TENNESSEE

Samuel L. Felker
Jessalyn H. Zeigler
BASS, BERRY & SIMS, PLC
150 Third Ave. South, Suite 2800
Nashville, Tennessee 37201
Telephone: (615) 742-6200
Facsimile: (615) 742-2719
sfelker@bassberry.com
jzeigler@bassberry.com
www.bassberry.com

I. Medical Expenses

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

An injured plaintiff bears the burden of proving that medical expenses the plaintiff incurred were both reasonable and necessary for the injuries suffered by the plaintiff. In all but the most obvious and routine cases, plaintiffs must present competent expert testimony to meet this burden of proof.[515] This is typically done by having the treating physician identify the bills and testify that the charges are reasonable and comparable to what other providers in the community would have charged for the same services. The treating physician also should testify that the charges were actually incurred and necessary to treat the injuries at issue in the suit.

In small cases, such expert testimony is not required. When medical, hospital or doctor bills paid or incurred because of any illness, are itemized and attached as an exhibit to a complaint, this is prima facie evidence that the bills were necessary and reasonable.[516] The total amount of the bills, however, must not be greater than $4,000, and the bills must be served upon other parties at least 90 days before trial to invoke the rebuttable presumption that the bills are reasonable.[517] A party may rebut the presumption that the bills are reasonable and necessary by offering evidence at trial, but this evidence

[515] *Borner v. Autry*, 284 S.W.3d 216, 218 (Tenn. 2009)(internal citations omitted).
[516] Tenn. Code Ann. § 24-5-113(a)(1)(2009).
[517] *Id.* at § 24-5-113(a)(3) & (b)(1).

must be served on the other parties at least forty-five days prior to the trial date.[518] The rebutting party must also give a statement of that party's intention to rebut the presumption and specify which bill or bills the party believes to be unreasonable.[519]

2. Future Medical Expenses

The plaintiff may also recover the present cash value of reasonable and necessary expenses for medical care, services, and supplies reasonably certain to be required in the future.[520] "Present cash value" means the jury must adjust the award for damages to allow for the reasonable earning power of money and the impact of inflation. Again, plaintiff must present competent expert testimony to establish the right to recover future medical expenses.

B. Collateral Source Rule and Exceptions

Tennessee recognizes the collateral source rule which permits a plaintiff to recover his or her "reasonable and necessary expenses" as an element of damages against the defendant without consideration of whether some or all of the medical expenses were paid by insurance or another source.[521] Thus, in an action for damages in tort, the fact that the plaintiff has received payments from a collateral source, other than the defendant, is not admissible in evidence and does not reduce or mitigate the defendant's liability.[522] The one exception is for medical malpractice cases, where T.C.A. § 29-26-119 reduces the damages recoverable by tort victims from health care providers, by the amount the tort victim realizes from collateral sources, thereby avoiding double recovery by the tort victim.[523]

C. Treatment of Write-downs and Write-offs

1. Medicare and Medicaid

The collateral source rule precludes a defendant from attempting to prove that a "reasonable" charge for a "necessary" service actually rendered, has been, or will be, paid by another – not the

---

[518] *Id.* at § 24-5-113(b)(2).
[519] *Id.; Mathews v. Cumberland Chevrolet Co., 640 S.W.2d 582 (Tenn. App. 1982).*
[520] *Tennessee Pattern Jury Instruction 14.01.*
[521] *State Auto. Mut. Ins. Co. v. Hurley*, 31 S.W.3d 562, 566 (Tenn. 2000)
[522] *Donnell v. Donnell, 220 Tenn. 169, 415 S.W.2d 127, 134 (Tenn. 1967); Steele v. Ft. Sanders Anesthesia Group, P.C., 897 S.W.2d 270, 282 (Tenn. App. 1994).*
[523] *Nance v. Westside Hospital*, 750 S.W.2d 740, 742-743 (Tenn.1988) (internal citations omitted).

