

SOUTH CAROLINA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

Under South Carolina law, in order to recover for past medical expenses, a plaintiff must prove that the defendant's act proximately caused the plaintiff's injuries.⁴⁶² "Expert testimony is not required to prove proximate cause if the common knowledge or experience of a layperson is extensive enough,"⁴⁶³ and, "as a broad general rule, any evidence which tends to establish the nature, character, and extent of injuries which are the natural and proximate consequences of defendant's acts is admissible, if otherwise competent."⁴⁶⁴ Conversely, when the issue of whether an injury was proximately caused by the defendant's alleged wrongful conduct is beyond the ken of the average lay person, expert testimony is necessary.⁴⁶⁵ "When one relies solely upon the opinion of medical experts to establish a causal connection . . . the experts must, with reasonable certainty, state that in their professional opinion, the injuries complained of most probably resulted from the defendant's negligence."⁴⁶⁶

⁴⁶² See, e.g., *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998).

⁴⁶³ *O'Leary-Payne v. R.R. Hilton Head, II, Inc.*, 371 S.C. 340, 349, 638 S.E.2d 96, 101 (Ct. App. 2006).

⁴⁶⁴ *Pearson v. Bridges, M.D.*, 337 S.C. 524, 530, 524 S.E.2d 108, 111 (Ct. App. 1999) (citation omitted).

⁴⁶⁵ See, e.g., *Gambrell v. Burlison*, 252 S.C. 98, 105-106, 165 S.E.2d 622, 625 (1969) (holding that an injured plaintiff complaining of an ailment several years after the injury is required to offer expert causation testimony in order to recover).

⁴⁶⁶ *Ellis v. Oliver*, 323 S.C. 121, 125, 473 S.E.2d 793, 795 (1996) (holding that the trial court did not err in permitting the plaintiff's expert to go line by line through the plaintiff's medical bills and give his expert opinion as to which medical expenses were proximately caused by the defendant's negligence).

“A plaintiff in a personal injury action seeking damages for the cost of medical services provided to him as a result of a tortfeasor’s wrongdoing is entitled to recover the reasonable value of those medical services, not necessarily the amount paid.”⁴⁶⁷ Despite the fact that “the amount paid may be relevant in determining the reasonable value of those services, the trier of fact must look to a variety of other factors in making such a finding.”⁴⁶⁸ “Among those factors to be considered by the jury are the amount billed to the plaintiff, and the relative market value of those services.”⁴⁶⁹ “Clearly, the amount paid for medical services does not alone determine the reasonable value of those medical services.”⁴⁷⁰

2. Future Medical Expenses

In order “[t]o recover for future medical expenses [in South Carolina], the expenses must be established with reasonable certainty.”⁴⁷¹ “Oftentimes a verdict involving future damages must be approximated,” and the jury is allowed wide latitude in making an approximation.⁴⁷² South Carolina’s appellate courts have held that this is a lower standard than the “most probable standard” used for proximate causation.⁴⁷³ To the extent a claim for medical monitoring can be construed as a claim for future medical expenses, “South Carolina has not recognized a cause of action for medical monitoring.”⁴⁷⁴

3. Minors’ and Parents’ Rights to Recover Past and Future Medical Expenses

“Ordinarily, the parents of an injured child have the right to bring an action against the tortfeasor for expenses incurred in caring for the child.”⁴⁷⁵ However, “the amount paid for medical care and treatment by the parent is not an element of damage” for a child; instead, “the parent has a cause of action

⁴⁶⁷ *Haselden v. Davis*, 353 S.C. 481, 484, 579 S.E.2d 293, 295 (2003) (citing 22 Am. Jur. 2d *Damages*, § 198 (1988)); see also *Mitchell v. Fortis Ins. Co.*, Op. No. 26718, 385 S.C. 570, 595-96, 686 S.E.2d 176, 189 (2009) (holding the trial court did not err in permitting the jury to evaluate the value of the plaintiff’s medical care in assessing damages despite the fact that the plaintiff received the medical care for free).

⁴⁶⁸ *Haselden*, 353 S.C. at 484, 579 S.E.2d at 295.

⁴⁶⁹ *Id.* (citing *Kashner v. Geisinger Clinic*, 432 Pa. Super. 361, 638 A.2d 980 (Pa. 1994)).

⁴⁷⁰ *Haselden*, 353 S.C. at 484, 579 S.E.2d at 295 (citing, *inter alia*, RESTATEMENT (SECOND) OF TORTS § 924 cmt. f (1979) (“The value of medical services made necessary by the tort can ordinarily be recovered although they have created no liability or expense to injured person, as when a physician donates his services.”)).

