OREGON

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I. MEDICAL EXPENSES

A. Requirement for Recovery of Medical Expenses

An injured plaintiff may recover as damages any medical expenses that are reasonable and necessary for the treatment of his or her injuries.[393] A variety of expenses have been approved by Oregon courts, including expenses for treatment by doctors and other medical providers, nursing care, medicine and procedures reasonably necessary to ascertain the nature of the injury.[394] Additionally, the cost of having a treating physician prepare a written report regarding plaintiff's injuries for an attorney or insurance company is recoverable as an item of plaintiff's damages.[395]

Medical expenses are recoverable by the person who incurred those damages. In the case of an unemancipated child, medical expenses are considered damages suffered by the parent and not the child.[396] However, medical expenses are recoverable in a lawsuit brought on behalf of the child if the parent consents to include those damages in the child's lawsuit.[397] Courts will not imply a parent's consent; rather, the parent must file a written consent that accompanies the child's complaint for

[393] *See* Mathews v. City of La Grande, 299 P. 999, 1001 (Or. 1931).
[394] *See, e.g.*, Chopp v. Miller, 504 P.2d 106, 107-08 (Or. 1972) (chiropractic care); Harris v. Hindman, 278 P. 954, 956-57 (Or. 1929) (nursing care); Ellington v. Garrow, 162 P.3d 328, 331 (Or. App. 2007) (physical therapy). *See also* Tuohy v. Columbia Steel Co., 122 P. 36, 38 (Or. 1912).
[395] *See Chopp*, 504 P.2d at 108.
[396] *See* Palmore v. Kirkman Laboratories, Inc., 527 P.2d 391, 396 (Or. 1974).
[397] *See* OR. REV. STAT. § 31.700(1) (2009).

damages.[398] If the parent does consent, he or she loses the right to recover such damages in a separate lawsuit brought on the parent's behalf.[399]

Damages awards for medical expenses can be generally divided into two categories: (1) past medical expenses, and (2) future medical expenses. Both categories are examined below.

1. Past Medical Expenses

To recover past medical expenses, plaintiff must prove that the medical supplies and services were (1) actually provided, (2) reasonable in amount, and (3) necessary for the treatment of conditions related to the injury.[400] Generally, the submission of medical bills alone is not sufficient to prove the amount of medical expenses a plaintiff is entitled to recover.[401] Rather, a testifying physician typically establishes the reasonableness and necessity of treatment.[402]

Not all medical expenses are reasonable and necessary. For example, medical expenses may not be necessary if they are due to a preexisting condition or a subsequent incident that required the medical care.[403]

2. Future Medical Expenses

Plaintiffs may recover medical expenses that have not been incurred but that will be necessary in the future.[404] To recover future medical expenses for a permanent injury, the plaintiff must show that such expenses are reasonably probable and not a mere possibility.[405] Further, to sustain a negligence

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398 *See* Barrington v. Sandberg, 991 P.2d 1071, 1075-76 (1999).
399 *See* OR. REV. STAT. § 31.700(2).
400 *See* Valdin v. Holteen, 260 P.2d 504, 510 (Or. 1953).
401 *See id*. at 510-11.
402 *See, e.g.*, *Valdin*, 260 P.2d at 511.
403 *E.g.*, Herrell v. Johnson, 899 P.2d 759, 762 (Or. App. 1995) (affirming defense verdict when sufficient evidence supported jury's finding that medical expenses were due to a preexisting condition); Fugate v. Safeway Stores, Inc., 897 P.2d 328, 332 (Or. App. 1995) (evidence of subsequent domestic abuse suffered by plaintiff was improperly excluded because it was relevant to show that chiropractic treatment may have been necessitated by event other than defendant's conduct).
404 *See* White v. Jubitz Corp., 219 P.3d 566, 578 (Or. 2009) (so stating).
405 *See* Ahonen v. Hryszko, 175 P. 616, 618 (Or. 1918) (referring to standard as one of "reasonable certainty").

action, plaintiffs must plead and prove a "present physical injury" to recover future medical expenses; threatened but unrealized future injuries are insufficient to state a claim.[406]

