NORTH DAKOTA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In North Dakota "expert medical testimony is not required to lay the foundation for the admission of medical bills or expenses into evidence." *Erdmann v. Thomas*, 446 N.W.2d 245, 247 (N.D. 1989). A plaintiff's testimony can establish sufficient foundation that medical bills incurred as a result of a vehicle crash. *Id.* For example, an affidavit of a plaintiff was sufficient in the summary judgment context to establish evidence of past medical expenses and to show evidence of a "serious injury." *Tuhy v. Schlabsz*, 1998 ND 31, ¶ 11, 574 N.W.2d 823. Once the threshold of past medical expenses has been met by sworn testimony, "the question whether the medical expenses were necessitated by the accident [becomes] one for the jury." *Id.* (quoting *Erdmann*, 446 N.W.2d at 248).

2. Future Medical Expenses

To recover future medical expenses, the plaintiff has the burden of showing "substantial evidence to establish with reasonable medical certainty that such future medical services are necessary" to recover future medical expenses in North Dakota. *Olmstead v. First Interstate Bank of Fargo, N.A.* 449 N.W.2d 804, 808 (N.D. 1989) (citing *Erdmann*, 446 N.W.2d at 247; *Olmstead v. Miller*, 383 N.W.2d 817, 822 (N.D.1986); *South v. Nat'l R.R. Passenger Corp.*, 290 N.W.2d 819, 842 (N.D.1980)). Testimony from a

physician that a plaintiff's medical condition was permanent and would worsen was sufficient evidence to present to a jury for consideration of future medical expenses. *Id.* (citing *South*, 290 N.W.2d at 842).

The North Dakota Supreme Court declined in *Olmstead v. Miller*, "to adopt an absolute rule which would make submission of jury instructions on future damages in the absence of expert medical testimony dependent on a determination of whether a plaintiff's injuries fall within a 'subjective' or 'objective' category." The North Dakota Supreme Court held in *Olmstead v. Miller* "that each case must be evaluated on its own particular facts and circumstances." A plaintiff must prove future damages with "reasonable certainty." *Olmstead*, 383 N.W.2d at 822 (citing Teegarden v. Dahl, 138 N.W.2d 668 (N.D. 1965); *Leonard v. N.D. Co-op. Wool Mktg. Ass'n*, 6 N.W.2d 576 (N.D. 1942)). A plaintiff cannot rely on speculative possibilities or conjecture. *Id.* A plaintiff must provide "substantial evidence to establish with reasonable medical certainty that such future medical services are necessary." *Id.* (quoting *South*, 290 N.W.2d at 842). Future damages based on the possibility of future medical treatment is not admissible. *Id.* (citing *Holecek v. Janke*, 171 N.W.2d 94 (N.D. 1969)).

B. Collateral Source Rule and Exceptions

The collateral-source rule is applied broadly in North Dakota to "bar evidence concerning potential government benefits a plaintiff might receive when formulating a damage award." *Anderson v. U.S.*, 731 F.Supp. 391, 400 (D. N.D. 1990) (citing *Nelson v. Trinity Med. Ctr.*, 419 N.W.2d 886, 892-93 (N.D. 1988). The United States District Court for the District of North Dakota has adopted *Overton v. U.S.*, 619 F.2d 1299 (8th Cir. 1980). The Eighth Circuit held in *Overton* that Medicare payments could be set off against damages owed to the plaintiff since this would prevent the plaintiff from enjoying "double recovery." *Overton*, 619 F.2d at 1307-09.

The North Dakota Supreme Court addressed the collateral source rule as applied to private insurance when it decided *Dewitz v. Emery*, 508 N.W.2d 334 (N.D. 1993). The case was presented to a jury, which found defendant 70% liable for the vehicle accident. *Id.* at 336. The jury awarded plaintiff $165,804 in damages, which was reduced by 30%. The defendant moved under N.D.C.C. § 32-03.2-06 for the trial court to reduce the jury award for collateral source payments. *Id.* at 340. The statute states:

> After an award of economic damages, the party responsible for the payment thereof is entitled to and may apply to the court for a reduction of the economic damages to the extent that the economic losses presented to the trier of fact are covered by a payment from a collateral source. A 'collateral source' payment is any sum from any other source paid or to be paid to cover an economic loss which need not be repaid by the party recovering economic damages, but does not include life insurance, other death or retirement benefits, or any insurance or benefit purchased by the party recovering economic damages.

N.D.C.C. § 32-03.2-06. Defendant requested that the verdict be reduced by $4,842.15 to take into account the "service benefit" agreement between the medical providers and plaintiff's insurer (Blue Cross/Blue Shield). The trial court denied this request, the supreme court affirmed. *Dewitz,* 508 N.W.2d at 340. The supreme court cited the legislative history of N.D.C.C. § 32-03.2-06, stating: "the personal insurance exception was included in the statute to encourage people to secure personal insurance." *Id.* The supreme court went on to conclude the "service benefit" was traceable to plaintiff's insurance policy:

> We also conclude, to the extent the Dewitz family benefited from the service benefit agreement between Blue Cross Blue Shield and health care providers, the benefit is traceable to the Dewitzes' insurance policy. Therefore, the benefit is properly included in the personal insurance exception of § 32-03.2-06.

Id.

But payments made on a plaintiff's behalf by the Indian Health Service did not fall under the personal insurance exception to the collateral source rule because plaintiff failed to show he purchased the benefits he received. *Leingang v. George,* 1999 ND 32, ¶ 24, 589 N.W.2d 585. Benefits such as Workers Compensation and Social Security do not fall under the collateral source rule exception. *Id.* at ¶ 27.

