NEW JERSEY

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

Plaintiffs are entitled to recover past medical expenses under New Jersey law. *Schroeder v. Perkel*, 87 N.J. 53, 69-70 (1981). A plaintiff can obtain payment for the "fair and reasonable value" of necessary past medical expenses. N.J. MODEL CIVIL JURY CHARGE 8.11(A) (approved Dec. 1996) (entitled "Damages Charges -- General, Medical Expenses (Non-Auto)). Reimbursable medical expenses are defined as those "which were reasonably required for the examination, treatment and care of injuries proximately caused by the defendant's negligence (or other wrongdoing)." *Id.*; *Schroeder*, 87 N.J. at 69-70. The medical expenses for which payment is available to plaintiffs include "the costs of doctors' services, hospital services, medicines, medical supplies and medical tests and any other charges for medical services." N.J. MODEL CIVIL JURY CHARGE 8.11(A). Notably, payments for past medical expenses that were paid by a plaintiff's health insurer are not obtainable pursuant to New Jersey's collateral source statute, which is discussed below. *See* N.J.S.A. 2A:15-97.

2. Future Medical Expenses

For a plaintiff in an action brought under New Jersey's Product Liability Act, N.J.S.A. 2A:58C-1, *et seq*., to recover future medical expenses -- that is medical surveillance costs -- the plaintiff must have suffered physical injury. *Sinclair v. Merck & Co., Inc.*, 195 N.J. 51, 62-64 (2008) (discussing alleged

injuries resulting from "the ingestion of a pharmaceutical product" in a lawsuit under the Product Liability Act); *see id.* at 54 ("N.J.S.A. 2A:58C-1 to -11, does not include the remedy of medical monitoring when no manifest injury is alleged"); *see also* WILLIAM A. DREIER, JOHN E. KEEFE, SR., & ERIC D. KATZ, NEW JERSEY PRODUCTS LIABILITY & TOXIC TORTS LAW 320-21 (Gann 2009) (discussing requirements to obtain medical surveillance costs in actions brought under the Product Liability Act and differing requirements in cases brought under common law); *see Sinclair*, 195 N.J. at 54 (noting that plaintiffs' "sole source of remedy for [a] defective product claim" is the Product Liability Act; as such, no alternative remedy is available under New Jersey's Consumer Fraud Act, N.J.S.A. 56:8-1 to -106, or other legislative or common law vehicles). Absent physical injury, recovery is explicitly barred. *Sinclair*, 195 N.J. at 54.

Once physical injury is established, plaintiffs have the right to recover future medical expenses resulting from their injuries brought about by the defendants. *Campo v. Tama*, 133 N.J. 123, 129-30 (1993); *Coll v. Sherry*, 29 N.J. 166 (1959). Considerations in calculating future medical expenses include the "nature, extent and duration of plaintiff's injury[,]" plaintiff's present age, "his/her general state of health before the accident, and how long [a jury] reasonably expect[s] the medical expenses to continue." N.J. MODEL CIVIL JURY CHARGE 8.11(I) (approved May 1997) (entitled "Damages Charges -- General, Future Medical Expenses). Plaintiff's life expectancy can also be considered if proofs are offered at trial. *Id.* If Plaintiff chooses to seek payments for future medical expenses, Plaintiff holds the burden of demonstrating, "by a preponderance of the evidence, the probable need for future medical care and the reasonableness of the charge for future medical care." *Id.*

B. Collateral Source Rule and Exceptions

New Jersey's collateral source statute, N.J.S.A. 2A:15-97, applies to civil actions "brought for personal injury or death[.]" *Id.* Its "primary effect was to eliminate double recovery to plaintiffs." *Perreira v. Rediger*, 169 N.J. 399, 409 (2001); *County of Bergen Employee Benefit Plan v. Horizon Blue Cross & Blue Shield of N.J.*, 412 N.J. Super. 126, 133-34 (App. Div. 2010). The statute requires that a successful plaintiff disclose to the court any "benefits [received] for the injuries allegedly incurred from

any other source other than a joint tortfeasor[,]" and, where the amount of those "benefits" "duplicates any benefit contained in the award[,]" the court should deduct it from plaintiff's recovery. N.J.S.A. 2A:15-97; *see also* BRIAN E. MAHONEY, NEW JERSEY PERSONAL INJURY RECOVERY 648-49 (Gann 2009) (discussing the collateral source statute). Notably, these "benefits" include payments that were covered by health insurance, less insurance premiums paid by plaintiff or a member of plaintiff's family. N.J.S.A. 2A:15-97; *see also Perreira*, 169 N.J. at 403 (2001) (barring health insurers from "recover[ing] funds expended pursuant to an insurance contract either by way or subrogation or contract reimbursement"). Also included are social security disability payments, but "only those future payments of social security benefits that are neither contingent nor speculative nor subject to change or modification may be included." *Woodger v. Christ Hosp*., 364 N.J. Super. 144, 153-54 (App. Div. 2003) (citing *Parker v. Esposito*, 291 N.J. Super. 560, 565-566 (App. Div.), *certif. denied*, 146 N.J. 566 (1996)).