Proof that future medical complications are merely possible is insufficient to recover damages for future medical care. However, such proof might nevertheless be admissible at trial, if offered to establish the nature and extent of a plaintiff's disability, and considered by a jury for that purpose in determining damages.[407] For example, one Oregon court noted that the mere possibility that future corrective surgery might be necessary carries with it a "cost, pain and distress," which is relevant to a jury's damages calculation.[408]

B. Collateral Source Rule and Exceptions

Oregon's collateral source rule and its exceptions are as follows:

> (1) In a civil action, when a party is awarded damages for bodily injury or death of a person which are to be paid by another party to the action, and the party awarded damages or person injured or deceased received benefits for the injury or death other than from the party who is to pay the damages, the court may deduct from the amount of damages awarded, before the entry of judgment, the total amount of those collateral benefits other than:
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> (a) Benefits which the party awarded damages, the person injured or that person's estate is obligated to repay;
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> (b) Life insurance or other death benefits;
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> (c) Insurance benefits for which the person injured or deceased or members of that person's family paid premiums; and
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> (d) Retirement, disability and pension plan benefits, and federal Social Security benefits.
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> (2) Evidence of the benefit described in subsection (1) of this section and the cost of obtaining it is not admissible at trial, but shall be received by the court by affidavit submitted after the verdict by any party to the action.[409]

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[406] *See* Lowe v. Philip Morris USA Inc., 183 P.3d 181, 184-86 (Or. 2008) (dismissing negligence claim for "medical monitoring" expenses).
[407] *See* Feist v. Sears, Roebuck & Co., 517 P.2d 675, 680 (Or. 1973).
[408] *See* Pelcha v. United Amusement Co., 606 P.2d 1168, 1168-69 (Or. App. 1980) (a 30 to 45 percent chance that plaintiff might need future corrective surgery was admissible and properly considered by a jury in calculating damages).
[409] *See* OR. REV. STAT. § 31.580 (2009).

The rule allows (but does not require) a trial court to subtract the value of collateral benefits from the damages a jury awarded to a plaintiff.[410] However, the trial court is precluded from offsetting four types of collateral benefits: (1) benefits the plaintiff is obligated to repay, (2) life insurance or other death benefits, (3) insurance benefits for which plaintiff paid a premium, and (4) retirement, disability and pension plan benefits, including Social Security benefits.[411]

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

Billed medical expenses that are later written off by a medical provider under an agreement with Medicare are not are not subject to post-verdict deduction from a damages award under the Social Security exception to the collateral source rule.[412] Further, the write-offs are not admissible as evidence at trial, even if they are offered to prove the reasonable value of the medical services rendered.[413] No reported Oregon appellate decision has considered whether Medicaid write-offs should be treated similarly, although the same analysis would presumably apply if Medicaid benefits were deemed Social Security benefits and fell under that exception to the collateral source rule.

2. Private Insurance

No reported Oregon appellate decision has considered whether a court should deduct from a damages award write-offs to medical bills that were reached under an agreement with a private insurer. Such a deduction would be improper if the write-offs were deemed a benefit that fell within one of the exceptions to the collateral source rule,[414] with the most likely candidate being whether such write-offs constituted insurance benefits for which premiums were paid.[415]

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[410] *See Jubitz*, 219 P.2d at 572.
[411] *See id.* at 572.
[412] *See id.* at 583.
[413] *See id.*
[414] *See id.* at 572.
[415] *See* OR. REV. STAT. §§ 31.580(1) (c) (setting forth exception).

