PENNSYLVANIA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

Under Pennsylvania law, a plaintiff is entitled to recover for past medical expenses reasonably and necessarily incurred, as well as all future medical expenses reasonably likely to be incurred. Moorhead v. Crozer Chester Medical Center, 765 A.2d 786, 789 (Pa. 2001), *abrogated on other grounds by Northbrook Life Insurance Co. v. Commonwealth*, 949 A.2d 333 (Pa. 2008); *McDonald v. United States*, 555 F. Supp. 935, 962 (M.D. Pa. 1983). As to past medical expenses, "the law requires a plaintiff to produce evidence which establishes, with a fair degree of probability, a basis for assessing damages." *Phillips v. Gerhart*, 801 A.2d 568, 577 (Pa. Super. 2002). "[T]he law does not require exact certainty as to the precise amount of damages incurred." *Id.* Medical expenses "'must be supported by a reasonable basis for calculation; mere guess or speculation is not enough.'" *Durosky v. United States*, 2008 WL 5104850, at *6-7 (M.D. Pa. Dec. 1, 2008) (*quoting McDonald*, 555 F. Supp. at 962).

A personal injury to a child gives rise to two independent causes of action: (1) the parents' claims for medical expenses and loss of services during the child's minority, and (2) the minor's claims for pain and suffering and expenses incurred after he or she reaches majority. *E.D.B. v. Clair*, 987 A.2d 681, 686-88 (Pa. 2009). Parents may recover medical expenses incurred for a minor child's care, but it is unclear whether a minor can also recover these expenses. *Id*. at 687-88, 691 n.10 (noting conflicting

[453] Mr. Beck thanks his co-author Margaret Osbourne for her valuable assistance with this project.

authority; "the broad question of the continuing vitality of the common law doctrine that bars an individual from bringing suit for medical expenses incurred during his or her minority is not before us and is not the basis for our decision.").

Pennsylvania has no "*per se*" rule regarding inconsistent verdicts that precludes a jury from awarding damages for medical expenses but denying recovery for pain and suffering. *Zeigler v. Detweiler*, 835 A.2d 764, 767-68 (Pa. Super. 2003). A jury may award damages for medical expenses without compensation for pain and suffering upon a reasonable basis that: "(1) the jury did not believe the plaintiff suffered any pain and suffering, or (2) that a preexisting condition or injury was the sole cause of the alleged pain and suffering." *Davis v. Mullen*, 773 A.2d 764, 767 (Pa. 2001).

Medical expenses are not "bodily injury" to which delay damages (prejudgment interest) can be added pursuant to Pa. R. Civ. P. 238. *Goldberg v. Isdaner*, 780 A.2d 654, 659 (Pa. Super. 2001).

In actions where the damages are less than $25,000, medical bills are admissible without need for authentication if provided to the opponent more than 30 days before trial. PA. R. CIV. P. 1311.1(b), 1305(b)(1).

2. Future Medical Expenses

Future medical expenses must proven by expert testimony both that future medical expenses will be incurred and their reasonable estimated cost. *Mendralla v. Weaver Corp*., 703 A.2d 480, 485 (Pa. Super. 1997); *Berman v. Philadelphia Board of Education*, 456 A.2d 545, 550-51 (Pa. Super. 1983). Once proof of future medical expenses is offered to a reasonable degree of certainty, the burden shifts to the defendant to produce evidence of a lesser amount. *DeCarlo v. United States*, 2002 WL 31499281,*29-31 (M.D. Pa. Sept. 11, 2002) (defendant offered insufficient evidence that plaintiff would be disqualified from heart transplant). Future medical expenses are not reduced to present value. *Kiser v. Schulte*, 648 A.2d 1, 4 (Pa. 1994); *see generally Kaczkowski v. Bolubasz*, 421 A.2d 1027 (Pa. 1980) (general Pennsylvania rule that future damages in personal injury cases are not reduced to present value).

