

MINNESOTA

Jillian M. Block
Bowman and Brooke LLP
150 South Fifth Street, Suite 3000
Minneapolis, Minnesota 55402
Telephone: (612) 339-8682
Facsimile: (612) 672-3200
jillian.block@bowmanandbrooke.com
www.bowmanandbrooke.com/minneapolis

I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

In Minnesota, plaintiffs in personal injury actions *may recover the entire amount* of the compensatory damages it requires *to make the plaintiff “whole* to the extent that he would have been had no injury occurred.” *Sorenson v. Cargill, Inc.*, 281 Minn. 480, 480, 163 N.W.2d 59, 60 (1968). These compensatory damages can be either general or special. *Phelps v. Commonwealth Land Title Ins. Co.*, 537 N.W.2d 271, 275 n.2 (Minn. 1995). Minnesota courts have defined general damages as the “natural, necessary and usual result of the wrongful act or occurrence in question.” *Id.* Additionally, special damages are those “which are the natural, but not the necessary and inevitable result of the wrongful act.” *Id.*

Overall, awards for health care expenses may include medical supplies, hospitalization, and health care services of every kind necessary up to the time of the verdict. Steenson & Knapp, 4 Minnesota Practice: Jury Instruction Guides—Civil CIVJIG 91.15 (2009). This includes a reasonable value of services for attendants if necessary. *Id.* Minnesota Statute Section 65.44, subd. 2, outlines the acceptable medical expenses for injuries arising from the maintenance or use of a motor vehicle which include traditional medical costs along with such other costs as in-patient services, prosthetic devices, prescription drugs, ambulance and transportation services, language translation, spiritual treatments for those relying on prayer alone.

1. Past Medical Expenses

Past medical expenses are said to include medical, x-rays, and rehabilitative services. *Kyute v. Auslund*, 668 N.W.2d 698, 699 (Minn. Ct. App. 2003). These past expenses may even be recovered for injuries resulting from an automobile accident regardless of the tort thresholds in Minnesota if unreimbursed. *Id.* (citing *Nemanic v. Gopher Heating & Sheet Metal, Inc.*, 337 N.W.2d 667, 669 (Minn, 1983)).

2. Future Medical Expenses

Overall, future damages for health care expenses are allowed if reasonably certain to be necessary for future treatment, including medical supplies, hospitalization, and other health care services. *Stenson & Knapp, supra*, 91.30. This includes the cost of attendants. *Id.* Additionally, if a plaintiff proves a present injury which increases the risk of future injury, the projected cost of medical monitoring can be included in an award. *Bryson v. Pillsbury Co.*, 573 N.W.2d 718, 720-21 (Minn. Ct. App. 1998).

a. Standard of Proof

Plaintiffs in civil actions must prove future damages to a reasonable certainty, and there will be no recovery for damages that are remote, speculative, or conjectural; yet it is unnecessary for the damages to be proved to an *absolute* certainty. *Pietrzak v. Eggen*, 295 N.W.2d 504, 507 (Minn. 1980); *Duchene v. Wolstan*, 258 N.W.2d 601, 605-06 (Minn. 1977); *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn. Ct. App. 1987).

- “Instead, the plaintiff must prove the reasonable certainty of future damages by a fair preponderance of the evidence.” *Id.*; *Carpenter v. Nelson*, 257 Minn. 424, 424 (1960); *Kwapien v. Starr*, 400 N.W.2d 179, 183 (Minn. Ct. App. 1987). This standard means that the plaintiff *must* show that damage is more likely to occur than to not occur. *Id.*
- While speculation about the amount of damages is not allowed, one acceptable method for calculating future medical expenses is to take the value of past medical expenses and multiply it by

the injured party's life expectancy. *Gensler v. Paulson*, No. A04-609, 2005 WL 147584, at *3 (Minn. Ct. App. Jan. 25, 2005).

