

## IDAHO

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### **I. MEDICAL EXPENSES**

#### **A. Requirements for Recovery for Medical Expenses**

“The award of economic damages must be based upon proof, not upon speculation or conjecture.” *Cole v. Esquibel*, 145 Idaho 652, 654, 182 P.3d 709, 711 (2008). On appeal, a district court’s award of damages will be upheld where sufficient evidence exists to uphold the award. *Sells v. Robinson*, 141 Idaho 767, 774, 118 P.3d 99, 106 (2005). However, damages do not need to be proven with “mathematical exactitude.” *McAtee v. Faulkner Land & Livestock, Inc.*, 113 Idaho 393, 399, 744 P.2d 121, 127 (Ct. App. 1987).

Medical expenses are recoverable for a vast number of treatments and can include, “physical therapy, exercise, and Pilates instruction[.]” *Bailey v. Sanford*, 139 Idaho 744, 751, 86 P.3d 458, 465 (2004).

#### **1. Past Medical Expenses**

Past medical expenses are recoverable for the amount supportable by evidence, either through medical bills, physician testimony, or plaintiff’s testimony. The trial court is granted broad discretion in determining the fairness of an award and whether the award is supported by the evidence. For example, the trial court may conditionally grant or deny a motion for a new trial based on either an increase or decrease in the jury award. I.R.C.P. 59.1. Any increases or decreases are purely discretionary and will

not be overturned on appeal absent an abuse of discretion. *Crowley v. Critchfield*, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007).

## **2. Future Medical Expenses**

Future medical expenses, unlike past medical expenses, must have some substance of medical proof for the court to uphold an award. *Cole*, 145 Idaho at 654, 182 P.3d at 711 (finding that the lack of medical testimony supporting any future medical treatments makes an award for future medical expenses improper). Future damages may only be awarded if they can be proven with reasonable certainty. *Id.* An appellate court will not uphold an award for future medical expenses if there is no evidence to support such an award. *Id.* at 655, 182 P.3d at 712; *but see Bailey*, 139 Idaho at 751, 86 P.3d at 465 (holding that itemized medical bills for physical therapy, exercise and Pilates instruction paired with testimony that plaintiff's pain from accident would continue into the future is sufficient for an award of future medical expenses).

An award for future medical expenses can be reduced to present value; however, future medical expenses will only be reduced to present value if requested by the parties prior to the jury's deliberation. *Quick v. Crane*, 111 Idaho 759, 781-82, 727 P.2d 1187, 1209-10 (1986) (finding no error in the jury's award without an instruction on present value or information regarding the reduction of damages to present value).

### **B. Collateral Source Rule and Exceptions**

Idaho follows the collateral source rule. "In any action for personal injury or property damage, a judgment may be entered for the claimant only for damages which exceed amounts received by the claimant from collateral sources as compensation for the personal injury or property damage[.]" I.C. § 6-1606. Collateral sources do not include benefits paid under a federal program that seeks subrogation, death benefits paid under a life insurance contract, or any benefits paid which are subject to a subrogation right, whether that right is created by contract or law. I.C. § 6-1606. The court will, after an award is made, reduce any award for payments made by a collateral source. I.C. § 6-1606. "Such award shall be

reduced by the court to the extent the award includes compensation for damages which have been compensated independently from collateral sources.” I.C. § 6-1606.

The award will not be reduced because the payor has failed to exercise any subrogation rights. The policy behind I.C. § 6-1606 “is to prevent the double payment of damages, not to prevent payment only in the absolute case that a third party exercises its contractual rights to recovery.” *Dyet v. McKinley*, 139 Idaho 526, 531, 81 P.3d 1236 (2003). Therefore, the subrogation right itself dictates whether an award will be reduced, not whether evidence exists to show an intent to exercise that right.