Not all duplicative "benefits" trigger deductions under the collateral source statute. For example, life insurance benefits, workers' compensation benefits, and certain automobile insurance benefits are explicitly excepted. N.J.S.A. 2A:15-97. The collateral source statute similarly does not apply to Medicaid payments, since those payments are reimbursable. *County of Bergen Employee Benefit Plan*, 412 N.J. Super. at 135; *Lusby by and Through Nichols v. Hitchner*, 273 N.J. Super. 578, 590 (App. Div. 1994). Further, settlement proceeds are not viewed as "benefits" that must be deducted from the jury's damage award, regardless of whether the joint tortfeasor is ultimately found liable for plaintiff's injury. *Kiss v. Jacob*, 138 N.J. 278, 282-83 (1994). This is to prevent inequity where the amount of a settlement and the allocation of fault could cause a 100% liable defendant to pay nothing. *Id.* at 284. At trial, a defendant is entitled to a set-off for the equitable share of liability assessed to a settled defendant by the jury. The trial defendant has the burden of proving the settled defendant's liability to plaintiff. *Young v. Latta*, 123 N.J. 584 (1991).

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

A. Scope of Physician-Patient Privilege and Waiver

Under New Jersey law, by filing suit, a plaintiff extinguishes the physician-patient privilege "to the extent that [that plaintiff's] medical condition will be a factor in the litigation." *Stempler v. Speidell*, 100 N.J. 368, 373 (1985) (citing N.J.S.A. 2A:84A-22.4); *see also* N.J.S.A. 2A:84A-22.4 ("[t]here is no privilege under this act in an action in which the condition of the patient is an element or factor of the claim or defense of the patient . . ."); N.J. R. EVID. 506(d). Resultantly, a non-party treating "physician is accessible to defendant, on a voluntary basis and on notice to plaintiff, for depositions and trial testimony even where plaintiff does not intend to call him." SYLVIA B. PRESSLER & PETER G. VERNIERO, RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, comment 2.2.5 to R. 4:10-2 at 1454 (Gann 2011) (citing *Stigliano v. Connaught Labs.*, 140 N.J. 305 (1995); *Lazorick v. Brown*, 195 N.J. Super. 444 (App. Div. 1984)). This, however, does not result in full, unfettered access to non-party treating physicians.

By way of the New Jersey Supreme Court's decision in *Stempler v. Speidell*, 100 N.J. 368 (1985), *ex parte* contacts with non-party treating physicians are permitted, although this practice is not without limit. The state's Supreme Court expressly provided that, generally speaking, depositions are not required for all contact with non-party treating physicians, explaining "[p]ersonal interviews . . . are an accepted, informal method of assembling facts and documents in preparation for trial. Their use should be encouraged as should other informal means of discovery that reduce the cost and time of trial preparation." *Stempler*, 100 N.J. at 382.

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

The informal discovery techniques permitted in *Stempler* generally co-exist with the requirements of the Health Insurance Portability and Accountability Act (HIPAA). *In re Diet Drug Litig.*, 384 N.J. Super. 546, 561 (Law Div. 2005); *Smith v. American Home Prods. Corp. Wyeth-Ayerst Pharm.*, 372 N.J. Super. 105, 126 (Law Div. 2003) (in answering "whether HIPAA preempts the informal discovery techniques[,]" stating that "[t]he answer is plainly "no."). Trial courts have, however, noted the potential liability of physicians if they violate the privacy requirements of HIPAA and have advised that physicians may want to have their own counsel present during an *ex parte* interview.

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

Under HIPAA, legal precedent, and New Jersey's Court Rules, Plaintiff's counsel is required to "provide written authorization to facilitate the conduct of interviews." *Stempler*, 100 N.J. at 382; Pressler & Verneiro, *supra*, comment 5.5 to *R.* 4:10-2(d)(4) at 1432. To assure compliance with HIPAA, New Jersey courts require that the plaintiff (the non-party physician's patient) authorize the interview with a non-party treating physician by completing and transmitting a form, set forth at Appendix XII-C to the New Jersey Court Rules. N.J. COURT R. 4-10-2(d)(4); Pressler & Verniero, *supra*, comment 5.5 to *R.* 4:10-2(d)(4) at 1463. The "Authorization to Release Private Health Care Information and for Voluntary Interview" requires that the plaintiff specifically authorize the non-party treating physician to disclose his or her "protected health information to and to participate in a voluntary interview with" an explicitly identified representative of defendant. N.J. COURT R., Appendix XII-C. The Authorization further requires that the plaintiff inform his or her health care provider as follows:

> In defending against the lawsuit I have filed against [defendant], the defendant is entitled to seek to interview witnesses with relevant information. Your participation in any such interview is entirely voluntary. You have the right to have my attorney present at the interview. You may disclose protected information reasonably related to the medical condition I have place in issue by my lawsuit. That condition relates to: _____. This authorization may be revoked by me at any time, and expires 120 days from the date I execute the authorization as indicated below. If you have questions relating to the scope of this authorization, you may contact your own attorney or my attorney.

