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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

A plaintiff may recover reasonable medical expenses that are the natural and proximate result of a defendant's tortious act. *See Warner v. Ware*, 182 So. 605 (Fla. 1938). The expenses must be both necessary and reasonable. *See Shaw v. Puleo*, 159 So. 2d 641 (Fla. 1964); *E. W. Karate Ass'n v. Riquelme*, 638 So. 2d 604 (Fla. 4th DCA 1994). Plaintiff bears the burden of proving both the necessity and reasonableness of any claimed medical expenses. *See Albertson's, Inc. v. Brady*, 475 So. 2d 986 (Fla. 2d DCA 1985).

Courts are split regarding the scope of evidence that a plaintiff must present on necessity and reasonableness. Some courts hold that a plaintiff's bare testimony on the amount of the medical bills and introduction of such bills into evidence is sufficient to send the issue to the jury. *See Irwin v. Blake*, 589 So. 2d 973 (Fla. 4th DCA 1991). Other courts hold that a plaintiff must provide a detailed description of the treatment relative to the alleged injury to admit the medical bills into evidence because the amount of the medical bills alone is insufficient. *See Albertson's, Inc. v. Brady*, 475 So. 2d 986 (Fla. 2d DCA 1985).

2. Future Medical Expenses

A plaintiff may recover medical expenses that may be incurred in the future if a reasonable basis exists for computing their amount. *See DeAlmeida v. Graham*, 524 So. 2d 666 (Fla. 4th DCA 1987).

Such a recovery requires more than a mere possibility that future treatment might be obtained. *See Shearon v. Sullivan*, 821 So. 2d 1222 (Fla. 1st DCA 2002). Rather, future medical expenses must be reasonably certain to be incurred. *See id.* Expert testimony is usually required to support a claim for future medical expenses. An award of future medical expenses does not require that the jury also award noneconomic damages. *See Allstate Ins. Co. v. Campbell*, 842 So. 2d 1031 (Fla. 2d DCA 2003).

B. Collateral Source Rule and Exceptions

At common law, Florida's collateral source rule ("CSR") prohibited a party from introducing evidence of collateral benefits and also prohibited the set-off of collateral source benefits from a damages award. *See Sheffield v. Superior Ins. Co.*, 800 So. 2d 197 (Fla. 2001). The CSR is now governed by section 768.76, Florida Statutes. Section 768.76 did not affect the common law principle that evidence of collateral sources may not be presented to the jury. *See Benton v. CSX Transp., Inc.*, 898 So. 2d 243, 245 (Fla. 4th DCA 2005). Under section 768.76, the court is now required to reduce the damage award by the amount of collateral sources for which no subrogation rights exist. *See* Fla. Stat. § 768.76(1). Thus, the jury determines the total amount of damages and the court then determines the amount of collateral source benefits and deducts that amount from the jury's verdict. *See Matiyosus v. Keaten*, 717 So. 2d 1097 (Fla. 5th DCA 1998). A standard jury instruction provides that the court will make the reduction. *See* Fla. Std. Jury Instr. (Civ.) 6.13(a). Counsel must ensure that the jury is instructed appropriately and any error in instructing the jury must be cured at trial and not by raising the issue for the first time on appeal. *See Matiyosus v. Keaten*, 717 So. 2d 1097 (Fla. 5th DCA 1998).

Other statutes apply the CSR to cases involving workers' compensation, *see* Fla. Stat. § 440.20(14), and motor vehicle accidents. *See* Fla. Stat. § 627.736(3). Briefly, section 627.736(3) allows the set-off of PIP benefits. Contrary to section 768.76, evidence of PIP benefits must be presented to the trier of fact (judge or jury) who then sets off the PIP benefits. *See Caruso v. Baumble*, 880 So. 2d 540 (Fla. 2004). To the extent that a plaintiff received PIP benefits, those amounts are subject to a set-off by the jury under section 627.736(3).

No reduction may be made for any collateral source for which a subrogation right exists. *See* Fla.

