

## ALABAMA

James C. Barton, Jr. and Alan D. Mathis  
**JOHNSTON BARTON PROCTOR & ROSE LLP**  
Colonial Brookwood Center  
569 Brookwood Village, Suite 901  
Birmingham, Alabama 35209  
Telephone: (205) 458-9400  
Facsimile: (205) 458-9500  
jbartonjr@johnstonbarton.com  
amathis@johnstonbarton.com  
www.johnstonbarton.com

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### I. MEDICAL EXPENSES

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

##### 1. Past Medical Expenses

Under Alabama law, plaintiffs may recover past medical expenses incurred as a result of their alleged injuries, so long as those expenses were “reasonable and necessary.” *See, e.g., Ex parte Hicks*, 537 So. 2d 486, 490 (Ala. 1988) (stating the general rule that “plaintiff may recover those medical expenses that are reasonable and necessary”); *Ala. Great Southern R.R. Co. v. Siniard*, 26 So. 689, 691 (Ala. 1898) (holding that the plaintiff “was entitled to recover the amount of fees she had reasonably paid to physicians in treating the wounds the defendant had inflicted upon her”).

The reasonableness and necessity of medical expenses are jury questions—the jury is not obligated to award medical expenses simply because they were incurred. *Leonard v. Steelman*, 693 So. 2d 476, 477 (Ala. Civ. App. 1997). *See also Foodtown Stores, Inc. v. Patterson*, 213 So. 2d 211, 217-18 (Ala. 1968) (remitting award of medical expense damages where plaintiff proved amount of medical expenses, but failed to show that the expenses were reasonable); *Aplin v. Dean*, 164 So. 737, 740 (Ala. 1935) (“If, after proving the amount of the charge, the plaintiff should fail to offer any evidence tending to show hospitalization was necessary, and the charge to be reasonable, the defendants should either move for the exclusion of the testimony as to the charge or bill, at the close of the evidence, or should ask for an affirmative instruction against recovery in that behalf, as in other cases of failure of proof.”)

The plaintiff is not required to prove that he actually paid the medical expenses claimed as damages, but only that he was liable for payment of them. *See, e.g., Roland v. Krazy Glue, Inc.*, 342 So. 2d 383, 385 (Ala. Civ. App. 1977).

In addition to doctor and hospital bills, recoverable medical expenses can include other reasonable and necessary expenses, such as travel expenses and medication expenses. *See, e.g., Smith v. Richardson*, 171 So. 2d 96, 100 (Ala. 1965) (noting that ambulance and drug bills had been “properly shown” at trial).

The Alabama pattern jury instruction pertaining to the recovery of medical expenses in personal injury actions states:

The measure of damages for medical expenses is all reasonable expenses necessarily incurred for doctors’ and medical bills which the plaintiff has paid or become obligated to pay. The reasonableness of, and the necessity for, such expenses are matters for your determination from the evidence.

Ala. Pattern Jury Instructions – Civil § 11.09.

The reasonableness and necessity of medical expenses is generally proved through expert testimony. *See, e.g., Dairyland Ins. Co. v. Jackson*, 566 So. 2d 723, 727 (Ala. 1990) (holding that plaintiff’s treating physician “was well qualified to give an opinion as to whether the care given to [the plaintiff] was necessary and whether the charges for that care appeared to him to be ‘fair and reasonable’”). Indeed, because the reasonableness and necessity of medical expenses are not generally considered to be matters of common knowledge, expert testimony is ordinarily *required* to prove reasonableness and necessity. *See, e.g., Harden v. Ala. Great Southern RR Co.*, 229 So. 2d 803, 805 (Ala. Civ. App. 1969) (finding that “charges of a psychiatrist are not matters of common knowledge, but rather are matters for expert opinion”). This is not always the case, however. *See, e.g., Britling Cafeteria Co., Inc. v. Shotts*, 173 So. 61, 62 (Ala. 1937) (concluding that expert testimony was not required to prove the reasonableness of a \$6.00 doctor’s bill for two visits because common knowledge would indicate that such a charge was reasonable); *Posey v. McCray*, 594 So. 2d 152, 154 (Ala. Civ. App. 1992) (finding that

expert testimony was not required to prove necessity of treatment because it was evident from the injury itself).

Also, copies of hospital records certified and affirmed by the custodian of those records are admissible “without further proof.” *See* Ala. Code §§ 12-21-5 to -7. The certificate of the custodian of records is to include the following language:

I further certify that I am familiar with and know, and knew when made and charged, the reasonable value and price for the various charges made and shown in said hospital records pertaining to [patient] and that said charges are in my judgment just, reasonable and proper and in keeping with those generally charged in the county and community where said hospital is located.

Ala. Code § 12-21-7.