All payments made under an insurance contract on account of bodily injury or death or damage to or loss of the property of another shall be credited upon settlement, judgment or award. I.C. § 41-1840. “When a party makes pre-litigation payments to the other side, the paying party is allowed to subtract those payments from the jury’s verdict.” *Schaffer v. Curtis-Perrin*, 141 Idaho 356, 361, 109 P.3d 1098, 1103 (2005) (internal quotations omitted) (citation omitted) (holding that “[w]here the jury’s verdict substantially exceeded all the medical expenses [plaintiff] was seeking, it is fairly certain that the award included the expenses for which [defendant] seeks a credit”); *Carlson v. Stanger*, 146 Idaho 642, 651, 200 P.3d 1191, 1200 (2008) (stating that pre-litigation payments of medical expense will be credited towards a party’s Rule 68 offer of judgment for purposes of determining an award of attorney’s fees and costs).

## **C. Treatment of Write-Downs and Write-offs**

### **1. Medicare and Medicaid**

Idaho treats Medicare or Medicaid write-offs as a collateral source, despite the fact that a Medicare or Medicaid write-off is technically not a collateral source. *Dyet*, 139 Idaho at 529, 81 P.3d at 1239. However, by treating a Medicare write-off as a collateral source, the court avoids the prejudice contemplated by I.R.E. 403<sup>70</sup> and promotes the policy of the collateral source doctrine to prevent a double recovery. *Id.* “Although the write-off technically is not a payment from a collateral source within the meaning of [the collateral source statute], it is not an item of damages for which plaintiff may recover because plaintiff has incurred no liability therefore.” *Id.* (quoting *Katstick v. U-Haul*, 740 N.Y.S.2d 167,

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<sup>70</sup> That is, any prejudice that a person may suffer by introducing evidence regarding a party’s insured status.

292 A.D.2d 797 (N.Y. 2002); *See also Slack v. Kelleher*, 140 Idaho 916, 925, 104 P.3d 958, 967 (2004).

## 2. Private Insurance

There is no Idaho case law regarding whether a court should deduct private insurance write-offs from a damage award. The Idaho courts have continuously effectuated the purpose of the collateral source rule, which is to prevent a plaintiff from obtaining double-recovery in a personal injury action. Further, when addressing insurance contracts, the Idaho Supreme Court has recently focused on the benefit retained by an insured under the policy provisions where there are multiple sources of recovery, some of which are subject to subrogation interests. *See Cherry v. Coregis Ins. Co.*, 146 Idaho 882, 888, 204 P.3d 522, 528 (2009) (holding that an insurance company, pursuant to a valid off-set provision, may only off-set the amount *retained* by the insured after taking into account any payments made subject to a subrogation lien).

It is presumed that the courts will treat private insurance company write-offs similarly to Medicare and Medicaid write-offs. However, any private insurance write-offs will be subject to the exception to the collateral source rule, which includes any benefit paid which is subject to a subrogation right.

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

Generally, Idaho does not permit *ex parte* communications with a non-party treating physician without the consent of the plaintiff patient. However, “the formal discovery rules do not preclude informal communications between defense counsel and ordinary *fact witnesses*.” *Morris v. Thomson*, 130 Idaho 138, 143, 937 P.2d 1212, 1217 (1997) (emphasis added). In Idaho, physician-patient communications are confidential by statute, unless the patient consents to the communication. I.C. § 9-203(4); *see also Pearce v. Ollie*, 121 Idaho 539, 542, 826 P.2d 888, 891 (1992) (Bistline, J., dissenting) (holding the issue moot as to whether defense counsel’s *ex parte* contact with two of plaintiff’s treating physicians was improper).

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

“A physician or surgeon cannot, without the consent of his patient, be examined in a civil action as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient” except in instances of suspected child abuse, domestic violence or will contests where the deceased’s mental or physical condition is questioned. I.C. § 9-203. A person’s heirs or representatives may waive this privilege on behalf of a decedent. I.C. §§ 9-203(D), (E); *See also Sprouse v. Magee*, 46 Idaho 622, \_\_\_, 269 P. 993, 996 (1928) (“[t]he statutes are for the benefit of the patient while living, and of his estate when dead”).

There is no privilege for “communication relevant to an issue of the physical, mental or emotional condition as an element of his[her] claim or defense or, after the patient’s death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.” I.R.E. 503(d)(3).

