

NEW HAMPSHIRE

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I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

In New Hampshire, it "has long been the law . . . that a plaintiff is entitled to recover the reasonable value of medical expenses reasonably required and actually given as a result of an injury suffered." *Veilleux v. Noonan*, Nos. 06-C-207, 06-C-051, 2008 WL 6016234 (N.H. Super. Ct. Apr. 7, 2008); *see, e.g., Holyoke v. Grand Trunk Ry.*, 48 N.H. 541 (1869) ("plaintiff is entitled to receive, as damages, one compensation for all injuries, past and prospective, in consequence of the defendants' wrongful or negligent acts"). "Indeed, a plaintiff's recovery is not limited to the actual amount charged for medical services, but is instead measured by the reasonable value of such services." *Williamson v. Odyssey House, Inc.*, No. Civ. 99-561-JD, 2000 WL 1745101 * 1 (D.N.H. Nov. 3, 2000).

In New Hampshire, the "valuation of the reasonable value of services" is consistent with RESTATEMENT (SECOND) OF TORTS, § 911 cmt. h (1979), which states:

"When the plaintiff seeks to recover for expenditures made or liability incurred to third persons for services rendered, normally the amount recovered is the reasonable value of the services rather than the amount paid or charged. If, however, the injured person paid less than the exchange rate, he can recover no more than the amount paid, except when the low rate was intended as a gift to him."

Id.; *see also Cook v. Morin-Binder*, Nos. 05-C-238, 05-C-319, 2007 WL 6624298 (N.H. Super. Ct. Jan. 12, 2007).

If a court determines that expert testimony is necessary to establish medical expenses this can be accomplished through a treating physician's testimony; however, a "plaintiff need not call every physician whose fee he claims as damages." *Wieszcek v. Sepessy*, 355 A.2d 865, 867 (N.H. 1976).

2. Future Medical Expenses

New Hampshire courts are also empowered to award "the reasonable value of . . . future medical care." *Johnston v. Lynch*, 574 A.2d 934, 942 (N.H. 1990). For example, a jury is permitted to consider "the reasonable value of medical, hospital, nursing care, services and supplies reasonably required and actually given in the treatment of the plaintiff," as well as "the reasonable value of similar items that will probably be required and given in the future." *Bennett v. Lembo*, 761 A.2d 494, 496 (N.H. 2000).

B. Collateral Source Rule and Exceptions

In New Hampshire, the collateral source rule "provides that an award of damages may not be reduced by the amount of benefits a plaintiff receives from a collateral source." *Cyr v. J.I. Case Co.*, 652 A.2d 685, 688 (N.H. 1994). The theory underlying the collateral source rule is that "payments by sources other than the tortfeasor do not act as an excuse by him to avoid payment to the injured party." *Sica v. Britton*, No. 05-C-213, 2007 WL 1385661 (N.H. Super. Ct. Feb. 1, 2007) (citations omitted). Therefore, under the collateral source rule, "if a plaintiff is compensated in whole or part for his damages by some source independent of the tort-feasor, he is still permitted to make full recovery against [the tort-feasor]." *Moulton v. Groveton Papers Co.*, 323 A.2d 906, 909 (N.H. 1974).

As a practical matter, the rule that collateral benefits are not subtracted from the plaintiff's recovery has been applied to benefits paid under insurance policies or by a relief association, employment benefits, gratuitous payments, social legislation benefits (such as social security, welfare, and pensions), and benefits received under some retirement acts. *Id.* See also *Cook v. Morin-Binder*, Nos. 05-C-238, 05-C-319, 2007 WL 6624298 (N.H. Super. Ct. Jan. 12, 2007) (reasonable value of past medical services that can be recovered for medical expenses is the amount paid by plaintiff or his insurer under the collateral source rule). The purpose of the collateral source rule is to prevent a windfall to the defendant tortfeasor, who would otherwise profit from benefits provided by a third party to the injured party. See

Clausen v. Sea-3, Inc., 21 F.3d 1181, 1193-94 (1st Cir. 1994). Indeed, the collateral source rule "dictates that this windfall should go to the injured plaintiff, rather than the tortfeasor defendant." *Aumand v. Dartmouth Hitchcock Med. Ctr.*, 611 F. Supp. 2d 78, 91 (D.N.H. 2009).

