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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

To recover past medical expenses, a party must introduce evidence that the treatment was a proximate result of the negligence of any party and that the treatment rendered was reasonable and necessary. RSMo. § 490.715.5(1).

Medical expenses may be submitted through an affidavit stating that the amount a person charged for a service was reasonable at the time and place that the service was provided and that the service was necessary. RSMo. § 490.525(2). Such affidavit is sufficient evidence to support a finding of fact by judge or jury that the amount charged was reasonable or that the service was necessary. RSMo. § 490.525(2).

2. Future Medical Expenses

Under Missouri law, expert testimony is admissible where it addresses the probability that future medical treatment may be necessary and of the potential cost of such treatment. *Wiley v. Homfeld*, 2009 307 S.W.3d 145, 153 (Mo.App. W.D. 2009). "It is Missouri's well-settled rule that a plaintiff is entitled to full compensation for past or present injuries that the plaintiff has shown by a preponderance of the evidence were caused by the defendant." *Id.* quoting *Swartz v. Gale Webb Transportation Company*, 215 S.W.3d 127, 130-31 (Mo. Banc 2007). "In accordance with this basic damage instruction, when an expert testifies to a reasonable degree of certainty that the defendant's conduct placed the plaintiff at an increased

risk of suffering possible future consequences, Missouri courts have long held that such testimony is admissible to aid the jury in assessing the extent and value of the plaintiff's present injuries, even if those future consequences are not reasonably certain to occur." *Id*. As such, under Missouri case law, expert testimony that is short of reasonable certainty, but addresses the probability of future treatment and the potential cost of such treatment is admissible. *Id.*

The Missouri Supreme Court held that the need for future medical monitoring is a compensable item of damage when liability is established under traditional tort theories of recovery. *Meyer v. Fluor Corporation*, 220 S.W.3d 712, 717 (Mo. banc 2007). However, this holding may be limited to only medical monitoring claims resulting from exposure to toxic substances. *Ratliff v. Mentor Corporation*, 569 F.Supp.2d 926, (W.D. Mo. 2008). The holding in Meyer limited medical monitoring claims to include only claims "resulting from exposure to toxic substances." *Id.* at 929. It does not support medical monitoring claims in garden variety product liability cases. *Id.* "This explicit limitation in *Meyer* leads this Court to believe that the Missouri Supreme Court would dismiss medical monitoring claims that do not result from exposure to toxic substances." *Id*.

B. Collateral Source Rule and Exceptions

The collateral source rule is a rule of evidence and is an exception to the general rule that damages in tort are compensatory only. *Smith v. Shaw*, 159 S.W.3d 830, 832 (Mo. banc 2005). "The collateral source rule prevents a tortfeasor from reducing his liability to an injured person by proving that payments were made to a person by a collateral source. The collateral source rule is not a single rule, but is instead a combination of rationales applied to a number of different circumstances to determine whether evidence of mitigation of damages should be precluded from admission." *Id.*

The common law collateral source rule is codified and slightly modified in RSMO § 490.715. RSMo Supp. 2009. Subsection 2 of § 490.715 allows a defendant to introduce evidence that someone other than the plaintiff paid all or part of the plaintiff's special damages, but the defendant cannot identify any source of the payment. *Deck v. Teasley*, 322 S.W.3d 536, 538 (Mo. Banc 2010). By choosing to

introduce such evidence, the defendant waives the right to a credit against a judgment as authorized by section 490.710. Section 490.715.3.

"The application of the collateral source rule prevents an alleged tortfeasor from attempting to introduce evidence at trial that the plaintiff's damages will be covered, in whole or in part, by the plaintiff's insurance. The rule expresses the policy that a "wrongdoer should not benefit from the expenditures made by the injured party in procuring the insurance coverage." *Smith*, 159 S.W.3d at 832 quoting *Duckett v. Troester*, 996 S.W.2d 641, 648 (Mo.App. 1999).

One exception to the general rule of inadmissibility of collateral source payments is when a plaintiff voluntarily injects his financial condition into the lawsuit. *Ratcliff v. Sprint Missouri, Inc.*, 261 S.W.3d 534, 545 (Mo.App. W.D. 2008). "Whether the plaintiff injects his financial condition through inadvertence or purposefully, it is the raising of plaintiff's financial condition with the jury that permits the opposing party to attack his claims of financial distress by showing that other financial assistance was available. Thus, if the plaintiff makes the jury aware of his financial condition, for example, in connection with a failure to obtain treatment or in an attempt to obtain sympathy, the defendant is not required to leave such evidence unchallenged." *Id.*

In *Ratcliff*, the plaintiff injected his financial condition into the case when asked by his attorney on direct examination about his failure to obtain medical treatment, and he responded that he could not "afford that option." *Id.* at 545 – 546. The defense was able to attack this claim of financial distress by introducing evidence of his worker's compensation claim settlement. *Id.* at 546.