3. Medical Monitoring

Under Pennsylvania law recovery of medical expenses incurred in testing for the onset of possible latent diseases may be recovered in a "medical monitoring" action in the absence of present physical injury:

> (1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.

Redland Soccer Club v. Dep't of the Army, 696 A.2d 137, 145-46 (Pa. 1997). Plaintiffs must prove these elements through expert testimony. *Redland Soccer*, 696 A.2d at 146; *Anthony v. Small Tube Manufacturing Corp.*, 580 F. Supp. 2d 409, 421 (E.D. Pa. 2008). Plaintiffs must allege that they suffered a harmful effect as a result of the exposure; it is not enough to allege dangerous or unsafe medical care as the hazard where plaintiff's condition did not change. *Walter v. Magee-Womens Hospital of UPMC Health Systems*, 876 A.2d 400, 405-06 (Pa. Super. 2005) (improperly conducted laboratory tests did not cause exposure to hazardous substance; medical condition was same before and after medical procedure), *aff'd*, 906 A.2d 1194 (Pa. 2006).

"Injury" in a medical monitoring claim is the quantifiable cost of medical care that will detect the disease, and the question for the jury is whether the plaintiff will need medical surveillance. *Redland Soccer*, 696 A.2d at 144. Pennsylvania courts prefer that plaintiffs recover actual monitoring costs through a court-administered trust fund rather than a lump-sum award. *Id*. at 142 n.6; *Foust v. SEPTA*, 756 A.2d 112, 118 (Pa. Commw. 2000).

B. Collateral Source Rule and Exceptions

Pennsylvania follows the common-law collateral source rule without general statutory modification. "[P]ayments from a collateral source shall not diminish the damages otherwise recoverable from the wrongdoer." *Johnson v. Beane*, 664 A.2d 96, 100 (Pa. 1995). Plaintiffs may "recover more than

once for the same injury provided these recoveries come from different sources." *Armstrong v. Antique Automobile Club*, 670 F. Supp.2d 387, 393-94 (M.D. Pa. 2009). Defendants in personal injury actions are prohibited from "introducing evidence of the plaintiff's receipt of benefits from a collateral source for the same injuries which are alleged to have been caused by the defendant." *Pusl v. Means*, 982 A.2d 550, 557 (Pa. Super. 2009). Plaintiffs are entitled to the full amounts of costs paid by collateral sources, including Medicare and insurance payments. *Moorhead*, 765 A.2d at 791. Practically speaking, in many cases plaintiffs receive no double recovery because they must repay the collateral source under the doctrine of subrogation. *Armstrong*, 670 F. Supp. 2d at 394.

An exception to the collateral source rule is where evidence is independently "relevant to a material issue in the case." *Gallagher v. Pa. Liquor Control Bd.*, 883 A.2d 550, 557-59 (Pa. 2005) (no error where worker's compensation benefit evidence was relevant to employer's identity). The collateral source rule does not restrict a plaintiff's introduction of evidence concerning collateral sources. *Simmons v. Cobb*, 906 A.2d 582, 585 (Pa. Super. 2006).

In certain specific types of cases the collateral source rule has been abrogated by statute. The Motor Vehicle Financial Responsibility law statutorily abrogates the collateral source rule and prevents double recovery by automobile accident victims but does not apply to out-of-state accident victims and insurers. *Armstrong*, 670 F. Supp. 2d at 394, *citing* 75 PA. CONS. STAT. §1720, 1722. The Medical Care Availability and Reduction of Error Act ("MCARE") has "negated the substantive collateral source doctrine in medical professional liability actions." *Gallagher*, 883 A.2d at 554 n.3, *citing* 40 PA. CONS. STAT. § 1303.508(a). MCARE, with limited exceptions, precludes a plaintiff in a medical malpractice action from recovering "past medical expenses . . . to the extent that the loss is covered by a private or public benefit or gratuity that the claimant received prior to trial." *Hartenstine v. Daneshdoost*, 4 Pa. D. & C.5th 282, 288-90 (Pa. C.P. Lehigh Co. 2008) (exception for benefits under subrogated ERISA plan does not apply to governmental insurance plan). MCARE does not preclude recovery for future medical expenses because "limiting future damages by amounts that may be covered in the future by Medicare risks a shortfall to plaintiff." *Amaya v. York Hospital*, 2006 WL 13101, at *2 (M.D. Pa. Jan. 3, 2006)

(emphasis original) (denying motion *in limine* to exclude evidence of future medical expenses that may be covered by Medicare).

