ILLINOIS

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses.

Under Illinois law, a plaintiff may be entitled to recover for both past and future medical expenses.

1. Past Medical Expenses

In order to recover for past medical expenses, a plaintiff must prove that (1) he or she has paid or become liable to pay a specific amount, and (2) the charges were reasonable for services of that nature.[72] A plaintiff may prove the first requirement by submitting the bills on which the claim is based and testifying that the bills were paid.[73] As to the second requirement, a hospital or doctor's bill is "*prima facie* reasonable and a proper foundation is laid when plaintiff testifies that the bill was for services rendered to him and that the bill has been paid."[74] Courts have reasoned that to require proof of reasonableness would "inconvenience both the parties, the court, and the public by requiring doctors and other medical or hospital personnel to leave their normal duties to testify to a matter which should otherwise go undisputed."[75]

[72] *Barreto v. City of Waukegan*, 133 Ill. App. 3d 119 (2nd Dist. 1985), *Zook v. Norfolk & W. Ry. Co.*, 268 Ill. App. 3d 157 (4th Dist. 1994).
[73] *Barreto*, 133 Ill. App. 3d at 130.
[74] *Id.*
[75] *Flynn v. Cusentino*, 59 Ill. App. 3d 262, 266 (3rd Dist. 1978).

Because the amount of past medical expenses may be determined with "mathematical certainty," the award of past medical expenses may not be based on speculation.[76] Rather, any award for past medical expenses must have direct support in the evidence submitted by the plaintiff.[77]

2. Future Medical Expenses

Unlike past medical expenses, future medical expenses cannot generally be calculated with certainty. As a result, the "trier of fact enjoys a certain degree of leeway in awarding compensation for medical costs that … are likely to arise in the future but are not specifically itemized in the testimony."[78] A plaintiff must, however, prove with "reasonable certainty" the need for future medical services in order to receive such an award.[79]

A plaintiff may establish a future need for medical services through expert testimony as to the need for and the value of those services.[80] At least one court has held, however, that such testimony is not required, but rather "[e]vidence that future medical expenses will be incurred can be inferred from the nature of the disability."[81] It is up to the trier of fact to weigh the evidence presented by both sides, including expert testimony, to determine whether to award damages based on future medical expenses and to calculate the amount of those damages.[82]

Although the trier of fact has some latitude in determining the appropriate award for future medical expenses, the award must sufficiently conform to the testimony and other evidence presented and not "shock the judicial conscience" or be the result of "passion or prejudice."[83]

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[76] *Zook*, 268 Ill. App. 3d at 169.
[77] *See id.* (reducing award for past medical expenses from jury's award of $150,000 to $144,035.98, as evidenced by medical bills).
[78] *Richardson v. Chapman*, 175 Ill. 2d 98, 112 (Ill. 1997), *but see Briante v. Link*, 184 Ill. App. 3d 812, 814 (1st Dist. 1989) (finding that because plaintiff did not introduce evidence of the type or cost of future physical therapy, which is susceptible to cost calculation, he was not entitled to a future damages award).
[79] *See Pry v. Alton & S. Ry. Co.*, 233 Ill. App. 3d 197, 217 (5th Dist. 1992) (*citing Biehler v. White Metal Rolling & Stamping Corp.*, 30 Ill. App.3d 435 (3rd Dist. 1975)).
[80] See *Biehler*, 30 Ill. App. 3d at 445.
[81] *Rainey v. City of Salem*, 209 Ill. App. 3d 898, 907 (5th Dist. 1991).
[82] *See Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 479-84 (1st Dist. 2008).
[83] See *Richardson*, 75 Ill. 2d at 113 (reducing award for future medical expenses by $1 million because jury's award was $1.5 million more than the expert's highest estimate); *Kinzinger v. Tull*, 329 Ill. App. 3d 1119, 1130 (4th Dist. 2002). *Cf. Evoy v. CRST Van Expedited, Inc.*, 430 F. Supp. 2d 775, 785 ($15 million economic damages award was