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

A. Scope of Physician-Patient Privilege and Waiver

Oregon's privilege regarding confidential communications between a patient and physician is set forth in OR. R. EVID. ("OEC") 504-1. It provides in pertinent part:

> (2) A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential information in a civil action, suit or proceeding, made for the purposes of diagnosis or treatment of the patient's physical condition, among the patient, the patient's physician or persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family.[416]

The privilege shields from discovery confidential communications made for the purpose of diagnosis and treatment by a physician. The term "physician" means licensed doctors and dentists, or persons reasonably believed by the patient to be so, from any state or nation, and includes "licensed or certified naturopathic and chiropractic physicians and dentists."[417] "Confidential communication" is defined to mean a communication "not intended to be disclosed to third persons."[418] Not all disclosures to third persons, however, destroy the privilege. The privilege extends to "persons who are participating in the diagnosis or treatment under the direction of the physician, including members of the patient's family."[419]

The privilege encompasses not only oral communications between a patient and physician, but also any medical records in which such information might be recorded.[420] The privilege applies to civil lawsuits but not to criminal proceedings.[421] Additionally, the physician-patient privilege is not applicable in a worker's compensation proceeding.[422]

A separate evidentiary rule – OR. R. EVID. 511 – establishes how the physician-patient privilege is waived. That rule provides in pertinent part:

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[416] OR. R. EVID. 504-1(2).
[417] *Id.* 504-1(1)(c).
[418] *Id.* 504-1(1)(a).
[419] *Id.* 504-1(2).
[420] *E.g.*, Nielson v. Bryson, 477 P.2d 714, 716 (Or. 1970), *superseded by statute*, 1973 OR. LAWS, Ch. 136, § 3, *as recognized in* Woosley v. Dunning, 520 P.2d 340, 343-45 (Or. 1974).
[421] *See* State v. Betts, 384 P.2d 198, 205 (Or. 1963).
[422] *See* Booth v. Tektronix, Inc., 823 P.2d 402, 406 (Or. 1991).

> A person upon whom Rules 503 to 514 confer a privilege against disclosure of the confidential matter or communication waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This section does not apply if the disclosure is itself a privileged communication. Voluntary disclosure does not occur with the mere commencement of litigation or, in the case of a deposition taken for the purpose of perpetuating testimony, until the offering of the deposition as evidence. * * * Voluntary disclosure does occur, as to psychotherapists in the case of a mental or emotional condition and physicians in the case of a physical condition upon the holder's offering of any person as a witness who testifies as to the condition.[423]

The rule makes it clear that "the mere commencement of litigation does not constitute disclosure. Thereafter, however, waiver can occur during discovery or at trial, either on direct or cross-examination."[424] Waiver occurs when a plaintiff affirmatively takes a discovery deposition of his or her physician.[425] Once privilege is waived, the scope of waiver extends to all of plaintiff's physicians regarding that condition, and not just the physician who was deposed.[426]

It is less clear if (or how) a plaintiff might waive privilege by responding to deposition questions at the request of an adverse party. One early federal decision found that waiver did not occur when several plaintiffs responded to interrogatories and deposition questions about their medical treatment, even though their attorney did not invoke the physician-patient privilege, because the testimony was deemed to be compelled and not voluntary.[427] Subsequent Oregon Supreme Court decisions have restated that rule, citing the federal decision as authority.[428] Nevertheless, in another context, the Oregon Supreme Court stated that a waiver of privilege might occur if plaintiff's counsel does not object to questioning during a perpetuation deposition that would elicit information about a privileged topic.[429] Similarly, a

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[423] OR. R. EVID. 511.
[424] OR. R. EVID. 511 (1981 Conference Committee Commentary) (citation omitted).
[425] *See* State *ex rel.* Grimm v. Ashmanskas, 690 P.2d 1063, 1068 (Or. 1984); State *ex rel.* Calley v. Olsen, 532 P.2d 230, 235 (Or. 1975).
[426] *See Ashmanskas*, 690 P.2d at 1067-68; *Calley*, 532 P.2d at 236.
[427] *See* Reynolds Metals Company v. Yturbide, 258 F.2d 321, 333-34 (9th Cir. 1958).
[428] *See Ashmanskas*, 690 P.2d at 1067 n. 3 (so stating); *Nielson*, 477 P.2d at 716 (same).
[429] *See* State *ex rel.* OHSU v. Haas, 942 P.2d 261, 273 (Or. 1997) (stating rule but upholding claim of privilege as to investigatory report).

