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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

A plaintiff is "entitled to recover a reasonable amount for the damages which are shown to have resulted to him" from the accident or incident in question. *Nourse v. Austin*, 140 Vt. 184, 185, 436 A.2d 738, 739 (1981). The damage measure for past medical expenses is "the reasonable value of the services rendered to the plaintiff." *Smedberg v. Detlef's Custodial Serv., Inc.*, 182 Vt. 349, 366, 940 A.2d 674, 685 (2007). A plaintiff must prove, by a preponderance of the evidence, the extent and nature of his damages, and "must show that such damages are the direct, necessary, and probable result of defendant's negligent act." *Callan v. Hackett*, 170 Vt. 609, 609, 749 A.2d 626, 628 (2000). Some proof must be offered – generally in the form of expert medical testimony – as to the necessity of medical services and the reasonableness of the charges. *See Kinney v. Cloutier*, 125 Vt. 109, 111, 211 A.2d 246, 248 (1965). The determination of what constitutes the "reasonable value" of medical expenses is one for the jury to decide. *Id.*

Vermont Rule of Civil Procedure 54 provides that the amount of a judgment includes prejudgment interest and costs. Vt. R. Civ. P. 54(a). When medical damages are reasonably ascertainable, an award of prejudgment interest on such damages is appropriate. *See Smedberg*, 182 Vt.

at 366-67, 940 A.2d at 685-86; *see also Fleming v. Nicholson*, 168 Vt. 495, 724 A.2d 1026 (1998) (prejudgment interest is available when damages are "liquidated or readily ascertainable at the time of the tort" or when, in the trial court's discretion, such an award is "required to make the plaintiff whole"). Medical bills are recoverable even if paid by plaintiff's insurance or some other collateral source. *See infra* Section I.B.

2. Future Medical Expenses

Future damages are recoverable when plaintiff shows a "reasonable certainty or a reasonable probability that the apprehended future consequence will ensue from the original injury." *Gettis v. Green Mountain Econ. Dev. Corp.*, 179 Vt. 117, 129, 892 A.2d 162, 172 (2005). Competent expert medical testimony is necessary to lay the foundation for a claim of future medical expenses. *Wheeler v. Cent. Vermont Med. Ctr., Inc.*, 155 Vt. 85, 92, 582 A.2d 165, 169 (1990); *Hebert v. Stanley*, 124 Vt. 205, 209-10, 201 A.2d 698, 702-703 (1964). Mere speculation and conjecture may not form the basis for future damages. *Wheeler*, 155 Vt. at 92, 582 A.2d at 169; *Howley v. Kantor*, 105 Vt. 128, 133, 163 A. 628, 631 (1933) (holding that plaintiff could not recover for a "possibly" cancerous lump when the doctor acknowledged that the diagnosis was "at this stage pure speculation.").

Similarly, merely demonstrating a high likelihood of future medical problems is not sufficient to support an award for future medical expenses. *Hebert*, 124 Vt. at 210, 201 A.2d at 702-73. Medical expert testimony is necessary to demonstrate that there is a "reasonable certainty or a reasonable probability" that the expenses in question will be incurred in the future, and for what period of time. *Id*. In *Wheeler*, the Vermont Supreme Court clarified that "reasonable certainty" is synonymous with the preponderance standard governing most issues in civil litigation. 155 Vt. at 94, 582 A.2d at 170.

A jury should be instructed that any award for future medical expenses should be discounted to present value. *Dubus v. Grand Union Stores of Vermont*, 159 Vt. 537, 542, 621 A.2d 1288, 1292 (1993); *see also Parker v. Roberts*, 99 Vt. 219, 131 A. 21, 23 (1925). However, if a party wants the court to use a specific discount rate, it must lay a proper foundation for such an instruction. *Dubus*, 159 Vt. at 542, 621 A.2d at 1292.

B. Collateral Source Rule and Exceptions

Vermont follows the collateral source rule, holding that "benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer." *Bradley v. Buck*, 131 Vt. 368, 372, 306 A.2d 98, 101 (1973); *see also Hall v. Miller*, 143 Vt. 135, 465 A.2d 222 (1983) ("For more than a century, Vermont courts have applied the collateral-source doctrine to deny to a Defendant a set-off for payment the Plaintiff receives from a third, or collateral source.").

Whether plaintiff has paid for the collateral source protection is irrelevant to the rule's application. *See Hall*, 143 Vt. at 144, 465 A.2d 222, 227 ("In Vermont, the [collateral source] rule has never been limited, expressly or impliedly, to situations where plaintiff has paid for the protection of insurance."); *see also Kerr v. Rollins*, 128 Vt. 507, 266 A.2d 804 (1970) ("The fact that this expense was furnished gratuitously, or borne by another, presents no obstacle to the recovery of its reasonable worth to the person injured."); *Northeastern Nash Automobile Co. v. Bartlett*, 100 Vt. 246, 247, 257-58, 136 A. 967 (1927).