Id. Thus, the Authorization assures that plaintiff's privacy rights under HIPAA are protected while providing a means to permit informal discovery to move forward. This requirement is in place, because the Supreme Court recognized that, due to physician-patient confidentiality requirements, the plaintiff's consent is needed for a physician to participate in an interview with defendant's counsel. *Stempler*, 100 N.J. at 382. Where a plaintiff unreasonably withholds an authorization for the interview of a non-party treating physician, production of that authorization "can be compelled . . . by motion." *Id.*

Additionally, a plaintiff is permitted to seek a protective order from the court where "a proposed *ex parte* interview with a specific physician threatens to cause such substantial prejudice to plaintiff" as to necessitate the trial court's supervision. *Id.* at 383. These protections can include requiring plaintiff's

counsel to be present for the interview or disallowing the interview and "requiring defendant's counsel to proceed by deposition." *Id.*

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

Trial courts act as gatekeepers in regulating discovery, and *ex parte* discovery is no exception. As set forth above, where a plaintiff unreasonably withholds an authorization for the interview of a non-party treating physician, production of such authorization "can be compelled . . . by motion." *Stempler*, 100 N.J. at 382. In *Stempler*, the New Jersey Supreme Court set for the conditions for defense counsel's *ex parte* contact with a physician when that contact is ordered by the Court in response to a motion to compel. Defense counsel must:

1. provide the treating physician with a description of the anticipated scope of the interview;

2. communicate with "unmistakable clarity" that the physician's participation in the *ex parte* interview is voluntary, and

3. provide plaintiff's counsel with reasonable notice of the time and place of the proposed interview.

Id.

Though New Jersey trial courts allow *ex parte* contact with plaintiff's treating physicians, such informal discovery is not required. *Id.* at 383. Trial courts have the discretion to prohibit *ex parte* contact and require deposition in accordance with formal discovery rules. *Id.*; *Smith*, 372 N.J. Super. at 133. In *Stempler*, the New Jersey Supreme Court did not identify the types of cases that would necessitate adherence to formal discovery rules; however, notably, New Jersey trial courts presiding over certain mass tort pharmaceutical litigations have barred *ex parte* contacts with non-party treating physicians, because the impracticality of judicial oversight of compliance with the *ex parte* interview process and the anticipated motions for protective orders would defeat the purpose of seeking to make pre-trial discovery more efficient and cost effective, *See, e.g., Smith*, 372 N.J. Super. at 136 (but noting that "[t]his [] does not imply that *Stempler* is not available as an informal discovery tool for mass tort cases"). In those cases

where trial courts have permitted *ex parte* contact, the courts have imposed conditions beyond those required by *Stempler*.

E. Local Practice Pointers

Given the requirement of *Stempler* to conduct an *ex parte* interview of plaintiffs' treating physician, most defense counsel opt to follow the formal discovery process and depose the physician. Defense counsel are careful to avoid any direct contact with plaintiff's treating physician to avoid any unintended *ex parte* communication; this includes having administrative staff schedule depositions. Recognizing that all parties have the same right to access to all non-party witnesses, if a court denies a defendant's application for *ex parte* contact, the court will also prohibit. the plaintiffs' counsel from any *ex parte* contact with plaintiff's treating physicians. *See Stempler* 100 N.J. at 380-81.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Once an action is filed, the Rules Governing the Courts of the State of New Jersey applicable to all depositions govern a defendant's seeking to obtain the testimony of a non-party treating physician. Depositions may be taken upon notice to all parties without leave of court being required or, when necessary, may be compelled by subpoena. N.J. COURT R. 4:14-1.

Where a party seeks to take a deposition by notice, that party must give notice in writing to the witness and all parties in the action -- specifying a time and place for taking the deposition that is reasonably convenient for all parties and the name and address of each person to be deposed (or, if not known, a sufficiently specific general description that will identify the person) -- no less than 10 days prior to the date of the deposition. N.J. COURT R. 4:14-2(a); N.J. COURT R. 4:14-7(c).