waiver was found by a federal court when a plaintiff provided a lengthy, non-responsive narrative about a privileged communication in response to a deposition question.[430]

The rules regarding waiver of privilege as to the testimony of a plaintiff's physicians should not be confused with the separate rules regarding the production of a party's written medical records. In 1970, the Oregon Supreme Court initially found that hospital records remained subject to the physician-patient privilege even after a plaintiff had put his or her medical condition at issue by filing a lawsuit.[431] That decision was legislatively reversed in part, however, when the statutory privilege was amended in 1973 by the Oregon legislature. The 1973 amendments were subsequently interpreted to provide that, "upon the filing of an action for personal injuries[,] the physician-patient privilege is waived to the limited extent of permitting defendant to demand 'a copy of all written reports of any examinations relating to injuries for which recovery is sought.'"[432] The amended privilege continued to prohibit depositions of a plaintiff's physicians, except, however, when those physicians refused a defendant's request to provide a written report regarding plaintiff's injuries.[433]

In 1978, these statutory rules and portions of FED. R. CIV. P. 35 were combined and codified into Oregon law as Rule 44 of the Oregon Rules of Civil Procedure.[434] Thus, under Oregon law, once a plaintiff has commenced a lawsuit and sought financial compensation for physical or mental injuries caused by another, that plaintiff is required to make available all medical records regarding the injuries at issue to any defendant that asks for them.[435]

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[430] *See* Leaco Enterprises, Inc. v. General Elec. Co., No. 87-1026, 1989 WL 35861, at *3-4 (D. Or. 1989) (finding waiver of attorney-client privilege).
[431] *See Nielson*, 477 P.2d at 716.
[432] *Woosley*, 520 P.2d at 344 (quoting 1973 OR. LAWS, Ch. 136 § 3 (*former* Or. Rev. Stat. § 44.620(2) (1973))).
[433] *See Woosley*, 520 P.2d at 344.
[434] *See* Council on Court Procedures, OREGON RULES OF CIVIL PROCEDURE 133 (Dec. 2 1978).
[435] *See* OR. R. CIV. P. 44C-E (2010); *see also id*. 55H (rule regarding subpoenas for protected health information held by third parties).

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

No reported Oregon appellate decision has considered the extent to which the Health Insurance Portability and Accountability Act ("HIPAA"),[436] and its implementing regulations, impact or otherwise preempt Oregon's evidentiary rules regarding the physician-patient privilege or waiver of that privilege.

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

Medical records releases are commonplace in personal injury litigation. Such authorizations are normally limited to the retrieval of records from medical providers, but they can also be worded more broadly to permit informal *ex parte* interviews of a plaintiff's physicians by defense counsel. No specific Oregon statute or rule of procedure addresses the specific form or content of a valid authorization or stipulation allowing *ex parte* contact. However, litigants should be aware of federal HIPAA regulations and Oregon statutory law and administrative rules that generally set forth requirements regarding the form and content of a valid authorization for the disclosure of protected health information.[437] Further, the Oregon legislature has proposed a model form of authorization that is commonly used to allow the disclosure of protected health information.[438]

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

In the absence of a plaintiff's consent, defendants may ask the court to issue an order allowing *ex parte* contact with the plaintiff's physicians by filing an appropriate motion. Prior to the passage of HIPAA, in 1996, Oregon trial courts routinely granted such motions. These rulings were based largely on the Oregon Supreme Court's decision in *Ashmanskas*. There, the court held that by deposing the defendant physician in a medical malpractice case, plaintiff had "terminated" the physician-patient privilege as to his injuries.[439] Accordingly, the court found that defendant physician was entitled to

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[436] *See* Pub. L. No. 104-191 (1996).
[437] *See, e.g.*, 45 C.F.R. § 164.508(c) (describing "core elements and requirements" of valid HIPAA authorization); OR. REV. STAT. §§ 192.518 *et seq*. (general requirements for private providers and state health plans); OR. REV. STAT. §§ 746.600 *et seq*. (private health plans); OR. REV. STAT. § 179.505 (public providers); OR. ADMIN. R. 410-014-0020(1) (2009).
[438] *See* OR. REV. STAT. § 192.522.
[439] *See Ashmanskas*, 690 P.2d at 1067-68

depose any of plaintiff's treating physicians despite plaintiff's privilege objection.[440] The defense bar and most trial courts believed that as long as the privilege had been waived, there was no legal obstacle to informal *ex parte* communications as well.

