

OKLAHOMA

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I. MEDICAL EXPENSES

A. Requirement for Recovery of Medical Expenses

1. Past Medical Expenses

In Oklahoma, recovery of past medical expenses is typically a question of causation. Past medical expenses are “special damages,” like lost wages, property damage, or other out-of-pocket expenses. Thus, there is usually no dispute as to the *amount* of such expenses. The bills speak for themselves. The only issue for the fact finder to determine is whether the treatment described in the bills is a result of the defendant’s alleged act or omission.

Under Oklahoma law, connecting the medical treatment and bills to the accident and alleged injury need not be done through expert testimony in many cases. *See, Reed v. Scott*, 820 P.2d 445, 448-50 (Okla. 1991) (finding that the plaintiff’s own testimony was sufficient to uphold an award of past medical expenses); and *Godfrey v. Meyer*, 933 P.2d 942, 943-44 (Okla. Civ. App. 1996) (citing *Reed* and holding that “a plaintiff may, under appropriate circumstances, establish a *prima facie* case for past medical expense and pain and suffering without the necessity of a medical expert”). Indeed, “even subjective injuries may be of a character that expert medical testimony is not necessary to prove the causal connection between the accident, injury, pain and suffering, medical treatment and expense.” *Godfrey*, 933 P.2d at 944.

2. Future Medical Expenses

Unlike past medical expenses, Oklahoma law clearly requires expert medical testimony for a plaintiff to recover future medical expenses. *See, Reed and Godfrey, supra; see also, Whitney v. Douglas*, 307 P.2d 154, 158 (Okla. 1957). Such a requirement makes sense in light of the Oklahoma Supreme Court's language in *Carraco Oil Co. v. Morhain*, 380 P.2d 957, 958-59 (Okla. 1963). In *Morhain*, the court held that there was no legal basis for the plaintiff to recover damages for future medical expenses where there was no evidence in the record that future treatment was a probable necessity. *Id.* (quoting 25 C.J.S. Damages § 47b). Plaintiffs need not put on expert evidence regarding the *amount* of future medical expenses, only that such expenses will be necessary. *M.K.&O. Airline Transit Co. v. Deckard*, 397 P.2d 888, 889 (Okla. 1964). Because there is no absolute standard for measuring such damages, “a wide latitude of discretion is necessarily left to the good sense and discretion of the jury which fixes the award.” *Id.* (citing *Shebester, Inc. v. Ford*, 361 P.2d 200 (Okla. 1961)). On the other hand, where a plaintiff's expert testifies as to the amount of future medical expenses, the defendant is not required to controvert such evidence with expert testimony of its own. *Moore v. Subaru of America*, 891 F.2d 1445, 1452 (10th Cir. 1989) (“A battle between dueling experts is not necessary if sufficient lack of reliability is shown during cross examination.”)

B. Collateral Source Rule and Exceptions

The seminal case on the collateral source doctrine in Oklahoma is *Denco Bus Lines v. Hargis*, 229 P.2d 560 (Okla. 1951), which describes the rule as follows:

Upon commission of a tort it is the duty of the wrongdoer to answer for the damages wrought by his wrongful act, and that is measured by the whole loss so caused and the receipt of compensation by the injured party from a collateral source wholly independent of the wrongdoer does not operate to lessen the damages recoverable from the person causing the injury.

Id. at 561 (Syllabus by the Court, No. 2); *see also, Porter v. Manes*, 347 P.2d 210, 212 (Okla. 1959); *Worsham v. Nix*, 145 P.3d 1055, 1072 (Okla. 2006). The rule is also codified in the Oklahoma Workers' Compensation Act, which provides that “[n]o benefits, savings or insurance of the injured employee, independent of the provisions of this act shall be considered in determining the compensation or benefit to

be paid under this act.” 85 Okla. Stat. § 45(A); *see also*, *Blythe v. Univ. of Okla.*, 82 P.3d 1021 (Okla. 2003) (discussing Section 45 and holding that the collateral source rule applied to allow a claimant to be reimbursed her employer’s workers’ compensation carrier for the cost of prescriptions paid by her health insurer); *Kimery v. Public Service Co. of Okla.*, 562 P.2d 858 (Okla. 1977) (applying the collateral source rule in holding that evidence of a surviving spouse’s remarriage is inadmissible at trial to mitigate damages in a wrongful death action).