C. Treatment of Write-downs and Write-offs, Medicare and Medicaid, Private Insurance, and Provider Reductions

Under Pennsylvania law, plaintiffs are entitled to "recover the reasonable value of medical services." *Moorhead*, 765 A.2d at 789. When a provider accepts an amount less than the "reasonable value" of medical services as payment in full, the plaintiff's compensatory damages are limited to amounts actually paid for the medical services rendered. *Id*. at 789-90; *Blanck v. Wyndham International, Inc.*, 2004 WL 5829760, at *1 (Mag. E.D. Pa. March 11, 2004) (plaintiff barred from introducing medical bills in excess of amounts accepted as full payment by medical facilities). In this respect, Pennsylvania law draws no distinction between Medicare and Medicaid payments, private insurance, and provider discounts. *Moorhead*, 765 A.2d at 789 (limiting recovery to amounts paid to medical center under contracts with Medicare and insurance and not the value of services rendered); *Roberts v. Pa. Hospital*, 2005 WL 4934136, 2005 Phila. Ct. Com. Pl. Lexis 587, at *20-21 (Pa. C.P. Phila. Co. Dec. 30, 2005) (excluding evidence of unbilled charitable medical expenses), *aff'd mem.*, 915 A.2d 158 (Pa. Super. 2006). Medical bills showing actual payments must be proven "reasonable" by plaintiffs. *Moore v. Home Depot U.S.A., Inc.*, 2007 WL 4322208, at *1 (E.D. Pa. Dec. 6, 2007) (amount actually paid is relevant to reasonableness but not dispositive; physicians competent to testify regarding reasonableness of medical charges).

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

The Pennsylvania physician-patient privilege statute provides: "No physician shall be allowed . . . to disclose any information which he acquired in attending the patient in a professional capacity . . . which shall tend to blacken the character of the patient, without consent of said patient, except in civil matters brought by such patient, for damages on account of personal injuries." 42 PA. CONS. STAT. §5929 (2009). Accordingly, patients "surrender" the physician-patient privilege when they file suit

placing their physical or mental health at issue. *Grimminger v. Maitra*, 887 A.2d 276, 279 (Pa. Super. 2005); *Moses v. McWilliams*, 549 A.2d 950, 955 (Pa. Super. 1988) (en banc); *McOwen v. Marie*, 2007 WL 338669, at *1-2 (E.D. Pa. Jan. 31, 2007). Confidentiality extends only to medical information that "blackens" the character of the patient. *Compare Grimminger*, 887 A.2d at 280-81 (statements regarding arm injuries were not confidential statements that blackened character) *with Kuney v. Benjamin Franklin Clinic*, 751 A.2d 662, 665 (Pa. Super. 2000) (testimony regarding physical, mental, and emotional issues of ex-wife who allegedly engaged in bizarre and harmful behavior tended to blacken character).

"Pennsylvania law distinguishes between information communicated to a physician by a patient and information acquired through examination and observation," and the privilege only applies to protect "information directly related to the patient's communication and thus tending to expose it." *Stenger v. Lehigh Valley Hospital Center*, 609 A.2d 796, 803 (Pa. 1992) (holding anonymous AIDS test results not protected). The privilege belongs only to the patient; the physician may not claim or waive it. *In re Asbestos Products Liability Litigation*, 256 F.R.D. 151, 155 n.11 (E.D. Pa. 2009); *see Commonwealth v. Alexander*, 708 A.2d 1251, 1257-58 (Pa. 1998) (holding that patient is entitled to waive privilege at any time, regardless of physician's knowledge or consent). Access to treating physicians in litigation is governed by rule. *See infra*.

