

## LOUISIANA

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### I. MEDICAL EXPENSES

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

In Louisiana, in order for a plaintiff to recover in tort, he or she must prove that the defendant was negligent and that plaintiff's damages were caused by defendant's fault.<sup>242</sup> Plaintiff must show more than defendant's fault to recover damages. Civil Code Article 2315 requires plaintiffs to prove that defendant's fault actually caused plaintiff's damage.<sup>243</sup>

Medical expenses are a proper item of damage in Louisiana.<sup>244</sup> It is error for a jury to fail to award medical expenses proven by the victim.<sup>245</sup> Generally, plaintiffs may recover the medical expenses, past and future, which they incur as a result of the injury.<sup>246</sup> However, plaintiffs may only recover the medical expenses incurred in good faith as a result of injury; therefore, plaintiff must demonstrate that the need for treatment of injuries resulted from tortfeasor's conduct.<sup>247</sup>

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<sup>242</sup> *Jordan v. Travelers Ins. Co.*, 245 So.2d 151, 155 (La. 1971).

<sup>243</sup> *United Pentecostal Church of Hodge v. Interstate Surplus Underwriters*, 368 So.2d 1104, 1109 (La. App. 2 Cir. 1979).

<sup>244</sup> *Chambers v. Graybiel*, 25,840 (La.App. 2 Cir. 6/22/94), 639 So.2d 361, 367, *citing* *Thames v. Zerangue*, 411 So.2d 17 (La. 1982).

<sup>245</sup> *Chambers*, 639 So.2d at 367, *citing* *Sumrall v. Sumrall*, 612 So.2d 1010, 1014 (La. App. 2 Cir. 1993).

<sup>246</sup> *White v. Longanecker*, 93-1122 (La.App. 1 Cir. 5/23/94); 637 So.2d 1213, 1218, *writ den.*, 94-1704 (La.10/7/94); 644 So.2d 640.

<sup>247</sup> *Dauzat v. Canal Ins. Co.*, 96-1261 (La.App. 3 Cir. 4/9/97), 692 So.2d 739, 747.

## 1. Past Medical Expenses

Louisiana jurisprudence requires more than plaintiff's uncorroborated testimony to establish past medical expenses.<sup>248</sup> A plaintiff must provide adequate proof of medical expenses by establishing a causal relationship between claimed expenses and the tort.<sup>249</sup> Such proof includes medical evidence, such as bills and physician's testimony.<sup>250</sup> When a claim for medical expenses is supported by an invoice, that bill is generally sufficient to recover for past medical expenses, unless there is reasonable suspicion or contradictory evidence showing that the bill is unrelated to the accident.<sup>251</sup> Even if the tortfeasor shows victim's medical treatment was unneeded, he is required to pay the victim for the costs of medical treatment as long as the victim acted in good faith in incurring the medical treatment.<sup>252</sup> Plaintiffs are not permitted to recover past medical expenses that were incurred primarily in preparation for trial rather than for medical treatment.<sup>253</sup>

## 2. Future Medical Expenses

Plaintiff's burden of proof in a future medical expenses claim is preponderance of evidence.<sup>254</sup> Future medical expenses must be ascertained with some degree of certainty; therefore, plaintiffs are required to show that, more probably than not, they will incur specific future medical expenses.<sup>255</sup> Plaintiffs must provide medical testimony showing that future medical expenses are likely to be required and the probable cost for those expenses.<sup>256</sup> Because strong proof is required, an award for future medicals may not be based on jury speculation.<sup>257</sup>

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<sup>248</sup> Lowery v. Savana, 33,384, p. 9-10 (La. App. 2 Cir. 5/10/00), 759 So.2d 1020, 1026.

<sup>249</sup> See *id.*

<sup>250</sup> See *id.*; see also Harrington v. Wilson, 08-544 (La. App. 5 Cir. 1/13/09), 8 So.3d 30, 41 (reducing part of plaintiff's medical expenses claim because she failed to attach copies of bills of her medical treatment from doctor and hospital.)

<sup>251</sup> Brandao v. Wal-mart Stores, Inc., 35,368, p.13 (La.App. 2 Cir. 12/19/01), 803 So.2d 1039, 1047.