Vermont's well-established collateral source rule applies whether the payment was in whole or in part, and applies to a wide range of third-party payments and benefits, including insurance, pensions, employer-paid sick leave, uninsured motorist coverage, charitable donations, and tax benefits. *See Bradly v. H.A. Manosh Corp*., 157 Vt. 477, 485, 601 A.2d 978, 983 (1991) (uninsured motorist coverage); *Coty v. Ramsey Associates, Inc*., 149 Vt. 451, 462, 546 A.2d 196, 204 (1988) (tax benefit); *Houghton v. Leinwhol*, 135 Vt. 380, 376 A.2d 733 (1977) (pension benefits); *D'Archangelo v. Loyer*, 125 Vt. 325, 329, 215 A.2d 520 (1965) (allowing recovery of lost wages despite receipt of sick leave pay); *see also Windsor School Dist. v. State*, 183 Vt. 452, 474, 956 A.2d 528, 544 (2008) (explaining that when a federal agency is the tortfeasor the collateral source rule has generally been applied to Social Security benefits because of the plaintiff's contribution to the creation of those benefits).

The Vermont Supreme Court has not yet addressed whether Medicaid and Medicare payments qualify for inclusion under Vermont's collateral source rule; however, at least one lower court has held

that such payments should be covered under the rule and thus excluded from evidence. *See O'Bryan v. Hannaford Bros. Inc.*, No. 10-1-07 Ancv., 2008 WL 6825535 (Super. Ct. Addison County Dec. 30, 2008) ("Given the Vermont Supreme Court's recent, and strong, endorsement of the collateral source rule in *Windsor* . . . [t]here is no reason for this court to believe that [it] will treat Medicare payments any differently from payments from other insurance providers or charitable contributions.").

However, consistent with prevailing tort principles, a damage award may be offset by the amount plaintiff receives from the tortfeasor's insurer. *See Scott v. Polak*, 2002 WL 34423800, No. 2001-272 (Vt. 2002) (citing the Restatement (Second) of Torts § 920A(1)(1977)).

C. Treatment of Write-downs and Write-offs

The Vermont Supreme Court has not yet considered whether the amount billed for medical treatment and services, as opposed to the amount(s) actually paid to and received by the medical provider as full compensation and reimbursement, is the appropriate measure of the "reasonable value" of medical expenses. There is disagreement among the lower courts as to whether a medical provider's writing off part of a bill, or otherwise accepting less than "face value," should be taken into account when determining damages; this issue is likely to be considered and resolved by the Vermont Supreme Court in the near future. The *O'Bryan* court excluded evidence of the lesser amount accepted by plaintiff's medical providers as payment in full, and stated that there is "no evidence as to how the power of the government to obtain health care services (Medicare) for its eligible citizens at a discounted rate establishes the 'reasonable value' for these services." *O'Bryan v. Hannaford Bros. Inc.*, No. 10-1-07 Ancv., 2008 WL 6825535 (Super. Ct. Addison County Dec. 30, 2008).

Other courts have reached the opposite conclusion. For example, in *McGowan v. Chase*, No. S-739-06, 2009 WL 2969645 (Vt. Super. Ct. Chittenden County May 11, 2009), the court held that "unless and until our Supreme Court explicitly holds that the amount(s) billed for medical treatment and services is the default measure of damages, as opposed to the amount(s) actually paid to, and received by the medical provider as full compensation and reimbursement, the court will stand by its ruling here that the latter is the applicable, and more appropriate standard." *Id*. Likewise, in *Bora v. Chittenden County*

Transp. Auth., No. S0243-04, 2006 WL 4660871 (Vt. Super. Ct. Chittenden County April 11, 2006), the court explained that "it is difficult to accept the principle that the billed amount represents the 'reasonable value' of the service, when the billed amount is rarely paid in full for many services," and held that the amount actually accepted as payment should be received in evidence as proof of the 'reasonable value' of such services. *Id*.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

In Vermont, the "Patient's Privilege" is governed by Vermont Rule of Evidence 503 and title 12, section 1612 of the Vermont Statutes. Rule 503 covers any "confidential communication" made for the purposes of diagnosis or treatment of any physical, mental, dental, or emotional condition, including alcohol or drug addiction, to those responsible for or involved in such a diagnosis or treatment. Vt. R. Evid. 503(a)(6), 503(b). Similarly, section 1612 prohibits disclosure of "any information" provided to "a person authorized to practice medicine, chiropractic, or dentistry, a registered professional or licensed practical nurse, or a mental health professional as defined in 18 V.S.A. § 7101(13)" when that information was "necessary to enable the provider to act in that capacity." Vt. St. T. 12 § 1612(a); *see also State v. Raymond*, 139 Vt. 464, 470-71, 431 A.2d 453, 456-57 (1981) (holding that the statutory privilege prohibits a nurse from testifying that a patient had alcohol on his breath when treated). Both the rule and the statute cover any person authorized to practice medicine or dentistry in any state or nation, any person registered or licensed as a professional or practical nurse in any state or nation, and a wide range of mental health professionals. *See* Vt. R. Evid. 503; Vt. Stat. Ann. tit. 12, § 1612(a); see also Vt. Stat. Ann. tit 18, § 7101(13).