## **2. Future Medical Expenses**

Alabama courts have long held that plaintiffs may recover future medical expenses if their alleged injuries are “permanent or irremediable, or will require future treatment or nursing.” *South & North Ala. R.R. Co. v. McLendon*, 63 Ala. 266, 273 (Ala. 1879). *See also Elba Wood Products, Inc. v. Brackin*, 356 So.2d 119, 126 (Ala. 1978) (“Future medical expenses are a proper element of damages in a personal injury action.”).

When the plaintiff is seeking future medical expenses, the Alabama pattern jury instruction pertaining to the recovery of medical expenses is modified to say:

The measure of damages for medical expenses is all reasonable expenses necessarily incurred for doctors’ and medical bills which the plaintiff has paid or become obligated to pay and the amount of the reasonable expenses of medical care, treatment and services reasonably certain to be required in the future. The reasonableness of, and the necessity for, such expenses are matters for your determination from the evidence.

Ala. Pattern Jury Instructions – Civil § 11.09 (emphasis added).

As with past medical expenses, evidence that claimed future medical expenses are reasonable and necessary is normally shown through expert testimony. *See, e.g., Owens-Corning Fiberglass Corp. v. James*, 646 So. 2d 669, 672 (Ala. 1994).

Although plaintiffs may recover for future medical expenses, it should be noted that Alabama courts have specifically declined to recognize a distinct cause of action for medical monitoring when the

plaintiff does not have a past or present injury. *Hinton v. Monsanto Co.*, 813 So. 2d 827, 830-32 (Ala. 2001) (stating, in response to a certified question from the United States District Court for the Northern District of Alabama, that Alabama law “provides no redress for a plaintiff who has no present injury or illness” and therefore “does not recognize a cause of action for medical monitoring”).

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

At common law, Alabama recognized the collateral source rule and deemed evidence of a plaintiff’s receipt of benefits from sources other than the defendant, such as medical insurance, to be inadmissible. *See, e.g., Ensor v. Wilson*, 519 So. 2d 1244, 1266-67 (Ala. 1987). In 1979 the Alabama legislature modified (as set forth below) the collateral source rule for medical expenses in product liability actions. Ala. Code. § 6-5-522. In 1987 similar provisions were adopted for application in medical malpractice cases, *see* Ala. Code § 6-5-545, and for civil actions generally, *see* Ala. Code § 12-21-45. Despite the existence of these three statutes abrogating the collateral source rule, Alabama law in this area is somewhat murky.

### **1. Product Liability Actions**

The statute applicable to product liability actions abrogates both the evidentiary and damages aspects of the common law collateral source rule. Ala. Code § 6-5-522 (making evidence that medical or hospital expenses have been paid by a collateral source admissible “in mitigation of such medical or hospital expense damages”).

The product liability statute provides that when evidence of such collateral source payments is admitted, the plaintiff is entitled to introduce evidence of the cost of obtaining those payments—that is, insurance premiums, co-pays, and the like. The statute makes the costs of obtaining collateral source payments recoverable as damages. Ala. Code § 6-5-522.

A companion statute applicable to product liability actions provides a mechanism for making evidence of collateral source payments *inadmissible* if the plaintiff can show that he “is obligated to repay the medical or hospital expenses which have been or will be paid or reimbursed.” Ala. Code § 6-5-524. This provision is to protect the right of subrogation of collateral source payors. In essence, if the plaintiff

is obligated to repay collateral source payors, section 6-5-522 does not apply, and the common law collateral source rule remains in effect.

## **2. Medical Malpractice and All Other Civil Actions**

The statutes applicable to medical malpractice actions and all other civil actions are substantively identical to each other, but they differ significantly from the product liability statute. *Compare* Ala. Code § 6-5-454 (applying in medical malpractice actions) *and* Ala. Code § 12-21-45 (applying in all other civil actions) *with* Ala. Code §§ 6-5-522 to-524.

Like the product liability statute, these statutes allow the defendant to introduce evidence of collateral source payments of medical and hospital expenses and allow the plaintiff to introduce evidence of the costs of obtaining those collateral source payments. See Ala. Code §§ 6-5-545 & 12-21-45. The similarities to the product liability statute end there.

These statutes allow the plaintiff to introduce evidence of his obligation to repay collateral source payors, but the statutes do so without any impact on the defendant's ability to introduce evidence of the collateral source payments. Ala. Code §§ 6-5-545(c) & 12-21-45(c). Also, and perhaps more significantly, these statutes change the evidentiary aspect of the common law collateral source rule without any reference to the effect that evidence is to have on the plaintiff's recovery of damages. This omission has led to a significant amount of confusion and criticism. *See, e.g., Killian v. Melser*, 792 F. Supp. 1217, 1219-21 (N.D. Ala. 1992).

