VIRGINIA

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

A plaintiff in a Virginia personal injury action may recover any medical expenses that are shown with reasonable certainty to have been proximately caused by the defendant's negligence. The expenses must be incurred as a result of medically necessary treatment and reasonable. In making this showing, plaintiffs are aided by Virginia Code § 8.01-413.01, which allows the plaintiff to create through his own testimony a rebuttable presumption that his medical bills are authentic and that the charges reflected therein were reasonable.[588] Section 8.01-413.01 provides, in pertinent part:

> In any action for personal injuries, wrongful death, or for medical expense benefits payable under a motor vehicle insurance policy issued pursuant to § 38.2-124 or § 38.2-2201, the authenticity of bills for medical services provided and the reasonableness of the charges of the health care provider shall be rebuttably presumed upon identification by the plaintiff of the original bill or a duly authenticated copy and the plaintiff's testimony (i) identifying the health care provider, (ii) explaining the circumstances surrounding his receipt of the bill, (iii) describing the services rendered and (iv) stating that the services were rendered in connection with treatment for the injuries received in the event giving rise to the action. The presumption herein shall not apply unless the opposing party or his attorney has been furnished such medical records at least twenty-one days prior to the trial.[589]

As noted by the Supreme Court of Virginia, however, § 8.01-413.01 creates only a presumption:

[588] VA. CODE ANN. § 8.01-413.01(A).
[589] *Id.*

> If the defendant challenges the authenticity of the bills, they will be insufficient in themselves to create a jury issue, and independent proof of authenticity will be necessary. If the defendant challenges only their quantitative reasonableness, a jury issue is created on that question. The jury may then consider the bills as "some evidence" of their quantitative reasonableness, to be weighed against such evidence as the defendant may present on that question. If the defendant contests their medical necessity or causal relationship and further represents to the court that the defense will offer evidence on those issues, the bills will be insufficient in themselves to create a jury issue, and expert foundation testimony will be prerequisite to their admission.[590]

The right to recover medical expenses due to personal injuries suffered by an unemancipated infant may be asserted by the parent or guardian.[591] "An infant is not entitled to recover the expenses incurred in healing or attempting to be healed of his injuries in an action brought against a tort-feasor to recover damages for personal injuries unless (1) he has paid or agreed to pay the expenses; or (2) he alone is responsible by reason of his emancipation or the death or incompetency of his parents; or (3) the parent has waived the right of recovery in favor of the infant; or (4) recovery therefor is permitted by statute."[592]

The Virginia Supreme Court has held that a jury award that compensates a plaintiff the exact amount of his medical expenses and other special damages is inadequate as a matter of law, regardless whether those damages were controverted.[593]

2. Future Medical Expenses

Virginia personal injury plaintiffs may also recover for the future effects of an injury, including medical expenses, provided there is sufficient evidence.[594] Making this showing, however, can be difficult, as damages for future expenses cannot be awarded when those expenses are speculative.[595] For example, the Supreme Court of Virginia has held that evidence the plaintiff has a 20-25% permanent disability and is still being treated by his physician at the time at trial is not sufficient to support a verdict

[590] McMunn v. Tatum, 379 S.E.2d 908, 914 (Va. 1989).
[591] Moses v. Akers, 122 S.E.2d 864, 865-66 (Va. 1961).
[592] *Moses*, 122 S.E.2d at 866.
[593] Bowers v. Sprouse, 492 S.E.2d 637, 639 (Va. 1997).
[594] Hailes v. Gonzales, 151 S.E.2d 388, 390 (Va. 1966).
[595] *See id.* at 390 (reversing jury verdict which may have been based on award of future medical expenses, where evidence was that plaintiff's treating physician had released her from care and told her that future treatment would not be necessary); *see also* State Farm Mut. Auto. Ins. Co. v. Kendrick, 491 S.E.2d 286, 287 (Va. 1997) (future expenses too speculative).

for future expenses when there is no evidence that the plaintiff will have to undergo an operation, be hospitalized, or incur nursing expenses in the future.[596]

B. Collateral Source Rule and Exceptions

"The collateral source rule is a long-standing principle in Virginia tort law and has been applied in tort cases for more than a century."[597] It provides "[c]ompensation or indemnity received by a tort victim from a source collateral to the tortfeasor may not be applied as a credit against the quantum of damages the tortfeasor owes.[598] "A person who is negligent and injures another 'owes to the latter full compensation for the injury inflicted[,] . . . and payment for such injury from a collateral source in no way relieves the wrongdoer of [the] obligation.'"[599] Thus, a tortfeasor's obligation to the plaintiff is not diminished by plaintiff's receipt of insurance payments, social security benefits, public and private pension payments, unemployment compensation benefits, vacation and sick leave allowances, and other payments made by employers to injured employees, both contractual and gratuitous.[600]

In addition to this common law rule, Virginia Code § 8.01-35 provides:

> In any suit brought for personal injury or death, provable damages for loss of income due to such injury or death shall not be diminished because of reimbursement of income to the plaintiff or decedent from any other source, nor shall the fact of any such reimbursement be admitted into evidence.