A witness's attendance at a deposition may also be compelled by subpoena. N.J. COURT R. 4:14-7(a). The subpoena may be issued by an attorney or a party in the name of the court's clerk, and must state the name of the court, state the title of the action, and command the witness to whom it is directed to appear at a specified time and place to give testimony. N.J. COURT R. 1:9-1. The subpoena may also compel production of documents that fall within the scope of the examination. N.J. COURT R. 4:14-7(a).

Importantly, when production of documents is compelled, the subpoena must make clear that production should occur at the date and time of the deposition and at no point sooner to allow an adversary the opportunity to move to quash the subpoena. N.J. COURT R. 4:14-7(c); *Cavallaro v. Jamco Prop. Mgmt.*, 334 N.J. Super. 557, 566-67 (App. Div. 2000). Additionally, while a subpoena upon a non-party treating physician may be served via registered, certified, or regular mail, that service is effective only if the non-party responds to the subpoena; for the court to have personal jurisdiction over an uncooperative non-party, that non-party must be served via personal service. *N.J. Cure v. Estate of Hamilton*, 407 N.J. Super. 247, 251-52 (App. Div. 2009); N.J. COURT R. 4:4-4; N.J. COURT R. 1:9-1.

Of note, where the deposition of a treating physician must be taken outside of New Jersey, specific provisions apply. When the deposition will occur in another state within the United States, it can be taken on notice by the same manner as an in-state deposition, pursuant to the terms of a commission or letter rogatory issued by a New Jersey court, or by any manner stipulated to by the parties. N.J. COURT R. 4:11-5. When a deposition is taken on notice, it must be taken by a person authorized to administer oaths under the laws of New Jersey, the United States, or the location of the deposition. *Id.*; N.J. COURT R. 4:12-2. In contrast, when taken by stipulation, the designation under the stipulation itself confers the power to administer any necessary oaths. N.J. COURT R. 4:11-5. These procedures follow the general requirements of the "Uniform Interstate and International Procedure Act" § 301 (13 U.L.A. 487), although that uniform provision has not been adopted within New Jersey. Pressler & Verneiro, *supra*, comment 1 to R. 4:11-5 at 1477-78. In a foreign country, a deposition must comply with applicable treaties and/or conventions and must be taken either "on notice before a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or [] before such person or officer as may be appointed by commission or under letters rogatory." N.J. COURT R. 4:12-3; Pressler& Verneiro, *supra*, comment to R. 4:12-3 at 1479 (citing *Husa v. Labs. Servier SA.*, 326 N.J. Super. 150 (App. Div. 1999)).

B. Witness Fee Requirements and Limits

The party taking a deposition must pay the non-party-treating physician a reasonable fee for his or her appearance, absent a court order directing otherwise. N.J. COURT R. 4:10-2(d)(2). If the parties and the physician cannot agree on what constitutes a "reasonable fee[,]" that sum is left to be determined by the court. *Id.* Any fees charged for the witness's preparation for the deposition, again, absent a court order to the contrary, must be paid by the proponent of that witness. *Id.* Additionally, unless ordered otherwise by the court, the party taking a deposition must pay for a non-party treating physician's travel time and expenses when that non-party treating physician either resides or works in New Jersey if the deposition is not taken at the non-party physician's residence or place of business. N.J. COURT R. 4:14-7(b)(2). Where a treating physician does not live or work in New Jersey, however, two options exist for the location of the deposition -- again, both alterable by court order. The party taking the deposition must either bear the expense of deposing the witness within the county where the action is pending or at another agreed upon location within New Jersey, or the party taking the deposition must "pay all reasonable travel and lodging expenses incurred by all parties in attending the witness' out-of-state deposition." *Id.*

C. Local Custom and Practice

A unique aspect of New Jersey practice is that an attorney cannot issue a subpoena solely for production of documents. Instead, the subpoena must be for the deposition of the custodian of records with instructions to produce the relevant documents at the time of the deposition and no sooner. *See* N.J. COURT R. 4:14-7(c). This is regardless of whether the deposition will actually ever take place. Often, the end result remains production of documents only (and the Court Rules provide that the party receiving the document production must notice all other parties of its receipt of the documents, their specific nature and contents, and make the documents available for copying and inspection); however, the full process and timeline for noticing the oral deposition must be followed. *See id.*

Additionally, particularly in regards to depositions of non-party treating physicians and medical professionals, it is advisable to obtain an agreement with your adversary setting forth a framework for

contacting non-party treating physicians regarding scheduling of depositions at the outset of the process wherein depositions are sought. In order to avoid any violation of the *Stempler* requirements by any potential or accidental *ex parte* communication with a non-party treating medical professional, these agreements are often best arranged by a member of your administrative staff contacting the medical professional and making arrangements to set dates for the depositions prior to the issuance of subpoenas in order to expedite the scheduling process in light of physicians' busy schedules.