Indeed, the lack of guidance as to the intended effect on damages led, at least in part, to the Supreme Court of Alabama's conclusion in 1996 that section 12-21-45 was unconstitutional. *American Legion Post No. 57 v. Leahey*, 681 So. 2d 1337 (Ala. 1996). Just four years later, however, the court reversed course, overruled its decision in *Leahey*, and declared that sections 12-21-45 and 6-5-545 were both constitutional. *Marsh v. Green*, 782 So. 2d 223 (Ala. 2000). In finding these statutes to be constitutional, the court responded to the criticisms regarding the statutes' "apparent attempt to change the law of evidence without expressing the effect on the law of damages." *Id.* at 233 n.2 (quoting *Leahey*, 681 So. 2d at 1346). The court stated that the statutes' silence as to their effect on damages "can be

viewed as a virtue, not a vice, because it leaves to the courts their historical function of determining the limits of recoverable damages through an evolving common law.” *Id.* at 233 n.2. The court continued:

This statutory silence gives both a plaintiff and a defendant latitude to explore various arguments about windfalls. A defendant may desire to argue that reimbursement of the plaintiff for medical expenses already paid by an insurer is a double recovery. On the other hand, a plaintiff may wish to argue that the defendant reaps a windfall unless additional damages are awarded, beyond the mere expense of the insurance or other collateral-source benefits, so as to compensate the plaintiff for having the discipline and foresight to devote money or earning power to paying the expense of acquiring the insurance or other collateral-source benefits rather than paying for some immediate gratification. Any review of matters concerning the validity or permissible effect of such arguments must await a proper case. A verdict form dealing specifically with collateral-source reimbursement would facilitate such a review.

*Id.*

Since its decision in the *Marsh* case, the Supreme Court of Alabama has not provided any significant guidance in this area. Moreover, Alabama does not have a pattern jury instruction explaining the effect collateral source payments are to have on the measure of medical expense damages. As a result, the effect these statutes have on awards of damages can vary from trial court to trial court and from jury to jury.

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

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

There is no statutory or case law authority in Alabama dealing specifically with the treatment of Medicare and/or Medicaid write-downs and write-offs.

In 2001, in the case of *Hull v. Jackson*, the Supreme Court of Alabama affirmed a trial court’s order holding that the plaintiff was permitted to introduce into evidence only those amounts actually paid by her insurer, plus her co-pays, rather than the gross amounts that had been billed by the hospital. *See Jennifer Howard, Alabama’s New Collateral Source Rule: Observations from the Plaintiff’s Perspective*, 32 Cumb. L. Rev. 573, 588 ( 2001) (discussing *Hull v. Jackson* and the admissibility of insurance write-downs). The court withdrew its opinion in *Hull*, however, and has not commented directly on this issue since that time. *See Hull v. Jackson*, 794 So. 2d 349 (Ala. 2001) (withdrawing earlier opinion).

Presumably, the plaintiff is free to introduce evidence of the gross amount of hospital bills without regard to insurance write-downs or write-offs. As discussed above, however, defendants can introduce evidence of the amount of payment or reimbursement by the insurance providers. That evidence, coupled with evidence of the gross amount of hospital bills and the amount actually owed or paid directly by the plaintiff, would effectively provide the jury with evidence of any insurance write-down or write-off.

Because of the lack of appellate court guidance on this issue, Alabama litigants will often enter into agreements before trial, stipulating to (1) the gross amount of medical / hospital bills; (2) the amount of those bills paid for by insurance; (3) the amount of any write-down or write-off; and (4) the plaintiff's out-of-pocket payments or obligations. This information would be presented to the jury, and it would be left to the jury's discretion (as influenced by the arguments of the respective parties) to decide the appropriate measure of medical expense damages.

## **2. Private Insurance**

As discussed above, there is no statutory or case law authority in Alabama dealing specifically with the treatment of private insurance write-downs and write-offs.

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

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

Alabama does not recognize a general physician-patient privilege. *See, e.g., Romine v. Medcenters of America, Inc.*, 476 So. 2d 51, 54 n.2 (Ala. 1985) (“There is no testimonial privilege in Alabama covering communications between a physician and his patient or the physician’s knowledge of the patient’s condition acquired by reason of the relationship.”)<sup>1</sup>

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<sup>1</sup> Despite the lack of a testimonial privilege, physicians in Alabama are “under a general duty not to make extrajudicial disclosures of information acquired in the course of the doctor-patient relationship and [] a breach of that duty will give rise to a cause of action.” *Horne v. Patton*, 287 So. 2d 824, 829-30 (Ala. 1973). Alabama courts recognize, however, that “this duty is subject to exceptions prompted by the supervening interests of society, as well as the private interests of the patient himself.” *Id.* at 830. Thus, a surrender of confidentiality occurs when the patient places his injury and its causes into issue by filing a lawsuit. *Mull v. String*, 448 So. 2d 952, 954-55 (Ala. 1984).

