NEW MEXICO

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I. Medical Expenses

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In New Mexico, a plaintiff may recover past medical expenses as part of an award of damages for personal injury. In order to be recoverable, the past medical expenses must be reasonable in amount and the care must have been medically necessary. Reasonableness and necessity must, in general, be proven by expert medical testimony. In addition, the causal connection between past medical expenses and the accident must be proved to a reasonable degree of medical certainty. UJI 13-1804 NMRA; *Madrid v. Lincoln County Med. Ctr.*, 1996-NMSC-049, ¶ 22, 122 N.M. 269, 923 P.2d 1154.

2. Future Medical Expenses

A plaintiff may also recover the reasonable value of medical care, treatment and services reasonable certain to be received in the future. UJI 13-1804 NMRA. Any award of future medical expenses is to be reduced to present cash value. UJI 13-1804 NMRA. Future medical expenses and the causal connection between an accident and the claimed damages must also be proved to a reasonable degree of medical probability by expert medical testimony. *Madrid v. Lincoln County Med. Ctr.*, 1996-NMSC-049, ¶ 22, 122 N.M. 269, 923 P.2d 1154.

B. Collateral Source Rule and Exceptions

Under New Mexico law, the collateral source rule is a rule of the law of damages. As applied, the collateral source rule provides that an alleged wrongdoer may not set up in mitigation or reduction of

damages that the party seeking damages has been wholly or partially compensated by insurance. *Martinez v. Knowlton*, 88 N.M. 42, 516 P.2d 1098 (Ct. App. 1975); *Salgado v. Commercial Warehouse*, 86 N.M. 633, 526 P.2d 430 (Ct. App. 1974).The collateral source rule is designed to ensure that a plaintiff may accept compensation from sources other than the tortfeasor without fear that the tortfeasor will not then be required to pay. *Miera v. Dairyland Insurance Co.*, 143 F.3d 1337, 1341 (10th Cir. 1998) (quoting D. Dobbs, *Handbook on the Law of Remedies*, § 8.10, at 581 (1973)).

The source of the payments must be a source collateral to the alleged tortfeasor. The source must be sufficiently collateral or independent to assure an unwarranted double recovery has not occurred. *Miera v. Dairyland*, 143 F.3d at 1341. This rule "is designed to preclude an alleged tort-feasor from setting up in mitigation or reduction in damages that the plaintiff has been compensated by insurance in whole or in part, *where such insurance was not procured by the alleged wrongdoer*." *Yardman v. San Juan Downs, Inc.*, 120 N.M. 751, 906 P.2d 742, 753) (Ct. App. 1995) (emphasis added); *see* also, *Jojola v. Baldridge Lumber Co.*, 96 N.M. 761, 635 P.2d 316, 320 (Ct. App. 1981). However, the collateral source rule does not apply and defendant is entitled to an offset when benefits are shown to derive from the defendant or a source identified with him. *Aragon v. Brown*, 93 N.M. 646, 648, 603 P.2d 1103, 1105 (Ct. App. 1979), overruled in part on other grounds, *Smith v. Village of Ruidoso*, 128 N.M. 470, 994 P.2d 50 (Ct. App. 1979). In *Aragon*, the court said: "It is the well-reasoned and majority rule that where the benefits derive from the defendant himself, or from a source identified with him, he is entitled to credit for it, since there is no collateral source but only funds provided by the defendant." *Aragon*, 603 P.2d at 1105.

The collateral source rule is not a complete bar to admission of evidence that a plaintiff was covered by insurance or received payment of insurance benefits. Instead, this evidence may be relevant to and admissible on several issues, including proof of agency, ownership or control, bias or prejudice, or for impeachment purposes. Rule 11-411 NMRA; *Mac Tyres, Inc. v. Vigil*, 92 N.M. 446, 589 P.2d 1037 (1979); *Jojola v. Baldridge Lumber Co.*, 96 N.M. 761, 635 P.2d 316 (Ct. App. 1981). Evidence of receipt

of insurance benefits is also relevant in New Mexico to rebut a claim by plaintiff of a lack of funds to pay bills. See, *Jojola*, 96 N.M. at 329.

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

The New Mexico appellate courts have not yet decided whether a plaintiff may recover the full amount of medical expenses billed by the providers or whether the plaintiff is limited to recovery of the amounts actually paid by Medicare or Medicaid. The trial courts in New Mexico are divided on the issue. Some have held that the amount paid and accepted as payment in full for the medical services is the amount plaintiff is entitled to recover as compensatory damages and that the measure of damages is not what the highest payor would have paid for the same medical services but what was actually incurred in the care and treatment of plaintiff's injuries. Others continue to allow awards of the full amount of expenses billed by the providers.

2. Private Insurance

As with Medicare and Medicaid, the New Mexico appellate courts have not yet decided whether a plaintiff **may** recover the full amount of medical expenses billed by the providers or whether the plaintiff is limited to recovery of the amounts actually paid by private insurance. The trial courts in New Mexico are similarly divided on the issue, with some holding that the amount paid and accepted as payment in full for the medical services is the amount plaintiff is entitled to recover as compensatory damages, while others continue to allow awards of the full amount of expenses billed by the providers.

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

A. Scope of Physician-Patient Privilege and Waiver

The scope of the physician-patient privilege in New Mexico is set out in Rule 11-504 of the New Mexico Rules of Evidence. That Rule provides:

> "A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications, made for the purposes of diagnosis or treatment of the patient's physical, mental or emotional condition, including drug addiction, among the patient, the patient's physician or psychotherapist, or persons who are participating in

> the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family."

