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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In a negligence action in Rhode Island, a plaintiff may recover for the actual costs expended on treating the resulting injury, including any ameliorative care. *Emerson v. Magendantz*, 689 A.2d 409, 414 (R.I. 1997).

2. Future Medical Expenses

Foreseeable future medical expenses may also be recovered in actions for negligence, even if the amount of those expenses cannot be determined with "mathematical precision." *Shepardson v. Consol. Med. Equip., Inc.*, 714 A.2d 1181, 1184 (R.I. 1998); *see also Kay v. Menard*, 754 A.2d 760, 771-72 (R.I. 2000); *Markham v. Cross Transp., Inc.*, 376 A.2d 1359, 1367 (R.I. 1977); *but see Emerson*, 689 A.2d at 414 (refusing to award future medical expenses for unwanted child in negligent sterilization case). A showing that the plaintiff has incurred medical expenses of a certain amount in the past, and that pain and disability necessitating medical care is expected to continue in the future, suffices to establish the basis for an award of future medical expenses. *Kay*, 754 A.2d at 771; *Markham*, 376 A.2d at 1367. Testimony of a treating physician can be used to establish the need for future medical care; a physician may also

testify as to the possible cost of such care. *Id*.; *Shepardson*, 714 A.2d at 1184.

B. Collateral Source Rule and Exceptions

The collateral source rule applies to negligence actions in Rhode Island, and provides that "a tort-feasor [is required] to pay in full the damages suffered by the injured person without credit for any amounts received by the injured person from sources independent of the defendant." *Colvin v. Goldenberg,* 273 A.2d 663, 666 (R.I. 1971); *see also Votolato v. Merandi*, 747 A.2d 455, 463 (R.I. 2000); *Gelsomino v. Mendonca*, 723 A.2d 300, 301-02 (R.I. 1999); *Moniz v. Providence Chain Co*., 618 A.2d 1270, 1271 (R.I. 1993).

However, there are several exceptions to the collateral source rule. For example, the collateral source rule does not apply to workers' compensation benefits, which provide compensation for lost income as a result of an injury rather than compensatory benefits for the injury. *Moniz,* 618 A.2d at 1272. Similarly, the collateral source rule does not apply to medical malpractice actions pursuant to the Medical Malpractice Reform Act, R.I. Gen. Laws § 9-19-34.1. Yet, the exception to the collateral source rule for medical malpractice actions does not apply to Medicaid benefits, which have been determined to be outside of the statute's purview. *Esposito v. O'Hair*, 886 A.2d 1197, 1204 (R.I. 2005) ("We see no evidence the Legislature intended 9-19-34.1 to relieve private tortfeasors and their insurers from liability at the taxpayers' expense, and therefore we conclude that the Legislature intended the term 'income disability act' to mean an *act* that provides *income* to persons who are *disabled*. As noted above, Medicaid does not fit this definition.") (emphasis in original); *see also Kem v. Monchick*, C.A. No.: PC99-46464, 2004 R.I. Super. Lexis 23, at *13-15 (R.I. Super. Ct. Jan. 7, 2004).

Notably, one Rhode Island court has found the statute excepting medical malpractice actions from the collateral source rule to be unconstitutional as a violation of the equal protection clause. In *Reilly v. Kerzer*, C.A. No. PC1999-4098, 2000 R.I. Super. Lexis 60, at *17-18 (R.I. Super. Ct. Aug. 8, 2000), the court reasoned that the rule "makes so small a contribution to promoting the stability of the medical-malpractice-liability-insurance industry in Rhode Island, is so ineffective in advancing the legislative purpose, and is in effect so contrary to at least one of the clear legislative objectives, that it cannot be said

to be rationally related to the legitimate governmental purpose" for which the statute was enacted. *Id*. at *17; *see also Maguire v. Licht*, No. C.A. PC1999-3391, C.A. PC2000-0120, C.A. PC2000-5386, C.A. PC2001-0150, 2001 WL 1006060, at *1-2 (R.I. Super. Ct. Aug. 16, 2001).[454] While this decision has not been overturned, the Rhode Island Supreme Court has declined to consider the constitutionality of the statute. *See Esposito*, 886 A.2d at 1204 ("[o]ur holding that Medicaid is not an admissible collateral source payment under 9-19-34.1 renders it unnecessary for us to address whether the statute is . . . otherwise unconstitutional").

