MICHIGAN

Nicholas G. Even
BOWMAN AND BROOKE LLP
50 West Big Beaver Road, Suite 600
Troy, MI 48084
Telephone: 248/687-5300
Facsimile: 248/743-0422
nicholas.even@bowmanandbrooke.com
www.bowmanandbrooke.com

I. Medical Expenses

A. Requirements for Recovery of Medical Expenses

All reasonable expenses for past and prospective necessary medical and chiropractic care, treatment and services are fully compensable. M Civ JI 50.05; *Foley v. Detroit & M R Co*, 193 Mich. 233; 159 N.W. 506 (1916). The reasonable value of the medical care must be established. *Herter v. Detroit*, 245 Mich. 425; 222 N.W. 774 (1929). The plaintiff must show *the medical care was necessary* and *the expenses were reasonable*.

The reasonableness of expenses and the necessity of the medical care are typically not a matter of dispute. When the reasonableness of the expense is in dispute, the plaintiff may show the sums actually paid or to be paid and evidence as to how and why the expenses are reasonable and necessary. *Alt v. Konkle*, 237 Mich. 264, 270, 211 N.W. 661 (1927). The necessity of medical care is rarely in dispute because a plaintiff need only show that the expense was a reasonable and necessary outlay in an attempt to be cured of the injuries. *Grinnell v. Carbide & Carbon Chemicals Corp*, 282 Mich. 509, 531-32, 276 N.W. 535 (1937).

1. Past Medical Expenses

a. Bodily Injury and Wrongful Death Claims

Past recoverable medical expenses may include more than doctor or hospital fees, and the cost of nurses and attendants is generally recoverable, even if the injured party received but did not pay for the nursing services. *Sherwood v. Chicago & W.M. Ry. Co.*, 82 Mich. 374, 46 N.W. 773 (1890); *Styles v.*

Decatur, 131 Mich. 443, 91 N.W. 622 (1902). The expenses of traveling to the site of medical treatment are also recoverable. *Grinnell*, 282 Mich. at 532-33.

In a wrongful death claim, reasonable funeral and burial expenses are also recoverable and the trial court shall order payment, from the proceeds, of the decedent's reasonable medical, funeral and burial expenses for which the estate is liable, but the proceeds may not be applied to the payment of any other charges against the decedent's estate. MCL 600.2922(6)(d).

b. Other Statutory Claims

- First-Party No-Fault Claims.
  - A plaintiff in a first-party no-fault case against that plaintiff's insurer may recover all past medical expenses incurred. MCL 500.3107(1)(a).
  - A parent's exclusive recovery for a minor child's medical expenses is through a first-party no-fault case against the insurer, per MCL 500.3107. *Sizemore v. Smock*, 155 Mich. App. 745, 750, 400 N.W.2d 706. 709 (1986), *rev'd on other grounds*, 430 Mich. 283, 422 N.W.2d 666 (1988).
  - A parent may recover from that parent's insurer for the necessity of attending to an injured minor child, but may not recover those expenses through a separate action against a negligent driver who caused the injuries. *Van Marter v. American Fidelity Fire Ins. Co.*, 114 Mich. App. 171, 78-81, 318 N.W.2d 679 (1982).
  - When the insurer disputes the claimed damages, the insured may seek a declaratory judgment. If the insured establishes that a given expense is both *allowable* and *necessary*, the court may issue a declaratory judgment allowing the amount of the expense, but only after the expense has already been incurred. *Manley v. DAIIE*, 425 Mich. 140, 288 N.W.2d 216 (1986).
- Third-Party No-Fault Claims.
  - A plaintiff in a third-party no-fault case against a third-party tortfeasor is not entitled to recover medical expenses. MCL 500.3135.

- A parent cannot bring separate third-party claim against a driver who injures that parent's minor child for recovery of the minor child's medical expenses. *Sizemore v Smock*, 155 Mich. App. 745, 750, 400 N.W.2d 706. 709 (1986), *rev'd on other grounds*, 430 Mich. 283, 422 N.W.2d 666 (1988).

➢ Worker's Compensation Claims.

