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I. MEDICAL EXPENSES

A. Requirements for Recovery of Past Medical Expenses

In an Ohio tort action, an injured plaintiff may recover the necessary and reasonable value of medical expenses resulting from an injury caused by the defendant's wrongful act. *Robinson v. Bates*, 857 N.E.2d 1195, 1197 (Ohio 2006). Medical expenses are a type of economic loss. OHIO REV. CODE ANN. § 2307.011 (2010). The economic loss includes expenditures made for “medical care or treatment, rehabilitation services, or other care, treatment, services, products, or accommodations incurred as a result of an injury, death or loss to a person that is a subject of a tort action.” *Id.* There are no caps on damages awarded for recovery of medical expenses in an Ohio tort action.

A plaintiff establishes the reasonable value of medical care by providing “proof of the amount paid or the amount of the bill rendered and the nature of the services performed.” *Wagner v. McDaniels*, 459 N.E.2d 561, 563 (Ohio 2004). An injured individual may testify about his past injuries and past medical treatment. *Turner v. Progressive Ins. Co.*, No. 2007 CA 015, 2008 WL 4382698, at *5 (Ohio Ct. App. Sept. 26, 2008). An expert does not need to testify as to the necessity of *past* medical expenses. *Id.* However, after a plaintiff provides prima facie evidence of the necessity and reasonableness of the medical expenses, a defendant may rebut the plaintiff's evidence. *Id.*

B. Requirements for Recovery of Future Medical Expenses

A plaintiff may also recover for economic loss from future medical expenses that are reasonably certain to occur. § 2307.011; *Galayda v. Lake Hosp. System Inc.*, 644 N.E.2d 298, 301 (Ohio 1994). The

medical expenses must reasonably follow from the complained of injury. *Roberts v. Mutual Mfg. & Supply Co.*, 475 N.E.2d 797, 799 (Ohio Ct. App. 1984). A plaintiff cannot base damages resulting from an injury on “speculation or conjecture.” *Corwin v. St. Anthony Med. Ctr.*, 610 N.E.2d 1155, 1157 (Ohio Ct. App. 1992).

When the permanency of an injury is of an objective nature, no expert testimony is required. *Roberts*, 475 N.E.2d at 799. The facts of the injury alone are enough for a jury to draw conclusions about future pain and suffering. *Id.* When a plaintiff complains of subjective injuries, a plaintiff must present medical experts to testify to a degree of medical certainty that the plaintiff will suffer pain or permanency of injury in the future. *Id.*; *Turner*, 2008 WL 4382698 at * 5.

Additionally, a plaintiff must support a claim for future medical expenses with evidence that reasonably establishes the amount of economic loss that the plaintiff will likely incur for future medical treatment. *Hammerschmidt v. Mignogna*, 685 N.E.2d 281, 281-82 (Ohio Ct. App. 1996). A plaintiff must provide expert witnesses to indicate the amount, based on probability (not mere possibility) of the future medical expenses. *Id.* Juries are not allowed to simply speculate as to the amount of future medical expenses. *Id.*

C. Collateral Source Rule and Exceptions

Generally, in Ohio tort actions, the measure of damages is that which will compensate a plaintiff and make a plaintiff whole. *Robinson v. Bates*, 857 N.E.2d 1195, 1199 (Ohio 2006). The common-law collateral source rule acts as an exception to the traditional measure of tort damages. *Id.* Under the collateral source rule, if a plaintiff receives benefits from sources other than the wrongdoer, the benefits are irrelevant and immaterial to the plaintiff’s measure of damages. *Id.* The collateral source rule “prevents a jury from learning about a plaintiff’s income from a source other than the tortfeasor so that a tortfeasor is not given an advantage from third-party payments to the plaintiff.” *Id.*

In 2005, the Ohio General Assembly enacted Ohio Revised Code section 2315.20. Section 2315.20(A) states:

In any tort action, the defendant may introduce evidence of any amount payable as a

benefit to the plaintiff as a result of the damages that result from injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefits that is in the form of a life insurance payment or a disability payment.