⁴⁷¹ *Campbell v. Paschal*, 290 S.C. 1, 15, 347 S.E.2d 892, 901 (Ct. App. 1986) (citations omitted). In personal injury cases, however, “[a] party need not . . . prove future damages . . . to a mathematical certainty.” *Campbell*, 290 S.C. at 15, 347 S.E.2d at 901 (citation omitted); see also *Pearson*, 337 S.C. at 530, 524 S.E.2d at 111.

⁴⁷² *Pearson*, 337 S.C. at 530, 524 S.E.2d at 111 (Ct. App. 1999) (internal quotations and citations omitted).

⁴⁷³ See *Pearson*, 337 S.C. at 530, 524 S.E.2d at 111.

⁴⁷⁴ *Rosmer v. Pfizer, Inc.*, No. 9:99-2280-18RB, 2001 U.S. Dist. LEXIS 6678, at *15 (D.S.C. March 30, 2001).

⁴⁷⁵ *Endres v. Greenville Hosp. Sys.*, 312 S.C. 64, 66, 439 S.E.2d 261, 262 (1993) (citations omitted).

for the recovery of the medical expenses which he has incurred for the care and treatment of such minor,” and the minor child may maintain a cause of action as to all other damages.⁴⁷⁶

B. Collateral Source Rule and Exceptions

Under the collateral source rule in South Carolina, “compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer.”⁴⁷⁷ The only requirement for qualification as a collateral source is that the source be “wholly independent of the wrongdoer.”⁴⁷⁸ A source is wholly independent of the wrongdoer when (1) the wrongdoer has not contributed to it, and (2) payments to the injured party were not made on behalf of the wrongdoer.⁴⁷⁹ Additionally, the South Carolina collateral source rule applies to unemployment benefits, and it precludes a reduction in a plaintiff’s damages for disability payments from an employer, including workers’ compensation benefits.⁴⁸⁰

C. Treatment of Write-downs and Write-offs

3. Medicaid

The South Carolina Supreme Court has expressly stated that “the collateral source rule applies to Medicaid payments” such that the amount a plaintiff is billed by her medical provider may be recoverable as compensatory damages, despite the fact that the Plaintiff’s Medicaid may have paid a lower amount.⁴⁸¹ The court reasoned as follows: “[s]ince [Medicaid] is a ‘wholly independent’ collateral source, [a plaintiff’s] damages are not limited by the amounts paid by Medicaid.”⁴⁸² The court made clear that it was “cognizant that several courts hold that the amount paid by Medicaid (or similar programs) is dispositive of the reasonable value of medical services” and that the “basis for these cases appears to be that to allow a plaintiff to claim the billed amount, as opposed to the paid amount, would result in a

⁴⁷⁶ *Hughey v. Ausborn*, 249 S.C. 470, 475, 154 S.E.2d 839, 841 (1967) (citations omitted).

⁴⁷⁷ *Citizens & S. Nat’l Bank of S.C. v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995).

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* (citations omitted); see also *Mount v. Sea Pines Co., Inc.*, 337 S.C. 355, 357, 523 S.E.2d 464, 465 (Ct. App. 1999).

⁴⁸⁰ See *Dixon v. Besco Eng’g, Inc.*, 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995) (unemployment benefits); *Schenk v. Nat’l Health Care, Inc.*, 322 S.C. 316, 321, 471 S.E.2d 736, 738 (Ct. App. 1996) (same); *Powers v. Temple*, 250 S.C. 149, 156 S.E.2d 759 (1967) (worker’s comp).

⁴⁸¹ *Haselden*, 353 S.C. at 483, 579 S.E.2d at 294, n.3 (citing several foreign cases).

⁴⁸² *Id.* at 483, 579 S.E.2d at 294, n.3.

windfall.”⁴⁸³ However, the court rejected that line of cases, holding that their rationale was “contrary to the purposes behind the collateral source rule and would result in a windfall to the defendant tortfeasor.”⁴⁸⁴

2. Medicare

Although no South Carolina court has specifically addressed the issue of write downs in regard to Medicare, the dissenting Justice in *Haselden*, while stating that he would not subject the collateral source rule to Medicaid, admitted that he “would limit this . . . holding to Medicaid because of its unique attributes without deciding whether an individual who has purchased medical insurance and paid premiums, *through a private insurer or the Medicare system*, should be allowed to introduce evidence of write-offs which may be a part of the benefit of their bargain.”⁴⁸⁵ Thus, it seems likely that South Carolina courts would treat Medicare payments in the same manner that they have treated Medicaid payments.

