DISTRICT OF COLUMBIA, MD

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I. MEDICAL EXPENSES

A. Requirements For Recovery Of Medical Expenses

In the District of Columbia, a plaintiff does not have to prove his or her medical expenses with mathematical certainty. However, there must be some reasonable basis upon which to estimate damages to enable the fact finder to make a just and reasonable estimate of damages based on the relevant data.[331] Generally, a copy of a bill in which the dates of treatment are not itemized and no doctor has testified as to its authenticity, is nevertheless properly admissible where it corroborates the plaintiff's testimony concerning the necessity for medical attention after being injured.[332]

1. Expert testimony is not needed to form a basis for an award of damages for pain and suffering.

Cases presenting medically complicated questions due to multiple and/or pre-existing causes or questions as to permanent injuries require expert testimony on issues of causation.[333] However, pain and suffering, and other immediate consequences of an injury are generally within the knowledge and

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[331] Bedell v. Inver Hous., Inc., 506 A.2d 202, 205 (D.C. 1986); Romer v. D.C.,, 449 A.2d 1097, 1100 (D.C. 1982) (holding that trial court did not err in instructing jury not to award damages for future medical expenses in absence of evidence of duration and cost of treatment); D.C. v. Howell, 607 A.2d 501, 507 (D.C. 1992) (setting aside award for future medical expenses because no evidence was presented of the need for, and estimated cost of, additional treatment); General Elec. Co. v. Taalohimoineddin, 579 A.2d 729, 733-34 (D.C. 1990).

[332] Reese v. Crosby, 280 A.2d 526, 527 (D.C. 1971).

[333] Baltimore v. B.F. Goodrich Co., 545 A.2d 1228, 1231 (D.C. 1988).

experience of the average juror, and, therefore, do not require expert testimony.[334] Evidence of pain and suffering which exists at the time of the trial is sufficient to take the question of permanence to the jury.[335]

2. Plaintiff has a duty to mitigate damages.

In the District of Columbia, the duty to mitigate damages bars recovery for losses suffered that could have been avoided by reasonable effort and without risk of substantial loss or injury.[336] Efforts to mitigate damages need not be successful, so long as they are reasonable.[337] Further, the duty to mitigate damages does not apply where the defendant has prevented the plaintiff from taking steps to avoid or reduce losses.[338]

3. Judgments may be reduced in cases involving joint tortfeasors

In the case of joint tortfeasors, a judgment is to be reduced by half when the plaintiff sues multiple purported joint tortfeasors and one settles, but remains a party to the action because the other joint tortfeasor has submitted a cross-claim for contribution. The settling tortfeasor must also be found negligent.[339]

If the settling tortfeasor's liability is not determined, the court may reduce the plaintiff's damages award by the amount of the actual settlement rather than apply a 50% credit.[340] A settlement with a defendant later proven not to have been a joint tortfeasor also requires a reduction in the judgment against the tortfeasor.[341]

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[334] Garner v. Sam S. Bevard & Sons, 342 A.2d 52, 54 (D.C. 1975).
[335] American Marietta Co. v. Griffin, 203 A.2d 710, 712 (D.C. 1964); *see also, e.g.*, Shoppers Food Warehouse v. Moreno, 715 A.2d 107, 112 (D.C. 1998) (holding that testimony of plaintiff and her orthopedic doctor that she still suffered from injury at the time of trial was sufficient to justify permitting the jury to consider and award future damages for permanent injury).
[336] Edward M. Crough, Inc. v. Dep't of Gen. Servs. of D.C., 572 A.2d 547, 466-67 (D.C. 1990).
[337] *Edward M. Crough, Inc.*, 572 A.2d at 467.
[338] *Id.*
[339] Martello v. Hawley, 300 F.2d 721, 724 (D.C. Cir. 1962); Otis Elevator Co. v. Henderson, 514 A.2d 784, 786 (D.C. 1986) (remaining defendant was only entitled to a credit in the amount of the settlement because it failed to cross-claim for contribution and the jury never considered whether the settling defendant was liable for plaintiff's injuries).
[340] Crooks v. Williams, 508 A.2d 912, 915 (D.C. 1986).
[341] Snowden v. D.C. Transit Sys., Inc., 454 F.2d 1047, 1049 (D.C. Cir. 1972).