B. Collateral Source Rule and Exceptions

In 2008, the Illinois Supreme Court clarified Illinois' collateral source rule.[84] In that case, the court explained that Illinois follows the rule as set forth in the Restatement (Second) of Torts § 920(A)(2), which provides that "'[p]ayments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or part of the harm for which the tortfeasor is liable.'"[85] Under the collateral source rule a plaintiff is "entitled to recover the reasonable value of medical services" he or she has received.[86] Therefore, a defendant may neither reduce a plaintiff's award by the amount of compensation received from any collateral source nor introduce any evidence that some or all of the plaintiff's losses have been paid by insurance.[87] A defendant is also prevented from arguing that the plaintiff's medical bills were unreasonable by pointing to evidence that the bills were in fact settled for a lesser amount than was originally billed.[88] Rather, a defendant must prove unreasonableness of the bills through cross-examination and other witness testimony.[89]

The collateral source rule is slightly modified by statute in the context of medical malpractice.[90] Under the statute, in these particular cases, a judgment will be reduced by "50% of the benefits provided for lost wages or private or governmental disability income programs, which have been paid" and by "100% of the benefits provided for medical charges, hospital charges, or nursing or caretaking charges, which have been paid."[91]

Following the court's decision in *Wills*, it is unclear whether Illinois courts will continue to recognize any exceptions to the collateral source rule. Prior to *Wills*, courts had established one exception to the rule – a plaintiff is not entitled to recover for "services provided by charitable providers without

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supported by the evidence where the expert witness testified that future medicals alone coule be between $14.2 million and $19.8 million).

[84] *See Wills v. Foster*, 229 Ill. 2d 393 (Ill. 2008).
[85] *Id.* at 399.
[86] *Id.* at 407.
[87] *Id.* at 400.
[88] *Id.* at 418.
[89] *Id.*
[90] *See* 735 ILL. COMP. STAT. 5/2-1205 (2009).
[91] 735 ILL. COMP. STAT. 5/2-1205(ii) (2009).

charge, *i.e.* without generating an initial bill."[92] In *Wills* the court specifically overruled *Peterson* and declared that under Illinois law, plaintiffs are entitled to recover "the reasonable value of medical services."[93] By this statement, the court may have intended to abolish this exception to the rule. The court did not, however, explicitly mention the exception and no subsequent Illinois court has addressed the exception or whether it survives.

C. Treatment of Write-Downs and Write-Offs

Illinois courts' decisions on the collateral source rule also make clear that plaintiffs are entitled to recovery for the entirety of the medical expenses they incur, regardless of the percentage of those bills that is paid by their insurer or by Medicare or Medicaid.[94] As the court explained, a plaintiff is "entitled to recover as compensatory damages the reasonable expense of necessary medical care" and the collateral source rule protects any collateral payments to plaintiff "by denying the defendant any corresponding offset or credit."[95] Based on these principles, the court found that it was an error to reduce the plaintiff's award of medical expenses to the actual amount paid by Medicaid and Medicare.[96] Rather, the plaintiff was entitled to the full value of his medical expenses, as evidenced by the bills submitted by his physicians.[97] Write-offs were therefore irrelevant.[98]

Similarly, in *Arthur v. Catour*, 216 Ill. 2d 72 (2005), on which the court in *Wills* relied, the court found that the plaintiff was entitled to present the total amount she was billed for medical treatment to the jury for consideration of her damages.[99] The court reasoned that because the plaintiff was responsible for the entire amount billed, the fact that her insurer had paid a portion of the bill and had written-off a

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[92] *Nickon v. City of Princeton*, 376 Ill. App. 3d 1095, 1099 (*citing Peterson v. Lou Bahrodt Chevrolet Co.*, 76 Ill. 2d 353, 363 (Ill. 1979)).
[93] *Wills*, 229 Ill. 2d at 414-20.
[94] *Id.* at 418-419.
[95] *Id.* at 419.
[96] *Id.*
[97] *Id.* at 419-420.
[98] *Id.*
[99] *Arthur v. Catour*, 216 Ill. 2d 72, 82-83 (Ill. 2005).