3. Private Insurance

As set forth above, the collateral source rule has been applied in numerous circumstances to exclude evidence of benefits or payments made by “wholly independent” third parties, including insurance carriers and other insurance-like programs.⁴⁸⁶ However, those cases notwithstanding, the South Carolina Court of Appeals has held that the collateral source rule does not preclude a set-off of medical payments made on plaintiff’s behalf by the *defendant’s* insurer.⁴⁸⁷ The court in *Mount* reasoned that

⁴⁸³ *Id.* at 485, 579 S.E.2d at 295 (citations omitted).

⁴⁸⁴ *Haselden*, 353 S.C. at 485, 579 S.E.2d at 295.

⁴⁸⁵ *Id.* at 488, 579 S.E.2d at 297, n.5 (Burnett, J., dissenting) (emphasis added).

⁴⁸⁶ See *Rattenni v. Grainger*, 298 S.C. 276, 277-78, 379 S.E.2d 890, 890 (1989) (holding that the collateral source rule applies to insurance proceeds); *Johnston v. Aiken Auto Parts*, 311 S.C. 285, 287, 428 S.E.2d 737, 738 (Ct. App. 1993) (holding that the collateral source rule barred evidence related to repayment of vacation refund); *Citizens & S. Nat’l Bank of S.C. v. Gregory*, 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (holding that collateral source rule precluded consideration of any amount recovered on a guaranty agreement); *Pustaver v. Gooden*, 350 S.C. 409, 414, 566 S.E.2d 199, 201-02 (Ct. App. 2002) (holding that underinsured motorist benefits were subject to collateral source rule).

⁴⁸⁷ See *Mount v. Sea Pines Co., Inc.*, 337 S.C. 355, 357-58, 523 S.E.2d 464, 465 (Ct. App. 1999).

because the defendant paid premiums to the insurer, the insurer was not “wholly independent” of the defendant.⁴⁸⁸

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

A. Scope of Physician-Patient Privilege and Waiver

South Carolina does not recognize the physician-patient testimonial privilege.⁴⁸⁹ As the South Carolina Court of Appeals has explained:

At common law, neither the patient nor the physician has the privilege to refuse to disclose in court a communication of one to the other, nor does either have a privilege that the communication not be disclosed to a third person. 61 Am.Jur.2d *Physicians, Surgeons, and Other Healers* §§ 148, 169 (1981). Although several states have statutorily created a “physician-patient testimonial privilege,” South Carolina has not enacted a similar statute and does not recognize the physician-patient privilege. *See Peagler v. Atlantic Coast Line R.R. Co.*, 232 S.C. 274, 282-83, 101 S.E.2d 821, 825 (1958) (noting statutes have been enacted in most states making communications between a physician and patient privileged from compulsory disclosure, but there is no such statute in South Carolina).⁴⁹⁰

Despite there being no physician-patient privilege in South Carolina, state courts have created law directed toward protecting patient confidences.⁴⁹¹ In a companion case to *McCormick* (issued the same day), the court further stated that “[t]he terms ‘privilege’ and ‘confidences’ are not synonymous, and a professional’s duty to maintain his client’s confidences is independent of the issue whether he can be legally compelled to reveal some or all of those confidences, that is, whether those communications are privileged.”⁴⁹² Thus, “the law does recognize an action against a physician for the disclosure of confidential information, *unless* the disclosure is compelled by law or consented to by the patient.”⁴⁹³ Additionally, a plaintiff may “implicitly consent[] to the disclosure of her medical condition” by involving third parties in the various stages of her medical treatment.⁴⁹⁴

⁴⁸⁸ *Id.*

⁴⁸⁹ *McCormick v. England*, 328 S.C. 627, 635-40, 494 S.E.2d 431, 435-37 (Ct. App. 1997); *see also Aakjer v. Spagnoli*, 291 S.C. 165, 173, 352 S.E.2d 503, 508 (Ct. App. 1987).

⁴⁹⁰ *Snavelly v. AMISUB of South Carolina, Inc.*, 379 S.C. 386, 393, 665 S.E.2d 222, 225, n.5 (Ct. App. 2008).

⁴⁹¹ *See McCormick*, 328 S.C. at 640, 494 S.E.2d at 437 (recognizing for the first time that “an actionable tort lies for a physician’s breach of the duty to maintain the confidences of his or her patient in the absence of a compelling public interest or other justification for the disclosure”).

⁴⁹² *S.C. State Board of Medical Examiners v. Hedgepath*, 325 S.C. 166, 169, 480 S.E.2d 724, 726 (1997).