<sup>252</sup> Orgeron v. Prescott, 93-926, p. 12 (La. App. 5 Cir. 4/14/94), 636 So.2d 1033, 1041, *writ den.*, 94-1895 (La. 10/28/94), 644 So.2d 654.

<sup>253</sup> *White*, 637 So.2d at 1219; *Noland v. Liberty Mut. Ins. Co.*, 96 So.2d 360, 362 (La. App. 1 Cir. 1957).

<sup>254</sup> *Durkee v. City of Shreveport*, 587 So.2d 722, 730 (La. App. 2 Cir. 1991), *writ den.*, 590 So.2d 68 (La. 1991).

<sup>255</sup> *Veazey v. State Farm Mut. Auto Ins.*, 587 So.2d 5, 8 (La. App. 3 Cir.1991).

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

Plaintiff is not required to prove the exact value of necessary future medical expenses, but must show some evidence to support the award.<sup>258</sup> An award is proper when the finder of fact can use past medical expenses and other evidence in order to determine a minimal amount upon which reasonable minds could agree.<sup>259</sup>

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

The statutory basis of the collateral source rule in Louisiana is Louisiana Code of Evidence Article 409, which prevents a party from introducing evidence of offering or promising to pay or furnishing expenses caused by an injury to person or damage to property if introduction of that evidence is intended to prove liability for the injury or damage; furthermore, such evidence is not admissible to mitigate, reduce, or avoid liability for such injuries or damages.<sup>260</sup>

The collateral source rule, although of common law origin, is well-established in Louisiana jurisprudence.<sup>261</sup> The collateral source rule prevents the reduction of plaintiff's recovery to the benefit of the tortfeasor because of monies received by the plaintiff from sources independent of the tortfeasor's procurement or contribution.<sup>262</sup> Therefore, any payments received from an independent source are not subtracted from the tort victim's recovery from the tortfeasor, and the tortfeasor is liable for the same amount regardless of whether the tort victim had the prudence to purchase insurance.<sup>263</sup>

The collateral source rule applies to various types of cases, but it most frequently pertains to cases involving insurance and other benefits.<sup>264</sup> Because the collateral source rule is a rule of evidence and damages, it bars the introduction of evidence that plaintiff received benefits from a collateral source

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<sup>258</sup> *Clarkston v. Louisiana Farm Bureau Cas. Ins. Co.*, 2007-0158, p. 34 (La. App. 4 Cir. 7/2/08), 989 So.2d 164, 187-88, *citing* *Molony v. USAA Prop. & Cas. Ins. Co.*, 97-1836, p. 2-3 (La. App. 4 Cir. 3/4/98), 708 So.2d 1220, 1221-22.

<sup>259</sup> *Id.*

<sup>260</sup> LA. CODE OF EVID. ANN. art. 409 (2009).

<sup>261</sup> *Louisiana Dep't of Transp. & Dev. v. Kansas City S. Ry. Co.*, 2002-2349 (La. 5/20/03), 846 So.2d 734, 739.

<sup>262</sup> *Louisiana Dep't of Transp. & Dev.*, 846 So.2d at 739.

<sup>263</sup> *Id.* at 739-40.

<sup>264</sup> *Bozeman v. State of Louisiana, Dep't. of Transp. & Dev.*, 2003-1016 (La. 7/2/04), 879 So.2d 692, 698.

independent from the tortfeasor; this issue usually arises at trial after submission of a Motion in Limine.<sup>265</sup>

Although the collateral source rule prohibits a tortfeasor from receiving a credit for payments received by plaintiff from sources that are collateral from the tortfeasor's procurement, a tortfeasor is entitled to payments made by the tortfeasor.<sup>266</sup> Furthermore, evidence of collateral payments will be permitted if the purpose of introduction is to impeach the credibility of the plaintiff.<sup>267</sup>

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

#### **1. Medicare and Medicaid<sup>268</sup>**

Medicaid recipients may not collect a Medicaid "write-off" as damages since they did not provide consideration for the Medicaid benefit.<sup>269</sup> Therefore, plaintiffs' recoveries are limited to that amount actually paid by Medicaid.<sup>270</sup> However, in cases where a plaintiff's patrimony has been diminished in some way in order for plaintiff to obtain the benefits, then that plaintiff is entitled to the "benefit of the bargain," and may recover the full value of his or her medical services, including the write-off amount.<sup>271</sup>

Although the collateral source rule does not apply to claims made by Medicaid plaintiffs, Louisiana jurisprudence has permitted application of the rule to cases filed by Medicare plaintiffs.<sup>272</sup> In *Guilbeau*, the court refused defendant's argument for the extension of the holding of *Bozeman* to a

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<sup>265</sup> *Bozeman*, 879 So.2d at 699.

