

KENTUCKY

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

Past and future medical expenses are recoverable items of damages in a personal injury case.¹⁹⁴ To establish a right to recover such damages the injured person must show the amount and the reasonableness of the expense.¹⁹⁵ The injured person must also show that the expense resulted from an injury connected to the accident.¹⁹⁶ The amount of the expense can be established by testimony or introduction of the bill.¹⁹⁷ Testimony by an injured person that the medical expenses were incurred for treatment of injuries sustained in an accident in conjunction with copies of the actual medical bills constitutes a prima facie showing of reasonableness.¹⁹⁸ A physician or other medical provider can testify as to the amount and reasonableness of the expense.¹⁹⁹

B. Collateral Source Rule and Exceptions

An injured person is entitled to recover medical and hospital expenses even though these

¹⁹⁴ Ky. Cent. Ins. Co. v. Schneider, 15 S.W.3d 373, 374 (Ky. 2000) (“Damages for bodily injury are regarded as compensatory damages and include the expense of cure...”); Langnehs v. Parmelee, 427 S.W.2d 223, 224 (Ky. 1967) (as a general rule, necessary and reasonable expenses for medical services are recoverable in a suit for personal injuries.)

¹⁹⁵ Outland v. Dayer, 31 S.W.2d 725, 726 (Ky. 1930) (plaintiff’s failure to prove amount or reasonableness of medical bills justified jury’s verdict which was less than amount requested).

¹⁹⁶ Morgan v. Scott, 291 S.W.3d 622, 643 (Ky. 2009) (jury decides if medical bills are reasonable and stemmed from the injuries underlying the cause of action; however, directed verdict by trial court as to amount of medical expenses was not improper where there was no genuine issue of disputed fact).

¹⁹⁷ Daugherty v. Daugherty, 609 S.W.2d 127, 128 (Ky. 1980) (introduction of a medical bill alone is sufficient to establish its reasonableness in light of the statutory presumption in KRS 304.39-020(5)(a)).

¹⁹⁸ Townsend v. Stamper, 398 S.W.2d 45, 48 (Ky. 1965).

¹⁹⁹ Outland, 31 S.W.2d at 726.

expenses are paid by a third party such as an insurer or a governmental entity.²⁰⁰ The party causing the injury must bear the full cost of the injury, regardless of any compensation received by the injured party from an independent or collateral source.²⁰¹ Receipt of collateral source payments cannot result in denying plaintiff's tort remedy when the plaintiff had the foresight to obtain insurance coverage in the event of a catastrophe.²⁰² Moreover, evidence of collateral source payments or contractual allowances is inadmissible.²⁰³

C. Treatment of Write-Downs and Write-Offs

1. Medicare and Medicaid and Private Insurance

An injured person is entitled to recover the total amount billed, not the amount actually paid.²⁰⁴ The injured person is more deserving of any resulting benefit given his/her foresight in paying premiums for health insurance to an insurer, welfare fund, or the government.²⁰⁵ The injured person is not receiving a double recovery because the damage award is usually subject to subrogation.²⁰⁶ Moreover, the plaintiff's misfortune would be compounded if the jury perceives that the plaintiff has no need to recover such expenses since plaintiff's expenses were paid by a third party.²⁰⁷ Further evidence of contractual

²⁰⁰ *Daugherty*, 609 S.W.2d at 128 (discussing injured party's right to recover medical benefits paid by military, Medicare and a mine worker's welfare fund);

²⁰¹ *Baptist Healthcare Syss, Inc. v. Miller*, 177 S.W.3d 676, 683 (Ky. 2005) (*citing* *Schwartz v. Hasty*, 175 S.W.3d 621, 626 (Ky. App. 2005)).

²⁰² *O'Bryan v. Hedgespeth*, 892 S.W.2d 571, 578 (Ky. 1995) (denial of medical expenses and other damages to a plaintiff receiving collateral source payments violates the longstanding right of a plaintiff to recover against the wrongdoer in a personal injury claim for expenses incurred).