- The duty to provide medical care commences at the time of injury, regardless of the duration of any disability. *McMullen v. Gavette Const. Co.*, 200 Mich. 203, 166 N.W. 1019 (1918); *Cooke v. Holland Furnace Co.*, 200 Mich. 192, 166 N.W. 1013 (1918).
- An employer must furnish an employee who sustains an illness or personal injury arising out of and in the course of employment all reasonable and necessary medical, surgical and hospital services and medicines, as well as other treatment recognized under Michigan law. MCL 418.315(1).
- If an employer fails to furnish an employee with reasonable medical services for the treatment of a work-related injury, the employer shall reimburse the employee for the employee's reasonable medical expenses arising out of the injury. MCL 418.315(1),
- An employer must also provide an injured employee with dental services, crutches, artificial limbs, artificial eyes, teeth, hearing aids, eyeglasses, hearing apparatuses, and other appliances necessary to cure, so far as reasonably possible, and relieve from the effects of the injury. MCL 418.315(1).
- A third party who incurs medical expenses on behalf of the injured employee is entitled to reimbursement if the amount of the expense is owed to that third party. *Ptak v. Pennwalt Corp.*, 112 Mich. App. 490, 316 N.W.2d 251 (1982).

2. Future Medical Expenses

i. General

Future medical expenses are governed by the rule of reasonability, which in fact governs the award of all future damages and states as follows:

> It is the generally accepted rule that to entitle a plaintiff to recover damages presently for apprehended future consequences of an injury, there must be such a degree of probability of such consequences as to amount to reasonable certainty that they will result from the original injury.

Brininstool v. Michigan United Rys Co, 157 Mich. 172, 180, 121 N.W. 728 (1909); *See also Kellom v. City of Ecorse*, 329 Mich. 303, 308, 45 N.W.2d 293 (1951).

The computation of future medical expenses involves determining whether the plaintiff's injuries will persist or worsen, and what sort of reasonable medical attention will likely be required in the future. For an example of a successful showing of future medical expenses, see *Williams v. State Highway Department*, 44 Mich. App. 51, 58-59, 205 N.W.2d 200 (1972).

ii. Medical Monitoring

Michigan has impliedly recognized *medical monitoring*, or the recovery of costs of periodic medical examinations intended to monitor the plaintiff's health and facilitate early diagnosis and treatment of diseases caused by the plaintiff's exposure to toxic substances, as a cause of action. *See Meyerhoff v. Turner Construction Co*, 202 Mich. App. 499, 503, 509 N.W.2d 847 (1993), *on remand*, 210 Mich. App. 491, 534 N.W.2d 204 (1995). However, there is no cause of action for medical monitoring, based on negligence, absent an allegation of present physical injury, regardless of whether the claim is characterized as legal or equitable in nature. *Henry v. Dow Chemical Co.*, 473 Mich. 63, 71, 701 N.W.2d 684 (2005).

B. Collateral Source Rule and Exceptions

Michigan's statutory collateral source rule provides that, when the plaintiff seeks to recover for the expense of medical care or rehabilitation services, evidence to establish that the expense was paid or is payable, in whole or in part, by a collateral source is admissible, but *only after a verdict for the plaintiff and before a judgment is entered on that verdict*. MCL 600.6303(1). The purpose is that compensation due an injured party from an independent source other than the wrongdoer should not operate to lessen

the damages recoverable from the wrongdoer. *McMiddleton v. Otis Elevator Co.*, 139 Mich. App. 418, 362 N.W.2d 812 (1984).

a. Collateral sources include, "benefits received or receivable from an insurance policy; benefits payable pursuant to a contract with a health care corporation, dental care corporation, or health maintenance organization; employee benefits, social security benefits, worker's compensation benefits; or Medicare benefits." MCL 600.6303(4).

b. Medicaid benefits and benefits paid or payable by an entity entitled by contract to a lien against a third-party recovery when the contractual lien has already been exercised are not collateral sources. *Id.*; *See also Shinholster v. Annapolis Hosp.*, 255 Mich. App. 339, 660 N.W.2d 361(2003).

