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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

Reasonable past medical expenses are awarded in Wisconsin. According to the Wisconsin Supreme Court, “The general rule is that a plaintiff who has been injured by the tortious conduct of the defendant is entitled to recover the reasonable value of [medical services] reasonably required by the injury. This is a recovery for their value and not the expenditures actually made or obligations incurred.” *Steinbach v. Green Lake Sanitary Dist.*, 2000 WI 63, ¶ 15, 235 Wis. 2d 678, 611 N.W.2d 764 (citing *McLaughlin v. Chicago, Milwaukee, St. Paul & Pacific Ry. Co.*, 31 Wis. 2d 378, 395-96, 143 N.W.2d 32 (1966)). Furthermore, the Wisconsin Supreme Court has held, since 1898, that an individual is entitled to all of their past medical expenses, regardless of whether the treating physician performed an unnecessary surgery, so long as the individual used ordinary care in selecting their doctor. *Hanson v. American Family Mut. Ins. Co.*, 2006 WI 97, ¶ 3, 294 Wis. 2d 149, 716 N.W.2d 866 (citing *Selleck v. Janesville*, 100 Wis. 157, 75 N.W. 975 (1898)).

2. Future Medical Expenses

Reasonable future medical expenses also are awarded in Wisconsin. According to the Wisconsin Supreme Court, to obtain an award for future healthcare expense, there are two criteria must to meet: “(1) there must be expert testimony of permanent injuries, requiring future medical treatment and the incurring

of future medical expenses; and (2) an expert must establish the cost of such medical expenses.” *Weber v. White*, 2004 WI 63, ¶ 20, 272 Wis. 2d 121, 681 N.W.2d 137. (citing *Bleyer v. Gross*, 19 Wis. 2d 305, 311, 120N.W.2d 156 (1963)). Consequently, Wisconsin plaintiffs can recover damages for future medical expenses if they can show that the anticipated damages are for expenses that the plaintiff “will to a reasonable medical certainty suffer in the future.” *Dumer v. St. Michael’s Hospital*, 69 Wis. 2d 766, 776, 233 N.W.2d 372 (1975). Thus, testimony offered for the purpose of recovering future medical expenses must be “not in terms of ‘possibilities’ but ‘probabilities.’” *Bleyer v. Gross*, 19 Wis. 2d 305, 312, 120 N.W.2d 156 (1963). In 2006, the Wisconsin Court of Appeals held that, “Mathematical certainty, however, is not required for the determination of future medical expenses....” *L.M.S. v. Atkinson*, 2006 WI App 116, ¶ 35, 294 Wis. 2d 553, 718 N.W.2d 118.

B. Collateral Source Rule and Exceptions

The collateral source rule is a well-established rule of law in Wisconsin dating back to *Cunniën v. Superior Iron Works*, 175 Wis. 172, 184 N.W. 767 (1921). Within the last decade, three cases have reaffirmed the vitality of Wisconsin’s collateral source rule. In *Leitinger v. DBart, Inc.*, *Ellsworth v. Schelbrock*, and *Koffman v. Leichtfuss*, the Wisconsin Supreme Court has held that the collateral source rule permits a plaintiff to seek recovery for the reasonable value of medical services without consideration of payments made by the plaintiff’s insurer. *Leitinger v. DBart, Inc.*, 2007 WI 84, ¶ 29, 302 Wis. 2d 110, 736 N.W.2d 1; *Ellsworth*, 2000 WI 63, ¶ 2, 235 Wis. 2d 678, 611 N.W.2d 764; *Koffman*, 2001 WI 111, ¶ 2, 246 Wis. 2d 31, 630 N.W.2d 201. Moreover, in Wisconsin, the collateral source rule also acts as a rule of evidence that precludes information regarding the benefits a plaintiff obtained from sources collateral to the tortfeasor. *Leitinger*, 2007 WI 84, ¶ 30. The limited exception to the collateral source rule is when the evidence is offered for impeachment purposes. *Id.*

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

Wisconsin applies the collateral source rule to gratuitous medical services provided or paid for by the state, such as Medicare and Medicaid. *Thoreson v. Milwaukee & Suburban Transp. Corp.*, 56 Wis. 2d

231, 244, 201 N.W.2d 745 (1972). The general rule in Wisconsin is that a plaintiff who is injured by a defendant's tortious conduct is entitled to recover the reasonable value of medical services resulting from the injury. *McLaughlin*, 31 Wis. 2d 378 at 395-96. The reasonable value of medical costs is not always the actual expense. Because the test is not one of actual expense, but rather reasonable value, the plaintiff need not incur an actual charge. The theory behind this test is that allowing recovery in such cases creates a punitive effect, instead of the tortfeasor getting "the advantage of gratuities from third parties." *Thoreson*, 56 Wis. 2d at 243. Thus, the fact that the medical services are provided gratuitously will not prevent the plaintiff from recovering the value of those services as part of his compensatory damages. *McLaughlin*, 31 Wis. 2d at 395-96.

