

## UTAH

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### I. MEDICAL EXPENSES

#### A. Requirements for Recovery of Medical Expenses

##### 1. Past Medical Expenses

Past medical expenses may be recovered. Plaintiffs must show that they have been injured and, “once injuries have been shown, evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injuries and that the charges are reasonable.”<sup>549</sup> Plaintiff has the burden to show that the claimed medical expenses are reasonable and necessary.<sup>550</sup> Thus, once injuries have been shown, evidence is required to show that the medical expenses accurately reflect the necessary treatment that resulted from the injuries and that the charges are reasonable.<sup>551</sup> The Utah Court of Appeals has declined to require that a plaintiff call either her physician or insurance representative to testify that the medical bills were paid in order to demonstrate the charges were reasonable and necessary.<sup>552</sup> Instead, the Court held it was sufficient to lay a foundation for the admittance of plaintiff’s medical bills by plaintiff proffering that the bills were for medical expenses arising from her injuries,

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<sup>549</sup> *Gorostieta v. Parkinson*, 2000 UT 99, ¶ 35, 17 P.3d 1110.

<sup>550</sup> *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 981 (Utah 1993) (noting that requirement for compensation in tort action is that expenses be reasonable and necessary) (citations omitted).

<sup>551</sup> *Gorostieta*, 2000 UT at ¶ 35.

<sup>552</sup> *Stevenett v. Wal-Mart Stores, Inc.*, 1999 UT App 80, ¶ 31, 977 P.2d 508

were forwarded for payment to her insurance company, and were paid without objection by the insurance company.<sup>553</sup>

## 2. Future Medical Expenses

Future medical expenses may be recovered. Under the “one action rule,” “once a plaintiff suffers an actionable injury, she is entitled to recover damages not only for harm already suffered, but also for that which will probably result in the future.”<sup>554</sup> Damages for future medical expenses may be awarded regardless of whether a plaintiff succeeds in obtaining damages for past or present medical expenses.<sup>555</sup> But plaintiffs may be precluded from later seeking future damages if those damages are not sought at the time the cognizable injury is adjudicated.<sup>556557</sup>

## 3. Medical Monitoring

Utah law does allow a plaintiff to recover medical monitoring damages in certain cases.<sup>558</sup> A plaintiff must prove the following: “(1) exposure (2) to a toxic substance, (3) which exposure was caused by the defendant’s negligence, (4) resulting in an increased risk (5) of serious disease, illness, or injury (6) for which a medical test for early detection exists (7) and for which early detection is beneficial, meaning that a treatment exists that can alter the course of the illness, (8) and which test has been prescribed by a qualified physician according to contemporary scientific principles.”<sup>559</sup>

### B. Collateral Source Rule and Exceptions

The collateral source rule is in effect in Utah. Utah courts articulate the rule with respect to insurance payments as follows: “[W]hen an insurance company pays a party a sum of money pursuant to

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<sup>553</sup> *Id.* at ¶ 32.

<sup>554</sup> *Medved v. Glenn*, 2005 UT 77, ¶ 14, 125 P.3d 913; *see also Snow v. Irion*, 2005 UT App 521, ¶ 127 P.3d 1222 (applying the “one action rule”).

<sup>555</sup> *Medved*, 2005 UT 77, ¶ 13.

<sup>556</sup> *Id.* ¶ 14.

<sup>557</sup> *Id.* ¶ 14.

<sup>558</sup> *Hansen*, 858 P.2d at 979.

<sup>559</sup> *Id.*

a policy, the premium of which was not paid by nor contributed to by the defendant, the payments so received belong to the plaintiff and are not to be credited to the defendant.”<sup>560</sup>

The Utah Health Care Malpractice Act has codified the collateral source rule for malpractice actions.<sup>561</sup> The Act directs courts to collect evidence of collateral source payments and reduce damages awards in malpractice actions “by the total of all amounts paid to the plaintiff from all collateral sources which are available to him.”<sup>562</sup> But courts need not reduce an award “for collateral sources for which a subrogation right exists” or “for any collateral payment not included in the award of damages.”<sup>563</sup> “Collateral source” is defined as “(a) medical expenses and disability payments payable under the United States Social Security Act, any federal, state, or local income disability act, or any other public program, except the federal programs which are required by law to seek subrogation; (b) any health, sickness, or income replacement insurance, automobile accident insurance that provides health benefits or income replacement coverage, and any other similar insurance benefits, except life insurance benefits available to the plaintiff, whether purchased by the plaintiff or provided by others; (c) any contract or agreement of any person, group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services, except benefits received as gifts, contributions, or assistance made gratuitously; and (d) any contractual or voluntary wage continuation plan provided by employers or any other system intended to provide wages during a period of disability.”<sup>564</sup> A provider of a collateral source must serve a written notice of its claim on defendants in the malpractice action at least thirty days before settlement or trial of the action in order to preserve subrogation rights.<sup>565</sup>