By its terms, § 8.01-35 applies only to loss of income and not losses incurred because of medical expenses.[601]

The collateral source rule does not apply to amounts paid in settlement by one settling joint tortfeasor to the exclusion of other joint tortfeasors under Virginia Code § 8.01-35.1.[602] Importantly,

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[596] Minnix v. Hall, 178 S.E.2d 519, 520 (Va. 1971).
[597] Acuar v. Letourneau, 531 S.E.2d 316, 320 (Va. 2000).
[598] Schickling v. Aspinall, 369 S.E.2d 172, 174 (Va. 1988).
[599] *Acuar*, 531 S.E.2d at 320 (alterations in original) (*citing* Walthew v. Davis, Adm'r, 111 S.E.2d 784, 788 (Va. 1960)).
[600] *Schickling*, 369 S.E.2d at 174; *see also* Bullard v. Alfonso, 595 S.E.2d 284, 287 (Va. 2004) (holding payments made by an employer to an employee during the period of the employee's disability constitute a collateral source, and are not deductible from the quantum of damages owed by the tortfeasor).
[601] Karsten v. Kaiser Found. Health Plan of Mid-Atlantic States, Inc., 808 F. Supp. 1253, 1254-55 (E.D. Va. 1992) (applying Virginia law).
[602] *See* Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P., 560 S.E.2d 246, 252-53 (Va. 2002).

however, amounts paid under § 8.01-35.1 are not admitted into evidence and considered by the jury, but are merely considered by the court in determining the amount for which judgment should be entered.[603]

In addition, although workers' compensation benefits have in the past been covered by the collateral source rule,[604] the Virginia Code effectively nullifies the rule by assigning an employee's right to recover damages from a tortfeasor to the employer whenever a workers' compensation claim is made.[605]

Notably, though other jurisdictions have applied the collateral source rule to actions *ex contractu*, Virginia's Supreme Court has not yet considered the issue.[606]

C. Treatment of Write-downs and Write-offs

The Supreme Court of Virginia has explicitly held that amounts written off by health care providers pursuant to contracts with health insurers may not be deducted from amounts owed by a tortfeasor.[607] The rationale for this rule is that write-offs are a result of agreements between the plaintiff's health providers and the plaintiff's health insurance carrier, and such agreements are part of the benefits that the plaintiff obtains from his insurance carrier in exchange for premiums.[608] The "amounts written off are as much of a benefit for which [the plaintiff] paid consideration as are the actual cash payments made by his health insurance carrier to the health care providers."[609] "The wrongdoer cannot reap the benefit of a contract for which the wrongdoer paid no compensation."[610] Virginia law is clear that to the extent the existence of a collateral source creates a windfall, that windfall should benefit the victim rather than the wrongdoer.[611]

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[603] *Acordia*, 560 S.E.2d at 253.
[604] See *Schickling*, 369 S.E.2d at 173.
[605] *See* VA. CODE ANN. § 65.2-309(A) (2009); Wood v. Caudle-Hyatt, Inc., 444 S.E.2d 3, 6 (Va. App. 1994) ("making a 'claim' for workers' compensation benefits works as an assignment under Code § 65.2-309 of the employee's 'right to recover damages' from the tort-feasor").
[606] *Schickling*, 369 S.E.2d at 174.
[607] *Acuar*, 531 S.E.2d at 323.
[608] *Id.* at 322.
[609] *Id.*
[610] *Id.* at 323.
[611] *Id.*

Although the collateral source rule refers to sources collateral to the tortfeasor, a Virginia federal court has held that a plaintiff may receive compensatory damages for medical bills already paid pursuant to an HMO contract, even when that same HMO is liable to the plaintiff as a tortfeasor.[612] In reaching this conclusion, the court focused not on the source of the payment, but the capacity in which the payment is made:

> Even though the same defendant is being asked to pay the same damages twice, it is patent that the nature of the two payments is different. The nature of the first is as a payment from the defendant as insurer to the plaintiff as the insured. The nature of the second is as a payment from the defendant as tortfeasor to the plaintiff as the party injured by the defendant's negligence. It is axiomatic that the plaintiff is entitled to receive the benefit of her bargain under the insurance contract, irrespective of the fact that the carrier servicing that contract may also be the tortfeasor.[613]

