ALASKA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

In assessing damages in tort cases, Alaska courts apply the rule that "the injured party is entitled to be placed as nearly as possible in the position he would have occupied had it not been for the tortious conduct."[3] Thus, an injured plaintiff can recover for damages that proximately result from defendant's negligence; this includes both past and future medical expenses.[4]

1. Past Medical Expenses

An injured plaintiff can recover the reasonable expense of necessary medical care caused by the tort.[5] As with other compensatory damages, recovery of past medical expenses requires proof of causation and amount.[6] Plaintiff must illustrate that the tort caused the medical expenses.[7] Since Alaska law does not permit 'recovery for speculative or conjectural damage,[8] plaintiff must provide the factfinder a reasonable basis for computing the medical expenses award.[9] Further, plaintiff must illustrate that the

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[3] *Anchorage Chrysler Ctr., Inc. v. DaimlerChrysler Motors Corp.*, 221 P.3d 977, 988 (Alaska 2009) (internal citation and quotation omitted).
[4] *See M.A. v. U.S.*, 951 P.2d 851, 856 n.14 (Alaska 1998); *see also Helfrich v. Valdez Motel Corp.*, 207 P.3d 552, 561 (Alaska 2009) ("common law tort remedies compensate plaintiffs for consequential damages resulting from personal injury, including medical expenses….").
[5] *See Turner v. Municipality of Anchorage*, 171 P.3d 180, 185 (Alaska 2007).
[6] *See Pugliese v. Perdue*, 988 P.2d 577, 580 (Alaska 1999).
[7] *See Pugliese,* 988 P.2d at 580.
[8] *See Alexander v. State, Dept. of Corrs.*, 221 P.3d 321, 324 (Alaska 2009).
[9] *See Pugliese*, 988 P.2d at 580.

medical care was reasonably necessary.[10] Treatment may be considered reasonable when (1) plaintiff presents credible evidence from her treating physician that treatment undergone is reasonably effective and necessary, (2) other medical experts corroborate the evidence, and (3) the treatment falls within the realm of medically accepted options.[11]

A plaintiff with a preexisting condition or disability who suffers tortious injury may recover damages for aggravation of the condition, even when a healthy person would not have suffered such damage, but may not recover damages for the condition as it existed prior to injury.[12] Plaintiff must show the degree to which the tort aggravated the pre-existing condition. However, "when it is difficult to determine how much of a plaintiff's injury is due to the preexisting condition and how much to the aggravation caused by the defendant, a plaintiff seeking to establish causation need not prove with great exactitude the amount of aggravation."[13]

A plaintiff must mitigate medical expenses by using reasonable diligence to care for one's injuries.[14] Plaintiff's failure to mitigate damages reduces plaintiff's recovery.[15]

2. Future Medical Expenses

To establish a claim for future medical expenses, a plaintiff must prove two elements – causation and amount.[16] First, plaintiff must prove the "fact" of damages by a preponderance of the evidence.[17] To recover, plaintiff must prove to a reasonable probability that future medical expenses will occur.[18] Second, plaintiff must provide evidence that allows the factfinder to reasonably estimate the amount with a degree of certainty.[19] The factfinder cannot speculate or guess in making allowances for future medical

[10] *See Turner*, 171 P.3d at 185.
[11] *See id.*
[12] *See Doxsee v. Doxsee*, 80 P.3d 225, 228-29 (Alaska 2003); *Irving v. Bullock*, 549 P.2d 1184, 1187 (Alaska 1976).
[13] *Doxsee*, 80 P.3d at 228 (internal citation and quotation omitted).
[14] *See Irving*, 549 P.2d at 1187; *see also Gates v. City of Tenakee Springs*, 822 P.2d 455, 460 (Alaska 1991) ("It is the universal rule that a wronged party must use reasonable efforts to avoid the consequences of injury done by another.") (internal citations and quotations omitted).
[15] *See Maddox v. Hardy*, 187 P.3d 486, 494 (Alaska 2008).
[16] *Alexander*, 221 P.3d at 325.
[17] *See id.; Sherbahn v. Kerkove*, 987 P.2d 195, 198 -199 (Alaska 1999).
[18] *Alexander,* 221 P.3d at 325.
[19] *Id.; see also Pluid v. B.K.*, 948 P.2d 981, 984 (Alaska 1997) (quoting *Morrision v. State*, 516 P.2d 402, 405 (Alaska 1973) (". . . some items of damage cannot be fixed with mathematical precision. In those instances the trial

expenses.[20] Both the fact and the amount of future damages can be shown by evidence of type of treatment, costs of treatment, nature and duration of any hospitalization, resulting pain and suffering, and length of any period of disability flowing from medical procedures.[21]