OHIO REV. CODE ANN. § 2315.20(A) (2010). The statutory collateral-benefits rule makes evidence of collateral benefits admissible unless an exception is met. § 2315.20. For example, in the many cases involving a right of subrogation, § 2315.20 bars evidence of payment to plaintiffs. *Id.*

D. Write-offs and Write-downs

To prove the value of medical services in Ohio, a plaintiff may submit either a medical bill or evidence of the amount actually paid for medical services. *Robinson*, 857 N.E.2d at 1197. An evidentiary issue can arise when write-offs occur in medical billing. Write-offs are the difference between the original amount reflected on the medical bill and the negotiated amount accepted by healthcare providers as full payment. *Id.* at 1198.

Healthcare providers may agree to certain fee schedules with private insurance carriers. A provider then writes-off the difference between the amount charged and the amount received. A write-off involving a healthcare provider, a private insurer and an injured plaintiff is problematic under evidentiary rules because write-offs implicate the collateral source rule.

The Supreme Court of Ohio evaluated the interplay between private insurers, healthcare provider write-offs and the collateral source rule in *Jacques v. Manton*. 928 N.E.2d 434 (Ohio 2010). The Court held that the collateral source statute does not prevent a defendant from introducing evidence of write-offs. *Id.* at 438. The Court reasoned that write-offs are not paid by third parties and evidence of write-offs permit a jury to determine the actual amount of medical expenses incurred as a result of a defendant's tortious conduct. *Id.*

Write-offs may also occur when a provider contracts to supply medical services under Medicare or Medicaid. However, no Ohio court has decided a Medicare or Medicaid write-off case since the *Jacques* Court settled the issue of write-offs and the collateral source rule.

II. EX PARTE COMMUNICATIONS WITH NON-TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Ohio law recognizes a physician-patient privilege. OHIO REV. CODE ANN. § 2317.02 (2010). The Ohio Code states that a physician shall not testify to: (1) communications made to the physician by a patient during the physician-patient relationship; or (2) the physician's advice to the patient during the physician-patient relationship. § 2317.02(B)(1). The physician-patient privilege attaches when a patient consults a physician for treatment or diagnosis. *State v. Fears*, 715 N.E.2d 136, 150 (Ohio 1999). All communications protected by physician-patient privilege must relate to a patient's medical treatment and diagnosis, or to the physician's medical advice rendered to the patient. *Kromenacker v. Blystone*, 539 N.E.2d 675, 677 (Ohio Ct. App. 1987). The physician-patient privilege does not cover the names of treating healthcare providers or the drugs to which a patient is addicted. *Ingram v. Adena Health System*, 777 N.E.2d 901, 902 (2002).

Any breach of medical confidentiality is an injury to the patient. *Hageman v. Sw. Gen. Health Ctr.*, 893 N.E.2d 153, 156 (Ohio 2008). Ohio recognizes the breach of physician-patient confidentiality as a tort. *Id.*

The Ohio physician-patient privilege is not absolute. A plaintiff may waive physician-patient privilege by requesting a report of the plaintiff's medical examination performed for an adverse party. OHIO R. CIV. P. 35(B)(2). The plaintiff also may waive the privilege when her counsel takes the deposition of the medical examiner performing the exam. *Id.*

Similarly, in a tort action, a physician may testify (or be compelled to testify), about physician-patient information. § 2317.02(B)(1)(a). By statute, the physician-patient privilege does not apply when a patient files a civil injury case that puts their physical or mental health into issue. § 2317.02(B)(1)(a)(iii); § 2317.02(B)(3). A physician may also make disclosures without prior patient authorization in special situations where disclosure is necessary to protect or further countervailing interests, such as public health interests. *Biddle v. Warren Gen. Hosp.*, 715 N.E.2d 518, 524 (Ohio 1999).

