Court has not addressed the relationship between HIPAA and the confidential nature of the physician-patient relationship or any issue regarding HIPAA.

### C. Authorization of Ex Parte Physician Communication By Plaintiff

The West Virginia Supreme Court held in the *Kitzmiller* case that a plaintiff does not impliedly authorize the ex parte interview of a treating physician when he/she files a suit. *Kitzmiller*, at 454 Syllabus Point 2. In dicta, the Court indicated that an adversarial party could engage in an ex-parte interview with a plaintiff's physician, if the plaintiff authorized the discussion, stating "[w]e do not, however, intend by this holding to discourage a physician, with the full permission of the patient and his lawyer, from affording defense counsel a personal interview. Many cases never reach litigation, and surely if such an interview serves to dispose of a patient's claim before litigation or before a trial on the merits, it should be encouraged. *Id.*, at 456.

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

The West Virginia Supreme Court held in the *Kitzmiller* case that the a party could not be compelled by the court to authorize ex parte interviews of a treating physician. *Id.*, at 455.

### E. Local Practice Pointers

Many West Virginia health care providers will not release medical records unless ordered to do so by a court. For this reason, parties should obtain signed authorizations to release medical records early in the litigation so that if a provider is resistant, you can a motion for an order compelling the provider to release the records pursuant to the fully executed authorizations.

## III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

### A. Requirements to Obtain Testimony of Non-party Treating Physicians

Rule 26(b)(4)(A)(ii) of the West Virginia Rules of Evidence provides that leave of court is not necessary to take the deposition of a trial expert, including treating physicians. FRANKLIN D.

CLECKLEY, ROBIN J. DAVIS, & LOUIS J. PALMER, JR., LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE p. 738 (2nd ed. 2006). Pursuant to *Kitzmiller*, the opposing party must be allowed the opportunity to be present. *Kitzmiller*, at 455.

**B. Witness Fee Requirements and Limits**

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

Rule 26(b)(4)(C)(ii) provides that the court has discretion to require the party taking the deposition of a trial expert to pay a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining the opinions and facts of the expert.

**2. Case Law**

The West Virginia Supreme Court has not addressed the Rule 26(b)(4)(C)(ii) requirement that a party seeking testimony pay a testifying physician's fees.

**3. Local Custom and Practice**

It is the local custom in West Virginia to pay the testifying doctor's fee in advance before the deposition.