- An expense which *might* be necessary is sufficient to show special damages. *Dornberg v. St. Paul City Railway*, 253 Minn. 52, 60, 91 N.W.2d 178, 185 (1958).
- An injured child's parents may recover for the child's medical expenses, even if there is a judgment against the child. *Faber v. Roelofs*, 212 N.W.2d 856, 862 (Minn. 1973). Alternatively, tortfeasors are not liable to minor children for injuries to their parents. *Salin v. Kloempken*, 322 N.W.2d 736, 738 (Minn. 1982).

b. Rule

A plaintiff must establish two things to recover future medical expenses: (1) that the future medical treatments in question will be required; and (2) the amount of such damages through expert testimony. *Gensler*, 2005 WL 147584, at *2; *Krutsch v. Walter H. Collin GmBh Verfahrenstechnik Und Maschinenfabric*, 495 N.W.2d 208, 213 (Minn. Ct. App. 1993) (finding reasonable certainty when doctor testified injuries were permanent and would require continual treatment); *Kwapien v. Starr*, 400 N.W.2d 179, 184 (Minn. Ct. App. 1987) (finding future medical expenses reasonably certain when doctor testified about required physical therapy and pain for the rest of plaintiff's life).

Preverdict interest is calculated from the date of commencement of the action. Minn. Stat. § 549.09, subd. 1(b) (1990); *Krutsch v. Walter H. Collin GmBh Verfahrenstechnik Und Maschinenfabric*, 495 N.W.2d 208, 215 (Minn. Ct. App. 1993). However, it is available only

[i]f the amount of the losing party's offer was closer to the judgment or award than the prevailing party's offer, the prevailing party shall receive interest only on the amount of the settlement offer or the judgment or award, whichever is less, and only from the time of commencement of the action or a demand for arbitration...

Minn. Stat. § 549.09, subd. 1(b).

B. Collateral Source Rule and Exceptions

Collateral sources are defined as payments made to the plaintiff up to the date of a verdict in the case which are related to the injury or disability in question and stem from a defined group of sources.

Minn. Stat. § 548.36 (2009). Previously, Minnesota adopted the collateral source rule, meaning a plaintiff may recover damages from a tortfeasor, *even if* the plaintiff received money or services related to the injury from another source. *Hueper v. Goodrich*, 314 N.W.2d 828, 830 (Minn. 1982). This occurred although the additional source compensated the plaintiff for injuries sustained from the tortfeasor, and the tortfeasor's liability was not credited. *Id.* However, Minnesota's legislature changed this rule in 1986 because it gave plaintiffs an opportunity for double recovery. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 331 (Minn. 1990). Now Minn. Stat. § 548.36 allows for a reduction of a plaintiff's award based on the amount received from "collateral sources." *Heine v. Simon*, 702 N.W.2d 752, 764 (Minn. 2005).

The statute is not applied if it would result in under compensating the plaintiff. *Heine*, 702 N.W.2d at 764; *Imlay*, 453 N.W.2d at 335. Some of the sources of collateral payments are those made through Workers' Compensation Act or other public programs, health or automobile insurance, contracts with groups, or contractual or voluntary wage continuation plans from employers. Minn. Stat. § 548.36, subd. 1.; *see also Bruwelheide v. Garvey*, 465 N.W.2d 96, 99 (Minn. Ct. App. 1991) (holding that sick leave pay was not the same as "disability" pay which is a listed collateral source). Amounts for which a subrogation right is asserted are not included with collateral sources because they wind up getting paid to a subrogee. Minn. Stat. § 548.36, subd. 2(1); *Imlay*, 453 N.W.2d at 334.

a. Application of the Rule

During trial, juries are not informed of collateral sources. Minn. Stat. § 548.36, subd. 5. Additionally, the statute does not state which party has the burden of proving collateral amounts to the court. *Heine v. Simon*, 702 N.W.2d 752, 765 (Minn. 2005). Instead, both parties are permitted to submit evidence of the collateral sources paid or available, *as well as* amounts the plaintiff paid to secure the right to the benefits. *Id.* at 764; Minn. Stat. § 548.36, subd. 2. If the court is unable to determine the amounts based on the evidence submitted, it will schedule a conference within ten days with the parties. *Id.* at 764-65; Minn. Stat. § 548.36, subd. 3(b).

Deductions are made only for payments up to the date of the verdict and do not include amounts denied by an insurer due to lack of coverage or where the insurer discontinues payment. *Smith v. Amn. States Ins. Co.*, 586 N.W.2d 784, 786 (Minn. Ct. App. 1999). Apportionment of the damage award between the parties will only be made after the deduction of the collateral sources. *Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 335 (Minn. 1990).