B. Collateral Source Rule and Exceptions

When a tort plaintiff's items of damage are reimbursed by a third party who is independent of the wrongdoer, the plaintiff may still seek full compensation from the tortfeasor even though it amounts to double recovery.[342] The receipt of payment from a collateral source may not be injected into a trial to mitigate damages or in any manner that would mislead, improperly influence, or prejudice the jury.[343] Notably, the collateral source rule cannot be violated to contradict a party's testimony.[344]

In suits involving the District of Columbia, the collateral source rule does not apply to medical expenses paid by the District of Columbia.[345] In Jackson, the court held that Medicaid payments were not a collateral source for purposes of judgment against the District in wrongful death and survival actions.[346] Therefore, the District government was entitled to a credit for all medical bills of the deceased that were paid by Medicaid to the extent that they were included in the plaintiff's damages award.[347]

C. Treatment of Write-Downs and Write-Offs

In the District of Columbia, the collateral source rule does not preclude a patient with private medical insurance from recovering unpaid and written-off medical expenses as part of compensatory damages.[348] Any write-offs enjoyed by a patient are negotiated by a private insurance company pursuant to a contractual arrangement between the patient and the insurer that is wholly independent of the

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[342] Jacobs v. H.L. Rust Co., 353 A.2d 6, 7 (D.C. 1976).

[343] *Jacobs*, 353 A.2d at 7; *see also, e.g.*, Designers of Georgetown, Inc. v. E.C. Keys & Sons, 436 A.2d 1280, 1282 (D.C. 1981) (collateral source rule did not apply because plaintiff subrogated its right to seek damages for business interruption to its insurance company); Geffen v. Winer, 244 F.2d 375, 376 (D.C. Cir. 1957) (jury was allowed to consider the issue of lost wages even though plaintiff was paid during the time at issue); Bushong v. Park, 837 A.2d 49, 57-58 (D.C. 2003) (holding trial court did not abuse its discretion by not allowing defense counsel to question witness who prepared plaintiff's life care plan about her previous role in preparing a life care plan at request of plaintiff's worker's compensation carrier).

[344] Aylor v. Intercounty Constr. Corp., 381 F.2d 930, 934-35 (D.C. Cir. 1967).

[345] D.C. v. Jackson, 451 A.2d 861, 871 (D.C. 1982).

[346] *Jackson*, 451 A.2d at 871.

[347] *Id.*

[348] Hardi v. Mezzanote, 818 A.2d 974, 985 (D.C. 2003).

defendant.[349]

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

In the District of Columbia, "[t]he physician-patient privilege, unlike the attorney-client privilege, is not a child of the common law, but a creature of statute."[350] The physician-patient privilege is an evidentiary privilege only and "extends no further than the courtroom door."[351] The privilege has been codified at Title 14 of D.C. Code, and provides, in pertinent part, that in both federal and local courts in the District of Columbia,

> a physician or surgeon . . . may not be permitted, without the consent of the client, or of his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.[352]

There are four statutory exceptions to this general rule, including evidence in criminal cases where the accused is charged with causing death or inflicting injuries upon a human being; evidence relating to mental competency of an accused in a criminal trial when insanity is at issue; evidence relating to the mental competency of a child alleged to be delinquent or neglected; and evidence in criminal or civil cases where a person is alleged to have defrauded the government in relation to receiving or providing services under the medical assistance program.[353]

The statutory purposes of this privilege are to promote greater freedom of communication between physician and patient by covering the relationship with a "cloak of confidence" and to prevent disclosure of information concerning the patient which might result in embarrassment.[354]