1. Standard Post-Verdict Procedures

Ordinarily, after a verdict, the court determines the portion of the plaintiff's expenses which has been paid or is payable by a collateral source and reduces that portion of the judgment which represents damages paid or payable by a collateral source. MCL 600.6303(1). The court begins the process by determining the amount of the plaintiff's expense or loss which has been paid or is payable by a collateral source. MCL 600.6303(2). That amount is then reduced by a sum equal to the premiums or that portion of the premiums paid for the particular benefit by the plaintiff or the plaintiff's family or incurred by the plaintiff's employer on behalf of the plaintiff in securing the benefits received or receivable from the collateral source. *Id.*

Within ten days after a verdict for the plaintiff, the plaintiff's attorney must send notice of the verdict by registered mail to all persons entitled by contract to a lien against the proceeds of plaintiff's recovery. MCL 600.6303(3). If a contractual lien holder does not exercise the lien holder's right of subrogation within twenty days after receipt of the notice of the verdict, the lien holder shall lose the right of subrogation. *Id.*

2. Exceptions Permitting Pre-Verdict Admission Of Collateral Source Evidence

The collateral source rule is not an absolute bar to the admission of evidence that the plaintiff has been compensated by an independent source. *Nasser v. Auto Club Ins. Ass'n.*, 435 Mich. 33, 457 N.W.2d 637 (1990). Evidence concerning collateral benefits due to a plaintiff from an independent source is admissible where it has a bearing on some purpose other than the question of mitigation of damages. *Cole v. Detroit Auto. Inter-Insurance Exchange*, 137 Mich. App. 603, 357 N.W.2d 898 (1984). Acceptable purposes include evidence which has a bearing on a plaintiff's incentive to return to work and evidence proving malingering or motivation on the plaintiff's part not to resume employment or to extend disability. *Nasser*, 435 Mich. at 58-59.

3. Treatment of Write-downs and Write-offs

Michigan courts have not addressed the treatment of write-offs and write downs. Because the stated purpose of Michigan's collateral source rule is to prevent a plaintiff from receiving a double recovery or windfall by recovering the same expenses or damages from both a defendant and a collateral source, per *Haberkorn* v. *Chrysler Corp*, 210 Mich. App. 354, 374; 533 N.W.2d 373 (1995), Michigan is likely to the follow the growing trend of jurisdictions limiting a plaintiff's recovery to the amount actually paid for the medical services rather than permitting what would amount to a double recovery.

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

A. Scope of Physician-Patient Privilege and Waiver

Michigan's statutory physician-patient privilege states that a person duly authorized to practice medicine or surgery cannot disclose any information the person has acquired while attending to a patient in a professional character if the information was necessary to enable the person to prescribe for the patient as a physician or to do any act for the patient as a surgeon. MCL 600.2157. The physician-patient privilege is applicable only where the medical examination or consultation by the physician is conducted for the purpose of rendering medical advice or care to the person asserting the privilege. *VanSickle v. McHugh*, 171 Mich. App. 622, 430 N.W.2d 799 (1988).

Because the physician-patient privilege belongs to the patient, not to the physician, this privilege generally can be waived only by the patient. *Osborn v. Fabatz*, 105 Mich. App. 450, 306 N.W.2d 319 (1981). However, the physician-patient privilege may be waived when the patient fails to timely to assert the privilege. *Domako v. Rowe*, 184 Mich. App. 137, 457 N.W.2d 107 (1990), *judgment aff'd*, 438 Mich. 347, 475 N.W.2d 30 (1991). When a patient is incompetent, the patient's guardian may exercise the waiver. *Gaertner v. State*, 385 Mich. 49, 187 N.W.2d 429 (1971). Similarly, a parent or guardian may legally act for a minor and obtain access to the minor's medical records by executing a waiver of the physician-patient privilege. *Dierickx v. Cottage Hosp. Corp.*, 152 Mich. App. 162, 393 N.W.2d 564 (1986). The physician-patient privilege continues after a patient's death, and in the absence of a will contest among the decedent's heirs at law, the privilege may be waived only by the personal representative of the decedent's estate. *Scott v. Henry Ford Hosp.*, 199 Mich. App. 241, 501 N.W.2d 259 (1993). Once a patient has died, the beneficiary of a life insurance policy insuring the patient's life or the patient's heirs at law may waive the privilege for the purpose of providing the necessary documentation to a life insurer in examining a claim for benefits. MCL 600.2157.