<sup>266</sup> *Dumas v. Harry*, 94-19, p. 3-4 (La. App. 5 Cir. 5/11/94), 638 So.2d 283, 286, *citing* *Hall v. State Dep't of Highways*, 213 So.2d 169, 175 (La. App. 3rd Cir.1968), *writ refused* 252 La. 959, 215 So.2d 128 (La. 1968).

<sup>267</sup> *Id.*

<sup>268</sup> "It is worth noting that irrespective of whether the collateral source rule is applied to cases filed by Medicare plaintiffs, a Medicare beneficiary who receives payments from a primary payer such as a liability insurer must reimburse Medicare within sixty (60) days of receiving payment. See 42 U.S.C. § 1395(b)(2)(B)(ii) 2008; 42 C.F.R. § 411.24(h). Furthermore, in light of the recent amendments to the Medicare, Medicaid and SCHIP Extension Act of 2009 ("MMSEA"), an insurer may require as a condition of settlement that Medicare be included on the settlement check or that a separate check in the amount of Medicare's reimbursement claim be issued directly to Medicare."

<sup>269</sup> *Bozeman*, 879 So.2d at 705.

<sup>270</sup> *Id.* at 705-06.

<sup>271</sup> *Id.* at 706 (Victory, J., concurring, "[G]ratuitous collateral sources are not excluded from the collateral source rule under our holding. Our holding here is limited to the amounts written off by the health care provider, where no consideration was provided for that benefit, as contrasted with Medicare and private insurance, where consideration is provided for the benefit.").

<sup>272</sup> See *Guilbeau v. Bayou Chateau Nursing Ctr.*, 2005-1131, p. 15-17 (La. App. 3 Cir. 5/17/06), 930 So.2d 1167, 1178-79.

Medicare plaintiff's claim because unlike Medicaid, the Medicare payment method requires contribution by the patient.<sup>273</sup> Other courts, however, have refused the extension of the collateral source rule.<sup>274</sup> In *Suhor*, the Louisiana Fourth Circuit held that the collateral source rule does not apply to amounts written off by Medicare providers because healthcare providers are required to accept Medicare payments as full satisfaction of patient's expenses.<sup>275</sup> A plaintiff would receive a "windfall" if she recovers the amounts that her healthcare provider is prohibited from charging her under federal Medicare law.<sup>276</sup> Instead, the plaintiff is made whole when she is paid the amount actually paid by Medicare.<sup>277</sup> However, if the plaintiff can prove any amounts she paid in deductibles and co-payments for insurance, then she may be able to recover those amounts under the collateral source rule.<sup>278</sup>

## **2. Private Insurance**

The collateral source rule prevents the defendant from receiving a windfall because the victim has chosen to provide, by contract, other sources of redress for injury.<sup>279</sup> The tortfeasor should not benefit from a victim's prudence in acquiring insurance and other benefits.<sup>280</sup> Therefore, the tortfeasor's liability to plaintiff should not be reduced because the tort victim bought insurance from an insurer who has contracted with the medical provider for a write-off; any reduction in liability would be an unfair bonus toward the tortfeasor.<sup>281</sup> Accordingly, the collateral source rule applies to contractual write-offs obtained by an insurance company in exchange for providing business; evidence of such write-offs should be excluded from the jury's consideration of a medical expenses award.<sup>282</sup>

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

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

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<sup>273</sup> *Guilbeau*, 930 So.2d at 1179.

<sup>274</sup> *See Suhor v. Lagasse*, 2000-1628, p. 10 (La. App. 4 Cir. 9/13/00), 770 So.2d 422, 426-27.

<sup>275</sup> *Suhor*, 770 So.2d at 426.

<sup>276</sup> *Id.* at 427.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *Aetna Ins. Co. v. Naquin*, 488 So.2d 950, 954 (La. 1986).