An exception to the collateral source rule does exist in the Oklahoma Governmental Tort Claims Act, which provides that “[t]he state or a political subdivision shall not be liable if a loss or claim results from...[a]ny loss to any person covered by any workers’ compensation act or any employer’s liability act.” 51 Okla. Stat. § 155(14) (footnote omitted). This statutory exception has been upheld by the Oklahoma Supreme Court. *Gladstone v. Bartlesville Indep. School Dist. No. 30 (I30)*, 66 P.3d 442, 452 (Okla. 2003); *see also*, 8 Okla. Prac., Product Liability Law § 12:14 (2008). Another statutory exception to the collateral source rule is found at 63 Okla. Stat. § 1-1708.1D, which abrogates the rule in medical malpractice actions where the court determines that the collateral payment in question is not subject to subrogation or other right of recovery. This exception is rarely available, and thus, it is practically untested. However, if applied by a court to admit evidence of a collateral payment under Section 1-1708.1D, the plaintiff could argue that the statutory provision is unconstitutional “special law” under the Constitution of the State of Oklahoma and should not be enforced. *See*, Okla. Const. art. 5, § 46. “The terms of art. 5, § 46 command that court procedure be symmetrical and apply equally across the board for an entire class of similarly situated persons or things.” *Woods v. Unity Health Center, Inc.*, 2008 OK 97, 196 P.3d 529, 531; *see also*, *Zeir v. Zimmer, Inc.*, 2006 OK 98, 152 P.3d 861(holding that a statute requiring medical malpractice claimants to attach an affidavit of merit to their petition was an unconstitutional special law).

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

There is no Oklahoma law directly on point as to whether Medicare and Medicaid write-offs are admissible at trial. However, the United States District Court for the Northern District of Oklahoma has confronted the issue of Medicare write-offs and determined that the Oklahoma Supreme Court would likely exclude such evidence under the collateral source rule and allow the jury to consider the entire medical bill when setting damages. *Simpson v. Saks Fifth Avenue, Inc.*, 2008 WL 3388739 (N.D. Okla. 2008). Given the broad application of the collateral source rule on such matters in Oklahoma (see discussion of private insurance write-offs below), it is very likely that the *Simpson* court's analysis is correct on this issue of Oklahoma law.

2. Private Insurance

Oklahoma law does not allow a tortfeasor to benefit from a policy held and paid for by the injured party. *Weatherly v. Flournoy*, 929 P.2d 296, 299 (Okla. Civ. App. 1996). Although there is surprisingly little case law directly addressing this issue, Oklahoma courts consistently allow plaintiffs to recover the amount of medical expenses listed on the bills as opposed to the amount actually paid by the plaintiff's health insurer. The collateral source rule, discussed above, is generally cited as authority for such recovery. While there is an argument that this creates a windfall for the plaintiff, such a position is rarely (if ever) successful in Oklahoma. However, there is authority for the proposition that an insurer who pays under a med-pay provision of an automobile policy is not required to pay amounts written off of physicians' bills for the claimant's health insurer. *Woodrich v. Farmers Insurance Co., Inc.*, 405 F.Supp.2d 1276, 1277-80 (N.D. Okla. 2004) (applying Oklahoma law).

II. EX PARTE COMMUNICATION WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Oklahoma's physician-patient privilege is codified in the Oklahoma Evidence Code at 12 Okla. Stat. § 2503. *See also, Robinson v. Lane*, 480 P.2d 620 (Okla. 1971) (discussing the precursor to Section 2503 and the history of the privilege). Section 2503(D)(3) provides for a qualified waiver of the privilege "as to any communication relevant to the physical, mental or emotional condition of the patient in any proceeding in which the patient relies upon that condition as an element of the patient's claim or

defense...” Thus, the privilege is automatically waived under Section 2503 where a plaintiff puts his physical, mental or emotional condition at issue in a case, but only as to that condition. *See, Higginbotham v. Jackson*, 869 P.2d 319 (Okla. 1994) (holding that an order requiring a plaintiff to execute an unrestricted medical release entitling a defendant to obtain all the plaintiff’s medical records was beyond the scope of the waiver in Section 2503 and thus unenforceable); *Nitzel v. Jackson*, 879 P.2d 1222 (Okla. 1994) (holding same); and *Brown v. Blevins*, 968 P.2d 1218 (Okla. 1998) (holding same).

The Oklahoma Discovery Code also provides for a limited waiver of the physician-patient privilege where a patient is subjected to a physical or mental examination by the adverse party and the patient requests a report from the examination or deposes the examiner. 12 Okla. Stat. § 3235(E)(2). Subsection (E)(2)’s waiver is only necessary where “privilege has not already been waived as provided in the Oklahoma Evidence Code...” (referring to 12 Okla. Stat. § 2503). *See also, Boswell v. Schultz*, 175 P.3d 390 (Okla. 2007) (discussing waiver of the physician-patient privilege and holding that a patient may videotape an examination conducted pursuant to Section 3235).