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

Prior to the enactment of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the filing of a lawsuit for personal injury or malpractice in Michigan generally waived the statutory physician-patient privilege with respect to any injury, disease or condition at issue in a lawsuit, and a defendant was permitted to meet *ex parte* with the injured party's treating physician as part of discovery. *Domako*, 438 Mich. at 148.

Upon its enactment, the Michigan Court of Appeals held that HIPAA superseded Michigan law to the extent that its protections and requirements were more stringent than those provided by state law. *Holman v. Rasak***,** 281 Mich. App. 507, 511-12, 761 N.W.2d 391 (2008). As a result, the filing of a lawsuit no longer waives the confidentiality of health information and, unless the patient gives written consent or enters into an agreement, the patient's physician may only disclose confidential health information under limited conditions. *Id.* at 510. In the absence of written consent or an agreement

between the parties for the disclosure of confidential health information, a treating physician may only disclose that information under conditions set out in the HIPAA regulations, one of which provides for qualified protective orders consistent with 45 C.F.R. 164.512(e)(1). *Id.* at 511.

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

If the parties are willing to enter into a stipulated qualified protective order permitting *ex parte* meetings between the plaintiff's physicians and defense counsel, they are permitted to do so provided the order contain: (1) a prohibition on the use or disclosure of the protected health information outside the confines of the subject litigation, and (2) a requirement for the "return" or destruction of the protected health information once the litigation ends. *Id.* at 512.

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

Holman is currently pending on appeal to the Michigan Supreme Court. *Holman v. Rasak*, 483 Mich. 1001, 764 N.W.2d 573 (2009). While it is, the plaintiffs' bar continues to contend that, although HIPAA permits qualified protective orders, it precludes *ex parte* meetings between defense counsel and plaintiff's physicians. The issue is routinely contested at the trial court level.

Plaintiffs typically argue that *ex parte* meetings should not be permitted as they are contrary to HIPAA's privacy and notice rules, HIPAA's "qualified protective order" rule applies only when a party seeks protected health information in the context of formal discovery, and HIPAA regulations provide a definition of "qualified protective order" which cannot be reconciled with an allowance of *ex parte* meetings. Defendants respond that *ex parte* meetings should be permitted as long as defense counsel adhere to certain procedural requirements, pointing out that several federal courts recognize that HIPAA allows the release of oral information pursuant to a qualified protective order and that an *ex parte* rule can satisfy both HIPAA and state law through use of a HIPAA compliant authorization.

Some judges permit *ex parte* meetings as long as defense counsel has sought and obtained a proper qualified protective order, others disallow them under any circumstances, and even others allow them in limited instances such as when additional safeguards are included in the qualified protective order, including:

- A statement expressly permitting the physician from sharing otherwise-protected personal health information with the defense attorney;
- A description of the purpose of the meeting;
- A note on the optional nature of the meeting and the physician's ability to have his/her own lawyer present during the meeting;
- Confirmation that the plaintiff has notice of the order permitting the meeting, but noting that the meeting does not require the consent of or notice to plaintiff or plaintiff's attorneys; and
- A description of the permissible mode (orally, visually or other recorded form) in which the physician may provide information.

See Croskey v. BMW of North America, No. 02-73747, 2005 WL 4704767, at *4 (E.D. Mich. Nov. 10, 2005).

E. Local Practice Pointers

Multitudes of circuit court orders which address the issue of whether HIPAA precludes *ex parte* meetings between defense counsel and plaintiff's physicians and which are routinely attached to briefs, both in favor of and against the granting of a qualified protective order permitting *ex parte* meetings, are currently circulating among practitioners who handle Michigan personal injury cases.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Any time after a plaintiff has filed a Complaint and a defendant has secured representation, any party may obtain the testimony of a non-party treating physician, whether as a lay witness or an expert witness. MCR 2.302(B)(4)(a)(ii) and 2.302(B)(4)(d). The party seeking the testimony must provide notice of the examination to all parties and serve the physician with a subpoena. MCR 2.305 and 2.306.