The New Hampshire Supreme Court has not yet addressed whether Medicaid or Medicare payments qualify for inclusion under the collateral source rule. *Plummer v. Optima Health - Catholic Med. Ctr.*, No. 98-C-1010, 2000 WL 35730973 (N.H. Super. Ct. Nov. 13, 2000). However, several lower court decisions have concluded that such payments should be covered under the rule and thus excluded from evidence. *Id.*; see also *Gulluscio v. Hall*, No. 06-C-0045, 2007 WL 6647429 (N.H. Super. Ct. Oct. 01, 2007).

C. Treatment of Write-downs and Write-offs

The New Hampshire Supreme Court has not yet considered whether the amount billed for medical treatment and services, as opposed to the amounts paid to and received by the medical provider as full compensation and reimbursement, is the appropriate measure of the "reasonable value" of medical expenses. However, it is a touchstone principle of law that a plaintiff is "entitled to present evidence of the reasonable value of medical expenses reasonably required and actually given as a result of claimed injuries." *Cromeenes v. Pease*, No. 06-C-082, 2007 WL 5688535, *n.1 (N.H. Super. Ct. Oct. 18, 2007). Therefore, once a plaintiff has interjected medical expenses into the case, the law also permits "in appropriate circumstances as determined on a case by case basis, consideration of write offs by a plaintiff's health care provider." *Id.*; see also *Veilleux v. Noonan*, Nos. 06-C-207, 06-C-051, 2008 WL 6016234, *n.2 (N.H. Super. Ct. Apr. 7, 2008). Likewise, the court in *Williamson v. Odyssey House, Inc.*, No. Civ. 99-561-JD, 2000 WL 1745101 (D.N.H. Nov. 3, 2000), concluded that "[i]n light of New Hampshire's collateral source rule and the standard for the measure of damages for medical costs . . . the reasonable value of medical services that [plaintiff] has required and probably will require in the future is the proper measure of damages, regardless of the amount paid for those services by Medicaid." *Id.* at *1.

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

In New Hampshire the physician-patient privilege is governed by New Hampshire Rule of Evidence 503 and chapter 329, section 26 of the New Hampshire Revised Statutes. By creating the physician-patient privilege, "the legislature sought to protect patient health by encouraging patients to fully disclose all information about their injuries or ailments to medical providers, however personal or embarrassing, for the purpose of receiving complete treatment." *In re Grand Jury Subpoena for Med. Records of Payne*, 839 A.2d 837 (N.H. 2004); *see also Nelson v. Lewis*, 534 A.2d 720, 721-22 (N.H. 1987). The physician-patient privilege provides, in relevant part:

"[t]he confidential relations and communications between a physician or surgeon . . . and the patient of such physician or surgeon are placed on the same basis as those provided by law between attorney and client, and, except as otherwise provided by law, no such physician or surgeon shall be required to disclose such privileged communications. Confidential relations and communications between a patient and any person working under the supervision of a physician or surgeon that are customary and necessary for diagnosis and treatment are privileged to the same extent as though those relations or communications were with such supervising physician or surgeon."

N.H. Rev. Stat. § 329:26 (2008). Thus, "the boundaries of the privilege extend beyond communications and encompass the 'confidential relations' which exist between physician and patient," and, although these boundaries are not specified, the statute places the privilege on the same basis as that which exists by law between attorney and client. *State v. Elwell*, 567 A.2d 1002, 1006 (N.H. 1989) (reversed on other grounds). The New Hampshire Supreme Court has interpreted the statute to mean that communications between a physician and a patient, which include "medical reports or test results, generated by a physician as a consequence of the confidential relationship with his patient," are privileged. *Id.* However, the New Hampshire Supreme Court has ruled that the privilege has limitations. For instance, in *State v. LaRoche*, 442 A.2d 602 (N.H. 1982), the Court held that no privilege existed between defendant and emergency medical technicians ("EMT's") because "EMT's are not physicians or surgeons, and there was no evidence that the EMT's were working under the supervision of a physician or surgeon." *Id.* at 604.

