SOUTH DAKOTA

Catherine M. Sabers
LYNN, JACKSON, SHULTZ & LEBRUN P.C.
P.O. Box 8250
Rapid City, SD 57709
Telephone: (605) 342-2592 ext. 144
Facsimile: (605) 342-5185
csabers@lynnjackson.com

I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

The South Dakota Civil Pattern Jury Instruction provides that a Plaintiff may recover "the reasonable value of necessary medical care, treatment and services[.]"[509] This principle was recently reiterated by the South Dakota Supreme Court when it noted: "it is well settled that plaintiff are entitled to recover the reasonable value of their medical services[:] what constitutes a reasonable value for those services is a jury question." *See Papke v. Harbert*, 2007 SD 87, ¶78, 738 N.W.2d 510, 536.

Absent some stipulation as to admissibility of medical records or bills a plaintiff is required to establish the need for, and reasonable cost of his or her medical treatment via expert testimony. There is an exception to this general rule, which applies in personal injury and wrongful death cases where the plaintiff's damages claim does not exceed $75,000. If these prerequisites are met, despite the general hearsay prohibition, the medial records of a treating physician "may be used for all purposes in lieu of deposition or in-court testimony of [the] practitioner[.]" There are additional procedural steps which must be taken. For instance, the records must be attached to an affidavit from the physician, which verifies: (1) that the records constitute his or her entire report, and (2) that if called to testify he or she would testify to the same facts, observations, conclusions, and opinions as set forth in the records within a reasonable degree of medical probability. *See* S.D.C.L. §19-16-8.2. In addition, the party seeking to enter records via affidavit must notify all parties and provide a copy of the documents at least thirty days in advance of

[509] South Dakota Civil Pattern Jury Instruction 50-10-80.

trial. An opposing party may object to admission of this evidence on any legal ground other than hearsay. Likewise, the opposing part is not precluded from deposing, or calling as a witness, any practitioner whose affidavit has been offered.[510]

2. Future Medical Expenses

South Dakota Civil Pattern Jury Instruction 50-10-80 also address recovery for future medical expenses and instructs that a plaintiff may recover "the reasonable value of the necessary expense of medical care, treatment and services reasonably certain to be received in the future."[511] To recover future medical expenses the plaintiff must prove the following matters within a reasonable degree of probability: (1) the future effect of the injury and (2) its permanency or duration within reasonable medical certainty. *See Jorgenson v. Dronebarger*, 143 N.W.2d 869, 874 (S.D. 1966). As this is a matter outside the general knowledge of laypersons, expert testimony will, in all likelihood, be required. *See Garland v. Rossknecht*, 2001 SD 42, ¶14, 624 N.W.2d 700, 703 (citing *McGovern v. Murray Taxi Co.*, 60 N.W.2d 211, 213-214 (S.D. 1953)). A jury verdict for medical expenses will only be set aside "in extreme cases where it [can be said to result] from passion or prejudice or the jury has palpably mistaken the law. *See Gilkyson v. Wheelchair Exp., Inc.*, 579 N.W.2d 1, 5 (S.D. 1998).

B. Collateral Source Rule and Exceptions

South Dakota applies the collateral source rule in personal injury actions. *See Degen v. Bayman*, 241 N.W.2d 703, 708 (S.D. 1976). In *Degen*, the Supreme Court noted that the collateral source rule prohibits evidence that the plaintiff's medical expense were paid by some source "collateral to the defendant, such as by a beneficial society, by members of the plaintiff's family, by plaintiff's employer, or by and insurance company." *Id.* For instance, the *Degen* Court applied the collateral source rule so as to allow the plaintiff to present a claim for medical expense despite the fact that the medical services had been gratuitously provided to him by the Shriners Hospital for crippled children. *Id.*

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[510] S.D.C.L. §19-16-8.2 also applies to workers compensation proceedings; however, there is no $75,000 monetary limit on the statute's applicability. In other words, treatment records may be received via affidavit in any workers compensation proceeding.