²⁰³ *O'Bryan*, 892 S.W.2d at 578 (declaring KRS 411.188, which allowed for the admissibility of evidence of collateral source payments other than life insurance at trial, unconstitutional); *Baptist Healthcare*, 177 S.W.3d at 683-684 (holding exclusion of evidence of contractual allowance between Medicare and health care provider was proper).

²⁰⁴ *Baptist Healthcare*, 177 S.W.3d at 682-683 ("It is improper to reduce plaintiff's damages by payments for medical treatment under a health insurance policy if the premiums were paid by the plaintiff or a third party other than the tortfeasor.")

²⁰⁵ *O'Bryan*, 892 S.W.2d at 578; *Baptist Healthcare*, 177 S.W.3d at 683-684 (Medicare recipient deserves benefit of premiums paid); *Conley v. Foster*, 335 S.W.2d 904, 907 (Ky. 1960) (employee deserves benefit of wage contributions paid to welfare fund).

²⁰⁶ *O'Bryan*, 892 S.W.2d at 576 ("...benefits received are usually subject to subrogation so there is no 'double recovery' by any stretch of the imagination.").

²⁰⁷ *O'Bryan*, 892 S.W.2d at 576 (distinguishing between plaintiff's need to recover damages from wrongdoer and right to recover such damages).

discounts between the payor and the medical provider inure to the benefit of the injured person, not the tortfeasor.²⁰⁸

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

A. Scope of Physician-Patient Privilege and Waiver

While some states refuse to allow *ex parte* communications with treating physicians under the rationale that the physician-patient privilege prevents a physician from disclosing confidential medical information regarding a patient, Kentucky does not recognize such a privilege.²⁰⁹ The Kentucky Rules of Evidence only recognize six privileges: (1) attorney-client; (2) husband-wife; (3) religious privilege; (4) counselor-client; (5) psychotherapist-patient; and (7) identity of informer.²¹⁰ Accordingly, no Kentucky rule protects physician-patient communications.²¹¹

Treating physicians are considered to be important fact witnesses. Absent a privilege, a party is not entitled to restrict an opponent's access to a witness, however partial or important.²¹² Private interviews with physicians "permit investigation and preparation of possible defense theories without revealing potential work product" and "[t]he presence of plaintiff's counsel during these interviews could cause interference or disruption."²¹³ Before HIPAA, defense counsel could conduct *ex parte* interviews with plaintiff's treating physicians, as long as the physicians were willing to be interviewed by defense counsel.²¹⁴

Kentucky courts recognize a fiduciary relationship between a patient and his/her treating physician.²¹⁵ However, the filing of a personal injury lawsuit places the patient's medical condition in issue.²¹⁶ As a result, defendants were historically allowed to obtain relevant medical records and were

²⁰⁸ *Baptist Healthcare*, 177 S.W.3d at 683-684.

²⁰⁹ *Weiss v. Astellas Pharma, US, Inc.*, 2007 U.S. Dist. LEXIS 53453 *7 (E.D. Ky. 2007) (*citing* *Stidham v. Clark*, 74 S.W.3d 719, 727 (Ky. 2002)).

²¹⁰ KRE 503-508.

²¹¹ *Weiss v. Astellas Pharma, US, Inc.*, 2007 U.S. Dist. LEXIS 53453 at *6.

²¹² *Id.* at *14.

²¹³ *Id.* at *15.

²¹⁴ *Id.* at *15.

²¹⁵ *Id.* at *16.

²¹⁶ *Id.*

able to have *ex parte* discussions with a plaintiff's treating physician if the physician was willing to voluntarily confer with defense counsel.²¹⁷

KRS 311.595(16) does not prohibit a treating physician from disclosing a plaintiff's medical information. KRS 311.595(16) states that any physician who has "willfully violated a confidential communication" may have his or her license suspended or revoked for a period of time.²¹⁸ This statute does not prevent plaintiff's treating physicians from having *ex parte* communications with defense counsel, "at least so far as to those portions of plaintiff's medical records that are relevant to this action are concerned."²¹⁹ Yet, a plaintiff's communications with his treating physicians are confidential "and should remain confidential."²²⁰