portion of the bill, based on its contract with the provider, was of no consequence.[100] Instead, the plaintiff's damage award must be based on the total reasonable value of medical services she received.[101]

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

A. Scope of Physician-Patient Privilege and Waiver

The physician-patient privilege in Illinois is governed by section 8-802 of the Code of Civil Procedure, which provides that "[n]o physician…shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient."[102] There are 12 exceptions enumerated in the statute that allow the physician to disclose information primarily in various types of legal proceedings.[103] The privilege may also be waived by the patient or, in the case of death or disability, by his or her personal representative or other person authorized to sue for personal injury or by the beneficiary of an insurance policy on his or her life, health, or physical condition.[104] As the privilege applies only to information reasonably necessary for diagnosis and treatment, it does not prevent disclosure of the patient's identity as long as information regarding the patient's physical or mental status is not included.[105] The physician-patient privilege exists both to promote disclosure between a physician and a patient and to protect the patient's privacy rights.[106] The privilege covers not only physicians, but also support personnel, such as nurses, EMT's, and other members of hospital staff who might treat or care for patients.[107]

The patient may waive the privilege explicitly or implicitly. When a patient files suit against a doctor or hospital, he implicitly consents to releasing information relevant to the issue but only pursuant to formal discovery methods allowed by the Illinois Supreme Court Rules.[108]

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[100] *Arthur*, 216 Ill. 2d at 81.
[101] *Id.*; *Wills*, 229 Ill. 2d at 419-20.
[102] 735 ILL. COMP. STAT. 5/8-802 (2009).
[103] 735 ILL. COMP. STAT. 5/8-802(1)-(12) (2009).
[104] 735 ILL. COMP. STAT. 5/8-802(3) (2009).
[105] *Geisberger v. Willuhn*, 72 Ill. App. 3d 435, 438 (2nd Dist. 1979).
[106] *Tomczak v. Ingalls Mem'l Hosp.*, 359 Ill. App. 3d 448, 452 (1st Dist 2005).
[107] *People v. Kucharski*, 346 Ill. App. 3d 655, 660 (2nd Dist. 2004).
[108] *See* ILL. SUP. CT. RULE 210(a).

B. Interaction of Illinois Physician-Patient Privilege and HIPAA

The HIPAA Privacy Rule details the measures that must be taken to properly handle protected health information. HIPAA also contains a preemption clause which in effect sets forth that state laws relating to the privacy of individually identifiable health information that are "more stringent" than the HIPAA Privacy Rule are not preempted.[109]

Federal and state courts across the country have struggled to reconcile state privacy laws with the provisions of HIPAA. In *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004), the Seventh Circuit affirmed a decision in which a medical records subpoena issued by the Department of Justice under the Federal Rules of Civil Procedure was quashed under Illinois law, but on completely different grounds than those relied upon by the district court.[110] The federal district court applied Illinois' "more stringent" privacy law that creates a medical records privilege and precludes the disclosure of such information.[111] The Seventh Circuit, however, analyzed the issue differently, and held that state law privacy-related privileges are evidentiary in nature and do not govern federal question lawsuits.[112] Nevertheless, the court held that "the burden of compliance" with the medical records subpoena, inasmuch as "the natural sensitivity that people feel about the disclosure of their medical records" outweighed "the benefit of production of materials sought" by the subpoena.[113] Although the decision circumvented the interplay between HIPAA and the state privacy law, the subpoena was properly quashed and the medical records were protected from disclosure.[114]

Although *Northwestern Memorial Hospital v. Ashcroft* has been cited by other Illinois cases, no Illinois court has further explained or clarified the interplay between the HIPAA Privacy Rule and the Illinois statutory physician-patient privilege. However, in *Moss v. Amira*, 356 Ill. App. 3d 701 (1st Dist. 2005), a decision involving a *Petrillo* violation by defense counsel and an analysis of the evolution of the

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[109] 45 C.F.R. § 160.203(b).
[110] *Northwestern Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004).
[111] *Northwestern Mem'l Hosp.*, 362 F.3d at 925.
[112] *Id.*
[113] *Id.* at 927-929.
[114] *Id.* at 932-33.

