

## NORTH CAROLINA

Van Horger (Columbia office)  
Karen Wilson  
**NELSON MULLINS RILEY & SCARBOROUGH, LLP**  
Bank of America Corporate Center  
42nd Floor  
100 North Tryon Street  
Charlotte, NC 28202-4007  
Tel: 704.417.3112  
Fax: 704.377.4814  
karen.wilson@nelsonmullins.com  
www.nelsonmullins.com

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### I. MEDICAL EXPENSES

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

##### 1. Past Medical Expenses

North Carolina courts have held that medical bills are admissible where lay and medical testimony of causation is provided. *Smith v. Pass*, 382 S.E.2d 781, 788 (N.C. 1989). “[T]he treatment for which charges are incurred must be reasonably necessary, and the charges must be reasonable in amount.” *Chamberlain v. Thames*, 717, 509 S.E.2d 443, 450 (N.C. 1998). “[I]t remains entirely within the province of the jury to determine whether certain medical treatment was reasonably necessary.” *Jacobsen v. McMillan*, 476 S.E.2d 368, 372 (N.C. 1996).

##### 2. Future Medical Expenses

Before a jury may consider permanence of injuries as an element of damages in North Carolina, there must be evidence tending to show:

[T]he permanency of the injury and that it proximately resulted from the wrongful act with reasonable certainty. While absolute certainty of the permanency of the injury and that it proximately resulted from the wrongful act need not be shown to support an instruction thereon, no such instruction should be given where the evidence respecting permanency and that it proximately resulted from the wrongful act is purely speculative or conjectural.

*Collins v. St. George Physical Therapy*, 539 S.E.2d 356, 358 (N.C. Ct. App. 2000) (citing *Short v. Chapman*, 136 S.E.2d 40, 47 (N.C. 1964).)

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

It is well established in North Carolina that evidence of a plaintiff's receipt of benefits for his or her injury or disability from sources collateral to defendant generally is not admissible. *White v. Lowery*, 352 S.E.2d 866, 868 (N.C. Ct. App. 1987). North Carolina courts have invoked this doctrine to exclude evidence of workers' compensation benefits, *Spivey v. Wilcox Company*, 141 S.E.2d 808 (N.C. 1965); evidence that plaintiff's medical expenses had been paid by his employer as the result of hospital insurance carried for the benefit of its employees, *Young v. R.R.*, 146 S.E.2d 441 (N.C. 1966); and evidence that plaintiff received sick leave pay, *Fisher v. Thompson*, 275 S.E.2d 507 (N.C. 1981); *Marley v. Gantt*, 323 S.E.2d 725 (N.C. 1984).

North Carolina courts have held that evidence of a collateral source may be admissible if it is offered for a legitimate purpose. *See Dew v. Hronjak*, 179 N.C.App. 434, 673 S.E.2d 415 (Table) (N.C. Ct. App. 2006). Additionally, North Carolina courts typically only apply the collateral source rule in tort cases. *Wilson v. Burch Farms, Inc.*, 627 S.E.2d 249, 257 (N.C. Ct. App. 2006).

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

North Carolina has not addressed the treatment of write-downs and write-offs.

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

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

Section 8-53 of the North Carolina General Statutes provides that “[n]o person, duly authorized to practice physic or surgery, shall be required to disclose any information which he may have acquired in attending a patient in a professional character, and which information was necessary to enable him to prescribe for such patient ... or to do any act for him as a surgeon[.]” N.C. Gen.Stat. § 8-53 (2005). Medical records are covered by the statute to the extent that the records contain entries made by physicians and surgeons, or under their direction, that include information and communications obtained by the doctor for the purpose of providing care to the patient. *Sims v. Charlotte Liberty Mut. Ins. Co.*, 125 S.E.2d 326, 331 (N.C. 1962).

The physician-patient privilege is strictly construed and the patient bears the burden of establishing the existence of the privilege and objecting to the introduction of evidence covered by the privilege. *Mims v. Wright*, 578 S.E.2d 606, 609 (N.C. 2003). The physician-patient privilege is not an absolute privilege, and it is in the trial court's discretion to compel the production of evidence that may be protected by the privilege if the evidence is needed for a proper administration of justice. See N.C. Gen.Stat. § 8-53. "Judges should not hesitate to require the disclosure where it appears to them to be necessary in order that the truth be known and justice be done." *Sims*, 125 S.E.2d at 331.