Stat. § 768.76(1). As long as no subrogation right exists, the following benefits are "collateral sources" subject to a set-off:

a. Social Security Act benefits, *see* Fla. Stat. § 768.76(2)(a)1.

b. Benefits under a federal, state, or local income disability act; or any other programs providing medical expenses, disability payments, or other similar benefits, except where prohibited by federal law or expressly excluded by law as collateral sources, *see id.*

c. Benefits under health, sickness, or income disability insurance; automobile accident insurance providing health benefits or income disability coverage; and any other similar insurance benefits, *see* Fla. Stat. § 768.76(2)(a)2.; *Centex-Rodgers Constr. Co. v. Herrera*, 816 So. 2d 1206 (Fla. 4th DCA 2002).

d. Benefits under any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, *see* Fla. Stat. § 768.76(2)(a)3.

e. Benefits under a contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability, *see* Fla. Stat. § 768.76(2)(a)4.

f. Settlement with a co-tortfeasor, *see D'Angelo v. Fitzmaurice*, 863 So. 2d 311 (Fla. 2003); *Grobman v. Posey*, 863 So. 2d 1230 (Fla. 4th DCA 2003).

g. An annuity obtained by a tortfeasor (for example, an employer) in anticipation of potential legal liability, *see Atl. Express Corp. v. Stamp*, 832 So. 2d 829 (Fla. 3d DCA 2002).

The following benefits are not considered "collateral sources" and are not subject to a set-off:

h. Life insurance benefits available to a claimant, whether the claimant purchased them or others provided them, *see* Fla. Stat. § 768.76(2)(a)2.

i. Benefits under any federal program providing for the federal government's lien on, or

right to, reimbursement from a plaintiff's recovery, *see* Fla. Stat. § 768.76(2)(b).

j. Benefits pursuant to Title XVIII (42 U.S.C. § 1395 governing Medicare) and Title XIX (42 U.S.C. § 1396 governing Medicaid), *see* Fla. Stat. §§ 768.76(2)(a)1.; 768.76(2)(b); *Morales v. Scherer*, 528 So. 2d 1 (Fla. 4th DCA 1988) (Medicare benefits are subject to subrogation rights).

k. Benefits under workers' compensation law, *see* Fla. Stat. § 768.76(2)(b); *Bruner v. Caterpillar, Inc.*, 627 So. 2d 46 (Fla. 1st DCA 1993).

l. Benefits under any medical service program administered by the Department of Health, *see* Fla. Stat. § 768.76(2)(b).

m. "Med pay" benefits, *see Sutton v. Ashcraft*, 671 So. 2d 301 (Fla. 5th DCA 1996).

n. Free or low-cost services from the government or charitable agencies available to anyone, regardless of wealth or status, *see Fla. Physician's Ins. Reciprocal v. Stanley*, 452 So. 2d 514 (Fla. 1984).

C. Treatment of Write-downs and Write-offs

Medical expense damages must compensate a plaintiff for only actual economic loss. Thus, in accord with Florida's long-standing fundamental tenet that the purpose of tort recovery is to compensate, not enrich, an injured party, a plaintiff may recover damages for only those medical expenses actually paid – not those that are written down or off. *See generally Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005); *Mercury Motors Express, Inc. v. Johnson*, 393 So. 2d 545, 547 (Fla. 1981).

1. Medicare and Medicaid

A plaintiff cannot recover the full amount charged by a medical provider when the medical provider accepts a lesser payment from Medicare. Indeed, evidence of the full or original bill is not admissible. *See Cooperative Leasing v. Johnson*, 872 So. 2d 956 (Fla. 2d DCA 2004). The original amount is irrelevant because it does not constitute a loss. *See Thyssenkrupp v. Lasky*, 868 So. 2d 547 (Fla. 4th DCA 2003).

