

## WYOMING

Jeffrey R. Pilkington  
Jordan L. Lipp  
**DAVIS GRAHAM & STUBBS LLP**  
1550 Seventeenth Street, Suite 500  
Denver, Colorado 80202  
Telephone: (303) 892-9400  
Facsimile: (303) 893-1379  
jeff.pilkington@dgsllaw.com  
jordan.lipp@dgsllaw.com

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### I. MEDICAL EXPENSES

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

##### 1. Past Medical Expenses

A plaintiff is entitled to recover the reasonable value of medical and hospital expenses he or she incurred. *Grayson v. Williams*, 256 F.2d 61, 65-66 (10th Cir. 1958) (applying Wyoming law); *Banks v. Crowner*, 694 P.2d 101, 105 (Wyo. 1985).

##### 2. Future Medical Expenses

Without expert testimony supporting the need for future medical expenses, such expenses cannot be awarded. *Rittierodt v. State Farm Ins. Co.*, 3 P.3d 841, 843-44 (Wyo. 2000); *cf. Fetzer v. J.D. Dayley & Sons, Inc.*, 91 P.3d 152 (Wyo. 2004) (plaintiff's failure to disclose change in her orthopedic surgeon's expert opinion concerning future medical condition warranted exclusion of all testimony and evidence related to future medical expenses). A physician's testimony as to the need for future medication and physical therapy and the associated costs is sufficient evidence for a jury to be instructed on awards of future health care expenses. *Rudy v. Bossard*, 997 P.2d 480, 485 (Wyo. 2000).

#### B. Collateral Source Rule and Exceptions

Under Wyoming common law, a plaintiff is entitled to recover the reasonable value of the medical services necessary to treat the injury, even if the expenses were paid by the plaintiff's medical insurer, and even if the medical services are rendered gratuitously. *Grayson*, 256 F.2d at 65-66 (applying Wyoming law); *Banks*, 694 P.2d at 105; *but cf. Miller v. Campbell County*, 901 P.2d 1107,

1113 (Wyo. 1995) (before finding that collateral source rule does not apply to inverse condemnation, noting that there is a counter policy argument to the collateral source rule – “[t]he justification for this policy is that an injured plaintiff is entitled to be compensated for his loss and no more, and double recoveries are not favored in the law”) (internal quotation marks and citation omitted).

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

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

There are no published decisions in Wyoming on this issue.

#### **2. Private Insurance**

There are no published decisions in Wyoming on this issue.

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

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

Wyoming Rule of Evidence 501 provides in pertinent part: “Except as otherwise required by constitution or statute or by these or other rules promulgated by the Supreme Court of Wyoming, the privilege of a witness . . . shall be governed by the principles of the common law . . .” Wyo. Rule Evid. 501. The physician-patient privilege is not recognized in the common law of Wyoming, *see Matter of Parental Rights of PP*, 648 P.2d 512 (Wyo. 1982), rather the privilege is defined by statute. Wyoming Statute § 1-12-101(a)(i) provides in pertinent part:

- (a) The following persons shall not testify in certain respects:
  - (i) . . . [A] physician concerning a communication made to him by his . . . patient in that relation, or his advice to his . . . patient. The . . . physician may testify by express consent of the . . . patient, and if the . . . patient voluntarily testifies the . . . physician may be compelled to testify on the same subject.

Wyo. Stat. § 1-12-101(a)(i). This privilege extends “to all information secured by a doctor through observation, examination, or conversation with the patient.” *Wardell v. McMillan*, 844 P.2d 1052, 1066 (Wyo. 1992).

“When a patient places his physical or mental condition into contest [in a lawsuit], the physician-patient privilege is waived to the extent it is relevant to the controversy.” *Id.* Further, the physician-

patient privilege does not prevent the treating physician from rendering an expert opinion as to the patient's condition so long as the patient has filed a lawsuit placing into contest his or her condition. *Id.*

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

There are no published decisions in Wyoming on this issue.

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

A plaintiff can choose to waive his or her privilege as to communications with his or her physician, but as a practical matter, this rarely if ever occurs. There is no published case law that provides for a mechanism by which a defense counsel can have *ex parte* communications with a plaintiff's treating physician.

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

There are no published decisions in Wyoming on this issue.

**E. Local Practice Pointers**

If a defendant wants to learn about a plaintiff's care and treatment from his or her treating physician, the defense attorney can negotiate with the plaintiff's counsel for an interview. If no agreement is reached, the defendant must depose the treating physician.

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

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

Under the Wyoming Rules of Civil Procedure, a party is entitled to ten depositions, unless the number is modified by the court. Wyo. Rule of Civil Proc. (30)(a)(2)(A). A deposition of a treating physician would fall within this limitation.

**B. Witness Fee Requirements and Limits**

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

Pursuant to statute, fact witnesses are entitled to ten dollars per day and mileage at a statutorily set amount for trial testimony. Wyo. Stat. § 1-14-102(a). Expert witnesses who are qualified by the court and provide expert testimony which is admitted into evidence, "shall be allowed witness fees of twenty-

five dollars (\$25.00) per day or such other amount as the court allows according to the circumstances of the case.” Wyo. Stat. § 1-14-102(b).

Treating physicians are fact witnesses “[i]f they only testify as to what they observed and did within the physician-patient relationship.” *Smith v. Paiz*, 84 P.3d 1272, 1275 (Wyo. 2004). However, if treating physicians offer opinions, such as testimony “relating to diagnoses, prognoses and causation,” then they are expert witnesses. *Id.* at 1277. In such a case, the treating physicians must be disclosed as expert pursuant to Wyoming Rule of Civil Procedure 26(a)(2). *Id.* at 1279. While a treating physician must testify as a fact witness, a treating physician cannot be forced to be an expert witness against his or her patient. *Wardell*, 844 P.2d at 1067.

With regards to the depositions of treating physicians identified as experts under Wyoming Rule of Civil Procedure 26(a)(2), unless manifest injustice would result, the “court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery.” Wyo. Rule of Civil Proc. 26(b)(4)(C)(i).

## **2. Case Law**

The Wyoming Supreme Court has found that expert witness fees are not chargeable for time the expert spends while waiting to testify – rather it applies only to actual court time. *Hashimoto v. Marathon Pipe Line Co.*, 767 P.2d 158, 169 (Wyo. 1989); *Coulthard v. Cossairt*, 803 P.2d 86, 93 (Wyo. 1990), abrogated on other grounds in *Vaughn v. State*, 962 P.2d 149 (Wyo. 1998). The trial court is given discretion as to the appropriate fees. *Coulthard*, 803 P.2d at 93.

## **3. Local Custom and Practice**

Wyoming does not have an interprofessional code addressing the setting of payments for deposition or trial time for treating physicians. However, it is customary to pay treating physicians for their time at a deposition or trial at their normal hourly rate. There have been instances when the federal magistrate judge has rejected exorbitant charges requested by treating physicians for their testimony. However, there are no published Wyoming opinions on this issue.