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

HIPAA, through 45 C.F.R. §164.512(e), exempts "judicial proceedings" from the scope of its operation. Thus HIPAA "covered entities" may freely disclose medical information in accordance with the terms of a "court order" or "[i]n response to a subpoena, discovery request, or other lawful process, that is not accompanied by an order of a court" as long as there has been prior notice and an opportunity to resolve objections. Thus, HIPAA is:

> not intended to disrupt current practice whereby an individual who is a party to a proceeding and has put his or her medical condition at issue will not prevail without consenting to the production of his or her protected health information. In such cases, we presume that parties will have ample notice and an opportunity to object in the context of the proceeding in which the individual is a party.

65 Fed. Reg. 82462, 82530.

Pennsylvania courts addressed disclosure by "formal discovery request." *Howard v. Rustin*, 2007 WL 2811828, at *2-3 (W.D. Pa. Sept. 24, 2007) (citing 45 C.F.R. §164.512(e); internal citation omitted); *see T.M. v. Elwyn, Inc.*, 950 A.2d 1050, 1060 (Pa. Super. 2008) (directing trial court to consider Section 164.512(e) in molding its discovery orders). Pennsylvania courts have not addressed HIPAA in the context of "other lawful process" such as informal physician interviews, nor have they considered whether HIPAA has any preemptive effect on state litigation procedure.

HIPAA does not protect the discovery of information from physician-consultants who do not provide healthcare services, but only give medical opinions for litigation purposes. *In re Asbestos*, 256 F.R.D. at 154-55. Litigation experts are not HIPAA "medical providers." *Id.* HIPAA cannot prevent enforcement of subpoenas requesting production of documents related to the diagnosing reports and opinions. *Id.* at 155. No physician-patient privilege exists as to expert witnesses, and if there were, it would be waived by the filing of the lawsuit. *Id.*

C. Authorization of Ex Parte Physician Communication by Plaintiff

Pennsylvania Rule of Civil Procedure 4003.6 provides:

> Information may be obtained from the treating physician of a party only upon written consent of that party or through a method of discovery authorized by this chapter. This rule shall not prevent an attorney from obtaining information from (1) the attorney's client, (2) an employee of the attorney's client, or (3) an ostensible employee of the attorney's client.

PA. R. CIV. P. 4003.6. The term "client" refers to the attorney's client in the pending litigation and not any client of the attorney. *Heacock v. Sun Co.*, 38 Pa. D. & C.4th 1, 4, 8 (Pa. C.P. Phila. Co. 1998) (counsel improperly gathered medical records from another unrelated firm client). Waiver of privilege by filing suit "does not permit unfettered disclosure [and] Rule 4003.6 regulates the manner in which defense counsel obtains information from the plaintiff's treating physician." *Marek v. Ketyer*, 733 A.2d 1268, 1270 (Pa. Super. 1999) (granting new trial where Rule 4003.6 violated and physician testified as defense expert); *see also Alwine v. Sugar Creek Rest, Inc.*, 883 A.2d 605, 611 (Pa. Super. 2005) (denying new trial where treating physician did not testify as expert or offer any opinion testimony).

Rule 4003.6 requires counsel use formal discovery to obtain information from treating physicians, which require advance notice to the plaintiffs and gives them the opportunity to object. *White v. Behlke*, 65 Pa. D. & C.4th 479, 487 (Pa. C.P. Lackawanna Co. 2004). The policy of the rule is to "preclude a treating physician from acting in any adverse capacity to a patient in court, while protecting the right of the defense and the court to obtain full access to truthful testimony concerning past medical care." *Jakobi v. Ager*, 45 Pa. D. & C.4th 189, 193 (Pa. C.P. Phila. Co. 2000). Rule 4003.6 may not apply to cases pending in federal court. *Gregro v. Barthel*, 1996 WL 428819, at *2-4 (E.D. Pa. July 23, 1996) (noting conflicting authority regarding application of *ex parte* communication rules). However, a court may approve a defendant's engagement of a treater as an expert against the plaintiff-patient. *Great West Life Assurance Co. v. Levithan*, 153 F.R.D. 74, 77 (E.D. Pa. 1994).