The statute, by its terms, only applies to in-court, evidentiary disclosure of privileged information and not to other disclosures. For instance, the District Court held that disclosure of a veteran's medical

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[349] *Hardi*, 818 A.2d at 985; Calva-Cerqueira v. U.S., 281 F. Supp. 2d 279, 296 (D.D.C. 2003) (holding that the collateral source rule permitted an injured plaintiff to recover all of his medical costs regardless of any amount written off by plaintiff's medical care providers because the alleged cost writing-off was independent of the tortfeasor).

[350] Richbow v. D.C., 600 A.2d 1063, 1068 (D.C. 1991) (citations omitted).

[351] *Richbow*, 600 A.2d at 1068 (citations omitted).

[352] D.C. CODE § 14-307(a).

[353] D.C. Code § 14-307(b)(1)-(4).

[354] In re Wilson's Estate, 416 A.2d 228, 236 (D.C. 1980).

records by the Veteran's Administration was not "disclosure" within the meaning of Section 14-307 because the statute only applied to in-court disclosure.[355] In *DiGenova*, the documents were never presented to a grand jury and the person whose medical records were disclosed was never indicted.[356] Courts have disagreed about whether a tort action exists for unauthorized disclosure of information obtained through the physician-patient relationship.[357]

A. Waiver of Privilege

An implied waiver of the physician-patient privilege exists when the patient discloses, or permits disclosure of, information gained by the physician during the physician-patient relationship. Whether an act constitutes an implied waiver depends upon the facts and circumstances of the particular case.[358] For instance, a patient-litigant cannot authorize disclosure of only those portions of medical records favorable to his or her position, while withholding other relevant (but unfavorable) portions.[359] In such cases, the remaining relevant portions will be deemed waived. Furthermore, a patient who places his or her medical condition at issue in a lawsuit potentially waives any physician-patient privilege against disclosure of relevant medical evidence. *Id.* In *Sklagen,* a patient who filed a slip and fall lawsuit alleging negligence against a hospital, and who provided portions of her post-accident medical records, waived the privilege against disclosure of other relevant, pre-injury medical evidence.[360] However, waiver only extends to medical information relevant to the lawsuit.[361] Nor does a waiver to one person or entity constitute a waiver to other interested persons.[362]

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[355] Doe v. DiGenova, 642 F. Supp. 624 (D.D.C. 1986) (*rev'd in part on other grounds*, Doe v. Stephens, 851 F.2d 1457 (D.C. Cir. 1988)).
[356] *DiGenova*, 642 F. Supp. at 629; *see also* Logan v. D.C., 447 F. Supp. 1328, 1335 (D.D.C. 1978) (court opining that even if a doctor gave false information to a newspaper reporter concerning the patient's drug usage, such an action did not violate the privilege because it did not constitute in-court testimony).
[357] Compare Street v. Hedgepath, 607 A.2d 1238, 1246 (D.C. 1992) (recognizing a cause of action in tort for a breach of the confidential physician-patient relationship), with *Logan*, 447 F. Supp. at 1335 (refusing to recognize a cause of action).
[358] Nelson v. U.S., 649 A.2d 301, 309 (D.C. 1994).
[359] *Nelson*, 649 U.S. at 308 (citing Sklagen v. Greater Se. Cmty. Hosp., 625 F. Supp. 991, 992 (D.D.C. 1984).
[360] *Sklagen*, 625 F. Supp. at 992-93.
[361] See *Street*, 607 A.2d at 1246.
[362] *Nelson*, 649 A.2d at 308.