Statements made in the presence of or disclosed to third parties are covered as "confidential communications" under Rule 503, when the third party is assisting in the communication, diagnosis or treatment or is otherwise necessary to the privileged occasion. Vt. R. Evid. 503(a)(6). Rule 503 clearly prohibits disclosure by "any . . . person" present to further the interest in the consultation, interview, or examination, including interpreters, members of the patient's family or other participants in joint

counseling sessions. Vt. R. Evid. 503(b). In this respect, the rule differs from the statute, which does not expressly prohibit persons other than the medical provider from making a disclosure. See 12 V.S.A. § 1612(a).

Whether under Rule 503 or section 1612, the burden is on the party asserting the privilege to show that the privilege exists and that the communication itself is in fact privileged. *See State v. Sweet*, 142 Vt. 238, 239, 453 A.2d 1131, 1132 (1982); *see also State v. Tatro*, 161 Vt. 182, 184, 685 A.2d 1204, 1206 (1993). While a physician has the power to invoke the privilege, it is based on the presumption that he speaks for the patient, not on any inherent right of the physician; thus the power ends as soon as it is clear that the physician does not speak for the patient. *See* Vt. R. Evid. 503(c); *State v. Chenette*, 151 Vt. 237, 248, 560 A.2d 365, 373 (1989).

Any voluntary disclosure or consent to the disclosure of "any significant part of the privileged matter" by the patient waives the privilege, although this waiver does not apply if the disclosure itself is privileged. Vt. R. Evid. 510. Similarly, there is no privilege as to any communication "relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which he relies upon the condition as an element of his claim or defense." Vt. R. Evid. 503(d)(3). The commencement of a suit by a patient waives the privilege not only as to the actual condition at issue in the suit but also as to "matters causally or historically related to that condition." *Mattison v. Poulen*, 134 Vt. 158, 163, 353 A.2d 327, 330 (1976); *see also* Reporter's Notes to Vt. R. Evid. 503 (explaining that the exemption codified in Rule 503(d)(3) was intended to carry forward the Court's interpretation of 12 V.S.A. § 1612 in *Mattison*). Thus, relevant reports of plaintiff's mental and physical condition are discoverable under Vermont Rule of Civil Procedure 26(b)(1). *See* Vt. R. Civ. P. 26(b)(1); *Castle v. Sherburne Corp.*, 141 Vt. 157, 168, 446 A.2d 350, 355 (1982).

Under certain circumstances, defendant's examination by his opponent will also waive the physician-patient privilege. Rule 503 provides that the patient's privilege does not apply to any communications made in the course of a court-ordered examination of the physical, mental, or emotional condition of any party or witness. Vt. R. Evid. 503(d)(2). Additionally, under Vermont Rule of Civil

Procedure 35, if a party is ordered by the court to submit to an examination, and then obtains a copy of the report or deposes the examiner, the party waives the physician-patient privilege as to that condition in its entirety, with respect to any other past or future examinations involving the same mental or physical condition. *See* Vt. R. Civ. P. 35(b)(2)-(3) ("By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect to the same mental or physical condition.").

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

There are no Vermont cases addressing the interaction of HIPAA and the Patient's Privilege under state law.

C. Authorization of Ex Parte Physician Communication by Plaintiff

Vermont case law does not currently address the specific issue of plaintiff's authorization of ex parte communication with a treating physician.

D. Authorization of Ex Parte Physician Communication by Courts

Vermont case law does not specifically address the issue of the court's authorization of ex parte communication with a party's treating physician.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Vermont Rule of Civil Procedure 43 provides that "[i]n all trials, the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court." Vt. R. Civ. P. 43(a). A witness's deposition, including that of a treating physician, may not be used at trial unless an exception applies. *See Nichols v. Brattleboro Retreat*, 970 A.2d 1249, 1251, 2009 VT 4 (2009); *Boehm v. Willis*, 180 Vt. 615, 910 A.2d 908 (2006); *see also Simpson v. Rood*, 175 Vt. 546, 548, 830 A.2d 4, 7 (2003) ("In terms of the presentation of oral testimony in civil cases, Rule 43(a) leaves nothing to the court's discretion in the

absence of agreement by the parties to allow testimony in a different form."). The applicable exemptions are outlined in Vermont Rule of Civil Procedure 32(a)(3) and include privilege grounds, the witness's persistent refusal to testify despite a court order, unavailability due to death, illness or infirmity, or the witness's absence from the jurisdiction, when the proponent has been unable to procure the witness's presence by reasonable means. Vt. R. Civ. P. 32(a)(3); *see also Int'l Collection Serv., Inc. v. Gibbs*, 147 Vt. 105, 107, 510 A.2d 1325, 1327 (1986) ("[D]eposition testimony can be taken and used at trial if the witnesses are unavailable.").