[511] The pattern instruction was favorably cited in *Gilkyson v. Wheelchair Express Inc.*, 1998 SD 45, ¶22, 579 N.W.2d at 6.

The applicability of the collateral source rule in personal injury cases was more recently reiterated in *Jurgensen v. Smith*, 2000 SD 73, ¶17, 611 N.W.2d 439. There, the South Dakota's Supreme Court reiterated "it is well settled under South Dakota law that total or partial compensation received by an injured party from a collateral source, wholly independent of the wrongdoer does not operate to reduce the damages recoverable from the wrongdoer." *Id.* The *Jurgensen* Court also noted a possible exception to the collateral source rule; namely that "exclusion of collateral source evidence may constitute an abuse of discretion where the plaintiff "open[s] the door . . . to introduce evidence of collateral sources." *Id.* at ¶18. Despite this general recognition, the Supreme Court concluded that plaintiff had not opened the door to collateral source evidence where he had merely made general references to his "financial condition." *Id.*

Since *Jurgensen*, the South Dakota Supreme Court indicated that, in certain circumstances, it may be appropriate to allow evidence of collateral sources in a personal injury case if "the collateral source evidence is being offered for a relevant purpose [such as to prove] malingering." *See Cruz v. Gorth*, 2009 SD 19, ¶12-13, 763 N.W.2d 810." However, the Supreme Court also explained that, prior to admitting evidence, which would otherwise be deemed "collateral source" for a proper purpose (such as impeachment), the trial court must apply the balancing test set forth in S.D.C.L. Section 19-12-3 (Federal Rule of Civil Procedure Rule 403). Consequently, a trial court will be required to balance the probative value of the proposed evidence against the danger of unfair prejudice prior to admitting evidence of this nature. *Id.*

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

In *Papke v. Harbert*, the South Dakota Court addressed the admissibility of Medicare "write-offs" in the context of a medical malpractice claim. The defendant in *Papke* argued that the "reasonable value" of medical services should not include amounts "written-off" by a service provider because of a contractual agreement between the provider and Medicare, "as [that amount] would never be paid by anyone." *See Papke*, 2007 SD 87, ¶59, 738 N.W.2d 510, 530. The plaintiff in *Papke* responded by

arguing that the collateral source rule prohibited defendant from offering into evidence the portion of her bills that were written-off. *Id.* In answering the question presented, the South Dakota Supreme Court noted it was faced with a question of first impression. After an extended analysis of the law in other jurisdictions, the Supreme Court determined that the collateral source ruled applied in the *Papke* case. Consequently, the defendant was precluded from entering into evidence "amounts written off by medical care providers because of contractual agreements with sources independent of defendants." *Id.*[512]

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

A. Scope of Physician-Patient Privilege and Waiver

It is generally accepted that ex parte communication with a non-party treating physician is prohibited. The contours of that prohibition and its relation to the physician/patient privilege are discussed most directly in *Sowards v. Hills Materials Co.*, 521 N.W.2d 649 (S.D. 1994). In *Sowards*, the Supreme Court was presented with the question of whether opposing counsel could communicate with a plaintiff's non-party treating physician through a letter if the proposed letter was provided for his counsel's review prior to sending. The plaintiff argued, despite prior notice to his counsel and an ability to object to the proposed letter, the letter and/or procedure involved an impermissible ex parte communication and that it would violate his physician/patient privilege. *Id.* at 651-52.