2. Private Insurance

A plaintiff's recoverable medical damages are only those actually paid by the insurance provider. *See Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005); *Horton v. Channing*, 698 So. 2d 865 (Fla. 1st DCA 1997). It is likely reversible error to admit evidence of medical damages in excess of the sum actually paid or owed. *See Dourado v. Ford Motor Co.*, 843 So. 2d 913 (Fla. 4th DCA 2003); *Horton v. Channing*, 698 So. 2d 865 (Fla. 1st DCA 1997). Although the Supreme Court of Florida did not address the evidentiary issue in *Goble*, the Court knew of the evidence-based cases and did not disapprove of them. *See Goble v. Frohman*, 901 So. 2d 830 (Fla. 2005). In fact, three justices cited *Thyssenkrupp* with favor. *See id.*

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

Florida law applies a broad statutory physician-patient privilege. *See* Fla. Stat. § 456.057. The Supreme Court of Florida interprets that privilege very broadly to preclude *ex parte* communications with non-party treating physicians, even if the communication is limited to general topics and does not address the specific plaintiff's medical condition. *See Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996). Section 456.057, Florida Statutes, requires a specific authorization to waive the statutory privilege. A medical authorization to release medical records is insufficient.

A. Scope of Physician-Patient Privilege and Waiver

Section 456.057(7)-(8) sets forth the statutory privilege and, by its express language, prohibits a treating medical provider from discussing "the medical condition of a patient." Fla. Stat. § 456.057(7)(a), (8) (note that the statute excepts workers' compensation claims under section 440.13(4)(c)). Although section 456.057 does not expressly cover general discussions that do not address any particular patient, Florida courts interpret the statute so broadly that even general discussions are prohibited. *See Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996); *Lemieux v. Tandem Health Care, Inc.*, 862 So. 2d 745 (Fla. 2d DCA 2003).

In *Acosta*, the Court affirmed the quashing of a trial court order that allowed only general communication and prohibited any discussion of the plaintiff's "specific medical condition." *Acosta v.*

Richter, 671 So. 2d 149 (Fla. 1996) (analyzing the former statute under section 455.241, now renumbered as section 456.057). The Court held that the privilege is subject to only the limited exceptions enumerated in the statute that allow disclosure: (1) to other treating healthcare providers, (2) upon the patient's written authorization, (3) when compelled by subpoena, or (4) when necessary to defend a physician or healthcare provider against a pending or expected medical-negligence claim. *See id.* In reaching that holding, the Court expressly aligned itself with those cases applying a restrictive view of *ex parte* communications between defense counsel and a plaintiff's physicians and rejected those cases allowing an expansive application of the statutory exceptions. *See id.* Several of the rejected cases involved trial court orders that authorized only limited or general meetings with a plaintiff's physician that specifically excluded any reference to the plaintiff's medical condition. *See id.* Thus, the privilege is very broad and the basis for waiver is very narrow.

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

Although the statutes and case law do not directly address the issue, any waiver of the statutory privilege most likely still must comply with HIPAA. Given that any written authorization by a plaintiff must specifically cover the discussion or disclosure of the plaintiff's medical condition, such an authorization should (like all medical authorizations today) comply with the necessary HIPAA provisions.

C. Authorization of Ex Parte Physician Communication by Plaintiff

Any authorization by a plaintiff to allow discussions about the plaintiff's medical condition or treatment must specifically authorize such disclosure. *See* Fla. Stat. § 456.057(7)(a), (8). A general medical authorization or an authorization covering only medical records is insufficient. *See id.* The exceptions listed in section 456.057(7)(a) pertain only to medical records. *See* Fla. Stat. § 456.057(7)(a). They do not apply to discussions of the patient's medical condition. *See id.* Likewise, section 456.057(8) separately refers to the confidentiality of the provider's discussions about the patient's treatment and states that such confidential information may be disclosed only upon written authorization from the patient. *See* Fla. Stat. § 456.057(8). Thus, any written authorization to allow *ex parte* communication must specifically refer to, and authorize, the disclosure of a plaintiff's medical condition.

D. Authorization of Ex Parte Physician Communication by Courts

The relevant statutory provisions provide the sole basis for authorizing *ex parte* physician communication.