A patient, however, can unknowingly waive privilege by signing an authorization.[363] In *Jones*, an insured, in her original application for life insurance, signed an authorization for any physician to give the insurer any information requested regarding her past medical history.[364] The Court of Appeals held that the signing of such an authorization negated the patient's expectation of protected confidentiality.[365] Since the physician-patient privilege protects this expectation of confidentiality, the authorization was treated as a waiver of the privilege.[366]

B. Interaction of Physician-Patient Privilege and HIPAA

The Health Insurance Portability and Accountability Act ("HIPAA") has altered the landscape of medical privacy.[367] In particular, HIPAA has broadened the ability to revoke medical record release authorization. In Koch v. Cox, 489 F.3d 385, 386 (D.C. Cir. 2007), an employee sued his employer, the Securities and Exchange Commission ("SEC"), for allegedly refusing to accommodate his medical problems. He signed releases authorizing the SEC to obtain medical information from his health care providers but each release allowed revocation unless action had already been taken in reliance on the authorization.[368] Koch then attempted to revoke his authorization for his psychoanalyst just before the psychoanalyst was served with a subpoena for information.[369] Koch claimed that he never alleged that the SEC caused mental or psychological injury.[370] The court agreed, thus finding that Koch did not impliedly waive the privilege.[371] The court further found that under HIPAA regulations, the SEC was not a "covered entity" that was entitled to rely on Koch's initial authorization.[372] Since Koch's psychoanalyst

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[363] Jones v. Prudential Ins. Co. of Am., 388 A.2d 476, 482-83 (D.C. 1978).
[364] *Jones*, 388 A.2d at 482.
[365] *Id.* at 482-83.
[366] *Id.; but see* Ferguson v. Quaker City Life Ins. Co., 129 A.2d 189, 192 (D.C. 1957) (in a case challenging the denial of life insurance policy proceeds, the court held that it was error to admit medical records showing that the decedent suffered from a serious medical condition not disclosed on the insurance application when the insured's beneficiary did not waive the privilege).
[367] D.C. Code § 14-307 is not preempted or superseded by HIPAA because it is more stringent than the HIPAA regulations. Y.J.K. v. D.A., No. DRB-1911-04, 2005 WL 2220021, at *3 (D.C. Super. Ct. Sept. 9, 2005).
[368] *Koch*, 489 F.3d at 386-87.
[369] *Id.* at 387.
[370] *Id.*
[371] *Id.* at 388-91.
[372] *Id.* at 391-92.

had not yet acted on the authorization, and since the SEC was not entitled to rely on the authorization, the employee's waiver was revocable.[373]

C. Authorization of *Ex Parte* Physician Communications

In the District of Columbia, *ex parte* interviews with treating physicians are a permissible means of informal discovery when the plaintiff-patient has put a medical condition at issue in a lawsuit.[374]

When a party raises her medical condition in a lawsuit but then refuses to sign waivers authorizing health care professionals to disclose information about her medical condition, courts in the District of Columbia will compel the party to inform health care professionals that doctor-patient privilege is waived regarding issues relevant to the litigation.[375] Even though a party raising medical issues will be compelled to waive doctor-patient privilege claims, and thus allow disclosures by her health care providers, courts in the District of Columbia will not order doctors to participate in *ex parte* interviews.[376]

D. Local Practice Pointers

- The physician-patient privilege is only an evidentiary privilege and cannot be invoked outside of court.
- Patients can implicitly waive the physician-patient privilege by placing a medical condition at issue in a lawsuit or by signing an authorization for medical record release.
- A patient cannot authorize disclosure of only favorable portions of medical records. The entire relevant portion will be deemed waived in such a case.
- Even when a patient waives the privilege, the waiver only extends to relevant medical information.