Collateral source deductions for injuries stemming from the operation, ownership, maintenance or use of a motor vehicle are separately deducted from awards under Minnesota Statute Section 65B.51 (part of the Minnesota No-Fault Automobile Insurance Act). *Fischer v. W. Nat'l Mut. Ins. Co.*, No. A07-1895, 2008 WL 3290064, at *2, *4 (Minn. Ct. App. Aug. 12, 2008) (“A UIM claim is unique and ‘is both alike and unlike a tort cause of action.’”). Not included in the definition of collateral sources are liability payments from a tortfeasor’s insurer. *Do v. Am. Fam. Mut. Ins. Co.*, 2010 WL 1065325, at *7 (Minn. March 25, 2010). Minnesota courts have stated that the underlying premise is the same and “if there is to be a windfall either to an insurer or to an insured, the windfall should go to the insured.” *Fischer*, 2008 WL 3290064, at *2 (citing *Stout v. AMCO Ins. Co.*, 645 N.W.2d 108, 112 (Minn. 2002)).

C. Treatment of Write-downs and Write-offs

Write-off amounts are not currently subject to deduction under the collateral source statute. *Swanson v. Brewster*, No. A08-0806, 2009 WL 511747, at *4 (Minn. Ct. App. March 3, 2009); *see also Ruhland v. Carr’s Tree Serv., Inc.*, No. 70-CV-07-6323, 2008 WL 5325427 (D. Minn. Aug. 11, 2008) (“Minnesota appellate cases have been clear as to what the outcome should be in a ‘gap’ situation.”); *Fischer*, 2008 WL 3290064, at *4. However, the Minnesota Supreme Court has yet to address the issue. *Id.* at *2. Additionally, the Court of Appeals has recognized that the discharge of debt may act in the same way that an actual expenditure does, which defines the purpose of the statute; however, public policy and stare decisis dictate that a tortfeasor should be held responsible for *full* compensation. *Id.* at *4.

In *Mikulay v. Dial Corp.*, No. C9-89-1711, 1990 WL 57530, at *1 (Minn. Ct. App. May 8, 1990), the court found that a write off from a hospital in compliance with Medicare regulations was a

“benefit” to the plaintiff for which the statute applied. *Id.* at *2. However, later cases disagreed. The court of appeals subsequently noted that there is inconsistency in their decisions because the statute fails to define the terms “payment” or “paid;” however, they are bound to follow their previously published decisions. *Swanson*, 2009 WL 511747, at *4.

- Public policy dictates that a tortfeasor holds the responsibility of compensating an injured party for *all* harm that he causes, *not just the net loss* of the party. *Swanson*, 2009 WL 511747, at *4 (citing *Duluth Steam Coop. Ass’n v. Ringsred*, 519 N.W.2d 215, 217 (Minn. Ct. App. 1994)).
- Pre-judgment interest is assessed on the entire amount of damages incurred, not just those which are paid. Minn. Stat. § 549.09; *Ruhland v. Carr’s Tree Service, Inc.*, No. 70-CV-07-6323, 2008 WL 5325427 (August 11, 2008).

1. Medicare and Medicaid

The collateral source statute is also inapplicable to amounts written off as part of a providers Medicare contracts because no money was paid or exchanged when the medical providers wrote-off the amount, even if there will be double recovery to plaintiffs. *Davis v. St. Ann’s Home*, No. A06-1968, 2008 WL 126607, at *5 (Minn. Ct. App. Jan. 15, 2008).

2. Private Insurance

- There is *no entitlement* to deduct the amount of a write-off because the amount was never *paid*. Instead it represents the amount billed, but not charged, to the injured party. *Foust v. McFarland*, 698 N.W.2d 24, 36 (Minn. Ct. App. 2005).
- There is no entitlement to an amount discounted by a provider which represents the gap between what was billed and what a health insurer paid because the amount is not a payment as required by the collateral source statute. *Tezak v. Bachke*, 698 N.W.2d 37, 41 (Minn. Ct. App. 2005), *review denied* (Minn. Aug. 24, 2005).
- Claims that the original bill was reduced because it was unreasonable, are examined to determine the reasonable value of the services rendered, otherwise it would be unjust to not allow a plaintiff to

receive the amount of the gap between the paid and billed amounts in this fashion as a way around the collateral source doctrine. *Ruhland*, 2008 WL 5325427.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

The Minnesota Rules of Civil Procedure *differ* from the Federal Rules of Civil Procedure on treatment of communications with treating physicians, but they do not directly *conflict*. *Gobuty v. Kavanagh*, 795 F. Supp. 281, 288 (D. Minn. 1992). In fact, federal courts will apply the Minnesota statute dictating communication with treating physicians when the court sits in a diversity case. *Id.* (finding that allowing *ex parte* interviews in federal courts while failing to allow them in state courts would significantly influence a defendant's decision for removal).