Rule 11-504(B) NMRA.

The physician-patient privilege is in derogation of the common law. *Trujillo v. Puro*, 101 N.M. 408, 412, 683 P.2d 963, 967 (Ct. App. 1984). Consequently, the privilege must be construed strictly against the asserting party. *State v. Roper*, 1996-NMCA-73, ¸ 6, 122 N.M. 126, 921 P.2d 322, 324.

As a threshold matter, for the physician-patient privilege to apply, the patient must have conferred with a physician for treatment or diagnosis with the intent to be treated. *Reaves v. Bergsrud*, 1999-NMCA-75, ¶ 20, 127 N.M. 446, 982 P.2d 497, 501. A "patient" within the scope of Rule 11-504 is "a person who consults or is examined or interviewed by a physician or psychotherapist." Rule 11-504(A)(1) NMRA. Further, for the privilege to extend to communications with persons other than the physician, those persons must be acting "under the direction of the physician or psychotherapist." Rule 11-504(B) NMRA. Rule 11-504

defines "physician" to mean a "person authorized to practice medicine in any state or nation."

Rule 11-504 specifically provides that the physician-patient privilege does not apply to any communications relevant to the issue of the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense. Rule 11-504 (D)(3) NMRA. Therefore, where the plaintiff places physical, mental and emotional condition at issue as elements of the claims in the case, there is a waiver of the physician-patient privilege.

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

HIPAA prohibits wrongful discovery of or disclosure of individually identifiable health information. 42 U.S.C. § 1320d-6 (a). Penalties for wrongful disclosure include fines up to $50,000 and imprisonment for up to a year. 42 U.S.C. § 1320d-6(b). "Health information" is defined to mean any information whether oral or recorded in any form or medium, that is created or received by a health care provider, and 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 past, present, or future payment for the provision of health care to an individual. 42 U.S.C. § 42 U.S.C. § 1320d(4). "Health care provider" includes a hospital, skilled nursing facility, comprehensive outpatient rehabilitation facility, home health agency, hospice program, fund, or other health services, and any other person furnishing health services. 42 U.S.C. § 1320d(3) and 42 U.S.C. § 1395x(u).

In New Mexico, even where the plaintiff has waived the physician-patient privilege by placing physical or mental condition at issue, HIPAA prevents the defense from obtaining confidential medical information from a treating physician without authorization from the plaintiff or by court order.

C. Authorization of Ex Parte Physician Communication by Plaintiff

In New Mexico, a plaintiff may agree to permit *ex parte* communications with a treating healthcare provider, but is not required to authorize any *ex parte* contacts with treating physicians. *Church's Fried Chicken No. 1040 v. Hanson,* 114 N.M. 730, 734-35, 845 P.2d 824, 828-29 (Ct.App.1992); *Pina v. Espinoza,* 2001 NMCA-055, 130 N.M. 661, 29 P.3d 1062.

D. Authorization of Ex Parte Physician Communication by Courts

In *Church's Fried Chicken No. 1040 v. Hanson*, 114 N.M. 730, 734-35, 845 P.2d 824, 828-29 (Ct.App.1992), the New Mexico Court of Appeals affirmed an order prohibiting a compensation insurer from engaging in *ex parte* contacts with a worker's treating physician. The Court's decision was based on the confidentiality of the physician-patient relationship and the threat posed to that relationship by *ex parte* contacts between the patient's adversary and the patient's treating physician. *Id*. at 733-35, 845 P.2d at 827-29. See, also, *Gomez v. Nielson's Corp*.,119 N.M. 670, 894 P.2d 1026, 1029 (Ct. App. 1995). The prohibition has been extended to all *ex parte* contacts between a defendant or defense counsel and plaintiff's treating physicians. See, *Pina v. Espinoza,* 2001 NMCA-055, 130 N.M. 661, 29 P.3d 1062. At this time, then, the New Mexico courts prohibit, rather than authorize, any *ex parte* communications with a plaintiff's treating physician.

E. Local Practice Pointers

Ex parte contacts with treating physicians are taken very seriously by the New Mexico courts. Under the current state of the law, the only way an *ex parte* communication will be permitted is where authorized by the plaintiff. Absent such an authorization, any *ex parte* contact with a treating physician will likely result in severe sanctions, including monetary sanctions, exclusion of defenses, or a default judgment.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

The testimony of a non-party treating physician may generally be obtained only by agreement between the parties and the doctor or by a subpoena directed to the doctor. If the testimony is obtained through a deposition conducted upon agreement by the parties and the doctor, an authorization from the plaintiff, in compliance with the requirements of HIPAA will be required. If the deposition is taken under a subpoena, the subpoena will act as a court order and no further authorization is required. However, some healthcare providers will still request a HIPAA authorization before testimony is actually given at the deposition.

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

There is some dispute in New Mexico as to whether a treating doctor is to be considered a fact witness or an expert witness. In general, if the treating physician gives testimony as to causal connection, the doctor will be considered to be an expert witness, and may require payment of expert witness fees for the testimony. There are no limits in New Mexico on the amount an expert witness may charge. If the doctor is treated as a fact witness, then, technically, the doctor is entitled to the standard $75 witness fee. Rule 1-045 NMRA.

2. Case Law

New Mexico does not have any case law as to witness fee requirements or limits for treating physicians.

C. Local Custom and Practice

Most physicians in New Mexico are unwilling to give either deposition or trial testimony for the standard $75 witness fee. Instead, most will require payment of an expert witness fee, in advance of the testimony, before they will testify.