defendant or someone acting on his or her behalf – or has been forgiven, or that the service has been gratuitiously rendered. Thus, the fact that some or all of plaintiff's care was reimbursed by Medicare or Medicaid and the remainder of the bill forgiven, is not admissible and does not reduce the defendant's liability to the plaintiff for reasonable and necessary medical charges.[524]

2. Private Insurance

The collateral source rule precludes a defendant from attempting to prove that a "reasonable" charge for a "necessary" service actually rendered, has been, or will be, paid by another – not the defendant or someone acting on his or her behalf – or has been forgiven, or that the service has been gratuitously rendered. Thus, the fact that some or all of plaintiff's care was reimbursed by private insurance and the remainder of the bill forgiven, is not admissible and does not reduce the defendant's liability to the plaintiff for reasonable and necessary medical charges.[525]

There is no reported Tennessee decision on this subject.

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

A. Scope of Physician-Patient Privilege and Waiver

"There is no testimonial privilege for doctor-patient communications in Tennessee."[526] There is, however, an implied covenant of confidentiality between a physician and a patient arising out of the original contract of treatment for payment.[527] This implied covenant specifically precludes informal discussions with a law firm employed to defend the patient's claim: "[A] physician breaches his or her implied covenant of confidentiality by divulging medical information, without the patient's consent, through informal conversations with others."[528]

Thus, "[a]ny time a doctor undertakes the treatment of a patient, and the consensual relationship of physician and patient is established, two obligations…are simultaneously assumed by the doctor. Doctor and patient enter into a simple contract, the patient hoping that he will be cured and the doctor

[524] *Frye v. Kennedy, 991 S.W.2d 754, 764 (Tenn. App. 1998).*
[525] *Id.*
[526] *Overstreet v. TRW Commercial Steering Div.*, 256 S.W.3d 626, 631 (Tenn. 2008).
[527] *Givens v. Mullikin ex rel. McElwaney*, 75 S.W.3d 383, 407-08 (Tenn. 2002).
[528] *Id.*

optimistically assuming that he will be compensated. As an implied condition of that contract, this Court is of the opinion that the doctor warrants that any confidential information gained through the relationship will not be released without the patient's permission....Consequently, when a doctor breaches his duty of secrecy, he is in violation of part of his obligations under the contract."[529]

Furthermore, the filing of a lawsuit does not constitute a waiver of the covenant of confidentiality.[530] "Even if Tennessee law provided that the filing of a lawsuit involving medical issues constituted a waiver by the plaintiff of the covenant of confidentiality, we believe that this law would be preempted by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the rules promulgated by the United States Department of Health and Human Services pursuant to HIPAA."[531]

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

The provisions of HIPAA provide greater protection to patient information than Tennessee law, and, therefore, trump Tennessee state law. "Federal law clearly provides that the provisions of HIPAA and its related rules, where more stringent or, stated another way, more confidentiality-friendly, preempt the less stringent edicts of state law; while states can establish greater protections than those provided for under HIPAA, they cannot promulgate rules that provide for less stringent protections."[532]

C. Authorization of Ex Parte Physician Communication by Plaintiff

Tennessee courts have held that a prohibition on communicating ex parte with non-party physicians does not impede defendants from learning all of the plaintiff's relevant medical information.[533] However, Plaintiffs' counsel may consent to informal interviews of a non-party treating physician only when both counsel are present.[534]

D. Authorization of Ex Parte Physician Communication by Courts

---

[529] *Givens v. Mullikin ex rel. McElwaney*, 75 S.W.3d 383, 407-08 (Tenn.2002)(citing *Hammonds v. Aetna Cas. & Sur. Co*., 7 Ohio Misc. 25, 243 F.Supp. 793, 801 (1965)).
[530] *Alsip v. Johnson City Med. Ctr.*, 2005 WL 1536192, at *9 (Tenn. Ct. App. 2005).
[531] *Id.*
[532] *Id.; see also* 45 C.F.R. § 160.203 (2005).
[533] *Alsip v. Johnson City Med. Ctr.*, 197 S.W.3d 722, 727 (Tenn. 2006).
[534] *Id.* at 728.