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[373] *Koch*, 489 F.3d at 391.
[374] *Street*, 607 A.2d at 1247 (concluding that *ex parte* interviews with a treating physician are a permissible means of informal discovery when the plaintiff places her medical condition at issue and rejecting the argument that doctors' testimony should be excluded because it was obtained in an *ex parte* interview); *Sklagen*, 625 F. Supp. at 992 (*ex parte* interviews are an effective discovery procedure operating outside of, and not precluded by, the discovery rules).
[375] *See* Doe v. Eli Lilly & Co., Inc., 99 F.R.D. 126, 128 (D.D.C. 1983) (holding that the physician-patient privilege cannot be used as a "trial tactic" for a party to advantageously control the timing and circumstances of information to be revealed and directing the plaintiff to inform her physicians that the privilege would not bar disclosure of the information they possessed).
[376] Alston v. Greater Se. Cmty. Hosp., 107 F.R.D. 35, 38-39 (D.D.C. 1985) (finding that a doctor cannot be required to submit to an interview and recognizing the benefits of having counsel for the patient present at a formal deposition).

- HIPAA has broadened the ability to revoke medical record release authorization, but typically only if the physician has not already relied upon the release.

- If a party raises a medical issue in litigation, opposing counsel should seek an authorization from that party allowing health care providers to produce relevant documents and provide information, including through oral interviews, concerning the patient's relevant care and treatment.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

As discussed above,[377] courts in the District of Columbia recognize that *ex parte* interviews of witnesses are an efficient means of conducting informal discovery. If a party raises his medical condition in litigation, he must authorize his health care providers to produce relevant documents and allow his doctors to speak to lawyers without fearing that the patient will claim a violation of the doctor-patient privilege.[378] District of Columbia courts will not, however, compel doctors to answer questions during *ex parte* interviews.[379] Thus, unless the doctor consents to discussing his patient with the lawyer, the doctor's oral opinion may only be obtained through a deposition or trial testimony.

The District of Columbia's federal courts have not decided whether treating physicians must provide expert reports to offer opinion testimony.[380] Nonetheless, they appear to frown on any failure to identify such testimony as expert opinion. Outside the federal court system, the District of Columbia Court of Appeals has held that expert reports are not normally required from treating physicians who developed their opinions during treatment.[381] Nonetheless, while treating physicians may offer opinions developed during treatment as a fact witness, the opinions developed solely for litigation, however, must

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[377] *See* supra, Section II.C.
[378] Doe, 99 F.R.D. at 128.
[379] Alston, 107 F.R.D. at 38-39.
[380] *See* Disability Rights Council of Greater Washington v. Washington Metro. Area Transit Auth., 242 F.R.D. 139, 149 (D.D.C. 2007).
[381] See *Richbow*, 600 A.2d at 1068-69 (summarizing cases); Structural Pres. Sys., Inc. v. Petty, 927 A.2d 1069, 1073-74 (D.C. 2007) (holding that the focus is not whether the witness has been identified as a treating physician, but on the substance of whether the testimony involves opinions developed during treatment or as a result of the litigation); Safeway Stores, Inc. v. Buckmon, 652 A.2d 597, 606 (D.C. 1994) (affirming the admission of a treating physician's opinion which was disclosed in treatment records but not in an expert report).

be disclosed pursuant to expert disclosure rules and orders.[382] Parties may not avoid their obligations to disclose expert opinions by seeking the opinion during cross examination. Thus, if one party obtains opinions developed during treatment only, and the party cross-examining the witness intends to inquire into opinions not developed during treatment, the party conducting the cross-examination must identify the treating physician as an expert.[383] Similarly, parties may not avoid their expert disclosure requirements by asking a treating physician hypothetical questions during testimony about opinions developed during the course of treatment.[384]

Finally, at trial, if a party concedes that a treating physician could properly testify as a fact witness, that party cannot then preclude the physician from also offering an expert opinion based upon treatment of the patient based on claims of doctor-patient privilege.[385]

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Like the Federal Rules of Civil Procedure, the District of Columbia's Rules of Civil Procedure require parties seeking discovery from experts to pay "a reasonable fee for time spent in responding to discovery."[386] The rules and requirements for payment of witness fees at trial is the same in District of Columbia courts as it is in the United States District Court for the District of Columbia.[387]