A. Scope of Physician-Patient Privilege and Waiver

A party waives physician-patient privilege when the party places his or her medical condition at issue. Minn. R. Civ. P. 35.03. This rule limits the production of medical records by physicians, but fails to mention if *ex parte* interviews are allowed. Minn. R. Civ. P. 35.04. In 1976, the Minnesota Supreme Court attempted to clarify the waiver rule and stated that the policy underlying the rule was to bring forth relevant evidence, protect the patient and physician, assure relevant testimony, allow patient to know what testimony of physician is, and help to prevent doctor from unknowingly disclosing information. *Wenninger v. Muesing*, 307 Minn. 405, 240 N.W.2d 333, 336-37 (1976). The court found that, other than a tactical advantage for the adverse counsel, there was no reason to allow such communications. *Id.*; *see also In Re Baycol Products Litigation*, 219 F.R.D. 468, 471 (D. Minn. 2003).

In 1986, the Minnesota legislature attempted to clarify *Wenninger* by adding subdivision 5 to Minnesota Statute Section 595.02. *In Re Baycol Products Litigation*, 219 F.R.D. 468, 471 (D. Minn. 2003). Subdivision 1(d) of the statute prohibits physicians or surgeons from disclosing any information or opinions about a patient without their consent if it was obtained while acting within their professional capacity while attending to the patient. Minn. Stat. § 595.02, subd. 1. The updated subdivision 5 asserts that there is a waiver of privilege if the claim is *against a health care provider*, and that the adverse party can hold informal discussions with the provider with written notice 15 days prior and opportunity

to opposing counsel to be present. Minn. Stat. § 592.02, subd. 5. It further states that if the provider refuses to consent to the discussion, a court order may be obtained. *Id.* The purpose of the amendment was to eliminate some of the barriers which previously prevented defendants from obtaining relevant information by eliminating plaintiff's right to veto such discussions. *Blohm v. Minneapolis Urological Surgeons, P.A.*, 449 N.W.2d 168, 169-70 (Minn. 1989).

- Plaintiffs who put their medical condition at issue in litigation are only required to execute waivers as to access to their medical records. Defendants are not allowed to conduct *ex parte* interviews. *In Re Baycol Products Litigation*, 219 F.R.D. at 471 ("In fact, absent patient permission, subd. 5, Minnesota's most liberal physician-patient privilege rule, mandates the presence of plaintiff's attorney during an interview.")
- Plaintiffs do not have the right to object to an interview if 15 days notice and an opportunity to attend is given to the plaintiff. *Blohm v. Minneapolis Urological Surgeons, P.A.*, 449 N.W.2d 168, 170 (Minn. 1989).
- Discretion for determining when violations of the *ex parte* communications rule will result in sanctions, including exclusion of the evidence, are within the trial court's purview. *Younggren v. Younggren*, 556 N.W.2d 228, 233-34 (Minn. Ct. App. 1996).

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

There is currently no case law in Minnesota which discusses the interaction between the Health Insurance Portability Act of 1996 ("HIPAA") and the physician-patient privilege. However, the District Court of Minnesota stated that HIPAA may well preempt state law, but that a ruling on the matter should be left to state courts. *Johnson v. Parker Hughes Clinics*, No. Civ. 04-4130, 2005 WL 102968, at *2 n.1 (D. Minn. 2005). Minnesota Statute Section 62J.497, subd. 2 (c) is one area in which the legislature specifically stated that state law regarding transmission of information is preempted. Most importantly, HIPAA itself specifically outlines that the protections it offers do not extend to judicial and administrative proceedings under certain circumstances. 45 CFR 164.512 (e).