“[W]aiver of the privilege as to one physician does not waive the privilege as to any other physician.” *Harrington v. Hadden*, 69 Idaho 22, 26, 202 P.2d 236, 238 (1949). The privilege is not waived for one doctor by calling another doctor to testify regarding the same matter. *Id.*

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

There are no cases in Idaho that address this issue specifically. However, the Idaho Supreme Court recently held in a criminal case that a waiver executed by a person with the Department of Health is sufficient for disclosure of a person’s HIV positive status upon request by an investigating police department without causing a HIPAA violation.<sup>71</sup> *State v. Mubita*, 145 Idaho 925, 935-36, 188 P.3d 867, 877-78 (2008). The Court further noted that any HIPAA violation would warrant monetary sanctions, rather than suppression of the evidence. *Id.* at 936-37, 188 P.3d at 878-79.

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

Unless the treating physician is called as an expert to testify, a non-party physician is treated the same as an ordinary fact witness. *See Morris*, 130 Idaho at 143, 937 P.2d at 1217. A plaintiff may

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<sup>71</sup> Kanay Mubita was investigated and convicted for eleven counts of transferring body fluid which may contain HIV.

consent to *ex parte* communication with a physician by executing a release of medical information and records.

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

There are no cases in Idaho which address this issue.

**E. Local Practice Pointers**

As a general rule, *ex parte* communications with a non-party physician should be avoided unless the plaintiff consents to such communication in writing. This issue has not been widely litigated in Idaho, beyond the scope that communications between a physician and patient are deemed confidential by statute and that privilege is waived by the plaintiff placing his/her medical condition at issue. Defense counsel may subpoena and properly depose any non-party physician pursuant to the Idaho Rules of Civil Procedure. During initial discovery, defense counsel may also request a release of all medical records from plaintiff to obtain records regarding plaintiff's treatment. Any waiver should be made in writing and signed by plaintiff.

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

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

Any party may take the deposition of any person. I.R.C.P. 31(a). The attendance of a witness may be compelled by subpoena pursuant to Rule 45 of the Idaho Rules of Civil Procedure. I.R.C.P. 31(a). If the plaintiff has named the non-party treating physician as an expert, then the physician may not be contacted without the opposing party's permission. I.R.C.P. 26(b)(4).

**B. Witness Fee Requirements and Limits**

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

"Witness fees and expenses in the district court and the magistrates division thereof shall be in the amounts provided for under Rule 54(d)(1)." I.R.C.P. 45(e)(1). Witness fees are twenty dollars (\$20.00) per day along with thirty cents (\$0.30) per mile, one way. I.R.C.P. 54(d)(1). The court will award costs as a matter of right to the prevailing party; an award of costs for expert witness fees must be reasonable, but should not exceed two thousand dollars (\$2,000.00). I.R.C.P. 54(d)(1). Service of a subpoena to a

witness must give or offer “the person at the same time, if demanded, the fees for one (1) day’s attendance and the mileage allowed by law[.]” I.R.C.P. 45(e)(2). The prevailing party is awarded costs as of right, which includes witness fees and mileage, and may be awarded discretionary costs by the district court. See *Durant v. Christensen*, 117 Idaho 70, 72, 785 P.2d 634, 636 (1990).

## **2. Case Law**

Certain costs, such as witness fees, mileage fees and expert fees, are awarded as of right to the prevailing party. *World Cup Ski Shop, Inc. v. City of Ketchum*, 118 Idaho 294, 295, 796 P.2d 171, 172 (Ct. App. 1990). It is within the discretion of the court to award any amount above the requirements of I.R.C.P. 54(d)(1). An award of costs to the prevailing party, pursuant to I.R.C.P. 54(d)(1), is made at the discretion of the trial court; on appeal, the opposing party bears the burden of showing an abuse of discretion. *Gillihan v. Gump*, 140 Idaho 693, 697, 99 P.3d 1083, 1087 (Ct. App. 2003) (*overruled on other grounds*); *World Cup Ski Shop, Inc.*, 118 Idaho at 295-96, 796 P.2d at 172-73.

### **C. Local Custom and Practice**

Trial courts and appellate courts require discretionary costs and costs as of right to be submitted to the court in an itemized bill which outlines the expenses. This is to ensure that any costs awarded are reasonable. For this reason, it is essential that all costs for which recovery is sought, either as of right or discretionary costs, should be fully documented for submission to the court.