North Carolina courts have ruled that implied waivers occur where: the patient fails to object to testimony on the privileged matter; the patient herself calls the physician as a witness and examines him as to the patient's physical condition; or the patient testifies to the communication between herself and the physician. *Mims v. Wright*, 578 S.E.2d 606, 609 (N.C. Ct. App. 2003); *Capps v. Lynch*, 116 S.E.2d 137, 141 (N.C. 1960). Subsequent case law has also recognized an implied waiver where a patient, by bringing an action, counterclaim, or defense, directly placed her medical condition at issue. See *Jones v. Asheville Radiological Grp.*, 518 S.E.2d 528, 535 (N.C. 1999) (Walker, J., dissenting in part) (citing *Cates v. Wilson*, 321 N.C. 1, 17, 361 S.E.2d 734, 744 (1987) (Mitchell, J., concurring in the result)), rev'd, 524 S.E.2d 804 (2000) (per curiam).

However, even if the physician-patient privilege is waived, "the confidential nature of the physician-patient relationship remains, even though medical information is then subject to discovery." *Crist v. Moffatt*, 389 S.E.2d 41, 46 (N.C. 1990). Thus, plaintiff's waiver of the physician-patient privilege is not equal to an authorization of ex parte contact with a nonparty treating physician.

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

North Carolina courts have not yet addressed this issue.

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

The Supreme Court of North Carolina has held that "defense counsel may not interview plaintiff's nonparty treating physician privately without plaintiff's express consent." *Crist v. Moffatt*, 389

S.E.2d 41, 46 (N.C. 1990). The *Crist* court noted, however, that in so holding, it did not intend to discourage consensual informal discovery. *Id.* at 47-48.

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

North Carolina courts recognize generally that disclosure of physician-patient confidences is a decision made in the discretion of the trial judge. *State v. Smith*, 496 S.E.2d 357, 362 (1998). However, this rule has never been applied to authorize ex parte communications with plaintiff's nonparty treating physician.

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

In practice, North Carolina attorneys strictly adhere to the rule restricting direct communication with treating physicians. However, local lawyers acknowledge that the rules leave other means by which to obtain information from treating physicians, as described in section II above. Attorneys can of course subpoena and depose treating physicians. Additionally, defense attorneys can obtain the consent of the plaintiff to communicate directly with the treating physician. Local attorneys state that in practice, it is very rare to obtain such consent from a plaintiff in a malpractice action. However, in other types of cases involving treating physicians, plaintiffs will consent to such direct communication on a case by case basis.

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

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

Once a plaintiff has waived physician-patient privilege, defendants may utilize the statutorily recognized methods of discovery, as contained in the North Carolina Rules of Civil Procedure.

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

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

In relevant part, North Carolina General Statute § 7A-314 provides that "a witness under subpoena, bound over, or recognized....shall be entitled to receive five dollars (\$5.00) per day, or fraction thereof, during his attendance, which...must be certified to the clerk of superior court." N.C. Gen. Stat. § 7A-314(a) (2005).

If the witness resides "outside the county of appearance, but within 75 miles of the place of appearance...[the witness] shall be entitled to receive mileage reimbursement at the rate currently authorized for State employees, for each mile necessarily traveled from his place of residence to the place of appearance and return, each day." N.C. Gen. Stat. § 7A-314(b)(1) (2005). However, if the witness's residence is "outside the county of appearance and more than 75 miles from the place of appearance...[the witness] shall be entitled to receive mileage reimbursement at the rate currently authorized State employees for one round-trip from his place of residence to the place of appearance. A witness required to appear more than one day shall be entitled to receive reimbursement for actual expenses incurred for lodging and meals not to exceed the maximum currently authorized for State employees, in lieu of daily mileage." N.C. Gen. Stat. § 7A-314(b)(2) (2005).

In regards to expert witnesses, North Carolina General Statute § 7A-314(d) allows a court to increase an expert witness's compensation beyond the amount provided for in § 7A-314(a) and (b), as it provides that "[a]n expert witness... shall receive such compensation and allowances as the court,...in its discretion, may authorize." N.C. Gen. Stat. § 7A-314(d) (2005).

Additionally, § 7A-314(e) prevents redundancy in the application of witness fees to duplicative testimony, as it provides that "[i]f more than two witnesses are subpoenaed...to prove a single material fact, the expense for the additional witnesses shall be borne by the party issuing or requesting the subpoena." N.C. Gen. Stat. § 7A-314(e) (2005).

## **2. Case Law**

Like all witnesses, it is imperative that a non-party treating physician be subpoenaed, as the North Carolina Courts have consistently held that "only witnesses who have been subpoenaed may be compensated." *Overton v. Purvis*, 162 N.C. App. 241, 250, 591 S.E.2d 18, 25 (Ct. App. 2004); *See also Greene v. Hoekstra*, 189 N.C. App. 179, 657 S.E.2d 415 (2008); *Holtman v. Reese*, 119 N.C. App. 747, 752, 460 S.E.2d 338, 342 (Ct. App. 1995).