Thus, "[t]o set off payments owed by the defendant as insurer against compensation owed by the defendant as tortfeasor allows the defendant to reap a windfall by allowing it to avoid its contractual obligations to the plaintiff."[614]

Although not specifically addressed by the Supreme Court of Virginia, prior to *Acuar* some Virginia trial courts held that the collateral source rule applies to Medicare and Medicaid write-offs just as it does to private insurance. *See Kelly v. Thomasson*, 48 Va. Cir. 100, 1999 Va. Cir. LEXIS 32 (Roanoke County Jan. 29, 1999); *Perry v. McClure*, 47 Va. Cir. 504, 505, 1998 Va. Cir. LEXIS 367, at *2 (Portsmouth Dec. 22, 1998). Presumably, if presented with the issue now the Supreme Court would reach the same conclusion based on *Acuar*.

Several Virginia trial courts have held that the collateral source rule does not apply to medical bills that have been discharged in bankruptcy, and that plaintiffs therefore cannot recover those amounts. *See Payne v. Wyeth Pharms., Inc.*, Civil No. 2:08cv119, 2008 U.S. Dist. LEXIS 91849, at *21 (E.D.Va. Nov. 12, 2008); *Choice v. Kruse*, 57 Va. Cir. 13, 2001 Va. Cir. LEXIS 418 (Chesterfield Apr. 26, 2001); *Daniels v. Owens*, 54 Va. Cir. 284, 2000 Va. Cir. LEXIS 597 (Norfolk Dec. 21, 2000); *Morganthal v. Piper*, 38 Va. Cir. 354, 1996 Va. Cir. LEXIS 77 (Virginia Beach Feb. 7, 1996); *Walker v. Long*, 57 Va.

[612] *Karsten*, 808 F. Supp. at 1257-58.
[613] *Id.* at 1258.
[614] *Id.*

Cir. 419, 1993 Va. Cir. LEXIS 870 (Richmond City Oct. 20, 1993). *But see Dodd v. Lang*, 71 Va. Cir. 235, 2006 Va. Cir. LEXIS 151 (Roanoke City June 29, 2006) (holding collateral source rule applies to medical bills discharged in bankruptcy); *Hall v. Wal-Mart Stores, Inc.*, No. 4:05cv50, 2006 U.S. Dist. LEXIS 98017 (W.D.Va. Apr. 25, 2006) (same, decided without written analysis). The Supreme Court of Virginia has expressly declined to rule on this issue, but importantly has held that even if a plaintiff cannot recover for bills that have been discharged in bankruptcy, those bills may still be admitted at trial for the limited purpose of proving the plaintiff's pain and suffering.[615]

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

A. Scope of Physician-Patient Privilege and Waiver

There is no common-law physician-patient privilege in Virginia. A qualified statutory physician-patient privilege applicable only to civil proceedings exists, as stated in Virginia Code § 8.01-399A. It provides:

> Except at the request or with the consent of the patient, or as provided in this section, no duly licensed practitioner of any branch of the healing arts shall be permitted to testify in any civil action, respecting any information that he may have acquired in attending, examining or treating the patient in a professional capacity.[616]

The Code specifically provides coverage under this privilege for clinical psychologists.[617]

Importantly, the privilege does not apply in any action in which the physical or mental condition of the patient is at issue, in which case

> the diagnoses, signs and symptoms, observations, evaluations, histories, or treatment plan of the practitioner, obtained or formulated as contemporaneously documented during the course of the practitioner's treatment, together with the facts communicated to, or otherwise learned by, such practitioner in connection with such attendance, examination or treatment shall be disclosed but only in discovery pursuant to the Rules of Court or through testimony at the trial of the action.[618]

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[615] Barkley v. Wallace, 595 S.E.2d 271, 273-74 (Va. 2004) ("the fact that the bills had been discharged in bankruptcy was irrelevant to the question whether [plaintiff] experienced pain, suffering and inconvenience as a result of the accident").
[616] VA. CODE. ANN. § 8.01-399(A).
[617] VA. CODE ANN. § 8.01-399(E).
[618] VA. CODE ANN. § 8.01-399(B).