⁴⁹³ *Snavelly*, 379 S.C. at 393, 665 S.E.2d at 225 (citing *McCormick*, 328 S.C. at 635-40, 494 S.E.2d at 435-37).

⁴⁹⁴ *Id.* at 393, 665 S.E.2d at 225.

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

There is no testimonial physician-patient privilege in South Carolina, and no South Carolina state court has addressed HIPAA.⁴⁹⁵ However, the South Carolina Code provides that communications between clients and their licensed professional counselors or marriage and family therapists “are considered privileged as provided in Section 19-11-95.”⁴⁹⁶ Thus, if a defendant wishes to obtain a plaintiff’s medical records by way of written authorization, the defendant should ensure that an authorization complies with both HIPAA and state law.

C. Authorization of *Ex Parte*⁴⁹⁷ Physician Communication by Plaintiff

South Carolina has recognized that “policy considerations of patient privacy, physician-patient confidences, and the adequacy of formal discovery methods” make *ex parte* communications with a claimant’s physician or healthcare provider improper in the worker’s compensation context.⁴⁹⁸ Parties wishing to obtain a plaintiff’s medical information from the claimant’s physician must do so “through approved methods of discovery,” and they “may [only] speak with the claimant’s health care provider provided they obtain the claimant’s permission.”⁴⁹⁹ Therefore, a plaintiff may consent to an *ex parte* communication between one of the plaintiff’s treating doctors and an opposing litigant.

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

⁴⁹⁵ One federal court has briefly noted that “HIPAA does not create a private right of action nor does it relate to the distribution of prescription medicines.” *Williams v. Jones*, No. 9:07-CV-3437-MBS-GCK, 2008 U.S. Dist. LEXIS 27395, at *4 (D.S.C. April 4, 2008).

⁴⁹⁶ S.C. Code Ann. § 40-75-190.

⁴⁹⁷ South Carolina courts have corrected litigants that the term “*ex parte* communication” refers solely to communications between a party’s counsel and the court, without the presence of opposing counsel. *See Brown v. BI-LO, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 n.3 (2003) (citing *Black’s Law Dictionary* 597 (7th Ed. 1999)). In practice, then, this term should probably not be used in this context in South Carolina.

⁴⁹⁸ *Brown v. BI-LO, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 n.4 (2003) (defending this principle in a worker’s comp appeal despite a worker’s comp statute ordering physician disclosure of “existing information” to an employer because the plain language of the statute only required disclosure of “existing written records and documents” rather than actual direct communication with the physician).

⁴⁹⁹ *Id.* at 440, 581 S.E.2d at 838. Because the South Carolina Supreme Court recognized this principle in the worker’s comp context, in which the goal is “to settle claims quickly and efficiently,” *BI-LO*, 354 S.C. at 441, 581 S.E.2d at 839 (Pleicones, J., dissenting) (citing *Parker v. Williams and Madjanik, Inc.*, 275 S.C. 65, 70, 267 S.E.2d 524, 526 (1980)), and in spite of a statute requiring disclosure of a claimant’s medical information to his or her employer, it seems likely that South Carolina courts would also recognize this principle in civil litigation.

There is no decision from a South Carolina appellate court addressing whether a plaintiff can be ordered to provide authorizations allowing the plaintiff's doctors to speak with opposing litigants or their counsel. The South Carolina Supreme Court in *BI-LO* rejected the decision of both the Workers' Compensation Commission and the Court of Appeals that the claimant was required to permit her physician to speak directly with a medical representative from her employer about her injuries to promote "swift and sure compensation," which is clearly one of the goals of the Workers' Compensation Act.⁵⁰⁰ Although the Court based its rationale on statutory construction, the case appears to show the Court's tendency to favor the policy considerations behind respecting physician-patient confidentiality, despite the practical reasons behind holding otherwise.⁵⁰¹ Thus, it appears that courts in South Carolina would be reluctant to permit communications with a litigant's physician outside of the presence of the litigant and outside the realm of ordinary discovery.⁵⁰²

E. Local Practice Pointers

Although there is no physician-patient privilege in South Carolina, healthcare providers generally will not release medical records to a litigant without complying with HIPAA. Therefore, when collecting medical records of a plaintiff in a personal injury case, a defendant can either obtain a HIPAA compliant authorization from the plaintiff or send letters to the plaintiff's counsel notifying the plaintiff of the defendant's intent to subpoena the records and providing the plaintiff with the opportunity to object to the subpoena. There are also several statutes in place in South Carolina to protect the privacy of records related to the treatment of mental health and substance abuse.⁵⁰³ Therefore, if a case concerns those issues, it is likely that specific authorizations for the release of those records will be necessary.