Alabama does recognize a psychotherapist-patient privilege. Ala. R. Evid. 503; Ala. Code § 34-26-2. This privilege allows a patient to prevent the disclosure of confidential communications made for the purposes of diagnosis or treatment of the patient’s mental or emotion condition, including alcohol or drug addiction. Ala. R. Evid. 503(b). Alabama courts have consistently held that the fact that the patient has sued for mental or emotional injuries does not waive the psychotherapist-patient privilege. *See, e.g., Ex parte Pepper*, 794 So. 2d 340, 343-44 (Ala. 2001).

Alabama also recognizes a counselor-client privilege. Ala. R. Evid. 503A. This privilege protects communications between a licensed professional counselor or certified counselor associate and the client. Unlike the psychotherapist-patient privilege, the counselor-client privilege does not apply to communications relevant to the client’s mental or emotional condition when the client relies upon that condition as the basis for a claim or defense. Ala. R. Evid. 503A(d)(3).

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

Because Alabama does not recognize a general physician-patient privilege, HIPAA<sup>2</sup> is the primary impediment to obtaining patient information.

There is no statutory, case law, or other authority in Alabama addressing the interaction of a waiver of the psychotherapist-patient or counselor-client privileges and HIPAA.

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

Alabama law does not prohibit *ex parte* communications with non-party treating physicians. *See Zaden v. Elkus*, 881 So. 2d 993, 1009-12 (Ala. 2003); *Romine v. Medcenters of Am., Inc.*, 476 So. 2d 51, 54-55 (Ala. 1985). Plaintiff authorization is therefore not a prerequisite to conducting *ex parte* interviews with the plaintiff’s treating physician.

Nevertheless, the plaintiff may request that the court prohibit such *ex parte* communications. *Zaden*, 881 So. 2d at 999 n.7, 1011. The decision of whether to grant such a request is left to the discretion of the trial court. *Id.* at 1011.

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<sup>2</sup> The privacy rule of HIPAA—the Health Insurance Portability and Accountability Act of 1996—generally forbids healthcare providers from using or disclosing a patient’s “protected health information,” except as otherwise provided by the rule. 45 C.F.R. § 164.502(a).



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

Alabama law does not require court authorization in order to conduct *ex parte* interviews with a plaintiff's treating physician; however, trial courts may, at their discretion, prohibit such communications. *Zaden*, 881 So. 2d at 999 n.7, 1009-12. As in other discovery matters, one trial court's exercise of discretion on this issue is in no way binding on other trial courts. *Id.* at 1011.

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

Although Alabama law does not require plaintiff or court authorization of *ex parte* communications with the plaintiff's treating physician, physicians in Alabama will often demand such an authorization before participating in *ex parte* communications. Whether a party is successful in obtaining that authorization will, of course, vary from case to case.

The language used by the trial court in any HIPAA protective order it enters in a given case can have a significant impact on this issue. A *pro forma* HIPAA order commonly used by Alabama courts states that the order "neither broadens nor restricts any party's ability to conduct discovery pursuant to Alabama law." This language would seem to preserve a party's ability to have *ex parte* communications with the plaintiff's treating physician. In authorizing the disclosure of protected health information, however, the order refers only to "any third-party who is provided with a subpoena . . . ." By implicitly requiring service of a subpoena before the physician can disclose protected health information, the order would seem to eliminate the possibility of *ex parte* communications.

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

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

There are no special requirements for obtaining the testimony of non-party treating physicians—Alabama law treats them as regular fact witnesses. Accordingly, after commencement of the action, any party may take the testimony of a non-party treating physician by deposition upon oral examination. Ala. R. Civ. P. 30. The attendance of a non-party treating physician at deposition or trial may be compelled by subpoena as provided in Rule 45 of the Alabama Rules of Civil Procedure.

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

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

There are no Alabama statutes or rules of civil procedure governing witness fees specific to physicians. Witness fees in general are covered by Ala. Code §§ 12-19-130 to -138. Witnesses are allowed a \$1.50 attendance fee per day in civil cases along with \$.05 per mile for each mile to and from their residence. Ala. Code § 12-19-131.

## **2. Case Law**

There is no Alabama case law addressing witness fee requirements or limits particular to physicians.

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

Non-party physicians in Alabama will sometimes charge for their time spent testifying at deposition or trial, even when they are providing only fact testimony, as opposed to expert testimony. Such charges are typically paid without issue.

When possible, it is customary in Alabama to use non-party physicians' deposition testimony at trial rather than calling them as live witnesses. The Alabama Rules of Civil Procedure specifically provide for the use of physicians' deposition testimony instead of live testimony: "The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the witness is a licensed physician or dentist." Ala. R. Civ. P. 32(a)(3)(D).