### **C. Treatment of Write-downs and Write-offs**

#### **1. Medicare and Medicaid**

No Utah authority specifically addresses Medicare or Medicaid write-downs and write-offs.

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<sup>560</sup> *Phillips v. Bennett*, 439 P.2d 457, 458 (Utah 1968).

<sup>561</sup> Utah Code Ann. § 78B-3-405 (2008).

<sup>562</sup> *Id.* § 78B-3-405(1) and (2).

<sup>563</sup> *Id.* § 78B-3-405(1)

<sup>564</sup> *Id.* § 78B-3-405(3).

<sup>565</sup> *Id.* § 78B-3-405(4)

## 2. Private Insurance

Medical bill write-downs and write-offs by private health insurers have not been addressed by any Utah authority.<sup>566</sup> Whether the billed amount of the medical expenses is recoverable versus amount actually paid by the insurance company is often the subject of motions in limine filed by defendants. Trial courts have issued inconsistent rulings on this issue and no clear trend has developed.

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

#### A. Scope of Physician-Patient Privilege and Waiver

The scope of the physician-patient privilege is governed exclusively by rule 506 of the Utah Rules of Evidence.<sup>567</sup> Rule 506 provides as follows: “If the information is communicated in confidence and for the purpose of diagnosing or treating the parties, a patient has a privilege, during the patient’s life, to refuse to disclose and to prevent any other person from disclosing (1) diagnoses made, treatment provided, or advice given, by a physician or mental health therapist, (2) information obtained by examination of the patient, and (3) information transmitted among a patient, a physician or mental health therapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or mental health therapist . . . .”<sup>568</sup> The privilege may be claimed by the patient or by the physician on behalf of the patient.<sup>569</sup>

There are three exceptions to the privilege. No privilege exists under rule 506 for communications in which the subject condition is an element of any claim or defense, for communications dealing with the hospitalization of a patient for mental illness, or for communications made in the course of court-ordered examinations unless the court otherwise specifies.<sup>570</sup> The first exception to the privilege is limited “to the confines of the court proceedings” and the treatment of the

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<sup>566</sup> *Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 24, 163 P.3d 615 (presenting the issue of whether the collateral source rule applies to medical bill write-offs but refusing to address it because the plaintiff failed to preserve it for appellate review).

<sup>567</sup> *DeBry v. Goates*, 2000 UT App 58, ¶ 24 n.2, 999 P.2d 582; Utah R. Evid. 506 Advisory Comm. Note.

<sup>568</sup> Utah R. Evid. 506(b).

<sup>569</sup> *Id.* 506(c).

<sup>570</sup> *Id.* 506(d).

specific condition at issue, not the patient’s entire medical history.<sup>571</sup> In other words, the exception for communications regarding conditions placed at issue in litigation “is a limited waiver of privilege.”<sup>572</sup>

Utah courts have also recognized a physician’s fiduciary duty of confidentiality, which prevents physicians from disclosing confidential patient information to any third party.<sup>573</sup> This duty requires physicians to notify patients prior to disclosing their confidential records or communications in litigation *even if* the communications fall within one of the exceptions to the physician-patient privilege.<sup>574</sup>

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

No Utah authority address the physician-patient privilege as it relates to HIPAA.

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

Ex parte communications between a plaintiff’s treating physician and opposing counsel are prohibited.<sup>575</sup> This prohibition exists for two reasons. First, if ex parte communications were not prohibited, patient expectations of physician-patient confidentiality would be compromised.<sup>576</sup> Second, “appropriately limiting the scope of a treating physician’s disclosure requires judicial monitoring that cannot occur in the context of ex parte communications.”<sup>577</sup> No Utah authority has addressed whether, despite this prohibition, a plaintiff may authorize ex parte communications between his treating physician and an opposing party.

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

Because the Utah Supreme Court prohibits ex parte communications between a treating physician and opposing counsel,<sup>578</sup> courts are unlikely to authorize such communications.