To be a treating physician under Rule 4003.6, a physician need not have direct contact with the patient or recommend medication or therapy. *Marek*, 733 A.2d at 1269. Treating physician status may arise from the review of diagnostic testing, communication with other members of the medical team regarding the patient's care, and billing for services. *Id.* Rule 4003.6 does not apply to a physician who merely offers advice to a treating physician to assist that doctor with his or her patient's care. *Blaner v. IDEC Pharmaceuticals Corp.*, 58 Pa. D. & C.4th 129, 143-44 (Pa. C.P. Allegheny Co. 2002) (physician who consults solely by telephone who did not bill for his services was not "treating physician" and may act as expert witness for the defense).

As PA. R. CIV. P. 4003.6 is simply a state rule of civil procedure, and is not supported by a substantive privilege, it probably does not apply in federal court. *See Williams v. Rene*, 72 F.3d 1096, 1103 (3d Cir. 1995) (holding that similar Virgin Islands rule did not apply in federal court); *In re Orthopedic Bone Screw Products Liability Litigation*, 1996 WL 530107, at *3 (E.D. Pa. Sept. 16, 1996).

D. Authorization of Ex Parte Physician Communication by Courts

Pennsylvania courts have strictly construed Rule 4003.6 prohibiting *ex parte* communications and its limited exceptions and have disqualified counsel and excluded evidence based on violations. *See, e.g., Jakobi*, 45 D. & C.4th at 194-95 (disqualifying defense counsel for substantive *ex parte* communications

with treating physician); *Heacock*, 38 Pa. D. & C.4th at 4, 8 (limiting treating physician testimony to contemporaneous treatment of plaintiff and not subsequent care or prognosis where Rule 4003.6 was violated). Courts will allow *ex parte* contact, however, where the treating physician falls under one of the exceptions contained in Rule 4003.6. *See* PA. R. CIV. P. 4003.6(1)-(3). *Ex parte* defense contact with a treating physician is permitted where the doctor was an independent contractor at the defendant facility, under the exception to Rule 4003.6 allowing for attorneys to obtain information from an "ostensible employee of the attorney's client." *Bernick v. Inglis House*, 2008 WL 7390537, 2008 Phila. Ct. Com. Pl. Lexis 155, 3-4 (Pa. C.P. Phila. Co. July 3, 2008) (declining to disqualify counsel based on allegedly improper *ex parte* contact with treating physician), *aff'd mem.*, 2010 Pa. Super. Lexis 272 (Pa. Super. Jan. 4, 2010). This exception applies where the care by the "ostensible employee" is at issue and does not allow counsel to have communications with any treating physician who happens to be an employee. *White*, 65 Pa. D. & C.4th at 480-81, 493 (granting motion to preclude defense counsel from interviewing subsequent treating physician).

E. Local Practice Pointers

Due to the strict nature of Pennsylvania law prohibiting *ex parte* communications with physicians, practitioners should be careful in their dealings with treating physicians. In practice, litigants only receive discovery from treating physicians through formal means because plaintiffs and the courts rarely, if ever, authorize *ex parte* communications to discuss patient care beyond the statutory exceptions found in Rule 4003.6. Many counsel conduct non-substantive communications with treaters through their non-attorney staff. If seeking to use a treater as an expert, obtain prior court approval. *Levithan*, 153 F.R.D. at 77.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Non-party treating physicians may be subpoenaed to give deposition testimony. *See* PA. R. CIV. P. 231.1-234.2, 4007.1. Parties must meet certain procedural requirements before depositions may be videotaped, but the recorded deposition of treating physicians can then be used at trial as an exception to

the hearsay rule. PA. R. CIV. P. 4017.1(a), (g). Non-party treating physicians are not necessarily treated as experts and may testify solely as a fact witness at trial "so long as the treating physician's testimony is 'not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.'" *Hadley v. Pfizer, Inc.*, 2009 WL 1597952, at *3-4 (E.D. Pa. June 5, 2009) (*quoting* FED. R. EVID. 701(c)). In federal court, FED. R. CIV. P. 26 now allows treating physicians to give opinions within the scope of their treatment without requiring expert reports.