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Rhode Island has adopted several statutes which generally hold privileged medical records and other confidential health care information and physician-patient communications. While the easiest way to obtain a plaintiff's medical records is by obtaining consent of the plaintiff in the form of a signed authorization,[455] the statutory provisions also provide that a defendant can, under certain circumstances, obtain copies of the plaintiff's medical records and other confidential health care information without consent from the patient.

1. Medical Records and Other Confidential Health Care Information

The physician-patient privilege in Rhode Island is created by the Confidentiality of Health Care Communications and Information Act ("CHCCIA"). R.I. Gen. Laws § 5-37.3; *see also In re Doe Grand Jury Proceedings*, 717 A.2d 1129, 1132 (R.I. 1998).[456] The CHCCIA provides that "confidential health

[454] The same judge decided both *Maguire* and *Reilly*, based on the same reasoning. *See Maguire*, 2001 WL 1006060, at *1.
[455] Such authorization is generally only valid for 90 days. Linn F. Freedman & Jodi N. Bourque, "Requests for Medical Records: A Practical Guideline" 55-FEB *R.I.B.J*. 5, 5 (2007).
[456] The CHCCIA was previously called the Confidentiality of Health Care Information Act (the "CHCIA"); it is sometimes still referred to as the CHCIA. *See* R.I. Gen. Laws § 5-37.3-1 (indicating that the statute may be cited as the Confidentiality of Health Care Information Act). Certain portions of the previous iterations of the CHCCIA were held unconstitutional in *Bartlett v. Danti*, 503 A.2d 515 (R.I. 1986), because the statute protected confidential health care information from all compulsory legal process, thus impinging on the power of the judiciary and violating the separation of powers doctrine. A statute promulgated a few months after the *Bartlett* decision attempted to cure this constitutional defect. *See Pastore v. Samson*, 900 A.2d 1067, 1085 (R.I. 2006). That statute was again held unconstitutional for the same reasons in *State v. Almonte*, 644 A.2d 295, 299 (R.I. 1994) ("[w]e find nothing in this later statute that in any way changes our constitutional determination in respect to the prior privilege

care information," defined as "all information relating to a patient's health care history, diagnosis, condition, treatment, or evaluation obtained from a health care provider who has treated the patient," may not be released or transferred without the patient's written consent. R.I. Gen. Laws § 5-37.3-3(3) (ii) (2009); id. at §5-37.3-4.

Significantly, the CHCCIA does not preclude disclosure of confidential health information where a plaintiff "puts his or her medical condition at issue," including where a plaintiff brings an action against a medical professional for malpractice. *Lewis v. Roderick*, 617 A.2d 119, 121 (R.I. 1992) (decided under the CHCIA); *see also* R.I. Gen. Laws § 5-37.3-4(b) (8) (i) (2009).[457] This exception also applies where a defendant, in either a criminal[458] or a civil case, has put his or her medical condition at issue by raising it in his or her defense. *State v. Boss*, 490 A.2d 34, 36 (R.I. 1985) (decided under the CHCIA). Additionally, the CHCCIA does not protect health care information where the patient has personally put a physician's examination and opinion in the hands of a third party, such as through a medical opinion letter. *Trembley v. City of Cent. Falls*, 480 A.2d 1359, 1363 (R.I. 1984) (decided under the CHCIA). Hence, if a patient is not willing to sign an authorization, and the information fits the criteria noted above, "the next procedure is to notice the deposition of the keeper of records of the hospital or medical provider and issue a subpoena for the production of the records." Freedman & Bourque, *supra*, at 5.

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considered in *Bartlett*"). Nearly two years later, in 1996, the Rhode Island legislature enacted a third piece of legislation (the CHCCIA) in another attempt to eliminate the CHCIA's constitutional shortcomings. 1996 R.I. Pub. Laws chs. 248, 266. This effort succeeded; the Rhode Island Supreme Court determined that the revised act "addresses the heretofore recognized constitutional infirmities and strikes a permissible balance between a party's interest in maintaining the confidentiality of his or her personal health care records and the court's need to access relevant information." *In re Doe Grand Jury Proceedings*, 717 A.2d at 1133; *see also Pastore*, 900 A.2d at 1084-85 (detailing the history of the statute). Notably, even when the various iterations of these statutes were held invalid, courts concluded the underlying privilege was still in existence. *Washburn v. Rite Aid Corp.*, 695 A.2d 495, 498 (R.I. 1997).