The notice must be in writing and include the physician's name and address and the time and place for taking the physician's testimony. MCR 2.306(B). The notice also must provide reasonable notice that the testimony shall be taken. *Id.* In an unreported case, the Michigan Court of Appeals construed seven days to be reasonable notice when the witness had already been listed on a party's

witness list. *James v. Ann Arbor Public Schools*, No. 212786, 2000 WL 33418959, *2 (Mich. App. May 30, 2000).

The physician may be required to attend the examination in the county in which the physician resides, is employed, or transacts business in person, or at another convenient location determined by the court. MCR 2.305(C)(1). When the place of examination is in another state, territory or country, the party seeking to examine the physician may petition a court of that state, territory or country for a subpoena or equivalent process to require the physician to attend the examination. MCR 2.305(D).

After serving the notice, the party seeking to elicit the testimony may have a subpoena issued for the physician identified in the notice. MCR 2.305(A)(1). The subpoena must be served with the fee for attendance and mileage. MCR 2.506(G). The subpoena may command the physician to produce and permit inspection and copying of designated documents or other tangible things relevant to the subject matter of the pending action and within the scope of discovery. MCR 2.305(A)(2).

Upon a timely motion to quash the subpoena (set for hearing *before* the time specified for compliance contained in the subpoena), the court may enter an order quashing or modifying the subpoena, enter a protective order, or condition denial of the motion on prepayment of the cost of producing the documents or other tangible things by the issuing party. MCR 2.305(A)(4).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

A non-party treating physician who has been called as a lay witness is entitled to a witness fee of $12.00/day and $6/half day, or may be paid for his or her loss of working time, but not more than $15.00/day shall be taxable as costs as his or her witness fee. MCL 600.2552(1). The physician shall also be reimbursed at a standard per-mile rate set by the IRS (currently 55 cents/mile) for traveling expenses in coming to the place of attendance and returning from the place of attendance, to be estimated from the physician's residence, if within Michigan, or from the boundary line of this state that the physician passed in coming into Michigan, if the physician's residence is outside of Michigan. *Id.*

The party obtaining deposition testimony from a non-party treating physician expert must pay a *reasonable fee* for the physician's time spent in deposition, but not including preparation time, unless a manifest injustice would result from the payment. MCR 2.302(B)(4)(c)(i).

2. Case Law

a. When a party has provided notice that the party intends to use a non-party treating physician as an expert and another party seeks to obtain *lay witness* testimony from that physician, the party seeking the testimony must still pay the physician the reasonable fee for time spent in deposition. *Nowlin v. Michigan Auto. Compressor, Inc.*, Nos. 219045 and 219107, 2000 WL 33401829, at *3-*4 (Mich. App. Nov. 14, 2000).

b. Any fee awarded to the physician pursuant to the loss of working time provision should be for the purpose of making the physician whole, not to punish the subpoenaing party. *Spurling v. Battista*, 76 Mich. App. 350, 355, 256 N.W.2d 788 (1977).

c. When a *salaried* non-party treating physician has provided testimony as a lay witness, but received the physician's normal salary despite taking the time to provide the testimony, the court should consider if payment of more than the standard lay witness fee would amount to double compensation, make its findings clear and explain its measure of compensation on the record. *Spurling*, 76 Mich. App. at 355-56.

d. No Michigan appellate court has addressed what constitutes a reasonable fee for an expert's time in deposition and the issue is traditionally addressed on a case-by-case basis.

C. Local Custom and Practice

- When the non-party treating physician has been identified as an expert, the party seeking to depose the physician should always send a *duces tecum* deposition notice customized for the specific case in which the notice is served.
- A defendant who seeks to ensure the plaintiff's experts testify before the defendant's experts should lock in the order by serving deposition notices upon receipt of the plaintiff's witness list and, if a dispute remains, file a motion to compel the plaintiff's experts' depositions

before the depositions of the defense experts. The issue is decided on a case-by-case basis, as there is no settled law addressing the order of expert witness testimony.

- Defendants who are using "in-house" experts may seek agreement from the plaintiff's attorney that each party will pay for its own experts.