Likewise, the uniform witness fees and travel expenses for all witnesses, which are set forth in § 7A-314(a) and (b), apply to non-party treating physicians. The North Carolina Courts have explained the

statutory scheme, stating that "[w]itnesses who qualify for the uniform fee under section (a) are also entitled to reimbursement for travel expenses. N.C. Gen. Stat. § 7A-314(b) (2005). The amount of travel reimbursement depends on the distance of the witness' residence from the place of appearance and the current mileage reimbursement rate for state employees. *Id.* Some witnesses are also entitled to reimbursement for their actual lodging and meal expenses. N.C. Gen. Stat. § 7A-314." *Priest v. Safety-Kleen Systems, Inc.*, 663 S.E.2d 351, 355 (N.C. Ct. App. 2008). However, it is noteworthy that although the Courts sometimes describe the fees in § 7A-314(a) and (b) as being "mandatory," and the language in the sections are to that effect, case law exists which indicates that parties seeking an award of such fees can be denied them if they fail to request them in their motions, argue that they are entitled to them in their briefs, or fail to certify the uniform fees to the clerk of superior court as required by § 7A-314(a); *Id.*, at 355-356.

It is conceivable that a patient may have had more than one non-party treating physician. In such circumstances, at most two treating physicians should be called to prove a single material fact regarding the patient's treatment, as the witness fees associated with calling any additional physicians to prove that same material fact will be borne by the party issuing or requesting the subpoena. *Morgan v. Steiner*, 173 N.C. App. 577, 619 S.E.2d 516 (2005) (applying N.C.G.S. § 7A-314(e) and holding that a doctor and his practice were not entitled to award of costs for witness fees for third expert witness in medical malpractice action, where witness was third expert subpoenaed to prove single material fact).

In determining the amount of witness fees for a non-party treating physician, the type of testimony being offered becomes relevant, as North Carolina case law indicates that it is possible for a non-party treating physician to testify not only as an ordinary fact witness (i.e. a lay witness), but also as an expert witness. *Turner v. Duke University*, 381 S.E.2d 706, 325 N.C. 152 (N.C. 1989); *Lail ex rel. Lail v. Bowman-Gray School of Medicine*, 675 S.E.2d 370, 376-377 (2009) (holding that it reads "the "treating physician exception" to be a bright line exception-either the physician is a treating physician, or he is not," yet appearing to acknowledge, at least as an assumption for the sake of argument, that "there could be some searching inquiry which would divide a treating physician's testimony into admissible

“treating physician” opinion and inadmissible “expert” opinion, [although] none of the [physician's] testimony" before the Court fell outside of his role as a treating physician.) The North Carolina Supreme Court has explained the distinction between the two categorizations, finding that "[w]here a doctor is or was the plaintiff's treating physician and is called to testify not about the standard of the plaintiff's care but rather about the plaintiff's treatment and the doctor's choice of surgical procedures, he is not an expert witness." *Turner*, at 716. Additionally, that a treating physician was not retained for the purpose of litigation, personally treated the patient, and acquired knowledge regarding the patient's case before litigation arose, is further indication that the treating physician is an ordinary fact witness, as opposed to an expert. *Id.*

If a non-party treating physician provides expert testimony such that he becomes an "expert witness" within the meaning of the case law discussed above, presumably North Carolina General Statute § 7A-314(d) would apply. The North Carolina Courts have explained that "[s]ection (d) modifies Section (a) by permitting the court, in its discretion, to increase...[expert witnesses'] compensation and allowances." *Priest v. Safety-Kleen Systems, Inc.*, 191 N.C. App. 341, 663 S.E.2d 351 (N.C. Ct. App. 2008); *State v. Johnson*, 282 N.C. 1, 27-28, 191 S.E.2d 641, 659 (N.C. 1972). In fact, the decision as to whether to award expert witness fees at all lies within the court's discretion. *Blackmon v. Bumgardner*, 135 N.C. App. 125, 132, 519 S.E.2d 335, 340 (N.C. 1999). It is also noteworthy that in deciding whether to award expert witness fees, the court will look at the substance of the expert witness's testimony, as the North Carolina Courts have held that expert witness fees "may be awarded only if the witness' testimony was material and competent." *Williams v. Boylan-Pearce, Inc.*, 317 S.E.2d 17, 21, 69 N.C. App. 315, 321 (1984); *City of Charlotte v. McNeely*, 281 N.C. 684, 190 S.E.2d 179 (1972).

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

North Carolina lawyers look to the statutes to determine witness fees as appropriate. However, North Carolina practitioners also work together to come to mutually agreeable arrangements with regard to expert witnesses and special witness needs.