The privilege can also be overcome if the court determines in its discretion that disclosure is "necessary to the proper administration of justice."[619] In addition, the privilege does not apply when disclosure of otherwise protected information is necessary in connection with the care of the patient, or in the context of the practitioner's defense of his legal rights, including those rights with respect to medical malpractice actions.[620]

The privilege also does not apply when disclosure is necessary to comply with state or federal law.[621] In that regard, there are several Virginia statutory exceptions to the privilege, permitting, for example: disclosure of information to a government air safety agency concerning any disability potentially affecting operation of an aircraft[622]; disclosure to the DMV of persons with a disability potentially affecting their operation of a motor vehicle[623]; disclosure of information received in conjunction with an examination of an injured employee claiming workers' compensation[624]; and reports to the investigating agency in connection with suspected cases of child abuse or neglect.[625] The privilege also does not apply to examinations ordered under Supreme Court of Virginia Rule 4:10.[626]

To the extent the privilege does exist, it may only be waived by the patient – not even the patient's lawyer may obtain privileged information absent the consent of the patient or through formal discovery proceedings.[627] If a physician discloses confidential patient information without patient consent or other permissible justification under the statute, an action will lie in tort.[628]

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

Generally, absent patient consent, *ex parte* contact with a non-party treating physician is strictly prohibited by Virginia Code § 8.01-399, even when the patient has placed his physical or mental

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[619] *Id.*
[620] VA. CODE ANN. § 8.01-399(F).
[621] *Id.*
[622] VA. CODE ANN. § 54.1-2966(A).
[623] VA. CODE ANN. § 54.1-2966.1.
[624] VA. CODE ANN. § 65.2-607(A).
[625] VA. CODE ANN. § 63.2-1509(A).
[626] VA. R. SUP. CT. 4:10(c)(2).
[627] VA. CODE ANN. § 8.01-399(D).
[628] Fairfax Hosp. By and Through INOVA Health System Hosps., Inc. v. Curtis, 492 S.E.2d 642, 644 (Va. 1997).

condition at issue.[629] All communication must be "in discovery pursuant to the Rules of Court or through testimony at the trial of the action."[630] Va. Code Ann. § 8.01-399(B). The statute does allow communication between attorneys and their agents and the agents of non-party treating physicians in certain limited, largely administrative circumstances.[631] Specifically, § 8.01-399(D)(3) provides that the privilege shall not prohibit:

> Contact between a lawyer or his agent and a nonphysician employee or agent of a practitioner of healing arts for any of the following purposes: (i) scheduling appearances, (ii) requesting a written recitation by the practitioner of handwritten records obtained by the lawyer or his agent from the practitioner, provided the request is made in writing and, if litigation is pending, a copy of the request and the practitioner's response is provided simultaneously to the patient or his attorney, (iii) obtaining information necessary to obtain service upon the practitioner in pending litigation, (iv) determining when records summoned will be provided by the practitioner or his agent, (v) determining what patient records the practitioner possesses in order to summons records in pending litigation, (vi) explaining any summons that the lawyer or his agent caused to be issued and served on the practitioner, (vii) verifying dates the practitioner treated the patient, provided that if the litigation is pending the information obtained by the lawyer or his agent is promptly given, in writing, to the patient or his attorney, (viii) determining charges by the practitioner for appearance at a deposition or to testify before any tribunal or administrative body, or (ix) providing to or obtaining from the practitioner directions to a place to which he is or will be summoned to give testimony.[632]

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

Although the issue has not been widely considered, at least two Virginia courts have stated that § 8.01-399 also prevents a court from allowing a party to have *ex parte* contact with a non-party treating physician outside of formal discovery, even when the patient's physical or mental condition is at issue.[633]

Section 8.01-399(B) also prohibits a court from compelling a plaintiff to sign a medical records release unless the health care provider is located outside of Virginia or is a federal facility.[634]

D. Local Practice Pointers

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[629] VA. CODE ANN. § 8.01-399(D).
[630] VA. CODE ANN. § 8.01-399(B).
[631] VA. CODE ANN. § 8.01-399(D)(3).
[632] *Id.*
[633] McCauley v. Purdue Pharma, L.P., 224 F. Supp. 2d 1066, 1069 (W.D.Va. 2002) ("the statute creates a limited waiver of the physician-patient privilege, but only insofar as the information is revealed through discovery or at trial"); Curtis v. Fairfax Hosp., 36 Va. Cir. 35, 38, 1995 Va. Cir. LEXIS 1252, at *6 (Fairfax County Jan. 24, 1995) (noting in *dicta* that "[t]here is no Virginia authority for the proposition that formal discovery can be ignored when a party's condition is at issue").
[634] VA. CODE. ANN. § 8.01-399(B).