**E. Local Practice Pointers**

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<sup>571</sup> *Sorenson v. Barbuto*, 2008 UT 8, ¶ 10, 177 P.3d 614.

<sup>572</sup> *Id.*

<sup>573</sup> *Id.* ¶¶ 11-15; *DeBry v. Goates*, 2000 UT App 58, ¶ 28, 999 P.2d 582.

<sup>574</sup> *Sorenson*, 2008 UT 8, ¶ 16.

<sup>575</sup> *Id.* ¶ 21.

<sup>576</sup> *Id.* ¶¶ 21-22.

<sup>577</sup> *Id.* ¶ 21.

<sup>578</sup> *Id.*

As a practical matter, plaintiff’s counsel will not authorize ex parte communications between the treating physician and an opposing party. As such, defendants almost always depose non-party treating physicians, but plaintiff’s counsel is usually present during those depositions.

### **III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS**

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

Rule 506 of the Utah Rules of Evidence exclusively controls the physician-patient privilege, and thus the content of a non-party treating physician’s testimony, despite statutory authority purporting to govern such testimony.<sup>579</sup> A non-party treating physician may be called as a factual witness by a party opposing a patient in litigation and provide opinion testimony regarding any medical information for which no privilege exists pursuant to an exception to rule 506.<sup>580</sup>

#### **B. Witness Fee Requirements and Limits**

##### **1. Statutes and Rules of Civil Procedure**

Witnesses are entitled to a fee of \$18.50 for their first day of attendance at a trial and \$49 per day for each subsequent day of attendance.<sup>581</sup> The fees and other compensation of witnesses in civil cases must be paid by “the party who causes the witnesses to attend” the trial.<sup>582</sup> If a subpoena commands a witness’s appearance, the party or attorney issuing the subpoena must include with the subpoena the fees for one day’s attendance.<sup>583</sup> A subpoenaed witness need not appear unless the witness’s fees for subsequent days of attendance are paid each day on demand.<sup>584</sup>

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<sup>579</sup> *Sorenson v. Barbuto*, 2008 UT 8, ¶ 8, 177 P.3d 614, *Burns v. Boyden*, 2006 UT 14, ¶ 12, 133 P.3d 370, *DeBry v. Goates*, 2000 UT App 58, ¶ 24 n.2, 999 P.2d 582; Utah R. Evid. 506 Advisory Comm. Note (stating that rule 506 “is intended to supersede Utah Code Ann. §[] 78-24-8(4)”); Utah R. Evid. 501 Advisory Comm. Note (stating that “Utah Code Ann. § 78-24-8, insofar as it defines privileges relating to . . . physicians . . . [is] made ineffectual by the adoption of rules specifically redefining [that] privilege[.]”). Utah Code section 78-24-8 was renumbered in 2008 as section 78B-1-137.

<sup>580</sup> *Sorenson*, 2008 UT 8, ¶ 24 n.1.

<sup>581</sup> Utah Code Ann. § 78B-1-119(1) (2008).

<sup>582</sup> *Id.* § 78B-1-147(1).

<sup>583</sup> Utah R. Civ. P. 45(b)(2).

<sup>584</sup> Utah Code Ann. § 78B-1-147(1).

Costs are generally awarded to the prevailing party unless a court otherwise directs;<sup>585</sup> witness fees “may be taxed as costs against the losing party.”<sup>586</sup>

## **2. Case Law**

As to depositions of non-party treating physicians, the general rule is that a court “may award the prevailing party its costs of deposition if it finds that the depositions are taken in good faith, and are essential to the party’s development and presentation of its own case, either because the depositions were used in a meaningful way at trial, or because the development of the case was of such a complex nature that the information provided in the deposition could not have been obtained through less expensive means of discovery.”<sup>587</sup>

### **C. Local Custom and Practice**

In Utah, the party that notices the deposition of or calls as a witness a non-party treating physician pays the physician’s hourly rate. There is no statute or case law that limits the fee a physician may charge, and physicians are free to set their own hourly rates. Parties often agree to the physician’s fee or hourly rate in advance of the deposition.

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<sup>585</sup> Utah R. Civ. P. 54(d)(1).

<sup>586</sup> Utah Code Ann. § 78B-1-147(2).

<sup>587</sup> *Young v. State of Utah*, 2000 UT 91, ¶ 23, 16 P.3d 549.