<sup>280</sup> *Griffin v. Louisiana Sheriff's Auto Risk Ass'n*, 1999-2944, p. 35-37 (La. App. 1 Cir. 6/22/01), 802 So.2d 691, 714-15.

<sup>281</sup> *Griffin*, 802 So.2d at 714-15.

<sup>282</sup> *Id.*

According to Louisiana Code of Evidence Article 510(B)(1), a patient has a privilege to refuse to disclose and prevent the disclosure of confidential communications made for the purpose of advice, diagnosis, or treatment of his health condition between or among himself or his representative, healthcare provider, or their representative.<sup>283</sup> Comment (z) following Article 510 states that the doctor-patient privilege is limited to confidential communications and does not cover all information that a physician received by reason of his being such a physician, as was provided for by the former Revised Statute 15:476.<sup>284</sup> Confidential communications are any information not intended to be disclosed to persons other than the healthcare provider, their representatives, the patient's insurer, or people who are reasonably necessary for to facilitate the communication.<sup>285</sup> Moreover, the confidential communications include information, tangible substances or objects, physicians' opinions, and medical and hospital records obtained as a result of examination, consultation, or interview by the healthcare provider.<sup>286</sup> In other words, "when an individual walks into a doctor's office and opens his mouth, ... everything spilling out of it, whether it be his identity or his false teeth (a 'tangible object'), is presumptively privileged and beyond the reach of discovery."<sup>287</sup>

The privilege may be claimed by the patient or his legal representative.<sup>288</sup> Also, the patient's physician, psychotherapist, or healthcare provider, or their legal representatives, have the authority to claim the privilege on behalf of the patient.<sup>289</sup>

A patient waives this privilege when he or she asserts a personal injury claim in a judicial proceeding.<sup>290</sup> Still, the waiver of the privilege only applies to testimony at trial or to discovery of the privileged communication through approved discovery methods listed in the Louisiana Code of Civil Procedure Article 1421 *et seq*, such as: depositions; interrogatories; requests for production or inspection;

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<sup>283</sup> LA CODE OF EVID. ANN. art. 510(B)(1) (2009).

<sup>284</sup> LA. CODE EVID. ANN. art. 510 (comment z).

<sup>285</sup> LA. CODE EVID. ANN. art. 510(A)(8)(a)(i)-(v) (2009).

<sup>286</sup> LA. CODE EVID. ANN. art. 510(A)(8)(b) (2009).

<sup>287</sup> *Sarphie v. Rowe*, 618 So.2d 905, 908 (La.App. 1 Cir. 1993).

<sup>288</sup> LA CODE OF EVID. ANN. art. 510(D) (2009).

<sup>289</sup> *Id.*

<sup>290</sup> LA CODE OF EVID. ANN. art. 510(B)(2)(a) (2009).

physical or mental examinations; requests for release of medical condition; and requests for admission.<sup>291</sup>

It is important to note that the privilege is not designed to prevent the physician from receiving information relating to the patient, but is only designed to keep the physician from disclosing information about the patient.<sup>292</sup>

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

Because HIPAA is only meant to preempt “less stringent” state laws, and because Louisiana Code of Evidence article 510 imposes strict requirements on disclosure of medical records under the physician-patient privilege, HIPAA does not preempt Louisiana’s physician-patient privilege.<sup>293</sup>

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

Louisiana Code of Civil Procedure Article 1465.1 permits any party to serve on the plaintiff or any party whose medical records are relevant to an issue in the case a request that the plaintiff or other authorized person sign a medical records release allowing the health care provider to release medical records.<sup>294</sup> However, this release does not authorize *verbal* communication between the requesting party and the health care provider.<sup>295</sup> It is only in the context of testimony at trial or through the use of accepted discovery methods that it is proper for a physician to have *ex parte* communications regarding a patient’s medical information.<sup>296</sup>

Furthermore, Louisiana Revised Statute 13:3734 provides that a healthcare provider is not prohibited from disclosing privileged information via medical report either before or after legal proceedings have been instituted as long as patient has executed a written authorization for the disclosure.<sup>297</sup> When the patient is represented by an attorney who furnishes the healthcare provider with

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<sup>291</sup> LA CODE OF EVID. ANN. art. 510(E) (2009).