Because there is no physician-patient privilege in South Carolina, *ex parte* meetings between a treating doctor and defense counsel used to be a commonplace occurrence in South Carolina. However,

⁵⁰⁰ *BI-LO*, 354 S.C. at 440-41, 581 S.E.2d at 838 (citation omitted).

⁵⁰¹ *See id.* 354 S.C. at 440, 581 S.E.2d at 838 n.4.

⁵⁰² *Id.*

⁵⁰³ *See, e.g.*, S.C. Code Ann. § 19-11-95.

in *McCormick*,⁵⁰⁴ an independent tort was created on behalf of a patient against a doctor who discloses confidences learned during the treatment of the patient. Therefore, *ex parte* meetings rarely take place. Some defense counsel still attempt to obtain meetings with a treating doctor to discuss general topics at issue in a case without discussing anything specific to the plaintiff. Defense counsel should carefully consider whether to engage in such a meeting, and that decision may be influenced by many factors, such as whether the doctor is represented by counsel, whether a joint defense privilege may apply, etc.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

The testimony of a treating physician for deposition or trial in South Carolina may be obtained like any other witness. It should be noted that if a non-party treating physician voluntarily provides an affidavit without a patient's consent, it is possible that the physician may be sanctioned by the State Board of Medical Examiners. *See Hedgepath*, 325 S.C. at 170, 480 S.E.2d at 726 (upholding a decision by the State Board of Medical Examiners that a doctor who voluntarily provided an affidavit to a litigant in breach of his patient's confidences constituted misconduct under S.C. Code Ann. § 40-7-200, Reg. 81-60(D)).

Additionally, Rule 30(i) of the South Carolina Rules of Civil Procedure allows a litigant to take a deposition of a treating healthcare provider for use at trial regardless of whether the provider is considered "available" for trial under Rule 32 of the South Carolina Rules of Civil Procedure. Rule 30(i) provides:

The deposition of any licensed physician, psychologist, chiropractor, osteopathic physician or dentist who provided actual medical treatment to a party may be taken by any party to an action in which the physician, psychologist, chiropractor, osteopathic physician or dentist may be called as a witness, on notice to each party or attorney as provided in the rules. Notwithstanding the provisions of Rule 32(a)(3) regarding the location of a witness, an evidence deposition, otherwise admissible, may be received in evidence at a trial or hearing. . . . Before the evidence deposition, any party may obtain discovery from the witness as permitted by Rule 26. This rule shall not be the exclusive method of obtaining the testimony of the specified health care providers, nor shall the existence of an evidence deposition prevent any party from using any deposition otherwise admissible under Rule 32, or subpoenaing the deposed witness to testify at the trial or hearing. Provided, however, a party who noticed the evidence deposition must

⁵⁰⁴ 328 S.C. at 635-40, 494 S.E.2d at 435-37.

provide 2 days notice of the intent to call the treating health care provider as a witness and once that notice is given, must call that witness unless leave of court is granted.⁵⁰⁵

This rule is an effective vehicle for obtaining medical testimony for trial even if the healthcare provider is technically “available” for trial.

B. Witness Fee Requirements and Limits

The South Carolina Rules of Civil Procedure provide that if a person’s attendance is compelled by subpoena, the party serving the subpoena must tender “to that person the fees for one day's attendance of \$25.00 and the mileage allowed by law for official travel of State officers and employees.”⁵⁰⁶ The identical rule applies to witnesses attending depositions.⁵⁰⁷ Furthermore, “[w]hen the subpoena is issued on behalf of the State of South Carolina or an officer or agency thereof, fees and mileage need not be tendered.”⁵⁰⁸

C. Local Custom and Practice

A litigant in South Carolina can compel a treating physician to give a deposition by serving a subpoena on the doctor, along with a witness fee and mileage if the doctor has to travel. However, as in most jurisdictions, it is customary to schedule the deposition through the doctor's office and to compensate the doctor at the doctor's customary hourly rate.

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⁵⁰⁵ S.C. R. Civ. P. 30(i).

⁵⁰⁶ S.C. R. Civ. P. 45(b)(1). Effective July 1, 2006, the State mileage rate in South Carolina is 44.5 cents per mile. See <http://www.cg.sc.gov/agencyinfo/disbregs/irsrate.htm> (last visited Nov. 5, 2009).

⁵⁰⁷ S.C. R. Civ. P. 30(a)(2). Note that depositions may not be had in any case in South Carolina in which the amount in controversy does not exceed \$10,000.00. S.C. R. Civ. P. 30(a)(2).

⁵⁰⁸ S.C. R. Civ. P. 45(b)(1).