Likewise, although the confidentiality of "relations and communications" between physicians and psychologists are to be "carefully guarded," the privilege is "not absolute." *State v. Kupchun*, 373 A.2d 1325, 1327 (N.H. 1977); *see also State v. Farrow*, 366 A.2d 1177 (N.H. 1976). The New Hampshire

Supreme Court has identified three instances in which the physician-patient privilege may be pierced. First, the privilege will not be maintained where a statute specifically requires disclosure of medical records. *In re Brenda H.*, 402 A.2d 169, 171-73 (1979) (reversed on other grounds); *see, e.g.*, N.H. Rev. Stat. § 141-C:17 (mandatory disclosure to state officials is required for communicable disease). Second, the privilege does not hold in circumstances where a sufficiently compelling countervailing consideration is identified. *In re Kathleen M.*, 493 A.2d 472, 476-77 (N.H. 1985). Third, where disclosure is "essential" under the specific circumstances of the case, the physician-patient privilege will not prevent disclosure. *Kupchun*, 373 A.2d at 1327; *see also In re Grand Jury Subpoena for Med. Records of Payne*, 839 A.2d at 843 ("To establish essential need, the party seeking the privileged records must prove both that the targeted information is unavailable from another source and that there is a compelling justification for its disclosure.").

The physician-patient privilege further states that the privilege "shall . . . not apply to the release of blood samples and the results of laboratory tests for blood alcohol content taken from a person who is under investigation for driving a motor vehicle while such person was under the influence of intoxicating liquors or controlled drugs." N.H. Rev. Stat. § 329:26 (2008). For example, in *State v. Nickerson*, 780 A.2d 1257 (N.H. 2001), the New Hampshire Supreme Court held that this exception to the physician-patient privilege permitted the State to request defendant's physician to provide the results from defendant's blood test and later introduce those results at trial, irrespective of whether defendant consented to request, where defendant was under investigation for driving a motor vehicle while under the influence of intoxicating liquors. *Id.* at 1258.

The physician-patient privilege may also be waived. *See State v. Thresher*, 442 A.2d 578, 582 (N.H. 1982). For instance, where "the privilege-holder has injected the privileged material into the case . . . then the privilege-holder must either waive the privilege as to that information or be prevented from using the privileged information to establish the elements of the case." *Desclos v. Southern N.H. Med. Ctr.*, 903 A.2d 952, 957-59 (N.H. 2006) (holding, in a medical negligence action where plaintiff impliedly waived privilege, that the trial court may compel discovery, but only those records necessary to

resolve plaintiff's claims). In addition, a child's privilege may be waived by his or her parents or a guardian ad litem; however, when a minor has a separate interest and "is mature enough to assert the privilege personally, that assertion may be given substantial weight." *In re Berg*, 886 A.2d 980, 988 (N.H. 2005).

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

It appears that the New Hampshire courts have examined the physician-patient privilege as it relates to the Health Insurance Portability and Accountability Act ("HIPAA") on only one occasion. In *In re Berg*, 886 A.2d 980 (N.H. 2005), the New Hampshire Supreme Court held that HIPAA "does not create an absolute right in the father to access his children's therapy records." *Id.* at 989. In reaching this conclusion, the Court noted, that as a general matter, "a parent, among others, must be treated as the minor's personal representative, so long as the parent, under applicable law, has the authority to act on behalf of the minor in making decisions related to health care." *Id.* The Court added, however, that under HIPAA a "health care provider may not disclose or provide access to protected health information about an unemancipated minor to a parent" if doing so is prohibited by New Hampshire law. *Id.*

C. Authorization of Ex Parte Physician Communication by Plaintiff & Courts

In *Nelson v. Lewis*, 534 A.2d 720 (N.H. 1987), the New Hampshire Supreme Court held that "a plaintiff who places her medical condition at issue in an action for medical negligence does not waive the physician-patient privilege so as to permit defendants to interview treating physicians ex parte." *Id.* at 723. The *Nelson* Court explained that although a patient alleging a medical negligence action partially waived the physician-patient privilege "to the extent necessary" to provide opposing party information "essential" to defend the action," the patient was nonetheless entitled to refuse to permit defendant to inquire privately of treating physician concerning patient's care and treatment, and such consultation could not be compelled by the court under any circumstances. *Id.* at 720-23.