<sup>292</sup> *Coutee v. Beurlot*, 2006-2943, p. 6 (La. 9/5/07), 964 So.2d 304, 307.

<sup>293</sup> *Bihm v. Bihm*, 2005-1550, p. 4-5 (La.App. 3 Cir. 5/31/06), 932 So.2d 732, 735, *writ den.*, 2006-1695 (La. 10/6/06), 938 So.2d 81; *but see* U.S. ex rel. *Stewart v. The Louisiana Clinic*, 2002 WL 31819130, at \*5 (E.D. La. Dec. 12, 2000) (Louisiana law does not address “the form, substance, or the need for express legal permission from an individual,” which is required by 45 C.F.R. § 160.202).

<sup>294</sup> LA.CODE CIV. PROC. ANN. art. 1465.1(A) (2009).

<sup>295</sup> *Id.*

<sup>296</sup> *Coutee v. Global Marine Drilling Co.*, 2004-1293, p. 14 (La.App. 3 Cir. 2/16/05), 895 So.2d 631, 641-42, *rev'd on other grounds*, 2005-0756 (La.2/22/06), 924 So.2d 112.

<sup>297</sup> LA. REV. STAT. ANN. §13:3734(D).

an authorization executed by the patient, the healthcare provider is permitted to divulge to the attorney any communication upon which he relied in order to diagnose, treat, prescribe, or act for the patient without being required to comply with formal discovery.<sup>298</sup> Moreover, the healthcare provider may grant the attorney, as agent of the patient, access to medical reports, X-rays, and any other written information regarding the patient within the healthcare provider's possession.<sup>299</sup>

It is prejudicial error for a court to allow a defendant to present testimony of a plaintiff's treating physician in violation of the physician-patient privilege if plaintiff did not authorize *ex parte* verbal communication in her authorization for release of medical records.<sup>300</sup> In *Boutte*, the court found that in his verbal communications with defendant's attorney and physician-expert witness, plaintiff's treating physician clearly divulged privileged information to the defense which shed a bad light on plaintiff's credibility and the entire proceedings.<sup>301</sup>

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

Louisiana Revised Statute 13:3715.1 lists the exclusive methods by which medical records relating to a person's medical treatment, history, or condition may be obtained or disclosed by a health care provider, which are either pursuant to the provisions of Revised Statute §40:1299.96, the Code of Evidence Article 510, or a lawful subpoena or court order obtained in one of the methods listed within the statute.<sup>302</sup> A court order for the production of a patient's records is only appropriate with the consent of the patient or after a contradictory hearing with the patient, or his counsel of record, or after a finding by the court that the release of the requested information is proper.<sup>303</sup>

In cases where a communication involves the blood alcohol level or presence of drugs of a patient and an action for damages for injury, death or loss has been brought against the patient, Louisiana

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<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Boutte v. Winn-Dixie Louisiana, Inc.*, 95-1123, p. 10-11 (La.App. 3 Cir. 4/17/96), 674 So.2d 299, 305-06.

<sup>301</sup> *Id.*

<sup>302</sup> LA. REV. STAT. ANN. § 13:3715.1(B)(1) (2009).

<sup>303</sup> LA. REV. STAT. ANN. § 13:3715.1(B)(5) (2009); *but see* *State v. Skinner*, 2008-2522 (La. 5/5/09), 10 So.3d 1212 (Louisiana Supreme Court held this statute unconstitutional in the context of criminal trials because of federal jurisprudence on unreasonable searches and seizures and Louisiana's constitutional imposition of a heightened privacy interest for its citizens, patients' right to privacy in their medical and prescription records is a reasonable expectation of privacy, and a warrant is required for investigatory searches of medical records).