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[382] See *Structural Pres. Sys.*, 927 A.2d at 1074-75; Sowell v. Walker, 755 A.2d 438, 445-47 (D.C. 2000) (excluding the opinion of a treating physician when the patient did not see the treating physician until after the close of discovery and when the doctor's opinion was not disclosed until trial).
[383] *See* Gubbins v. Hurson, 885 A.2d 269, 275-79 (D.C. 2005).
[384] D.C. v. Howard, 588 A.2d 683, 691-93 (D.C. 1991).
[385] See *Richbow*, 600 A.2d at 1067-69.
[386] D.C. SUPER. CT. R. CIV. P. 26(b)(4).
[387] D.C. CODE § 15-714(a).

2. Case Law

To receive compensation at his or her normal hourly rates from the party requesting discovery, as is allowed for expert witness discovery, the witness must normally be designated as an expert.[388]

Although an expert may receive his or her normal rates during discovery, after trial, the prevailing party seeking to recover taxable costs and fees may only recover the statutory witness fee and not the actual fees it paid the treating physician for his or her time.[389] Even when contracts allow the recovery of attorneys' fees by a prevailing party, expert fees initially paid by a law firm to a testifying expert are not recoverable from the losing party as an "attorney fee."[390]

C. Local Custom and Practice

- *Ex parte* communications with nonparty, treating physicians are generally permitted once a party has expressly or impliedly waived the doctor-patient privilege.

- Although *ex parte* communications are permitted after waiver of privilege, physicians are not required to submit to *ex parte* interviews and, in many cases, the physician and patient benefit from a formal deposition.

- To ensure payment of reasonable fees for time spent in depositions, treating physicians should either reach an agreement that he will be paid his normal hourly rate or should move for an order quashing the subpoena on the ground that attending a deposition and receiving only the statutory witness fee would cause an undue burden.

- Even though there are situations in which treating physicians offering opinions may not be required to be identified as experts, to avoid unnecessary motions practice, when a party anticipates that a treating physician will provide an opinion or expert testimony at trial, that party should identify the treating physician as an expert during discovery and disclose the treating physician's expected opinion in pretrial disclosures.

- Treating physician testimony should always be disclosed in expert reports when the doctor developed an opinion solely as the result of litigation or when the doctor will offer an opinion

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[388] Cf. *Disability Rights Council*, 242 F.R.D. at 149-50 (applying the Federal Rule and rejecting the argument that a witness, who was not designated as an expert and was not hired to provide an opinion in anticipation of trial, performed expert work in responding to discovery).

[389] *See* Zdunek v. Washington Metro. Area Transit Auth., 100 F.R.D. 689, 693 (D.D.C. 1983) (finding that there is no statutory authority for paying more than the normal witness fee, plus subsistence and travel allowances, for experts); Upton v. Henderer, 969 A.2d 252, 254-57 (D.C. 2009) (only statutory witness fees, not actual expert fees, are recoverable after an offer of judgment); Harris v. Sears Roebuck and Co., 695 A.2d 108, 111 (D.C. 1997) (rejecting the argument that the trial court has discretion to award expert fees beyond the statutory witness fee); *see also* Goldring v. D.C., 2005 WL 3294005, at *4-5 (D.D.C. May 26, 2005) (finding that recoverable witness fees are limited by statute and that the Individuals with Disabilities Education Act is no exception); Aranow v. D.C., 780 F. Supp. 46, 48-49 (D.D.C. 1992) (finding that recoverable witness fees are limited by statute and that the Handicapped Children's Protection Act is no exception).

[390] Wilcox v. Sisson, 2006 WL 1443981, at *13 (D.D.C. May 25, 2006).

concerning the treatment of another doctor. Expert reports are also recommended when the treating physician developed his opinion after litigation began.

- If a treating physician offers an opinion at trial that was not disclosed in an expert report, counsel must establish that the opinion was developed during the course of treatment.