Notably, *Sowards* involved the appeal of a workers compensation case. In South Dakota, workers compensation cases are not bound by the state rules of civil procedure unless there is an order to the contrary by the hearing officer. *Id.* at 652. Nevertheless, *Sowards* is instructive on the issues of "ex parte" communication and the physician/patient privilege, as the Supreme Court decision includes discussion of those very issues. With regard to the question of "ex parte" communication, because the subject letter was provided to the plaintiff's counsel "in advance" and "no communication was made

[512] The Court reached this conclusion despite a state statute which partially limits the scope of medical malpractice special damages. *See* S.D.C.L. §21-3-12. The Supreme Court also indicated that, because neither side had argued that the statute was applicable, it would leave any further modification of the collateral source rule, as applied in medical malpractice cases to the Legislature.

without prior notice" the *Sowards* Court concluded there could be no impermissible "ex parte" communication. *Id.*

With regard to the physician/patient privilege issue, the *Sowards* Court did point out the state's statutory physician-patient privilege rule, which is codified at S.D.C.L. Section 19-13-7.[513] Nevertheless, after citing the privilege, the Supreme Court deemed it inapplicable as "it is clear that South Dakota law implies a waiver of the privilege if . . . a patient or litigant has placed his or her physical condition at issue as the basis of a legal claim." *Sowards*, 521 N.W.2d at 653. *See also* S.D.C.L. §19-13-11 and S.D.C.L. §19-2-3. Because *Sowards* claimed he suffered from a physical condition caused by a work-related injury and sought compensation therefore, the Supreme Court held that a valid waiver of the privilege had occurred. Of note, a waiver of this nature will be deemed to be narrow in scope and closely tailored to the time period or subject matter of the claim.

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

The South Dakota Supreme Court has not dealt, directly, with this issue. Moreover, the federal district court has only addressed the issue in a very limited fashion. In *DeNeui v Wellman*, plaintiff's non-party family physician was subpoenaed to give a deposition in a medical malpractice claim against a defendant surgeon. The non-party family physician's malpractice carrier (who happened to be the same carrier as that of the defendant surgeon) hired a separate attorney to represent the non-defendant physician during the deposition. In response, the plaintiff filed a motion for protective order seeking to prohibit the non-defendant physician from discussing her health condition with his own counsel. The plaintiff argued, in part, that the discussion would violate HIPPA. The federal district court indicated that, because the disclosure did not constitute "a public disclosure at a judicial proceeding but rather [was] limited to

[513] 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, 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. S.D.C.L. §19-13-7.

disclosure to [the physician's personal counsel], which [could not] be disclosed to a third party pursuant to the attorney client privilege," HIPPA did not justify the requested protective order.[514]

C. Authorization of Ex Parte Physician Communication by Plaintiff

It does not appear that the South Dakota Supreme Court has addressed this issue. Nevertheless, because a plaintiff can waive the statutory physician/patient privilege, it is assumed that plaintiff could authorize an ex parte contact with his physician.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

In *Veith v. O'Brien*, the Supreme Court appeared to favorably endorse the proposition that a treating physician (or more specifically a physician that that develops his opinions and perceptions during a course of treatment rather than in anticipation of litigation) does not likely fall within the definition of an "expert witness." *See Veith*, 2008 SD 88, 739 N.W.2d 15. Thus, *Veith* appears to support a conclusion that a treating physician need not be disclosed as part of a party's expert witness disclosures. However, as a matter of custom and practice, attorneys often reserve the right to present testimony from "any and all treating physicians" in their expert witness disclosure.

If discovery from a non-party treating physician is desired, it is usually obtained via a deposition of the practitioner. The party requesting the deposition bears the responsibility for the physician's fee associated with deposition time and likely, reasonable preparation time. *See* S.D.C.L. §15-6-26(b). Similarly, the party seeking to call a non-party treating physician at trial is responsible for any fee charged by the physician. Though a statutory witness fee of $20 per day plus mileage can be taxed as costs to a prevailing party, the actual charge for the physician's time attending trial cannot be taxed as costs. *See* S.D.C.L. §15-17-37. *See also Weiszhaar Farms, Inc. v. Tobin*, 522 N.W.2d 484, 494 (S.D. 1994).

[514] *DeNeui v. Wellman*, CIV. 07-4172-KES, 2008 WL 2330953 (D.S.D. June 5, 2008).