COLORADO

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I. Medical Expenses

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

Past medical expenses are compensable to the extent that they are reasonable in amount as well as necessary. *Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960). Therefore, the "correct measure of compensable damages for medical expenses is the necessary and reasonable value of the services rendered, rather than the amount actually paid for such services." *Lawson v. Safeway, Inc.*, 878 P.2d 127, 131 (Colo. App. 1994). Nevertheless, the amount the plaintiff paid for the medical services is some evidence of their reasonable value. *Id.* The amount billed by the medical providers, as opposed to the amount paid by the insurer, is the proper measurement of such damages. *Volunteers of Am. Colorado Branch v. Gardenswartz*, Case No. 09SC20, __ P.3d __ (Colo. Nov. 15, 2010).

2. Future Medical Expenses

A plaintiff's history of medical treatment for the injury at issue may support an award of future medical expenses. *Pfantz v. Kmart Corp.*, 85 P.3d 564, 570 (Colo. App. 2003). Accordingly, the need for future surgery is not required for an award of future medical expenses. *Id.* Rather, where a plaintiff is incurring other medical expenses, such as therapy and medications, or suffers from reduced movement as a result of the injury, an award of future medical expenses may be appropriate. *Id.* Nevertheless, any award of "'future medical expenses must be based upon substantial evidence which establishes the

reasonable probability that such expenses will necessarily be incurred.'" *Wallbank v. Rothenberg*, 74 P.3d 413, 419 (Colo. App. 2003) (quoting *Reynolds v. Reichwein*, 510 P.2d 895, 896 (Colo. App. 1973)).

3. Past and Future Medical Expenses – Minors' and Parents' Rights to Recovery

Parents can maintain a derivative action for certain types of damages they incur as a result of their child's injuries. *Elgin v. Bartlett*, 994 P.2d 411, 416 (Colo. 1999); *Kinsella v. Farmers Ins. Exch.*, 826 P.2d 433, 435 (Colo. App. 1992). These damages are limited to economic damages, which include, among other things, "reimbursement for medical and other expenses incurred because of the child's injuries." *Kinsella*, 826 P.2d at 435 (citing *Colorado Utilities Corp. v. Casady*, 300 P. 606 (1931)). The parents are entitled to recover the medical expenses of their child for the medical expenses incurred or that will be incurred up until their child is no longer a minor. C.J.I.—Civ. 6:3 (2009). The child is entitled to recover the future medical expenses he or she will incur after he or she is no longer a minor. C.J.I.—Civ. 6:2 (2009). A child ceases to be a minor at the age of 18. Colo. Rev. Stat. § 13-22-101(1)(c).

4. Future Medical Expenses -- Availability of Medical Monitoring Damages

There are no state appellate court decisions concerning claims for medical monitoring damages. However, the United States District Court for the District of Colorado has found that although Colorado has yet to do so, "the Colorado Supreme Court would probably recognize, in an appropriate case, a tort claim for medical monitoring." *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468, 1477 (D. Colo. 1991). A medical monitoring claim compensates a plaintiff "for diagnostic treatment," as a "tangible and quantifiable item of damage caused by a defendant's tortuous conduct." *Id.* There are no Court cases that support any other form of damages for medical monitoring.

B. Collateral Source Rule and Exceptions

In personal injury actions, after the verdict is received, the Court is required to reduce the amount of the jury verdict by the amount which the plaintiff has or will be indemnified or compensated for his loss by an outside source. Colo. Rev. Stat. § 13-21-111.6. Thus, gratuitous medical care, including Medicaid,

is covered under this rule and is set-off from the plaintiff's damages award. *Keelan v. Van Waters & Rogers, Inc.*, 820 P.2d 1145, 1147 (Colo. App. 1991), *aff'd*, 840 P.2d 1070 (Colo. 1992).

There is an exception to this statutory rule, known as the "contract exception," *Colorado Permanente Med. Group, P.C. v. Evans*, 926 P.2d 1218, 1230 (Colo. 1996), that applies when the collateral source payment is paid "as a result of a contract entered into and paid for by or on behalf" of the plaintiff. Colo. Rev. Stat. § 13-21-111.6. This exception applies not only to private medical insurance, but to any contracts for which a plaintiff gives consideration, whether in the form of money or employment, with the expectation of receiving future benefits. *Van Waters,* 840 P.2d at 1079. Thus, payments by the plaintiff's private insurer, medicare, or similar entities are not set-off from plaintiff's damages.