Damages for future medical expenses are based on actual life expectancy at time of trial.[22] Further, under AS 09.17.040, the factfinder must reduce future medical expenses to present value to reflect the fact that plaintiff recovers future expenses before they accrue.[23]

B. Collateral Source Rule and Exceptions.

Alaska's collateral source rule (1) prohibits reduction of plaintiff's damages when plaintiff has received compensation from a collateral source; and (2) precludes evidence of collateral source compensation on the theory that such evidence would affect the jury's judgment unfavorably to plaintiff on issues of liability and damages.[24] A "collateral source" includes any source entirely independent of and collateral to a wrongdoer legally responsible for the injuries.[25] Thus, while plaintiff's own insurance or a charity may be a collateral source, defendant's insurance is not, since defendant pays for coverage.[26]

However, AS 09.17.070 allows courts to reduce plaintiff's jury award to reflect unsubrogated collateral source payments in some circumstances.[27] Thus, AS 09.17.070 limits circumstances in which plaintiffs can receive double recovery.[28] Alaska Statute 09.17.070(a) provides:

> After the fact finder has rendered an award to a claimant, and after the court has awarded costs and attorney fees, a defendant may introduce evidence of amounts received . . . by

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judge is necessarily forced to estimate and as long as he follows the correct rules of law, and his estimation appears reasonable and is grounded upon the evidence, his findings will remain undisturbed.")).

[20] *Alexander*, 221 P.3d at 325.

[21] *Sherbahn*, 987 P.2d at 198-99.

[22] *Morrison*, 516 P.2d at 406.

[23] *Sherbahn*, 987 P.2d at 200.

[24] *John's Heating Serv. v. Lamb*, 46 P.3d 1024, 1043 (Alaska 2002).

[25] *See Chenega Corp. v. Exxon Corp.*, 991 P.2d 769, 790 (Alaska 1999).

[26] *See Chenega Corp.,* 991 P.2d at 790.

[27] *See id.* at 791.

[28] *See id.*

> the claimant as compensation for the same injury from collateral sources that do not have a right of subrogation by law or contract.[29]

The Alaska Supreme Court has indicated that a defendant seeking offset of collateral source payments must show the payments covered the same expenses compensated by the jury award.[30] Further, defendant may not introduce evidence of "(1) benefits that under federal law cannot be reduced or offset; (2) a deceased's life insurance policy; or (3) gratuitous benefits provided to the claimant."[31]

> In response, under AS 09.17.070(b): the claimant may introduce evidence of (1) the amount that the actual attorney fees incurred by the claimant in obtaining the award exceed the amount of attorney fees awarded to the claimant by the court; and (2) the amount that the claimant has paid or contributed to secure the right to an insurance benefit introduced by the defendant as evidence.[32]

If amount of collateral benefits introduced under AS 09.17.070(a) exceeds amount of payments introduced under AS 09.17.070(b), then the court reduces the total award by the difference.[33]

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid.

The Alaska Supreme Court has not decided how courts should handle write-downs or write-offs, whether by Medicare, Medicaid, or private insurance. However, the published dissent *Lucier v. Steiner Corporation*[34] illustrates how two justices view the issue.

In *Lucier*, the Court granted a petition for review of an interlocutory order, which limited plaintiff, in proving past medical expenses, to the actual amount paid by Medicaid, rather than the value her providers placed on their services.[35] The Court dismissed the petition for review as improvidently granted.[36] However, Justice Fabe provided a dissent, in which Justice Carpeneti joined.[37] The dissent disagreed with dismissal, noting that the issue presented a significant question of first impression in

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29 ALASKA STAT. § 09.17.070(a).
30 *See Falconer v. Adams*, 974 P.2d 406, 412-13 (Alaska 1999); *Liimatta v. Vest*, 45 P.3d 310, 319-20 (Alaska 2002).
31 ALASKA STAT. § 09.17.070(d).
32 ALASKA STAT. § 09.17.070(b).
33 ALASKA STAT. § 09.17.070(c).
34 *Lucier v. Steiner Corp*., 93 P.3d 1052 (Alaska 2004).
35 *See Lucier,* 93 P.3d at 1052-53.
36 *See id*. at 1052.
37 *Id.* at 1053. (Of the justices who participated in the *Lucier* dismissal, only Justices Fabe and Carpeneti remain on the Alaska Supreme Court.)