Revised Statute § 13:3734 provides that any party to a proceeding may use a lawful subpoena, summons, or court order served on the healthcare provider’s custodian of records in order to obtain healthcare records and communications, including but not limited to: medical, office, and hospital records; charts; correspondence; memoranda; lab tests and results; x-rays; photographs; financial statements; prognoses and diagnoses.<sup>304</sup>

### **E. Local Practice Pointers**

Because a treating physician does not examine the patient for the primary purpose of anticipating litigation, and because the attorney work-product rule excludes only writings that are obtained or prepared in anticipation of litigation, a treating physician is not an expert whose reports are excludable under the work product rule of Code of Civil Procedure Article 1424.<sup>305</sup>

As stated in Louisiana Revised Statute 37:1278.1, a physician may not use the physician-patient privilege to refuse to reply to a lawful subpoena of the Louisiana State Board of Medical Examiners for “medical information, testimony, records, data, reports or other documents, tangible items, or information relative to any patient treated by such physician under investigation.”<sup>306</sup> In return, the Board is required to keep confidential and deem privileged the name of any patient referenced within the information provided to the Board.<sup>307</sup>

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

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

Code of Civil Procedure Article 1351 provides the method for compelling testimony of a non-party witness, including the treating physician, at hearings or trials. To compel testimony, a subpoena is issued under seal of the court and shall state the name of the court, title of the action, and command attendance of witness at a specified place and time.<sup>308</sup> A non-party witness, who resides in or is employed

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<sup>304</sup> LA. REV. STAT. ANN. § 13:3734(E) (2009).

<sup>305</sup> Hoerner v. Anco Insulations, Inc., 1998-1398 (La.App. 4 Cir. 2/3/99), 729 So.2d 640, 644.

<sup>306</sup> LA. REV. STAT. ANN. § 37:1278.1 (2009).

<sup>307</sup> *Id.*

<sup>308</sup> LA. CODE OF CIV. PROC. ANN. art. 1351 (2009).

in Louisiana, may be subpoenaed to attend a trial or hearing anywhere in the state.<sup>309</sup> Additionally, a subpoena duces tecum may be used to order a person to appear and produce at a trial or hearing certain documents, things, or electronically stored information within their possession.<sup>310</sup> It is not error for a trial court to fail to require plaintiff's treating physicians to testify at trial if no subpoena was sought to compel physicians' attendance.<sup>311</sup>

Code of Civil Procedure Article 1436 provides the method for obtaining the deposition testimony of non-party witnesses. A witness who is a Louisiana resident may only be required to attend a deposition in the parish in which he resides, is employed, or transacts business, or at a place fixed by the court.<sup>312</sup> A nonresident witness may be compelled to attend a deposition only in the parish in which he is served with a subpoena or at a place fixed by the court.<sup>313</sup> Attendance of a witness at a deposition may be compelled with a subpoena as is used for trials.<sup>314</sup> A treating physician who fails to attend his noticed deposition in violation of a validly-issued subpoena may be held in constructive contempt of court and fined.<sup>315</sup>

## **B. Witness Fee Requirements and Limits**

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

Revised Statute 13:3666 empowers the court to fix the compensation for trial testimony of all expert witnesses, including physicians, and the reasonable and necessary costs of medical reports and hospital records. In setting the amount, the court considers the value of the doctor's time and the degree of learning or skill required to give that testimony.<sup>316</sup> The court hears evidence regarding the amount either out of the presence of the jury at trial on the matter or through a rule to show cause brought by the party

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<sup>309</sup> LA. CODE OF CIV. PROC. ANN. art. 1352 (2009).

<sup>310</sup> LA. CODE OF CIV. PROC. ANN. art. 1354 (2009).

<sup>311</sup> *Thompson v. Macy's East South, Inc.*, 2002-1163, p. 2-3 (La.App. 4 Cir. 11/20/02), 833 So.2d 433, 435.

<sup>312</sup> LA. CODE CIV. PROC. ANN. art. 1436 (2009).

<sup>313</sup> *Id.*

<sup>314</sup> LA. CODE CIV. PROC. ANN. art. 1437 (2009).

<sup>315</sup> *Bernard, et al. v. State Farm Mut. Auto Ins. Co.*, 1998-2509, p. 10 (La.App. 4 Cir. 6/30/99), 742 So.2d 609, 614.

<sup>316</sup> LA. REV. STAT. ANN. § 13:3666(A) (2009).

in whose favor judgment was granted.<sup>317</sup> The expert fee will be taxed as costs to be paid by the party who is cast in judgment.<sup>318</sup>

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<sup>317</sup> LA. REV. STAT. ANN. § 13:3666(B)(1)-(2) (2009).