A much broader waiver of the physician-patient privilege is available in medical malpractice actions in Oklahoma. *See*, 76 Okla. Stat. § 19(B). This provision allows for waiver of the privilege “concerning *any* communication made to a physician or health care provider with reference to *any* physical or mental condition or *any* knowledge obtained by the physician or health care provider by personal examination of the patient.” *Id.* (emphasis added). Not only does this provision not limit the type of information that can be disclosed, but it also waives the privilege in regard to communications made to any “health care provider,” not just physicians. *Id.*

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

The Oklahoma legislature recently amended 12 Okla. Stat. § 2503 to ensure that the privilege does not protect information otherwise available through laws like HIPAA. Effective November 1, 2009, Subsection (D)(5) provides that “[t]he testimonial privilege created pursuant to this section does not make communications confidential where state and federal privacy law would otherwise permit disclosure.” 12 Okla. Stat. § 2503(D)(5). Thus, Oklahoma’s physician-patient privilege waiver permits disclosure of

information to the full extent allowed by HIPAA, but not beyond. Moreover, the Supreme Court of Oklahoma has held that a court order permitting, not mandating, *ex parte* communications with non-party treating physicians where a patient has clearly placed his mental or physical condition at issue does not contravene HIPAA. *Holmes v. Nightengale*, 158 P.3d 1039 (Okla. 2007) (discussed in more detail below).

Further, in 2003, the Director of the Office for Civil Rights of the Department of Health and Human Services made clear that 76 Okla. Stat. § 19(B) was not preempted by 45 C.F.R. § 164.512 (a provision of the Privacy Rule adopted under HIPAA). The Director issued a written response to a Request for Exception Determination made by the Oklahoma State Medical Association and the Oklahoma Hospital Association and explained that Section 19(B) was not contrary to the provisions of HIPAA's Privacy Rule.

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

A plaintiff may execute a release authorizing release of medical records and even *ex parte* communications with his treating physicians. Such a release is generally enforceable as to obtaining medical records through subpoena and will be upheld by a court if challenged. Even with such a release, however, physicians can refuse to in *ex parte* communications with a party or their attorneys. Physicians are like any other fact witness in that regard. *See, Thomas v. Four Seasons Nursing Centers, Inc.*, 206 F.R.D. 294, 296 (N.D. Okla. 2002). As explained below, courts cannot compel physicians to partake in *ex parte* communications with parties. Thus, while the party wishing to interview the healthcare providers pursuant to a release authorization may still be able subpoena records and/or formally depose such providers, *ex parte* communications cannot be had if the provider is unwilling to cooperate.

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

In Oklahoma, a court order may permit, but not mandate, *ex parte* communications with non-party treating physicians where there has been a waiver of the physician-patient privilege. *Holmes*, 158 P.3d at 1042; *see also, Johnson v. District Court of Oklahoma County*, 738 P.2d 151 (Okla. 1987) (holding that a court cannot order discovery by *ex parte* communications because the Oklahoma Discovery Code does not recognize such a method as a proper form of discovery); and *Seaberg v.*

Lockard, 800 P.2d 230 (Okla. 1990) (holding that where no privilege exists, “neither statute nor case law prohibits legal representatives of a defendant from conducting *voluntary ex parte interviews* with a plaintiff’s prospective medical witness, but judicial action may not be invoked to facilitate or impede informal interviews.” (emphasis in original)). As mentioned above, the *Holmes* court also found that allowing *ex parte* communications did not contravene HIPAA requirements.

E. Local Practice Pointers

In Oklahoma, it is common for defense counsel in medical malpractice cases to file a HIPAA waiver notification. The notice explains to the court that the plaintiff has filed a medical malpractice case and, thus, the physician-patient privilege has been waived pursuant to 76 Okla. Stat. § 19(B). It also notifies the court of the defendant’s intent to obtain medical records and confer with willing healthcare providers. Finally, the notice gives the plaintiff a period of time within which to object to such methods. There is also a provision in the notice that if no objection is made and the plaintiff is not willing to negotiate and sign a release authorization, then the defendant may present the notification itself to healthcare providers for the purpose of obtaining records and conferring with willing providers. While healthcare providers can refuse to cooperate with defense counsel when presented with such a notice, it generally serves as a useful tool in motivating plaintiffs to execute a medical records release authorization.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