2. Private Insurance

In Wisconsin, a defendant insurance company does not receive the benefit of the written-off amounts. In *Koffman v. Leichtfuss*, the Wisconsin Supreme Court held that "where the plaintiff's health care providers settle the plaintiff's medical bills with the plaintiff's insurers at reduced rates, the collateral source rule dictates that the defendant-tortfeasor not receive the benefit of the written-off amounts." 2000 WI 111, ¶ 31. The Court held that because of negotiated and contracted discounts between health care providers and insurers, "an insurer's liability for the medical expenses billed to its insured is often satisfied at discounted rates, with the remainder being 'written-off' by the health care provider." *Id.* at ¶ 21. Therefore, in Wisconsin, "...the plaintiff may seek recovery of the reasonable value of medical services rendered, without limitation to the amounts actually paid by the plaintiff's insurers." *Id.* at ¶ 26.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Wisconsin Statute § 905.04 details the health care provider-patient privilege. The general rule of privilege is that "a patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made or information obtained or disseminated for purposes of diagnosis or treatment of the patient's physical, mental or emotional condition..." Wis. Stat. § 905.04(2). Furthermore, the patient, the patient's guardian, or conservator (or the personal representative

of a deceased patient) may claim the privilege. Wis. Stat. § 905.04(3). The patient's physician may claim the privilege, but only on behalf of the patient. *Id.* The presumption in Wisconsin is that the physician has authority to claim the privilege in the absence of evidence to the contrary. *Id.*

Regarding waiver, a party can waive the healthcare provider-patient privilege by making a claim or defense that makes his or her condition an issue in the case. Wis. Stat. § 905.04(4)(c). However, this form of waiver allows only formal discovery under Chapter 804 of the Wisconsin Statutes. *Steinberg v. Jensen*, 194 Wis. 2d 439, 468-69, 534 N.W.2d 361 (1995).

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

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Wis. Stat. § 146.82 provides privacy protection for patients, and a process for obtaining medical records to use in litigation without infringing on the plaintiff's confidentiality rights. *Johannes v. Baehr*, 2008 WI App 148, ¶ 11, 314 Wis. 2d 260, 757 N.W.2d 850. Generally, any state law that is contrary to the HIPAA Privacy Rule is preempted, with the exception of state laws that are more stringent than the federal requirements. *Id.* at ¶ 13. The Wisconsin Court of Appeals in *Johannes* held that informed written consent from the plaintiff-patient is "probably synonymous" with the HIPAA requirements for disclosure of protected health information as well as Wisconsin Confidentiality requirements set forth in Wis. Stat. § 146.82(1). *Id.* at ¶ 15.

C. Authorization of Ex Parte Physician Communication by Plaintiff

Wisconsin physician-patient privilege is a testimonial rule of evidence that is limited to judicial proceedings. *Steinberg*, 194 Wis. 2d at 464. Thus, defense counsel is not necessarily barred from engaging in ex parte communications with the plaintiff's treating physician. *Id.* at 465. Unless the plaintiff-patient has consented to the ex parte communication, opposing counsel who seeks to question the plaintiff's treating physician "must do so either in the presence of opposing counsel or through a writing, an exact duplicate of which must be sent concurrently to opposing counsel." *Id.* at 468-69. The mere filing of a lawsuit that creates a waiver of the plaintiff-patient privilege as to certain information relevant to the plaintiff's physical, mental, or emotional issue does not automatically extinguish the confidential

relationship that exists between patient and physician. *Id.* at 465. Defense counsel is permitted to engage in ex parte communications with the plaintiff’s treating physician provided that the communication does not bring about the disclosure of confidential information, and if the treating physician is not a party to the lawsuit. *Id.* at 468. Defense counsel may discuss topics such as scheduling and procedural matters in ex parte communications with the treating physician, and is permitted to notify the physician that he might be joined as a party to the lawsuit. *Id.*