Petrillo doctrine, the concurring opinion by Justice Quinn noted that the protections provided to medical patients in Illinois under *Petrillo* are now also provided under HIPAA.[115] Justice Quinn did not attempt to define the interplay between HIPAA and Illinois privacy law, but simply noted the significance of the issue and stated that the parameters of HIPAA as it relates to *Petrillo* and Illinois privacy statutes "will be discussed and resolved by the courts over the years to come."[116]

C. Authorization of Ex Parte Physician Communication by Courts

The Illinois rule regarding e*x parte* communications with physicians was handed down in the landmark decision *Petrillo v. Syntex Lab, Inc.*, 148 Ill. App. 3d 581 (1st Dist. 1986), *cert. denied* 113 Ill. 2d 584 (1987). In *Petrillo*, the court ruled that "*ex parte* conferences between defense counsel and a plaintiff's treating physician undermine the confidentiality of the physician-patient relationship."[117] The court determined that the sole procedure for a defendant to ascertain the substance of physician-patient communications is through the formal discovery process.[118]

Based upon the reality that physicians do not act alone in the discharge of professional duties to a patient, the Illinois courts have extended *Petrillo* to a broad range of medical and health care professionals and related personnel, including communications with physicians sharing offices with the treating doctor, communications between a defendant physician's attorney and a nurse who assisted the defendant during surgery with the plaintiff, and communications between a plaintiff's employer and the treating physician in worker's compensation proceedings.[119]

In 1999, an exception to the *Petrillo* rule was created through the passage of the Hospital Licensing Act, which provides in part that hospital staff can communicate with a hospital's legal counsel concerning patient medical records.[120] This statute was challenged in *Burger v. Lutheran General*

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[115] *Moss v. Amira*, 356 Ill. App. 3d 701, 710-11.
[116] *Moss*, 356 Ill. App. 3d at 712.
[117] *Petrillo*, 148 Ill. App. 3d at 590.
[118] *Id.* at 591.
[119] *Mondelli v. Checker Taxi Co.*, 197 Ill. App. 3d 258, 262-63 (1st Dist. 1990); *Roberson By Isacc v. Liu*, 198 Ill. App. 3d 332, 336-38 (5th Dist. 1990); *Hydraulics, Inc. v. Industrial Comm'n*, 329 Ill. App. 3d 166, 171 (2nd Dist. 2002).
[120] 210 ILL. COMP. STAT. 85/6.17(e) (2009).

Hospital, 198 Ill. 2d 21 (2001), which held that a hospital's malpractice defense counsel is permitted to communicate *ex parte* with hospital personnel regarding a patient's medical negligence action.[121]

D. Local Practice Pointers

The prohibition on *ex parte* contact with health care professionals first set forth in the *Petrillo* decision must be taken seriously and respected by defense attorneys. Illinois courts have held that even if the contact between defense counsel and plaintiff's treating physician was harmless, inadvertent or conducted in good faith, such contact can, and often will, result in sanctions.[122]

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

E. Requirements to Obtain Testimony of Non-Party Treating Physician

Illinois Supreme Court Rule 204(c) specifically addresses the requirements for obtaining the depositions of non-party physicians. The rule provides,

> The discovery depositions of nonparty physicians being deposed in their professional capacity may be taken only with the agreement of the parties and the subsequent consent of the deponent or under a subpoena issued upon order of court. A party shall pay a reasonable fee to a physician for the time he or she will spend testifying at any such deposition. Unless the physician was retained by a party for the purpose of rendering an opinion at trial, or unless otherwise ordered by the court, the fee shall be paid by the party at whose instance the deposition is taken.[123]