III. Obtaining Testimony of Non-Party Treating Physicians

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

The New Hampshire courts generally accord a treating physician's testimony "substantial weight"

because a claimant's treating physician often has "great familiarity with [claimant's] condition. *Appeal of Morin*, 669 A.2d 207, 210 (N.H. 1995). Moreover, under New Hampshire law a plaintiff is not required to "disclose" or "report" to defendant "to the extent that plaintiffs' experts will testify as to matters as to which 'the source of the facts which form the basis for a treating physician's opinions derive from information learned during the actual treatment of the patient.'" *Razzaboni v. Halle*, No. 05-C-0475, 2006 WL 1506697 *7 (N.H. Super. Ct. May 16, 2006) (citations omitted). The aforementioned testimony includes such matters as "causation, diagnosis, prognosis, and extent of disability;" however, where an expert is "retained to provide testimony at trial, or to the extent that a treating physician's testimony will exceed matters reasonably flowing from treatment, plaintiffs are subject to [New Hampshire's] disclosure and reporting requirements." *Id.* In other words, "medical professionals may testify as lay witnesses when they confine their testimony to 'personal observations which any lay person would be capable of making.'" *State v. Martin*, 694 A.2d 999, 1001 (N.H. 1997). For example, in *Tufts v. Levy*, No. 01-C-138, 2004 WL 5622363 (N.H. Super. Ct. Aug. 31, 2004), the court determined that plaintiff had failed to properly disclose his treating physician as an expert pursuant to New Hampshire Superior Court Rule 35, and, therefore, the treating physician was allowed to testify as a fact witness but was denied the opportunity to testify as to any medical opinions. *Id.*; see also N.H. Rev. Stat. § 516:29-b (disclosure of expert testimony in civil cases).

Where testimony of a non-party treating physician is sought by a party other than the claimant, a "mere conclusory statement" that a treating physician "offers the best evidence" will be insufficient to show "essentiality," which is required to overcome the physician-client privilege. *In re Kathleen M.*, 493 A.2d at 477. However, the physician-patient privilege does not preclude prior medical and mental records compiled by examinee's treating physician from being used by a court-appointed psychiatrist in forming an opinion in an involuntary commitment proceeding. *In re Field*, 412 A.2d 1032, 1035 (N.H. 1980).

B. Witness Fee Requirements and Limits

"As a general rule, costs are 'allowable only when authorized by statute or court rule.'" *Grenier v. Barclay Square Comm'l Condominium Owners' Ass'n*, 834 A.2d 238 (N.H. 2003) (citations omitted).

New Hampshire Superior Court Rule 87(a) provides that the "[c]osts shall be allowed as of course to the prevailing party as provided by these rules, unless the Court otherwise directs." Rule 87(b) explains that a party seeking costs must first file an "itemized, verified bill of all costs requested" before the court will rule upon a motion for costs, and then an aggrieved party may appeal the order for costs "regardless of whether an appeal concerning the underlying judgment is sought." In addition, Rule 87(c) permits the court discretion to award the prevailing party "costs including, but not limited to, actual costs of expert witnesses, if the costs were reasonably necessary to the litigation."

When determining "actual costs" the court will generally allow expert witness costs that were "reasonably necessary to litigation." *Flanagan v. Prudhomme*, 644 A.2d 51, 63 (N.H. 1994). This does not include all fees paid to expert witnesses, but instead is limited to those charges directly related to a witness's appearance and testimony in court. *Cutter v. Town of Farmington*, 498 A.2d 316, 322 (N.H. 1985). For instance, the courts have awarded "costs for the pretrial expenses of an expert witness as long as those expenses directly related to the witness's appearance and testimony in court." *Martinez v. Nicholson*, 911 A.2d 30, 35 (N.H. 2006).