Settling tortfeasors are not considered collateral sources under the statutory rule, *Montoya v. Grease Monkey Holding Corp.*, 883 P.2d 486, 490 (Colo. App. 1994), *aff'd*, 904 P.2d 468 (Colo. 1995). Settlement payments are therefore not off-set from damages, rather damages are proportioned for settling tortfeasors under Colorado's apportionment of fault statute. *See* Colo. Rev. Stat. § 13-21-111.5; *see also Montoya*, 883 P.2d at 489-90.

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

There are no published Colorado decisions whether Medicare or Medicaid's write-downs demonstrate reasonable medical bills, or if the plaintiff is entitled to the amount billed or the amount paid. Analogous case law regarding private insurance, addressed below, and an unpublished federal district court case suggest that the proper measure of damages occurs before the Medicare or Medicaid write-down. In other words, damages are measured by the amount billed, not the amount paid. *Krauss v. Beach*, C.A. No. 07-cv-02115-KLM-MJW, 2008 WL 4371939 (D. Colo. Sept. 23, 2008). Nevertheless, it should be noted, as discussed above, that the defendant is entitled to a set-off for Medicaid payments. *See Keelan*, 820 P.2d at 1147 (citing *Gomez v. Black*, 511 P.2d 531 (Colo. App. 1973)); *see also City of Englewood v. Bryant*, 68 P.2d 913, 914-15 (Colo. 1937).

2. Private Insurance

The Colorado Court of Appeals has found that under the contract exception to the collateral source rule, the plaintiff is entitled to damages in the amount charged by the health care providers, as opposed to the amount paid by the plaintiff's insurance carrier. *Tucker*, 211 P.3d at 711-12. Thus, the amount billed as opposed to the amount paid is the proper measure when ascertaining damages.

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

A. Scope of Physician-Patient Privilege and Waiver

Colorado's physician-patient privilege prevents a physician, surgeon, or registered nurse from being examined as a witness at trial or during discovery as to any information acquired in and necessary to treating a patient, unless the patient consents to such disclosure. Colo. Rev. Stat. § 13-90-107(1)(d). A party waives the physician-patient privilege by injecting his or her physical or mental condition into the case as the basis of a claim or an affirmative defense. *Clark v. Dist. Ct.*, 668 P.2d 3, 10 (Colo. 1983). This waiver is limited to the cause and extent of the injuries and damages claimed by the party. *Cardenas v. Jerath*, 180 P.3d 415, 424 (Colo. 2008). Bare allegations in the complaint of mental anguish, emotional distress, pain and suffering, and loss of enjoyment of life are not sufficient to waive physician-patient privilege as to mental or emotional issues. *See Weil v. Dillon Cos., Inc.*, 109 P.3d 127 (Colo. 2005).

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

Owing to the stringent nature of Colorado's physician-patient privilege, Colo. Rev. Stat. § 13-90-107(1)(d), there is a dearth of case law on the interaction between Colorado state law and HIPAA. Nevertheless, the Colorado Supreme Court has determined that its rulings on defense counsel's communications with treating physicians, discussed below, meets the requirements of HIPAA. *Reutter v. Weber*, 179 P.3d 977, 984 n. 4 (Colo. 2007). Further, since the Colorado physician-patient privilege only covers physicians, surgeons, and registered professional nurses, Colo. Rev. Stat. § 13-90-107(1)(d); *Belle Bonfils Memorial Blood Center v. District Court*, 763 P.2d 1003, 1009 (Colo. 1988), HIPAA would be

implicated when dealing with the treatment performed by a different type of health care provider, such as a medical technician.

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

Since the patient holds the physician-patient privilege, the patient/plaintiff can always authorize an *ex parte* communication. More often, however, communication between defense counsel and treating physicians occur pursuant to the rules dictated by the *Samms v. District Court* decision.

A defendant may have an informal meeting with the plaintiff's medical care-givers, so long as the defendant (1) provides notice of such a meeting to the plaintiff, and (2) permits the plaintiff to attend if he or she so chooses so that the plaintiff's counsel can make sure that no residually privileged information (*i.e.*, medical information unrelated to the action and therefore still subject to the privilege) is divulged. *Samms v. District Court*, 908 P.2d 520 (Colo. 1995). While a physician can decline to meet with defendant's counsel, the plaintiff's counsel cannot encourage a physician to do so. *Id.* In the medical malpractice context, when medical providers are engaged in a unified course of treatment that forms the basis of the malpractice action, *ex parte* communications are generally allowed. *Reutter*, 179 P.3d 977. This is due to the fact that the risk that such a non-party provider will divulge residually privileged information is low. *Id*.