E. Local Practice Pointers

The limitations on *ex parte* communication do not apply regarding physicians that perform an examination of the person or independent medical examination ("IME") under Rule 1.360, Florida Rules of Civil Procedure. Instead, Florida law treats such a physician as an expert witness, not a treating physician. *See West v. Branham*, 576 So. 2d 381 (Fla. 4th DCA 1991); *see also Adelman Steel Corp. v. Winter*, 610 So. 2d 1180 (Fla. 1st DCA 1992). As a result, in the absence of a treating-physician relationship, the rules of physician-patient confidentiality do not apply to limit communication with an IME physician. *See Acosta v. Richter*, 671 So. 2d 149 (Fla. 1996) (*quoting West v. Branham*, 576 So. 2d at 383, for the proposition that "the purpose of [the physician-patient privilege statute] is to preserve a patient's right to confidentiality with respect to information disclosed to a healthcare provider in the course of the *care and treatment of a patient* . . . .") (emphasis added); *Reed v. Reed*, 643 So. 2d 1180 (Fla. 1st DCA 1994) (recognizing that revisions to the workers' compensation statutes did not alter the holding in *Adelman Steel* that IME physicians act in no other capacity than as an expert witness for the requesting party).

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

The general rules of depositions apply to depositions of a non-party treating physician. Rule 1.310(a), Florida Rules of Civil Procedure, sets forth the time limitations relative to the start of the case. Rule 1.410(e)(2) governs the place for taking the deposition and generally provides that a person may be required to attend a deposition only in the county where he resides, is employed, or transacts his business. *See, e.g., Ormond Beach First Nat'l Bank v. J.M Montgomery Roofing Co.*, 189 So. 2d 239 (Fla. 1st DCA 1966). The rule provides that the court may establish some other location that is convenient or a witness may volunteer to appear at a place other than those designated by the rule or by court order. In those

instances, however, the deposing party always runs the risk of a non-appearance. In that event, the deposing party will have to serve the witness with another subpoena in accord with Rule 1.410(e)(2).

Rule 1.310(b)(1) sets forth the notice requirements for the deposition. It requires, among other things, that any party must give reasonable notice of the deposition in writing to every other party. Finally, under Rule 1.410(e)(1), a party may require a non-party witness to produce documents and other things before or at the deposition by serving the witness with a subpoena duces tecum. The notice of deposition served upon the other parties must then contain a designation of the items to be produced, which is typically accomplished by attaching a copy of the subpoena duces tecum to the notice.

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

To compel attendance at a deposition, a non-party treating physician must be served with a subpoena. *See* Fla. R. Civ. P. 1.310(a); 1.410. Like any other witness, the physician is entitled to receive, before testifying, a witness fee and, if required to travel to the deposition, travel expenses. *See* Fla. Stat. §§ 92.142; 92.151 (setting forth the statutory fees). As a practical matter, however, a non-party treating physician typically will require payment of his or her hourly rate for depositions or testimony.

2. Case Law

The rules and statutes set forth the fee requirements and limits.

C. Local Custom and Practice

The rules also provide the procedures for video and telephone depositions. Any party may video the deposition of any person without obtaining approval from the court or the other parties. *See* Fla. R. Civ. P. 1.310(b)(4). The deposing party need only state in the deposition notice that the deposition will be taken by videotape and provide the videographer's name and address. *See* Fla. R. Civ. P. 1.310(b)(4)(A). Video depositions prove increasingly useful when the physician will not be available to testify live at trial. For example, under Rule 1.330(a)(3), a deposition may be used at trial for any purpose if the witness is unavailable. Such instances include death, refusal or inability to attend trial, or if the witness is located more than 100 miles from the location of the court proceeding or is absent from the

state. *See* Fla. R. Civ. P. 1.330(a)(3). Thus, once properly authenticated, the video deposition may be of much greater value at trial than the deposition transcript alone for unavailable witnesses.

Telephone depositions require either court approval or stipulation by the other parties. *See* Fla. R. Civ. P. 1.310(b)(7). Absent court approval or the parties' stipulation, no party may use the deposition at trial. *See Smith v. DRW Realty Servs.*, 578 So. 2d 507 (Fla. 1st DCA 1991).