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

Pennsylvania law provides for tender of witness fees and expenses simultaneously with service of a non-party witness subpoena. *See* PA. R. CIV. P. 234.2(c) (referencing 42 PA. CONS. STAT. §5903 for the compensation and expenses of witnesses). Statutory compensation under §5903 is $5 per day plus $0.07 per mile for the distance traveled between the place of the deposition and the witness's residence. 42 PA. CONS. STAT. §5903(b)-(c). Where the deposition extends to the following day, and the witness resides more than 50 miles away, the witness is entitled to an additional $5 payment. *Id*. at §5903(d). Section 5903 provides that expert witnesses are entitled to additional per diem amounts, but does not specify the appropriate fee. *Id*. at §5903(a)(1). When a deposition is to take place more than 100 miles from the courthouse for the county in which the action is pending, a motion may be made by the opponent for expenses and counsel fees for attending the deposition. PA. R. CIV. P. 4008.

2. Case Law

If a non-party expert is also a fact witness, the expert may supply opinion testimony and is entitled to a "reasonable" fee. *Moses v. Albert Einstein Medical Center*, 25 Phila. Co. Rptr. 389, 415 n.102 (Pa. C.P. Phila. Co. Mar. 30, 1993); *Howard v. Port Authority*, 8 Pa. D. & C.4th 241, 244 n.3, 250 (Pa. C.P. Allegheny Co. 1990) (holding expert testimony fee of $750 for one day reasonable). Parties cannot avoid paying a treating physician expert witness deposition fees by contending that the physician is only a fact witness where the physician offers opinions in his reports regarding the treatment of plaintiff. *Howard,* 8 Pa. D. & C.4th at 245. Pennsylvania federal courts have determined that treating

physicians are entitled to compensation for deposition testimony at a higher rate than the statutory per diem supposed by 28 U.S.C. § 1821. *Scheinholtz v. Bridgestone/Firestone, Inc.*, 187 F.R.D. 221, 222 (E.D. Pa. 1999) (rejecting the deposition fees of plaintiff's physicians of $2,900 and $5,000 as "patently unreasonable" and "reluctantly" approving the agreed-upon fee of $600 per hour); *Slywka v. CMI-Equipment & Engineering*, 1997 WL 129378, at *1 (M.D. Pa. Mar. 14, 1997) (approving $300 per hour rate for expert portion of treating physician's testimony as "generous."). The position taken by the Pennsylvania federal courts is not universally shared elsewhere.

C. Local Custom and Practice

Parties usually negotiate procedures to facilitate the discovery of physician testimony, with courts stepping in only when the parties cannot agree. Because Rule 4003.6 precludes attorney contact with treaters, best practices assign that non-legal staff such as paralegals schedule depositions. Non-legal staff should determine at the outset whether the physician is represented by counsel. If so, counsel may communicate with the doctor's attorney. If not, the non-legal representative should communicate only with the physician's staff regarding non-substantive scheduling issues. If the scheduler must speak with the physician directly regarding scheduling, he or she should inform the physician that ethical responsibilities require that no substantive discussions take place. Witness fees are generally dictated by the deponent physicians, and the noticing party is usually responsible for the fee unless there is another agreement amongst counsel. Physicians often set their rates based on an hourly fee that they would receive if seeing patients, but there is generally room for negotiation. Disputes regarding fees are rarely brought to the court's attention.