<sup>318</sup> *Id.*

## 2. Case Law

Expert witnesses are entitled to reasonable payment for court appearances and for their preparatory work.<sup>319</sup> In setting the amount for the expert fee, the trial judge is not bound by the amount charged by the expert witness.<sup>320</sup> Because the trial court is vested with the discretion to fix expert witness fees, the award of such fees should not be disturbed on appeal without an abuse of discretion.<sup>321</sup> Furthermore, it is impermissible for an additional expert witness fee to be disguised as a medical expense.<sup>322</sup>

The trial judge will use a number of factors for consideration when setting the expert witness fee, such as: the time the expert spent preparing for and testifying at trial, time spent away from regular duties while waiting to testify, the nature and extent of the work performed, and the knowledge and skill of the expert.<sup>323</sup> Other factors are the helpfulness of the expert's report and trial testimony, the complexity of the problem considered by the expert, the amount in controversy, and awards to experts in similar cases.<sup>324</sup>

If a plaintiff loses on a claim supported by a physician's testimony, the defendant will not be held liable for the fee of that expert.<sup>325</sup>

### C. Local Custom and Practice

During a pretrial scheduling conference, the trial court judge has the discretion to limit the scope and/or use of an expert witness's testimony.<sup>326</sup>

The testimonies of different experts may be given different credibility depending on the experts' qualifications and facts upon which their opinions are based.<sup>327</sup> The jurisprudential rule is that the

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<sup>319</sup> *Allstate Enter., Inc. v. Brown*, 39,467, p. 18 (La. App. 2 Cir. 6/29/05), 907 So.2d 904, 917.

<sup>320</sup> *Allstate Enter., Inc.*, 907 So.2d at 917.

<sup>321</sup> *Landry v. Central Industries, Inc.*, 592 So.2d 478, 483 (La. App. 3 Cir.,1991), *writ den.* 593 So.2d 381 (La. 1992) *citing Pitts v. Bailes*, 551 So.2d 1363 (La. App. 3 Cir.1989), *writ den.*, 553 So.2d 860 (La.1989), *writ den.*, 556 So.2d 1262 (La.1990).

<sup>322</sup> *Hooper v. Wilkinson*, 252 So.2d 137, 142 (La. App. 3 Cir. 1971).

<sup>323</sup> *Allstate Enter., Inc.*, 907 So.2d at 917.

<sup>324</sup> *Id.*, *citing Hammock v. Louisiana State Univ. Med. Ctr. in Shreveport*, 34,086 (La. App. 2 Cir. 11/1/00), 772 So.2d 306, *and Smith v. Scott*, 26,849 (La. App. 2 Cir.5/10/95), 655 So.2d 582, *writ den.*, 95-1450 (La. 9/22/95), 660 So.2d 475.

<sup>325</sup> *Adamson v. Westinghouse Elec. Corp.*, 236 So.2d 556, 561 (La.App. 4 Cir. 1970).

<sup>326</sup> LA. CODE CIV. PROC. ANN. art. 1551(A)(5) (2009).

<sup>327</sup> *Ponthier v. Vulcan Foundry, Inc.*, 95-1343, p. 3-4 (La. App. 1 Cir. 2/23/96), 668 So.2d 1315, 1317.

testimony of treating physicians and specialists are presumed to carry more weight than that of non-treating physicians and general practitioners.<sup>328</sup> Still, the trial judge is not required to accept the testimony of an expert who is presumed to carry more weight if the judge does not find that expert's opinion as credible as the opinions of other experts. *Id.*

And lastly, it is a matter of established Louisiana jurisprudence that when plaintiffs do not provide a sufficient explanation for not presenting the testimony of their treating physician, there is a presumption that the testimony would have been unfavorable to that plaintiff.<sup>329</sup>

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<sup>328</sup> *Id.*, citing Orgeron, 636 So.2d at 1041; and Henbest v. Travelers Ins. Co., 235 So.2d 430, 432 (La. App. 2 Cir.1970).

<sup>329</sup> Chatelain v. U.S. Fid. and Guar. Co., 495 So.2d 379, 383-84 (La. App. 3 Cir. 1986), citing Mills v. Sentry Ins. Co., 463 So.2d 20 (La. App. 5 Cir.1985), *writ den.*, 464 So.2d 1383 (La. 1985).