However, HIPAA's implementing regulations sbstantially limited the disclosure of "protected health information" by medical providers and other covered entities.[441] Nevertheless, those regulations do not make a plaintiff's consent a prerequisite to every disclosure of protected health information, and they expressly authorize disclosures if "required by law" or made in response to a court order or proper subpoena.[442] Relying on these regulations, Oregon defense attorneys asked trial courts to enter orders authorizing *ex parte* contact after a plaintiff had waived privilege, with mixed results. In a comprehensive assessment of the interplay between HIPAA's legal requirements, Oregon's law of privilege, and various ethical rules and codes, a Multnomah County Circuit Court judge summarized the state of the law and practice in Oregon, and denied a motion by several defendants to allow *ex parte* contact with a plaintiff's physicians.[443] However, the trial court's order acknowledged that it had no binding effect on other judges, even in the same court, and specifically noted that the issue has been considered "with varying conclusions and results" by several different trial court judges throughout Oregon.[444] The Oregon Supreme Court has not yet resolved the issue.

E. Local Practice Pointers

The best practice for defense counsel is to always request copies of all written reports regarding a party's medical condition, which is the only discovery explicitly authorized by rule.[445] The safest way of securing *ex parte* contact with plaintiff's treating physicians is to obtain a signed individual authorization from plaintiff allowing such contact. If that is not forthcoming, the next step might be to inquire whether plaintiff would allow a joint interview of the physician or, alternatively, a deposition. If that does not

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[440] *See id.*
[441] *See* 45 C.F.R. §§ 164.502(a).
[442] *See* 45 C.F.R. §§ 164.512(a), (e)(1)(i), (e)(1)(ii).
[443] *See* Poppino v. Columbia Neurosurgical Associates, L.L.C., 2006 WL 4041462 (Or. Cir. Ct. 2006) (Trial Court Order).
[444] *Id.*
[445] *See* OR. R. CIV. P. 44C, 44E.

work either, counsel can consider filing a motion with the court for an order authorizing *ex parte* contact. Counsel that initiates contact with a physician in Oregon without prior authorization from plaintiff, or prior approval from the court, is treading in potentially hazardous legal waters.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Once privilege has been waived, a party can attempt to obtain a deposition of a non-party treating physician pursuant to OR. R. CIV. P. 55 or, in appropriate circumstances, OR. R. CIV. P. 44D(2). OR. R. CIV. P. 55 provides that a party may issue a subpoena to a non-party witness.[446] The subpoena may be issued in blank by the clerk of the court or by an attorney of record.[447] Finally, the subpoena must be properly served on the witness, either personally or by mail in appropriate circumstances.[448]

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

A subpoenaed witness is entitled to receive $30 for each day's attendance and a mileage reimbursement of 25 cents a mile if the person is required to travel in order to perform his or her duties as a witness.[449] If the proceeding involves a public body as a party, the daily witness fee is $5 and the mileage reimbursement is 8 cents per mile.[450] If the daily attendance fee is not paid, the witness is not obliged to remain in attendance.[451] Practitioners should also be aware that the Oregon State Bar has adopted a rule of conduct that requires physicians to be paid reasonable compensation for their time testifying at deposition or trial.[452]

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[446] *See* OR. R. CIV. P. 55A.
[447] *See id.* 55C.
[448] *See id.* 55D.
[449] *See* OR. REV. STAT. § 44.415(1).
[450] *See id.* § 44.415(2).
[451] *See Id.*
[452] *See* Oregon State Bar & Oregon Medical Association, *Statement of Principles Governing Certain Lawyer-Physician Relationships* (Nov. 1984), available online at http://www.osbar.org/_docs/rulesregs/jointstmts.pdf.