[457] The exception to confidentiality laws for actions against medical professionals does not apply to product liability actions. *In re: All Individual Kugel Mesh Cases*, 2008 R.I. Super. LEXIS 101, at *9 (R.I. Super. Ct. Aug. 26, 2008) ("This Court notes the exception to the confidentiality rule [for cases against medical professionals]. While there may be medical malpractice suits brought by the Plaintiffs in this case for the injuries they have suffered, this particular litigation is brought on a theory of products liability . . . [t]herefore, the exception does not apply.") (citation omitted).

[458] To balance the competing interests of privileged health care information and the confrontation clause in criminal cases, a defendant may request discovery of the medical records of persons who will be witnesses against him or her, if those records are relevant. *See State v. Brown*, 709 A.2d 465, 470-71 (R.I. 1998). The proper procedure for this discovery provides that the records be reviewed in camera by the trial judge, who will determine if any of the records are pertinent and must be disclosed to the defense. *Id.*; *see also State v. Bettencourt*, 723 A.2d 1101, 1114-15 (R.I. 1999).

2. Communications Between a Physician and Patient

A second statute protecting the doctor-patient relationship is the Privileged Communications Act, which provides:

> "In every legal action, both civil and criminal, no health care provider shall be competent to testify concerning any information obtained about a patient, nor shall he or she be required to produce any documentary evidence obtained about a patient, in the course of the customary professional health care relationship, without the consent of the patient."

R.I. Gen Laws § 9-17-24 (2009).[459] Exceptions to this prohibition apply in circumstances such as where competence is at issue, or where the court orders such testimony. *Id.*; *see also* § 5-37.3-6.1. Additionally, the Privileged Communications Act provides an exception where a plaintiff has put his or her medical history at issue. R.I. Gen. Laws § 9-17-24(1) (2009).

As mentioned *supra*, the Rhode Island legislature amended the CHCIA to comply with the constitutional requirement that even confidential medical information may be subject to compulsory legal process. Thus neither the CHCCIA nor the Privileged Communications Act prevents Confidential Health Information from release pursuant to a lawfully issued subpoena duces tecum issued by a grand jury in a criminal investigation or pursuant to a subpoena issued in a civil litigation.[460] *See Pastore*, 900 A.2d at 1086; *Guido,* 698 A.2d at 734. However, while a health care provider may provide records in response to a subpoena, it must precisely follow the directions of the subpoena and comply with any applicable provisions requiring that the patient be notified of the existence of the subpoena. *Washburn*, 695 A.2d at 500 ("to take advantage of the compulsory-legal-process exception to the privileged, confidential status of these records, [the subpoenaed party] was obliged to follow the directions on the subpoena . . . to the

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[459] This statute was first enacted in 1986 as part of the attempt to cure the constitutional defects with the CHCIA. 1986 R.I. Pub. Laws ch. 341. It was subsequently held unconstitutional in *State v. Almonte*, 644 A.2d 295 (R.I. 1994). Although the Privileged Communications Act and the legislation enacting the new CHCCIA are codified in different sections of the Rhode Island General Laws, it appears that the curing legislation solves the problems with the Privileged Communications Act, as it provides that "a health care provider . . . may disclose confidential health care information in a judicial proceeding if the disclosure is pursuant to a subpoena and [certain other conditions are fulfilled]." R.I. Gen. Laws § 5-37.3-6.1 (2009); *see In re Doe Grand Jury Proceedings*, 717 A.2d at 1133-34. *But see State v. Guido*, 690 A.2d 729, 734 n.1 (R.I. 1997) (noting that Almonte held § 9-17-24 unconstitutional and analyzing claims under § 5-37.3-6 instead).

[460] Thus, it appears that a health care provider may appear and testify in court regarding Confidential Health Information pursuant to a valid subpoena ad testificandum, despite the apparent prohibitions contained in the Privileged Communications Act on such testimony without the patient's consent. *See* R.I. Gen. Laws § 5-37.3-6.1 (2009).

letter"). A party that does not comply with the procedures set forth in the subpoena can be held liable for actual and exemplary damages and can also be found to have violated a party's right to privacy. *Id*. at 499-500 (citing §§ 5-37.3-9, 9-1-28.1(a)).

Additionally, there are various categories of sensitive information that are afforded additional statutory protection, such that disclosure is not permitted absent patient consent or a court order. For example, sexually transmitted diseases cannot be revealed. R.I. Gen. Laws § 23-11-9. Mental health records also have additional protections under the Rhode Island Mental Health Law, such that specific patient authorization or a Court Order must provide for their disclosure (R.I. Gen. Laws § 40.1-5-26); records relating to genetic testing must be obtained in the same manner (R.I. Gen. Laws § 27-41-53). Likewise, information on testing, diagnosis, or treatment relating to illicit drug or alcohol use or abuse are protected under 42 U.S.C. § 290 dd-2. *See generally*, Freedman & Bourque, *supra*, at 7-8.