In light of the limited access to non-party treating physicians, determining whether they are represented by counsel and establishing contact with that counsel may prove beneficial prior to taking the physician's deposition. Through the physician's counsel you can potentially educate the treating physician on your goals in the deposition, allay any concerns the physician may have, and gain intelligence about where the physician stands on the relevant issues. In considering this approach, however, one must be careful not to run afoul of the privilege indirectly.

Defense counsel may also be well served to take both a discovery and *de bene esse* deposition of non-party treating physicians whose records suggest they may provide favorable testimony. Rule 4:7(a)(4)(E) of the Rules of the Supreme Court of Virginia permits a treating physician's deposition testimony to be used at trial for any purpose.[635] Taking the discovery deposition will usually allow defense counsel to confirm favorable findings in the treating physician's medical records and explore medical issues that are not entirely clear from the records. Taking a *de bene esse* deposition immediately thereafter may help defense counsel to develop a more focused, cleaner and more effective record of the treating physician's medical findings for use at trial. Although this practice has been commonplace in Virginia practice for a number of years, there is no statute or rule authorizing *de bene esse* depositions in Virginia. Thus, as noted by one Virginia court, counsel may need consent or a court order before seeking both a discovery and *de bene esse* deposition. *See Boyer v. Dabinett*, 74 Va. Cir. 19, 24, 2007 Va. Cir. LEXIS 268, at *12 (Winchester Feb. 28, 2007).

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

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

Assuming the physician-patient privilege has been waived, either because the plaintiff has placed his physical or mental condition at issue or otherwise, a non-party treating physician may be summonsed to testify in deposition or at trial by issuance of subpoena, including attorney-issued subpoena.[636] Like any other non-party witness, a non-party treating physician's deposition must be taken in the county or

[635] VA. SUP. CT. R. 4:7(a)(4)(E).
[636] VA. CODE ANN. § 8.01-407.

city where he resides, is employed, or has his principal place of business, unless the witness and parties agree on another location, or the court orders another location for good cause.[637]

Unlike other non-party witnesses, however, a treating physician's deposition may be used for any purpose at trial, regardless of whether the physician is otherwise unavailable.[638]

B. Witness Fee Requirements and Limits

The Virginia Code provides for daily mileage and toll reimbursement for witnesses summonsed to testify.[639] Witnesses who are compelled to attend and testify that qualify as an expert witness are not subject to the statutory limitations, and are entitled to such compensation and mileage as the court may, in its discretion, order to be paid by the party in whose behalf the witness is called.[640]

Still, "agreements to pay witnesses for lost time and expenses incurred, in excess of the statutory fees, are not unusual, extraordinary or improper."[641] *Slayton v. Weinberger*, 213 Va. 690, 694, 194 S.E.2d 703, 706 (1973). "While the existence of such an agreement may be shown as affecting the weight and credibility of the witness' testimony, the existence of an agreement is not ordinarily sufficient grounds to set aside a verdict and award a new trial."[642]

Rule 3:4(c) of the Virginia Rules of Professional Conduct permit an attorney to advance, guarantee, or pay (1) reasonable expenses incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying; and (3) a reasonable fee for the professional services of an expert witness. An attorney may not pay an occurrence witness a fee for merely testifying, however, and may not pay an expert witness a contingent fee. *See* Rule 3:4(c) note 3.

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[637] VA. CODE ANN. § 8.01-420.4(B).
[638] VA. SUP. CT. R. 4:7(a)(4)(E); Thornton v. Glazer, 628 S.E.2d 327, 328-29 (Va. 2006); Henning v. Thomas, 366 S.E.2d 109, 115 (Va. 1988).
[639] VA. CODE. ANN. § 17.1-612; VA. CODE ANN. § 2.2-2823.
[640] VA. CODE ANN. § 17.1-612.
[641] Slayton v. Weinberger, 194 S.E.2d 703, 706 (Va. 1973).
[642] *Slayton*, 194 S.E.2d at 706 (*citing* Smith v. Allen, 212 F. Supp. 713 (E.D.Va. 1962)).

Importantly, if the plaintiff takes a nonsuit as of right within seven days of trial, the court may require the plaintiff to pay reasonable expert witness fees and travel costs that are actually incurred by the defendant as a result of the nonsuit.[643]

C. Local Custom and Practice

It is customary in Virginia for parties noticing the deposition of a non-party treating physician to pay the physician's standard fee for actual time spent in deposition, provided that fee is reasonable. Non-party treating physicians are not typically reimbursed for any time spent reviewing their files or otherwise preparing for their testimony.

[643] VA. CODE ANN. § 8.01-380(C).