A patient, guardian or other legal representative of a patient may statutorily waive the physician-

patient privilege. § 2317.02(B)(1)(a)(i). Once the privilege is waived by the patient, a patient cannot limit the waiver. *Menda v. Springfield Radiologists, Inc.*, 737 N.E.2d 590, 594 (Ohio Ct. App. 2000). A physician is not the holder of the privilege and cannot waive the patient's privilege. Waiver can occur when a patient gives express consent, the spouse of a deceased patient gives express consent, or a dispute involves the competency of a deceased patient. §§ 2317.02(B)(1)(a)-(e).

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

State laws establish and regulate the physician-patient privilege. The federally enacted Health Insurance Portability and Accountability Act ("HIPAA") also protects the privacy of individually identifiable health information. Under HIPAA, a covered entity may disclose protected health information without a HIPAA-compliant authorization in order for the entity to comply with subpoenas. 45 C.F.R. § 164.512(f)(1)(ii)(B) (2010). HIPAA allows covered entities to release a limited amount of information relevant to a lawsuit in response to a court order, subpoena, or other proper discovery request. 45 C.F.R. § 164.512(e)(1). HIPAA preempts contrary state law, however, it does not preempt a state's more stringent privacy provisions.

Ohio has created a state statutory physician-patient privilege that is more stringent than the Federal privacy rules. *Grove v. Ne. Ohio Nephrology Assoc., Inc.*, 844 N.E.2d 400, 407 (Ohio App. Ct. 2005). HIPAA does not preempt Ohio physician-patient privilege. *Id.* HIPAA also does not affect any waiver of a patient's right of physician-patient confidentiality. *Hawes v. Golden*, No. 03CA008398, 2004 WL 2244448, at **2-3 (Ohio Ct. App. Sept. 22, 2004).

The Ohio physician-patient privilege protects patient health information from disclosure, but patients can voluntarily waive the privilege. § 2317.02(B)(1)(a)(i). A patient can waive protected health information by signing an authorization for the release of protected health information. *Med. Mutual v. Schlotterer*, 909 N.E.2d 1237, 1241 (Ohio 2009). The consent to release the health information is valid, and waives the physician-patient privilege, "if it is voluntary, express and reasonably specific in identifying to whom the information is to be delivered." *Id.* The express nature of the consent is violated if medical information is released for any other purpose beyond the scope of the authorization. *Id.*

C. Authorization of Ex Parte Physician Communication by Plaintiff

Unless an exception applies, a physician cannot disclose protected health information without express patient consent. § 2317.02 (B)(1)(i). Physician-patient privilege protects the sanctity of the physician-patient relationship by encouraging the full and free disclosure of health information. *State Med. Bd. of Ohio v. Miller*, 541 N.E.2d 602, 604 (Ohio 1989). Although section 2317.02 does not explicitly prohibit ex parte communications between an attorney and a non-party treating physician, the purpose of the statute notes ex parte communications with the physician are not permissible without patient consent.

A patient may voluntarily consent to the release of medical information to facilitate the exchange of discoverable information. Nevertheless, any disclosure of protected health information cannot exceed the scope of the patient's written authorization. *Schlotterer*, 909 N.E.2d at 1241. If a patient authorization does not include permission for ex parte communications between legal counsel and a non-party treating physician, substantive communication between counsel and a non-party treating physician violates patient-physician privilege. When a patient expressly permits ex parte communication, counsel may speak to a non-party treating physician.

D. Authorization of Ex Parte Communications By Courts and Local Practice Pointers

Some state courts allow counsel to conduct informal interviews of non-party treating physicians in furtherance of efficient and inexpensive discovery. *See Stempler v. Speidell*, 495 A.2d 857, 862 (N.J. 1985). When patient authorization for the ex parte communications is unreasonably withheld, the courts will intervene in the discovery process and compel the production of authorization. *Id.* at 864.

Ohio law is silent on the subject of court authorization of ex parte communications between counsel and a non-party treating physician. The Ohio rules regulating pre-trial discovery require formal physician depositions instead of informal ex parte interviews. OHIO R. CIV. P. 26(A). In Ohio, counsel customarily does not conduct ex parte communications with a non-party treating physician absent the written authorization of the patient. Unlike in New Jersey, Ohio courts have hold compelled an authorization for ex parte communications. When counsel needs to get information from a non-party

treating physician, counsel should not attempt to communicate with the physician ex parte, and instead should seek to depose the physician.