B. Authorization of Ex Parte Physician Communication by Plaintiff

Under Section 5.37.3-4(b)(8)(ii) of the CHCCIA ex parte communications with physicians are generally prohibited, although "[n]o consent for release or transfer of confidential health care information shall be required [where] . . . the patient whose information is at issue brings a medical liability action against a health care provider." *See Pitre v. Curhan*, No. Civ.A.00-0053, Civ.A. 99-1138, Civ.A.00-2506, Civ.A.98-3610, 2001 WL 770941, at *11 (R.I. Super. Ct. Jul. 10, 2001) (citing CHCCIA § 5-37.3-4(b) (8) (ii)). This provision suggests that *ex parte* communications would be permitted in these circumstances, and some courts have permitted *ex parte* contacts in medical malpractice actions. *See, e.g., Lewis*, 617 A.2d at 122 (permitting *ex parte* interviews with treating physicians in a medical malpractice case). However, the ability to have *ex parte* contact with a treating physician is not absolute in a medical malpractice action. For example, the Superior Court in *Pitre* concluded that the provision of the CHCCIA "does not allow an opponent to a medical malpractice action to have carte blanche over a patient's confidential health care information," and concluded that "disclosure shall *not* be through ex parte contacts and not through informal ex parte contacts with the provider by persons other than the patient or his or her legal representative." *Pitre*, 2001 WL 770941, at *11-12.

Likewise, the District of Rhode Island federal court concluded that the right to *ex parte* communications would not be permitted for the past or present physicians of ten plaintiffs in *In re Kugel Mesh Hernia Repair Patch Litig*., MDL No. 07-1842ML, 2008 WL 2420997, at *1 (D.R.I. Jan. 22, 2008). Nor would the Superior Court of Rhode Island, in a concurrent product liability action, permit defendants to speak with the plaintiffs' treating physicians where they had voluntarily agreed to refrain from questioning the physicians about any individual cases. [461] *See In re: All Individual Kugel Mesh Cases*, 2008 R.I. Super. LEXIS 101, at *4 (R.I. Super. Ct. Aug. 26, 2008).

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

A party seeking to obtain information from a non-party treating physician must do so through formal discovery and comply with applicable rules of civil procedure. R.I. Gen. Laws § 5-37.3-4 (b) (8) (ii). At trial, treating physicians are typically called as fact witnesses, rather than as an expert witness. *See, e.g., Donovan v. Bowling*, 706 A.2d 937, 941 (R.I. 1998) ("The testimony of a treating physician is entirely different from that of an expert retained solely for litigation purposes because a treating physician is like an eyewitness to an event and will be testifying primarily about the situation he or she actually encountered and observed while treating the patient"). Neither party may be prevented from calling a treating physician by the retention of that physician as an expert witness by the opposing party. *Id*. Where the plaintiff seeks to call a treating physician in an action, any related privilege is waived. *Id*. As described *supra*, calling a physician to testify regarding a person's medical condition where it has not been put at issue in the action by that person is subject to the provisions of Rhode Island's confidentiality laws. R.I. Gen. Laws § 5-37.3-6.1; id. at 9-17-24.

B. Witness Fee Requirements and Limits

Rhode Island General Laws § 9-17-5 provides that subpoenaed witnesses must be paid a fee and mileage costs for attendance at court:

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[461] It appears that the carve-out for production of medical records has also been applied in the pharmaceutical product liability context. Although the CHCCIA is not specifically referenced in *Castrignano v. E.R. Squibb & Sons, Inc.*, 546 A.2d 775 (R.I. 1988), the opinion references the plaintiff's mother's medical records. *Id.* at 777.

> "Every witness who be duly served with a subpoena . . . and shall have his or her lawful fees tendered to him or her for his or her travel from his or her place of abode to the place at which he or she shall be summoned to attend, and for one day's attendance, shall be obligated to attend accordingly."

The subpoenaed witness must attend in compliance with the subpoena regardless of whether or not the required fee and mileage has been paid. *See Robinson v. Ridlon*, 653 A.2d 730, 731 (R.I. 1995).

Rhode Island General Laws § 9-29-7 sets the required witness fees at $10 and $0.10 for each mile traveled for each day's attendance in court. § 9-29-7(a) (1) & (2) (2009). Expert Witnesses may be retained for a fee that the court finds is "just and reasonable." *Id*. at § 9-29-7(b).