C. Treatment of Write-downs and Write-offs

No North Dakota statutes or case law address this matter.

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

A. Scope of Physician-Patient Privilege and Waiver

The North Dakota Supreme Court recognizes the importance of the physician-patient relationship and the confidentiality that flows from this relationship. *Tehven v. Job Serv. North Dakota,* 488 N.W.2d 48, 51 (N.D. 1992). North Dakota Rules of Evidence Rule 503 states, in pertinent part:

(**a)(4)** A communication is 'confidential' if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(b) General Rule of Privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition, including alcohol or drug addiction, among himself, his physician or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patient's family.

(c) Who May Claim the Privilege. The privilege may be claimed by the patient, his guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or psychotherapist at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the patient.

(d) Exceptions.

(1) *Proceedings for Hospitalization.* There is no privilege under this rule for communications relevant to an issue in proceedings to hospitalize the patient for mental illness, including alcohol or drug addiction, if the psychotherapist in the course of diagnosis or treatment has determined that the patient is in need of hospitalization.

(2) *Examination by Order of Court.* If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule with respect to the particular purpose for which the examination is ordered unless the court orders otherwise.

(3) *Condition an Element of Claim or Defense.* There is no privilege under this rule as to a communication relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of his claim or defense.

N.D.R.Evid. Rule 503(a)(4).

The North Dakota Supreme Court explained in *Tehven*:

> Generally, a physician may not disclose medical information acquired in treating a patient. The importance of physician-patient confidentiality is recognized in § 43-17-31(13), N.D.C.C., which provides that disciplinary action may be imposed upon a physician for "willful or negligent violation of the confidentiality between physician and patient." Courts have generally recognized a patient's right to recover damages from a physician for unauthorized disclosure of medical information as an invasion of privacy, a breach of the physician-patient confidential relationship, a violation of statute, or breach of the fiduciary relationship between a physician and a patient. The patient's privilege against disclosure of medical information generally extends to hospital records. Thus, a hospital has a very important interest in maintaining the confidentiality of patients'

hospital medical records to avoid liability for unauthorized disclosure of patient medical information.

Tehven, 488 N.W.2d at 51. The filing of a claim with worker's compensation, however, constitutes a consent to use any information concerning any health care or health care services received by any physician, hospital, or clinic to disclose any such information to worker's compensation. *State ex rel. Workforce Safety and Ins. v. Altru Health Sys.*, 2007 ND 38, ¶ 19 729 N.W.2d 113 (citing N.D.C.C. § 65-05-30).

When a plaintiff put her physical condition at issue by bringing a medical malpractice claim against her physician, the plaintiff waived her physician-patient privilege in regard to her claim. *Sagmiller v. Carlsen*, 219 N.W.2d 885, 894 (N.D. 1974). This waiver also applied to plaintiff's treatment for her ailments by nondefendant physicians after treatment by the defendant physician. *Id.* The North Dakota Supreme Court has noted that a plaintiff did not waive the physician-patient privilege under state law protections if federal protections still apply. *Jane H. v. Rothe*, 488 N.W.2d 879, 881 (N.D. 1992).

The North Dakota Supreme Court affirmed a lower court's decision to place restrictions on state worker's compensation agency from requiring the claimant's treating physician and physician's assistant to review videotaped surveillance of the claimant in preparation for or during ex parte investigatory depositions. *State ex rel Workforce Safety and Ins.*, 2007 ND 38 at ¶¶ 24-25. The North Dakota Supreme Court did differentiate between the investigative phase of the administrative agency and the adjudicative phase, stating: "what [the agency] is seeking here as a part of its investigation is not simply existing information from the claimant's treating physician and physician's assistant gained in the course of examination or treatment, but rather the ex parte creation of new expert opinion and testimony regarding observations of the videotape made outside of the physician-patient relationship." *Id.* at ¶ 24.

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

No North Dakota statutes or case law address this matter.

C. Authorization of Ex Parte Physician Communication by Plaintiff

No North Dakota statutes or case law address this matter.

D. Authorization of Ex Parte Physician Communication by Courts

The United States District Court for the District of North Dakota denied a pharmaceutical manufacturer's motion to compel the plaintiff to execute authorizations to allow treating physicians to participate in ex parte interviews with the defendant. *Bohrer By and Through Bohrer v. Merrill-Dow Pharm., Inc.*, 122 F.R.D. 217, 218 (D. N.D. 1987); *see also Weaver v. Mann*, 90 F.R.D. 443, 444 (D. N.D. 1981) (denying informal ex parte communications between plaintiff's treating physicians and defendant). The district court determined that even if it issued an order compelling the plaintiffs to execute an authorization to permit the defendants to communicate ex parte with the treating physicians, that the treating physicians would refuse to participate. The *Bohrer* court accepted the following reasoning from *Alston v. Greater Southeast Cmty. Hosp.*, 107 F.R.D. 35 (D. D.C. 1985): "[I]t would seem a futile act to require the patient to sign the authorization allowing oral interviews, especially if counsel for the plaintiff can contact the physicians and advise them that notwithstanding the medical authorization signed by the plaintiff, the doctor has the discretion to decline to be interviewed or to give any oral information except by formal deposition."

E. Local Practice Pointers

Ex parte communications with non-party treating physicians is rare, and takes place only when the plaintiff has agreed to it.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

No North Dakota statutes or case law address this matter.

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

N.D.R.Civ. P. 26(b)(5) Trial preparation-Experts provides, in relevant part:

> (5) Trial Preparation Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

* * *

> (C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

C. Local Custom and Practice

Depositions of non-party treating physicians, whether designated as experts or not, generally takes place without incident, as long as payment is made for the physician's time at the deposition.