Parties may also stipulate to the use of a treating physician's deposition at trial. *See Simpson*, 175 Vt. 546 at 548, 830 A.2d 4 at 7. In the absence of such a stipulation, however, plaintiff has no obligation to raise an objection at the time of a deposition to the use of such testimony at trial; it is defendant's burden to demonstrate that the witness is unavailable at the time of trial and thus that an exemption to the well-established requirement for live oral testimony applies. *See Nichols*, 970 A.2d at 1251 ("[D]espite plaintiffs' clear understanding that the sole purpose of the deposition was to preserve testimony for trial . . . plaintiffs expressly denied having entered into any stipulations at the start of the deposition, and more importantly, were under no affirmative obligation to raise an objection at that time; it remained defendant's burden . . . to establish a foundation for the deposition's admission at trial.").

Should a physician be testifying not as a fact witness but as an expert, additional evidentiary and disclosure rules apply. Vermont Rule of Evidence 702, governing the admissibility of expert testimony, is identical to Federal and Uniform Rules 702. *See* Vt. R. Evid. 702; Reporter's Notes to Vt. R. Evid. 702; *State v. Streich*, 163 Vt. 331, 342, 658 A.2d 38, 46 (1995). In accordance with federal practice, Vermont has adopted the principles of *Daubert* in determining the admissibility of expert witness testimony. *See Streich*, 163 Vt. at 342, 658 A.2d at 46. Although Vermont's Rules of Civil Procedure do not require automatic disclosure of an expert report, a party can obtain information on the other party's expert witnesses, and their expected testimony, through the use of interrogatories and depositions. *See* Vt. R. Civ. P. 26(b)(4)(A)(i)-(ii). However, for the purposes of this rule, "[a]n expert whose knowledge or opinions are relevant because of his participation in the events giving rise to suit" – for example, a

treating physician – "should be treated for discovery purposes as an ordinary witness." *Hutchins v. Fletcher Allen Health Care*, 172 Vt. 580, 582, 776 A.2d 376, 379 (2001); *see also* Reporter's Notes to Vt. R. Civ. P. 26.

B. Witness Fee Requirements and Limits

Vermont Rule of Civil Procedure 54(d)(1) provides that costs "other than attorneys' fees shall be allowed as of course to the prevailing party, as provided by statute and by these rules, unless the court otherwise specifically directs." V.R.C.P. 54 (d)(1). Under 32 V.S.A. § 1471, a party who prevails in supreme, superior, family, district or environmental courts may recover as costs "a fee equal to the entry fees, the cost of service fees incurred and the total amount of the certificate of witness fees paid." 32 V.S.A. § 1471 (McKinney's 1973). In civil actions, allowable fees include $30 per day for attendance in any court or tribunal or to give a deposition, and in-state witness travel costs "at the rate of reimbursement allowed state employees for travel under the terms of the prevailing collective bargaining agreement." 32 V.S.A. § 1551. The party seeking witness costs must provide a sworn and signed statement by each witness detailing the number of miles the witness traveled and the number of days he attended as a witness. *See* 32 V.S.A. § 1553. There is no requirement that the witness be subpoenaed. *See Bowler v. Miorando*, 112 Vt. 363, 364, 24 A.2d 351, 352 (1942).

Additionally, under Vermont Rules of Civil Procedure 26, a discovering party is ordinarily expected to pay the other party's expert witness a "reasonable fee" for time spent responding to interrogatories or giving a deposition. *See* Vt. R. Civ. P. 26(b)(4)(C). However, the Vermont Supreme Court has held that a trial court abused its discretion by awarding expert witness costs that exceeded the generally allowable witness fees set forth in 32 V.S.A. § 1551. *See Ianelli v. Standish*, 156 Vt. 386, 390, 592 A.2d 901 (1991). While travel costs are recoverable under section 1551, they are limited to in-state travel costs. *See* 32 V.S.A. § 1551; Jordan v. Nissan North America, Inc., 176 Vt. 465, 853 A.2d 40 (2004) (holding that the statutory limit to in-state travel costs did not violate equal protection rights or violate the Commerce Clause, as it served a legitimate state purpose, encouraging parties to limit

litigation costs, and conserving judicial resources by eliminating disputes over the reasonableness of out-of-state travel).