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

As set forth above, a defendant may have an informal meeting with plaintiff's medical care-givers, so long as the defendant (1) provides notice of such a meeting to the plaintiff, and (2) permits the plaintiff to attend if he or she so chooses to make sure no residually privileged information is divulged. *Samms*, 908 P.2d 520. In the medical malpractice context, when medical providers are engaged in a unified course of treatment that forms the basis of the malpractice action, *ex parte* communications are generally allowed. *Reutter*, 179 P.3d 977. A defendant may request such a meeting by a motion. *Id.*

E. Local Practice Pointers

Generally, defense counsel writes a letter to the plaintiff's counsel that he or she has scheduled a meeting with the plaintiff's physician, and inviting the plaintiff's counsel to attend such a meeting. Thus,

if a dispute arises, the plaintiff can raise the issue with the court prior to any such meeting. When the case involves a unified course of treatment, the defendant physician's counsel writes a letter to the plaintiff's counsel informing him or her that defendant's counsel is in the process of scheduling an *ex parte* meeting with the plaintiff's physician. Thus, in these circumstances as well, the plaintiff can then raise the issue of the *ex parte* meeting with the Court if necessary prior to any such meeting.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Under the Colorado Rules of Civil Procedure, a party is entitled to two non-party, non-expert depositions, unless the number is modified by the Court. Colo. Rule of Civil Proc. 26(b)(2)(A). Accordingly, there is no limit placed on the number of expert depositions. *Id.* In order for a treating physician to fall within the "expert" category, and therefore not count towards the two non-party non-expert deposition limit, a party must disclose him or her under Colo. Rule of Civil Proc. 26(a)(2). *Id.*; *cf. Gall ex rel. v. Jamison*, 44 P.3d 233, 234 n. 2 (Colo. 2002) (expert disclosures are divided between specially retained experts and "occupational experts, such as treating physicians").

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Witnesses under subpoena are entitled to a mileage fee at a statutorily set amount per mile to travel to the deposition or trial. Colo. Rev. Stat. § 13-33-103; *see also Crawford v. French*, 633 P.2d 524, 526-27 (Colo. App. 1981). Witnesses are entitled to a very small fee under statute. Colo. Rev. Stat. § 13-33-102. Expert witnesses "called to testify only to an opinion founded on special study or experience" shall receive additional compensation under the statute, in an amount to be fixed by the Court. Colo. Rev. Stat. § 13-33-102(4).

2. Case Law

There is no Colorado state court law on witness fees for treating physicians. There is federal case law from the District of Colorado on this issue. Federal case law provides that treating physicians who are not endorsed as experts are not entitled to any fee above the normal $40 fee for deposition. *Baker v.*

Taco Bell Corp., 163 F.R.D. 348, 350 (D. Colo. 1995). When a treating physician is endorsed as an expert witness, federal courts still take a close look at the physician's fees and will reduce them as the Court deems appropriate. *Cf. Grady v. Jefferson County Bd. of County Comm'rs*, 249 F.R.D. 657, 662 (D. Colo. 2008) (lowering specially retained expert physician's fee from $2000 an hour to $600 an hour, and stating that "[t]his court finds that the deposition hourly rate of $2,000 per hour as set forth in Dr. Spiro's fee schedule is grossly excessive and comes near to being extortionate."); *Kumar v. Copper Mountain, Inc.*, Civil Action No. 07-cv-02597-PAB-MEH, 2008 WL 5225878, at *1-*2 (D. Colo. Dec. 15, 2008) (lowering fee of specially retained expert physician from $1500 per hour to $750 per hour).

3. Local Custom and Practice

The local practice regarding witness fees for treating physicians has been memorialized in the "Interprofessional Code," which is endorsed by the Colorado Bar Association, Colorado Medical Society, Denver Bar Association and Denver Medical Society. Section 9.6 of the "Interprofessional Code," provides, in part: "An expert witness fee is owed [to the physician] if the subject of the testimony arises out of the individual's role or status as an expert and cannot be conditioned upon the eliciting of expert 'opinions.'" The Interprofessional Committee, *The Interprofessional Code*, (2d ed. 1997) (Available at http://www.cobar.org/index.cfm/ID/226/CITP/Interprofessional-Code/). Based upon the Interprofessional Code, it is common practice for the party deposing the treating physician to pay for his or her time at the deposition at the physician's normal hourly rate – regardless of whether the expert is separately disclosed as an expert witness by either party.

However, courts have not enforced the Interprofessional Code requirements that the physician be paid his or her normal hourly rate at the deposition. *See Baker*, 163 F.R.D. at 351-52; *Kumar*, 2008 WL 5225878, at *1-*2 (D. Colo. Dec. 15, 2008).