D. Authorization of Ex Parte Physician Communication by Courts

Wisconsin courts authorize some ex parte physician communication. Under Wis. Stat. § 804.10(1), ex parte discovery by defense counsel from the plaintiff’s treating physician is not within the permitted scope of discovery, although limited ex parte communication is permitted as long as it does not relate to confidential matters. According to the Wisconsin Supreme Court, the requirements for ex parte communications by an attorney with an adverse party’s treating physician are: (1) inform the physician at the outset that he or she can decline to speak with counsel; (2) warn that the conversation must be limited to matters that are not confidential; (3) instruct the physician not to disclose or discuss anything that he or she believes might possibly be confidential; and (4) take all steps reasonably practicable to ensure that the conversation does not stray into a discussion of confidential information. *Steinberg*, 194 Wis. 2d at 467-68. The court distinguished ex parte communication from ex parte discovery, because discovery can easily lead to the inadvertent disclosure of confidential information. *Id.*

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

A. Requirements to Obtain Testimony of Non-party Treating Physician

Wisconsin rules of evidence allow qualified parties to offer scientific, technical or other specialized testimony of experts if such knowledge “will assist the trier of fact to understand the evidence or to determine a fact in issue.” Wis. Stat. § 902.02. In Wisconsin, a party can compel a treating physician via subpoena to testify as a fact witness. *Glenn v. Plante*, 2004 WI 24, ¶ 28, 269 Wis. 2d 575, 676 N.W.2d 413. Such testimony could include the physician’s observations, decisions and actions taken in the treatment of the patient. *Id.* The treating physician generally cannot be compelled to testify as an expert

witness, unless expert opinion is unique or irreplaceable and must be required. *Id.*; see also *Burnett v. Alt*, 224 Wis. 2d 72, 589 N.W.2d 21 (1999). If the plaintiff chooses to offer the testimony of his treating physician in the capacity of an expert witness, he may be required to disclose the identity of any such expert if the opposing party requests this information. Wis. Stat. § 804.01. Furthermore, the opposing party may depose the treating physician who is expected to offer expert opinions at trial. *Id.*

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

A few Wisconsin statutes exist regarding witness fee requirements. The first relevant statute, Wisconsin Statute § 885.06(1), states “Except when subpoenaed on behalf of the state, of a municipality in a forfeiture action, or of an indigent respondent in a paternity proceeding, no person is required to attend as a witness in any civil action, matter or proceeding unless witness fees are paid or tendered, in cash or by check, share draft or other draft, to the person for one day's attendance and for travel.” However, that statute should be viewed in association with Wis. Stat. § 907.06(1), which allows the court to appoint expert witnesses. Such court-appointed experts are entitled to “reasonable compensation in whatever sum the judge may allow.” Wis. Stat. § 907.06(2).

2. Case Law

Multiple cases exist regarding witness fees in Wisconsin. In *Burnett v. Alt*, the Wisconsin Supreme Court held that a physician who has asserted his or her privilege not to testify can only be required it if: (1) there are compelling circumstances present; (2) *the party seeking the testimony has presented a plan for reasonable compensation of the expert* and (3) the expert will not be required to do additional preparation for the testimony. 224 Wis. 2d 72, 89, 589 N.W.2d 21 (1999) (emphasis added).

The Wisconsin Supreme Court strengthened this standard in *Glenn v. Plante*. In that case, the Wisconsin Supreme Court overruled a divided court of appeal to hold that a doctor should not have been ordered to give expert testimony. 2004 WI 24, ¶ 2. The plaintiffs argued that if doctors are permitted to avoid testifying whenever they choose to, this will result in a very small group of physician experts who could charge an inflated price for their services or conversely, an influx of less qualified doctors. *Id.* at ¶

18. Despite this legitimate argument, the Court held that the doctor could not be compelled to testify. *Id.* at ¶ 19. Rather, the Court held that, “simply because Koh was Glenn’s treating physician, it does not necessarily follow that his expert opinion is unique or irreplaceable and must be required.” *Id.* at ¶ 28. However, the court did leave open the possibility, that “even if Koh is not required to give expert opinion testimony in this case, he may be compelled to testify as to his observations as Glenn’s treating physician.” *Id.* at ¶ 31.