Although Ohio has not considered the issue of court authorized ex parte communications with non-party treating physicians, a District Court Judge in the Northern District of Ohio considered the issue of regulating ex parte communications between counsel and party treating physicians. *In Re Ortho Evra Products Liability Litigation* Order, No. 1:06-40000 (N.D. Ohio Jan. 20, 2010). Judge Katz in the Ortho Evra Multi District Litigation held that plaintiffs' counsel were allowed to have ex parte contact with treating physicians, but only to discuss the physicians' records, course of treatment and related matters. Judge Katz held plaintiffs' counsel could not discuss liability issues or theories, product warnings, defendant research documents or related materials ex parte with the treating physicians.

III. Obtaining testimony of Non-party treating physicians

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

Ohio Civil Rule 30 allows any party, after commencement of an action, to take the testimony of any person by deposition upon oral examination. OHIO R. CIV. P. 30. A party can compel the attendance of a party deponent by the use of notice of examination, but a party must use a subpoena to compel the attendance of a witness deponent. *Id.*

Non-party treating physicians are witness deponents. If the physician refuses to appear to give testimony, the party seeking the physician's testimony may subpoena the physician. A subpoena commands the physician to give testimony at a specified trial, hearing or deposition. OHIO R. CIV. P. 45.

Additionally, Cuyahoga County Common Pleas Court Local Rule 21.1(A) requires that counsel exchange the reports of medical witnesses they expect to testify. Counsel cannot take a discovery deposition of their opponent's non-party medical witness until the mutual exchange of reports occurs. CUYAHOGA CTY. R. CIV. P. 21.1(F).

B. Witness Fee Requirements and Limits

The Ohio Revised Code guarantees that witnesses in civil cases receive:

Twelve dollars for each full day's attendance and six dollars for each half day's attendance at a court of record, mayor's court, or before a person authorized to take depositions, to be taxed in the bill of costs. Each witness shall also receive ten cents for each mile necessarily traveled to and from his place of residence to the place of giving his testimony, to be taxed in the bill of costs.

OHIO REV. CODE ANN § 2335.06. While treating physicians are not legally entitled to a reasonable fee beyond the nominal witness fee, it is customary in Ohio to reimburse non-party treating physicians for professional time spent testifying at a deposition or at a trial. The customary fee is between \$250-\$500 per deposition.

Although it is customary to pay testifying treating physicians, a treating physician does not have an enforceable entitlement to compensation. Ohio common law attempts to draw a line between treating physicians and expert physicians. *See Fisher v. Ford Motor Co.*, 178 F.R.D. 195 (N.D. Ohio 1998) (Carr, J.). A treating physician's testimony pertains solely to the facts noted in the medical record. The treating physician is not required to give any opinions, and thus, a treating physician is only entitled to the statutory witness fee. If a treating physician is asked to testify on expert issues, under Ohio Civil Rule 26, the expert is entitled to a reasonable fee for time spent responding to discovery.

C. Local Custom and Practice

When defense counsel wants to obtain the testimony of a non-party treating physician, counsel typically discusses the need to depose the treating physician with opposing counsel. Then, the attorney calls the physician's office to inform the physician that the physician's testimony is needed. Because ex parte communications are generally not permissible, the attorney should only discuss administrative matters with the physician's staff, and refrain from discussing the substantive case.

Physicians typically have an established fee schedule for depositions and trials. If the fee is reasonable, Ohio attorneys customarily pay the physician's requested fee. When the fee is unreasonable, the attorney can negotiate a reduction in fees or ask the court to intervene and reduce the fees. Finally, if a physician is uncooperative and refuses to voluntarily appear for a deposition or trial, counsel may subpoena the physician and only pay the physician the nominal witness fee described in Ohio Revised Code § 2335.06.