In Oklahoma, a non-party witness such as a treating physician may be required by subpoena to testify at a deposition or at trial pursuant to 12 Okla. Stat. § 2004.1. This provision sets forth the proper procedure form for the issuance and service of a subpoena, as well as the duties in responding to and objecting to subpoenas. The statute requires a witness served with a subpoena “to attend a trial or hearing at any place within the state.” 12 Okla. Stat. § 2004.1(A)(3). However, “[a] witness shall be obligated to attend to give a deposition only in the county of his or her residence, a county adjoining the county of his or her residence or the county where he or she is located when the subpoena is served.” 12 Okla. Stat. §

3230(B)(1). Either the court clerk or an attorney authorized to practice law in Oklahoma may issue and sign a subpoena on behalf of the court. 12 Okla. Stat. § 2004.1(A)(4). Also, the party issuing the subpoena must attach the fees for one day’s attendance and mileage allowed by law (see discussion of fees below). 12 Okla. Stat. § 2004.1(B)(1).

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Fees that must be paid to ordinary or fact witnesses are governed by 28 Okla. Stat. § 81. This statute provides that a witness who appears “pursuant to an order, subpoena, or other lawful means for compelling the appearances of witnesses, Ten Dollars (\$10.00) for each day of attendance, plus reimbursement as prescribed by law for travel expenses at rates not to exceed those prescribed by law for reimbursement for state employees.” 28 Okla. Stat. § 81(A)(3) (Oklahoma uses the IRS mileage rate, which was 55 cents per mile in 2009); *see also*, 12 Okla. Stat. § 400 (allowing a witness to leave the deposition, trial or hearing if payment of fee is not made at the beginning of each subsequent day after the first day). However, as discussed below, non-party treating physicians will nearly always be considered “experts” for purposes of witness fees. Thus, they would be entitled to “reasonable fee” for the time spent in responding to discovery or appearing to testify pursuant to a subpoena, and not the \$10.00 per day plus mileage mentioned above. *See*, 12 Okla. Stat. § 3226(B)(5)(c). What is a “reasonable” fee will of course vary from case to case, and if an agreement cannot be reached between the parties, the court will make a determination as to the amount of the fee in question.

2. Case Law

Because the pertinent provisions of 12 Okla. Stat. § 3226 are nearly identical to those in Rule 26 of the Federal Rules of Civil Procedure, Oklahoma courts look to federal case law in determining questions about whether a witness is entitled to an ordinary witness fee or an expert fee. *See, McCoy v. Black*, 949 P.2d 689, 692 (Okla. Civ. App. 1997) (citing *Hall v. Goodwin*, 775 P.2d 291, 293 (Okla. 1989)); *see also, Heffron v. District Court of Oklahoma County*, 77 P.3d 1069 (Okla. 2003) (addressing issue of witness fees relating to insurance adjusters and a fire investigator, not physicians). In *McCoy*, the

Oklahoma Court of Civil Appeals examined federal case law construing Rule 26 and found three guidelines for deciding the issue of witness fees under that rule. First, where a physician has been retained to testify as to both facts garnered from an examination of a patient as well as matters within the physician's realm of expertise, the physician will be considered an expert and entitled to a reasonable fee. *McCoy*, 949 P.2d at 693-94. Second, where a physician treated a patient prior to anticipation of litigation and the party is seeking information based solely on facts learned in the course of such treatment, the physician will not be considered an expert. *Id.* Third, where there is a hybrid of the first two scenarios, i.e., the physician treated the patient prior to litigation and will be asked for opinions within his realm of expertise, the physician is considered an expert. *Id.* It should also be noted that a federal court decision decided around the same time as *McCoy* held that two treating physicians were entitled to expert fees under Rule 26 and reasoned as follows:

[A]lmost all of a treating physician's testimony concerning diagnosis, treatment and prognosis, is expert testimony under Fed.R.Evid. 702. A treating physician would be a "fact" witness only in rare situations, such as where the physician also witnessed the accident or incident in question.

Grant v. Otis Elevator Co., 199 F.R.D. 673, 676 (N.D. Okla. 2001).

When a party is required to pay an expert witness fee to depose a treating physician, the fees are considered taxable costs and may be recovered if that party prevails. 12 Okla. Stat. § 942; *see also*, *Fuller v. Pacheco*, 21 P.3d 74, 81 (Okla. Civ. App. 2001) (citing *Atchley v. Hewes*, 965 P.2d 1012, 1015 (Okla. Civ. App. 1998)). However, a party may only recover costs for expert witness fees paid to an adverse party's witnesses. *Id.* (disallowing award of expert witness fees as costs where a party sought costs in connection with deposing its own expert).