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

If a patient and his attorney permit, physicians may still give personal interviews to defense counsel. *Wenninger*, 307 Minn. at 412, 240 N.W.2d at 337. However, unilateral, private interviews are not allowed. *Id.* at 406. In *Wenninger*, the Minnesota Supreme Court stated that, while it did not believe *ex parte* communications were intended through the waiver of privilege when a party puts its health at issue in a trial, it did not wish to discourage *ex parte* communications with a physician when the patient and his attorney have granted full permission. *Id.* at 412. "Many cases never reach the litigation stage, and surely if such an interview serves to dispose of a patient's claim before litigation or before a trial on the merits, it should be encouraged." *Id.*

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

The *Wenninger* defendants argued that a plaintiff in a medical malpractice suit had waived her *entire* physician-patient privilege by putting her health in issue and moved the court for an order authorizing an interview with the plaintiff's physician. 307 Minn. at 406. The court stated that for protection of both parties treated and physicians, these *ex parte* conversations should not be allowed, absent an additional waiver from the plaintiff over what was required by statute. *Id.* at 411.

However, since *Wenninger*, the legislature enacted Minn. Stat. Section 595.02, subd. 5 which states that in cases against health care providers the privilege is waived if the provider consents; however, if the provider does not consent a court order is necessary to compel the party. *Id.*

E. Local Practice Pointers

- *Ex parte* discussions with treating physicians by opposing counsel are not allowed without full consent of the patient.
- A party waives the physician-patient privilege when they place their medical condition at issue. Typically, this privilege only extends to medical records, however, in suits against health care providers informal discussions are allowed with physicians, given proper notice.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

The requirements for subpoenas in Minnesota courts are contained in Minn. R. Civ. P. 45.03 which states that attorneys *must* take steps to ensure that they are not subjecting the subject of the subpoena to an undue burden. Minn. R. Civ. P. 45.03 (a). Subsection b outlines how such subpoenas may be modified or quashed, including if the subpoena requests disclosure of a privileged matter without an applicable waiver. The decision to quash a subpoena is within the discretion of the court. *Sumstad v. Wilson*, Nos. A08-0019, A08-0020, 2009 WL 173506, at *3 (Minn. Ct. App. Jan. 27, 2009) (quashing the subpoena of a non-party treating physician due to the undue burden placed on the doctor because the request was last minute, could be substituted with deposition transcripts, did not leave reasonable time for compliance, and that the doctor was not a proper rebuttal witness). The court “shall exercise its power with liberality in issuing [an] order [] which justice requires for the protection of parties or witnesses from unreasonable annoyance, expense, embarrassment, or oppression.” *Baskerville v. Baskerville*, 246 Minn. 496, 506, 75 N.W.2d 762, 769 (1956); *see also Shakopee Mdewakanton Sioux (Dakota) Gaming Enterprise v. Prescott*, A06-1934, 2007 WL 2769666, at *1 (Minn. Ct. App. Sept. 25, 2007).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

A witness who is not a party at trial or the employee of a party, but who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents. Minn. R. Civ. P. 45.03 (d). This rule is limited by the overall confines of scope for discovery, potential protective orders. Minn. R. Civ. P. 26.02, 26.03. Additionally Minn. Stat. § 549.04 gives district courts the discretion to tax “reasonable disbursements” against such a non-prevailing party.

2. Case Law

Non-prevailing parties *may* have to pay for non-party witnesses as part of the payment of costs. *NeoNetworks, Inc. v. Mark U. Cree*, A07-729, 2008 WL 2104161, at *8 (Minn. Ct. App. May 20, 2008). The court in *NeoNetworks* stated that, although this amount is not expressly taxed, it was a mandatory cost which should be carried by the non-prevailing party. *Id.*

Individuals called to testify on behalf of the state or agencies thereof do not receive attendance fees for testimony. *In re Special Guardianship of Kinney*, No. C7-01-2102, 2002 WL 1056377, at *1 (Minn. Ct. App. May 28, 2002) (finding that fees were not required for witness when called by the assistant county attorney for Waseca County).

C. Local Custom and Practice

- Physicians called as witnesses on behalf of the state or state agencies are not paid for their time.
- Non-prevailing parties may have to pay non-party witnesses at the end of a suit.
- Reasonable notice must be given to any non-party physicians whose testimony is desired at trial.