C. Treatment of Write-downs and Write-offs

Missouri has a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Section 490.715. The value of medical treatment is specifically addressed in subsection 5 of 490.715. Subsection 5 states:

> (1) Parties may introduce evidence of the value of the medical treatment rendered to a party that was reasonable, necessary, and a proximate result of the negligence of any party.

(2) In determining the value of the medical treatment rendered, there shall be a rebuttable presumption that the dollar amount necessary to satisfy the financial obligation to the health care provider represents the value of the medical treatment rendered. Upon motion of any party, the court may determine, outside the hearing of the jury, the value of the medical treatment rendered based upon additional evidence, including but not limited to:

a. The medical bills incurred by a party;

b. The amount actually paid for medical treatment rendered to a party;

c. The amount or estimate of the amount of medical bills not paid which such party is obligated to pay to any entity in the event of a recovery.

Notwithstanding the foregoing, no evidence of collateral sources shall be made known to the jury in presenting the evidence of the value of the medical treatment rendered.

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"The rebuttable presumption created by section 490.715.5 is that the dollar amount paid to satisfy the financial obligation to the health care providers is the value of the medical treatment rendered." *Deck*, 322 S.W.3d at 539. To rebut the presumption, the plaintiff is required to present substantial evidence that the value of the medical treatment rendered is an amount different from the dollar amount necessary to satisfy the financial obligations to the health care providers. *Id.* at 540. The evidence needs to be presented to the judge outside of any hearing by a jury. *Berra v. Danter*, 299 S.W.3d 690 (Mo.App. E.D. 2009). Once such substantial evidence is proffered, the presumption in § 490.715 is rebutted and the question of the value of the medical services becomes a fact question for the jury. *Deck*, 322 S.W.3d at 539. Both parties will be able to present evidence to the jury of the value of the medical expenses including the amount necessary to satisfy the financial obligation and the unpaid portions of the amounts charged. *Id.* Once the presumption is rebutted, the trial court has no authority to weigh the competing evidence presented by both parties regarding the value of the medical treatment. *Id.* at 541-42. It is a question of fact for the jury to determine and it is presented to the jury free from any presumption. *Id.* at 539. Despite the admissibility of such evidence, the collateral source rule still applies and prevents any evidence that payment was made by an insurer. *Id*. at 542.

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

A. Scope of Physician-Patient Privilege and Waiver

The physician patient privilege is contained in RSMo. § 491.060(5). Although it is written in terms of competency to testify, it is construed as a privilege statute. State ex rel. *Dean v. Cunningham*, 182 S.W.3d 561, 566 (Mo. banc 2006). It provides that the following persons shall be incompetent to testify . . .

> A physician licensed pursuant to chapter 334, RSMo, a chiropractor licensed pursuant to chapter 331, RSMo, a licensed psychologist or a dentist licensed pursuant to chapter 332, RSMo. concerning any information which he or she may have acquired from any patient while attending the patient in a professional character, and which information was necessary to prescribe and provide treatment for such patient as a physician, chiropractor, psychologist or dentist.

RSMo. § 491.060(5). See, *Brandt v. Medical Defense Associates*, 856 S.W.2d 667, 669 (Mo. banc 1993) and *Brandt v. Pelican*, 856 S.W.2d 658, 662 (Mo. banc 1993).

Whether or not the privilege created by § 491.060(5) applies, depends on the circumstances, facts, interests of justice under the given facts, and if there is a stronger countervailing interest. *State ex rel. Health Midwest Development v. Daugherty*, 965 S.W.2d 841, 844 (Mo. banc 1998). The privilege only applies when a person seeks treatment from a medical professional and not applicable when treatment is ordered by the court. *Id*. The privilege will not apply to the results of blood or alcohol tests that are otherwise admissible. *State v. Waring*, 779 S.W.2d 736, 739-41 (Mo.App. 1989).

The physician-patient privilege can be waived by the patient or the patient's personal representative. *Leritz v. Koehr*, 844 S.W.2d 583, 584-85 (Mo.App. 1993). The privilege is waived when a person brings a lawsuit placing his or her mental or physical condition at issue. *State ex rel. Metropolitan Trnasportation Services, Inc. v. Meyers*, 800 S.W.2d 474, 475 (Mo.App. 1990).

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

Missouri law has not been pre-empted by HIPAA, because it has been held to be consistent with HIPAA's regulatory scheme prohibiting *ex parte* communications. *State ex rel Proctor v. Messina*, 320 S.W.3d 145, 154 (Mo. 2010). HIPAA prohibits physicians from engaging in an *ex parte* oral disclosure

of a patient's protected health information unless an express exception applies. *Id.* at 150. Under 45 C.F.R. § 164.502(a), HIPAA permits *ex parte* communications when the patient expressly authorizes the *ex parte* communications by issuing a valid authorization pursuant to 45 C.F.R. § 164.508(a)(1). *Id*. at 154. Missouri courts are not authorized to issue orders governing methods of informal *ex parte* communications with plaintiff's non-party treating physicians. *Id*. As such, Missouri law enforces HIPAA's prohibition of *ex parte* communications and only the patient (not the court) has authority to waive such physician-patient privilege and allow *ex parte* communications. *Id*.