Tennessee courts do not generally allow ex parte communications between defense counsel and a decedent's non-party physicians because of public policy concerns.[535] "[T]he risk of breaching physician-patient confidentiality is heightened by ex parte communications, which could 'expose the doctor to charges of professional misconduct or tort liability.' Thus, were [Tennessee courts] to allow ex parte communications between defense counsel and the plaintiffs' non-party treating physicians, increased litigation in the State's already overburdened trial court system would result."[536]

E. Local Practice Pointers

The bottom line is that ex parte communications between defense counsel and a treating physician are not allowed, and while plaintiff may consent to an informal interview, plaintiff's counsel must be present.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Informal interviews with non-party treating physicians are prohibited in Tennessee.[537] While ex-parte interview may be less expensive and time-consuming that formal discovery, the patient's interest in maintaining the confidentiality of personal information which is irrelevant to the dispute, outweighs considerations of cost and efficiency.[538] There are, however, efficient alternative methods available for obtaining the testimony of non-party treating physicians, including deposition by written questions.[539] Thus, Tennessee courts have joined other courts in holding that "formal discovery procedures enable defendants to reach all relevant information while simultaneously protecting the patient's privacy by ensuring supervision over the discovery process."[540]

---

[535] *Id.; see also Jacobs v. Nashville Ear, Nose & Throat Clinic,* 2010 Tenn. App. LEXIS 448, at *45-46 (Tenn. Ct. App. July 15, 2010).
[536] *Id.* (internal citations omitted).
[537] *Id.; see also Jacobs v. Nashville Ear, Nose & Throat Clinic,* 2010 Tenn. App. LEXIS 448, at *45-46 (Tenn. Ct. App. July 15, 2010).
[538] *Id.*
[539] *Id.*
[540] *Id.*

B. Witness Fee Requirements and Limits

1. Statutes and Rules of Civil Procedure

There is no witness fee requirement for depositions in Tennessee courts, but attendance fees for trial subpoenas are governed by statute.[541] Also, T.C.A. 24-9-101 provides an exemption from trial appearance to any "practicing physician, psychologist, senior psychological examiner, chiropractor, dentist or attorney." For the production of medical records at trial, the records custodian is likewise excused from trial attendance but can instead submit to the court a certified copy of the records.[542] Generally, Tenn. R. Civ. Pro. 45.04(2) provides that a witness may be deposed only in the county in which the witness resides, or is employed or transacts his or her business.

2. Case Law

The exemption from court appearance granted to certain healthcare providers in T.C.A. 24-9-101 is strictly construed, so that any other healthcare provider not listed is still subject to subpoena, and their absence at trial is not grounds for admitting their deposition into evidence.[543]

C. Local Custom and Practice

Although there is no express provision under Tennessee law for compensation of physicians and other healthcare providers at depositions, it is standard practice for the attorney who schedules the deposition to pay their customary hourly rate for testimony. Sometimes the arranging attorney will ask opposing counsel to pay for cross-examination time, but there is no hard and fast rule or custom on that subject. If the hourly rate appears excessive, it is sometimes necessary to negotiate the rate with the doctor and to advise opposing counsel so there is no inference that the physician is being "overpaid" or "bribed" to give deposition testimony. In final analysis, the doctor is subject to a deposition subpoena and can be compelled to appear and testify. Of course, counsel wants to avoid that confrontation at all costs so as not to alienate the doctor and thereby influence the testimony.

---

[541] *T.C.A. 24-4-101, et seq.*
[542] *T.C.A. 24-9-101(8).*
[543] *Raines v. Shelby Williams Indus., Inc*., 814 S.W.2d 346 (Tenn. 1991)(deposition of vocational expert is not admissible and absence from trial not excused).