Alaska, and provided an opinion.[38] The dissent reasoned, "The medical care that Lucier received at Medicaid's expense was a collateral source benefit and its value may not be used to reduce her damages award, except under the conditions and procedures laid out in AS 09.17.070."[39]

2. Private Insurance

No reported Alaska decision addresses write-offs or write-downs by private insurance.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Alaska Evidence Rule 504 sets forth Alaska's physician and psychotherapist-patient privilege. It provides in pertinent part:

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's physical, mental or emotional conditions, including alcohol or drug addiction, between or among the patient, the patient's physician or psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.[40]

The privilege shields, from discovery, confidential communication between a patient and a physician and between a patient and a psychotherapist. "A patient is a person who consults or is examined or is interviewed by a physician or psychotherapist."[41] "A physician is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be."[42] A "psychotherapist" includes:

> (A) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, (B) a person licensed or certified as a psychologist or psychological examiner under the laws of any state or nation or reasonably believed by the patient so to be, while similarly engaged, (C) a person licensed as a marital or family therapist under the laws of a state or nation or reasonably believed by the patient so to be, while similarly engaged, or (D) a person licensed as a professional counselor under the laws of a state or nation, or reasonably believed by the patient so to be, while similarly engaged.[43]

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[38] *See id.*
[39] *Id.*
[40] ALASKA R. EVID. 504(b).
[41] ALASKA R. EVID. 504(a)(1).
[42] ALASKA R. EVID. 504(a)(2).
[43] ALASKA R. EVID. 504(a)(3).

A communication is confidential if not intended to be disclosed to third persons not involved in consultation, examination, interview, diagnosis, or treatment of the patient[44]. However, Alaska law includes a patient-litigant exception to the privilege. Alaska Evidence Rule 504(d)(1) provides:

> As to communications relevant to the physical, mental or emotional condition of the patient in any proceeding in which the condition of the patient is an element of the claim or defense of the patient, of any party claiming through or under the patient, of any person raising the patient's condition as an element of that person's own case, or of any person claiming as a beneficiary of the patient through a contract to which the patient is or was a party; or after the patient's death, in any proceeding in which any party puts the condition in issue.

Thus, filing a personal injury action waives the physician–patient privilege as to all information concerning plaintiff's relevant health and medical history.[45] The scope of waiver extends to all matters pertinent to plaintiff's claim, including those matters that are relevant based on historical or causal connection.[46]

The Alaska Supreme Court has admonished litigants that they should not involve the courts in discovery disputes in personal injury lawsuits. The Court has advised, "when a plaintiff's medical privilege has been waived by the filing of suit, discovery should normally proceed without judicial participation in a manner demonstrating candor and common sense"[47] and has warned:

> Since the filing of the personal injury suit is the operative fact of waiver, it should not be necessary for the defendant to file a formal request in court. If defendant is required to obtain court-ordered waiver, then clearly costs and attorney fees are appropriate in all but the most unusual cases.[48]

Further, the Alaska Supreme Court has stated:

> We find no legal impediments in existence which limit informal methods of discovery, such as private conferences with the attending physicians, or the voluntary exchange of medical information by the parties. In our opinion such informal methods are to be encouraged, for they facilitate early evaluation and settlement of cases, with a resulting

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[44] ALASKA R. EVID. 504(a)(4).
[45] *See Ayuluk v. Red Oaks Assisted Living, Inc.*, 201 P.3d 1183, 1204 (Alaska 2009); *Trans-World Invs. v. Drobny*, 554 P.2d 1148, 1151 (Alaska 1976); *Arctic Motor Freight, Inc. v. Stover*, 571 P.2d 1006, 1008-09 (Alaska 1977).
[46] *See Drobny*, 554 P.2d at 1151; *Arctic Motor*, 571 P.2d at 1007.
[47] *Ayuluk*, 201 P.3d at 1204 (internal quotation and citation omitted).
[48] *Arctic Motor*, 571 P.2d at 1009.

decrease in litigation costs, and represent further the wise application of judicial resources.[49]

Thus, discovery disputes over medical information or contact with treating physicians are limited.