HIPAA also allows disclosure of protected health information in the course of any judicial or administrative proceeding. 45 C.F.R. § 164.512(e). Under Missouri law, 45 C.F.R. § 164.512(e) permitting disclosures in the course of judicial proceedings, does not apply to a meeting for *ex parte* communications. *Proctor*, at 154. Trial courts do not supervise or exercise authority over *ex parte* communications and they are not considered "judicial proceedings." *Id*. In short, "the plain and ordinary language of 45 CFR §164.512 (e)(1) does not authorize the disclosure of protected health information during a meeting in which an attorney without express authorization of the patient, has *ex parte* communications with a physician." *Id.* at 155.

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

Plaintiffs have the choice of whether or not to sign an authorization allowing ex parte communications with their treating physicians. *Id.* Plaintiffs are free to execute authorizations allowing ex parte communications between their treating physician(s) and any person to whom the plaintiff authorizes such ex parte communications about the plaintiff's mental and/or physical condition. *Id.* However, a plaintiff is not obligated to sign any such authorization. *Id.*

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

Trial courts in Missouri do not have authority to issue an order mandating that a treating physician engage in *ex parte* communications. *State ex rel Proctor*, 320 S.W.3d at 154. Missouri case law is clear that while it does not prohibit a plaintiff from authorizing another party to engage in voluntary *ex parte* communications with his or her treating physician, the trial courts have never supervised these

communications nor exercised authority over them, and the trial courts do not have authority to compel a plaintiff to expressly authorize *ex parte* discussions with his or her physician or to compel a physician to comply with the plaintiff's authorization of such. *Id.*, also see *Brandt I*, 856 S.W.2d at 661; and *Woytus*, 776 S.W.2d at 392. In short, the trial courts have no authority to force a physician, over his own objection, to engage in informal *ex parte* discussions with an attorney during discovery. *Brandt I*, 856 S.W.2d at 662.

Given Missouri's law on the subject of *ex parte* physician communications, the meeting at which *ex parte* communications occur is not a judicial proceeding because the trial court has no general oversight of the meeting or any control over it. *Id.* Thus, 45 C.F.R. § 164.512(e), which permits disclosures in the course of judicial proceedings, does not apply to a meeting for *ex parte* communications, and consequently, a trial court has no authority to issue a purported HIPAA order advising the plaintiff's non-party treating physicians that they may or may not participate in informal discovery via *ex parte* communications. *Id.*

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

To communicate with a non-party treating physician *ex parte*, one must obtain a valid authorization from the plaintiff, and then supply the individual with the privacy assurances required under the federal HIPAA guidelines. However, if the treating physician does not agree to the communications even in light of the valid HIPAA authorization, Missouri courts do not have the authority to force the physician to engage in *ex parte* communications. *See State ex rel Proctor*.

Testimony from non-party treating physicians can always be obtained through traditional discovery methods such as a formal deposition. See Missouri Rules of Civil Procedure, Rule 56.

B. Witness Fee Requirements and Limits

Rule 4 of the Missouri Rules of Professional Conduct states that physician's are entitled to reasonable compensation for time spent in conferences, preparation of medical reports, and for court or other appearances. These fees are proper and necessary items of expense in litigation involving medical

records. The amount of the physician's fee should never be contingent upon the outcome of the case or the amount of damages

It is within the trial court's broad discretion to determine if a witness' testimony is in the nature of expert testimony and thus entitled to payment by the party seeking discovery. *Mulberry v. Baker,* 897 S.W. 2d 64 (MoApp. W.D. 1995). Generally, the party seeking discovery from the expert shall pay the expert's fee unless manifest injustice would result. Rule 56.01(b)(4)(b)

In analyzing Rule 56.01(b)(5), treating physicians are considered non-retained expert witnesses and are not subject to Rule 56.01(b)(4) which provides for payment of the expert's fee. *Adams v. Squibb,* 128 S.W. 3d 149

C. Local Custom and Practice

Missouri Rules of Professional Conduct provide a "code" for physicians and attorneys to follow as a guide in their interrelated practice. Rule 4. They are not laws, but are suggested rules of conduct for members of the professions.

Rule 4 details obligations with respect to medical reports, conferences, subpoena's for medical witness's, arrangements for Court appearances, physician's being called as a witness, fees for services of physician's relative to litigation, payment of medical fees, implementation of this Code at state and local levels, and consideration and disposition of complaints.

With regard to issuing a subpoena on a physician, the Rule provides that the attorney should not cause the subpoena to be issued without prior notification to the physician. The rule states that arrangements can be made for the attendance of the physician as a witness which takes into consideration the professional demands upon his time. Reasonable notice of the intention to call the physician as a witness and advising him of the approximate time of his required attendance should be given to the physician. Furthermore, the attorney should make every effort to conserve the time of the physician.