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

While prior case law appears to allow *ex parte* interviews with plaintiff's treating physicians under certain conditions, HIPAA probably precludes such communications. Kentucky courts have not addressed this issue. Although HIPAA does not specifically address *ex parte* communications with a treating physician, the statute is designed to protect the privacy of protected health information. The statute defines health information as any information "whether oral or recorded in any form or medium, that: (1) is created or received by a health care provider...; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual."²²¹ Arguably, this provision makes HIPAA applicable to *ex parte* communications with a treating physician since it references oral communications. Therefore, the treating physician is prohibited from disclosing plaintiff's health information without the plaintiff's authorization, a court order, or a properly executed subpoena.²²² A subpoena must provide assurances that: (1) plaintiff has been put on notice of the requested disclosure;

²¹⁷ *Id.* at *16-17.

²¹⁸ *Id.* at 17.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ 45 C.F.R. § 160.103 (2006).

²²² Phillips, Kramer & Burleigh, *Kentucky Practice: Rules of Civil Procedure Annotated*, 6th Ed., p. 640.

(2) plaintiff has had a reasonable time to object to the intended disclosure; and (3) the time for raising objections, or all objections filed by plaintiff have been resolved and the disclosure is consistent with such resolution.²²³

If the information is not protected by HIPAA (*e.g.* the physician is not a covered entity under HIPAA because he does not electronically transmit health information or health insurance claims), and the contact is not otherwise legally improper, a defense attorney seeking an *ex parte* interview with plaintiff's treating physician may wish to advise the physician that he is not required to talk to the interviewer absent a subpoena.²²⁴ Also, the attorney should probably advise the physician that the unauthorized release of patient information may expose the physician to allegations by the patient of professional misconduct or tort liability.²²⁵

C. Authorization of Ex Parte Physician Communication by Plaintiff

A HIPAA-compliant authorization, executed by a plaintiff, permitting *ex parte* communications with a treating physician is valid. The authorization can allow a treating physician to discuss a patient's medical care with defense counsel. However, a physician is not mandated to communicate. Most plaintiff's attorneys will strike such language from the authorization and object to any *ex parte* communications with plaintiff's treating physician. Of course, defense counsel has the right to take the deposition of a treating physician pursuant to CR 30 and CR 45.²²⁶

D. Authorization of Ex Parte Physician Communication by Courts

A party may obtain a court order allowing a healthcare provider to disclose protected health information.²²⁷ If no court order is issued, protected health information may be disclosed in response to a subpoena, discovery request, or other lawful processes.²²⁸ A court will not compel a plaintiff to execute a

²²³ *Id.* at 640.

²²⁴ *Id.*

²²⁵ *Id.* (citing *Davenport v. Ephraim McDowell Memorial Hosp., Inc.*, 769 S.W.2d 56 (Ky. App. 1988)).

²²⁶ See CR 30.01; see also CR 45.

²²⁷ Phillips, Kramer & Burleigh, *Kentucky Practice: Rules of Civil Procedure Annotated*, 6th Ed., p. 640.

²²⁸ *Id.*

HIPAA-compliant authorization permitting defense counsel to have *ex parte* contacts with his treating physicians.²²⁹

E. Local Practice Pointers

While no Kentucky rule prohibits *ex parte* communications with a plaintiff's treating physician, attorneys practicing in Kentucky would be prudent to obtain a HIPAA-compliant authorization from plaintiff or a court order, explicitly permitting defense counsel to contact a plaintiff's treating physician *ex parte*.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Pursuant to CR 30.01, any party may take the testimony of any person by deposition upon oral examination.²³⁰ The attendance of a witness may be compelled by subpoena as provided in CR 45.²³¹ In Kentucky, attorneys customarily contact the treating physician's office to arrange for a convenient date and time to take the physician's deposition. If the physician refuses to appear, counsel may subpoena the treating physician to attend his or her deposition. At trial, however, a treating physician cannot be required to testify.²³²

A treating physician is a "transaction witness," which is someone involved in the treatment of injuries that underlie a lawsuit. As such, the treating physician cannot be compelled to give expert standard of care or causation opinions. Merely designating a physician as an expert witness does not

²²⁹ *Weiss v. Astellas Pharma, US, Inc.*, 2007 U.S. Dist. LEXIS 53453, *18 (E.D. Ky. 2007). See also *Geary v. Schroering*, 979 S.W.2d 134, 135-36 (Ky. Ct. App. 1998) (holding that trial court had no authority to require a plaintiff to execute a medical authorization because to do so would act like an *ex parte* subpoena and permit discovery without any adversarial safeguards).