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

No Alaska decision has considered whether HIPAA affects or preempts Alaska's law regarding the physician-patient privilege or waiver thereof. As a practical matter, before consulting physicians or obtaining medical records, defendant must generally obtain a signed medical release from plaintiff that fulfills HIPPA requirements for disclosing protected health information. Without such a release, physicians and medical providers will not provide confidential information.

C. Authorization of Ex Parte Physician Communication by Plaintiff

Alaska law authorizes defense counsel to engage in informal ex parte conference with plaintiff's treating physician.[50] However, the physician has discretion whether to engage in informal ex parte contacts with defense counsel, and physicians may not be compelled to engage in such contact.[51] Since HIPAA restricts disclosure of confidential medical information, treating physicians generally require a signed medical release from plaintiff.

D. Authorization of Ex Parte Physician Communication by Courts

Alaska courts will not compel a treating physician to engage in informal ex parte contact with defense counsel.[52] If a physician refuses informal contact with defense counsel, then defense counsel should formally depose the physician pursuant to Alaska Civil Rules.

E. Local Practice Pointers

Since privilege is automatically waived, plaintiffs generally provide signed medical releases, which comply with HIPAA, early in or prior to litigation. Such releases benefit plaintiff by alleviating the burden and expense of producing vast quantities of medical records to satisfy disclosure obligations and benefit defendant by giving direct access to information without having to rely on plaintiff as

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[49] Langdon v. Champion, 745 P.2d 1371, 1373 (Alaska 1987) (quoting *Drobny*, 554 P.2d at 1151-52).

[50] *See id*. at 1375.

[51] *See id*.

[52] *See id*.

gatekeeper for production of relevant information.[53] Whether voluntary or in response to production requests, production of signed medical releases is the normal practice. While the Alaska Supreme Court has stated that signed medical releases are not mandatory where alternative methods of discovery will produce the same information and better protect a plaintiff's legitimate privacy needs,[54] trial courts generally compel production of medical releases when plaintiffs refuse.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Under Alaska Civil Rule 30, upon reasonable notice in writing, a defendant may depose any person, including plaintiff's treating physician.[55] Under Alaska Civil Rule 45, witness attendance may be compelled by subpoena.[56] There are no privilege issues since the physician–patient privilege is waived upon lawsuit filing.[57]

B. Witness Fee Requirements and Limits

1. Statues and Rules of Civil Procedure

A percipient witness testifying before the court or in deposition receives a witness fee of $12.50 per hour, if attendance, including travel time, is less than three hours.[58] If attendance requires more than three hours, the witness receives a witness fee of $25.00 per day.[59] If testimony and travel cannot be completed in one day, then the witness is entitled to the per diem allowed for state employees.[60] If the witness must travel more than 30 miles one way, then the witness is entitled to receive mileage reimbursement at the rate allowed for state employees.[61] A witness may demand payment in advance of their testimony.[62]

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[53] *See Ayuluk*, 201 P.3d at 1204.
[54] *Id*. at 1205.
[55] ALASKA R. CIV. P. 30(a)(2)(A)(iii).
[56] ALASKA R. CIV. P. 45(a).
[57] ALASKA R. EVID. 504(d)(1).
[58] ALASKA R. ADMIN. 7(a).
[59] *Id.*
[60] *Id.*
[61] ALASKA R. ADMIN. 7(b).
[62] ALASKA R. ADMIN. 7(e).

A prevailing party is entitled to recover fees for the time an expert spends testifying.[63] Recovery cannot exceed $150.00 per hour.[64]

2. Case Law

Recovery of expert fees is limited to "the time the expert was actually testifying."[65]

B. Local Custom and Practice

As a practical matter, counsel will not force a treating physician or expert to testify via subpoena and will reasonably compensate such a witness for time spent preparing for testimony and testifying. This facilitates examination and ensures that the witness will approach the matter seriously and objectively.

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[63] ALASKA R. ADMIN. 7(c).
[64] *Id.*
[65] PRATT & WHITNEY CANADA, INC. V. SHEEHAN, 852 P.2d 1173, 1183 (Alaska 1993) (citing Alaska Administrative Rule 7(c)).