Although on its face the rule applies to only to a physician's discovery deposition, at least one court has found that the rule "reflects our supreme court's recognition and acknowledgment that a treating physician's time is valuable" and as a result rule 204(c) can be extended to evidence depositions.[124]

Case law interpreting rule 204(c) and its requirements is sparse. The committee commentary following the rule, however, provides that a court considering a request for a subpoena directed to non-party physician deposition should "exercise discretion" and refuse to grant the request "unless there is

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[121] *Burger*, 198 Ill. 2d at 52.
[122] *See, e.g., Pourchot v. Commonwealth Edison Co.*, 224 Ill. App. 3d 634, 637 (3rd Dist. 1992); *but see Mahan v. Louisville & Nashville R.R. Co.*, 203 Ill. App. 3d 748, 754 (5th Dist. 1990) (*ex parte* communications between defense counsel and plaintiff's treating physician was *de minimis* and did not involve any private or confidential information, and the court found no *Petrillo* violation).
[123] ILL. SUP. CT. R. 204(c).
[124] *Woolverton v. McCracken*, 321 Ill. App. 3d 440, 443 (5th Dist. 2001); *but see Meyers v. Bash*, 334 Ill. App. 3d 369, 375 (4th Dist. 2002) (restricting application of Rule 204(c) to discovery depositions).

some preliminary showing of good cause, regardless of whether there has been an objection by opposing counsel."[125] In order to establish good cause, the moving party "must be able to show that he has received the medical records available in the case and nevertheless has good reason to believe that a deposition is necessary."[126] The court may require an affidavit to establish good cause.[127] The commentary also provides that the rule does not apply to physicians who are parties to the case or who are "closely associated with a party."[128]

It must be noted, however, that at least one court has specifically held that the commentary is not to be considered part of rule 204(c). In *Buckholtz v. MacNeal Hosp.*, 313 Ill. App. 3d 521 (1st Dist. 2000), the court found that because the rule was clear on its face, the court could not look to extrinsic sources including the committee comments to aid in its application.[129] Under this reasoning, the court disregarded the plaintiff's argument that the doctor, a resident at the defendant hospital, was "closely associated with a party" and therefore the rule did not apply.[130]

F. Witness Fee Requirements and Limits

Generally, subpoenaed witnesses are compensated for time spent in a deposition or at trial at a rate of $20 per day plus $.20 per mile they are required to travel to and from the deposition or trial.[131] Illinois Supreme Court Rule 204(c), however, carves out an exception to the general rule for "physicians being deposed in their professional capacity" and instead dictates that such witnesses be compensated with a "reasonable fee."[132]

Illinois courts have not, however, elaborated on what constitutes a "reasonable fee." In the one

[125] ILL. SUP. CT. R. 204(c) (Comm. Cmts.).
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] *Buckholtz*, 313 Ill. App. 3d at 525-526.
[130] *Id.*
[131] 705 ILL. COMP. STAT. 35/4.3(a) (2009).
[132] ILL. SUP. CT. R. 204(c).

case to date addressing the "reasonable fee" requirement, the appellate court simply upheld the trial court's finding that $300 per hour was reasonable without explanation.[133]

The only other guidance for reasonableness comes from certain local court rules – for example, the 16th, 18th and 19th Judicial Districts. In the 18th and 19th Districts, the rules establish that the fee charged by a physician for testimony "should be no higher than a physician's charges for other medical services."[134] The rules additionally provide for the type of evidence a party must introduce in support of the reasonableness of the fee.[135]

[133] *Buckholtz*, 313 Ill. App. 3d at 526.
[134] R. OF THE 18TH JUDICIAL DIST. R. 7.03(A); UNIF. R. PRAC. 19TH JUDICIAL DIST. R. 3.15(A).
[135] R. OF THE 16TH JUDICIAL DIST. R. 7.03; UNIF. R. PRAC. 19TH JUDICIAL DIST. R. 3.15(C).