²³⁰ CR 30.01.

²³¹ CR 45.01, *et seq.*

²³² CR 32.01 ("At trialany part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof" if the witness is a "practicing physician, dentist, chiropractor, osteopath, [or] podiatrist....").

mean the witness must give opinion testimony that the physician does not feel qualified to give or on which he/she is not prepared to express an opinion.²³³

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Under Kentucky Rule of Civil Procedure 26.02(4)(c), the court requires that a party pay an expert a reasonable fee for time spent in a deposition.²³⁴ A treating physician may be considered an “expert” if he/she acquires facts and opinions in furtherance of the treating physician’s expertise. If the treating physician is simply testifying based on his/her knowledge acquired from treating the plaintiff, then no Kentucky statute or rule requires a treating physician to be paid to give a deposition.

A reasonable fee is usually based on the normal rates of the expert. An expert should not be allowed to charge more to an opposing party than to the person for whom the expert will testify at trial. Under most circumstances, the fee is agreed upon in advance. If an agreement cannot be reached, the court should determine the reasonableness of the fee. A party may petition the court before or after a deposition to determine the reasonableness of an expert’s compensation. In determining “reasonableness,” several factors may be considered: (1) the fee actually being charged to the party who retained the expert; (2) fees the expert traditionally has charged in related matters; (3) the witness’ area of expertise; and (4) the nature and complexity of the discovery responses provided.²³⁵

Under Kentucky’s Supreme Court Rule 3.4(b), a lawyer shall not knowingly counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.²³⁶ The commentary to this rule notes that “it is not improper to pay a witness’s expenses or to compensate an

²³³ Phillips, Kramer & Burleigh, *Kentucky Practice: Rules of Civil Procedure Annotated*, 6th Ed., p. 636 (*citing* Reed v. Fetherston, 785 F. Supp. 1352 (E.D. Wis. 1992)).

²³⁴ CR 26.02(4)(c).

²³⁵ Phillips, Kramer & Burleigh, *Rules of Civil Procedure Annotated*, § Rule 26.02, p. 636 (6th Ed.) 2005 (*citing* Jochims v. Isuzu Motors, Ltd., 141 F.R.D. 493, 495-96 (S.D. Iowa 1992)).

²³⁶ KY. SCR 3.4(b).

expert witness on terms permitted by law,” although “it is improper to pay an expert witness a contingent fee.”²³⁷

2. Case Law

In Kentucky, “physicians are ‘person[s]’ within the meaning of CR 26.02(4) and are thus subject to the rule’s disclosure requirement when testifying about events beyond those they personally observed.”²³⁸ As an expert, a treating physician is entitled to receive a reasonable payment for testifying in a deposition.

C. Local Custom and Practice

Customarily, a party will pay a treating physician for his or her time in giving a deposition, even though the treating physician may not be identified as an expert witness. The reasoning is that a treating physician is more likely to be cooperative with a party that pays for the treating physician’s time away from his or her medical practice to give a deposition.

If the treating physician has been identified as an expert and has acquired knowledge in furtherance of his or her expertise, the party taking the deposition usually pays the expert’s reasonable hourly rate for time actually spent in the deposition.²³⁹ A party could be required to pay the expert’s customary hourly rate preparing for a deposition, traveling to the deposition, and photocopying exhibits.²⁴⁰ However, the prevalent custom in Kentucky is to only pay for the actual time spent in the deposition.²⁴¹

²³⁷ KY. SCR 3.4 Comment (3).

²³⁸ Charash v. Johnson, 43 S.W.3d 274, 281 (Ky. Ct. App. 2000).

²³⁹ Phillips, Kramer & Burleigh, Kentucky Practice: Rules of Civil Procedure Annotated, 6th Ed., p. 636.

²⁴⁰ *Id.*

²⁴¹ *Id.*