

MISSISSIPPI

Stephanie M. Rippee
WATKINS & EAGER PLLC
The Emporium Building
400 East Capitol Street
Jackson, Mississippi 39201
P.O. Box 650, Jackson, MS (39205)
Telephone: (601) 965-1991
Facsimile: (601) 965-1901
srippee@watkinseager.com

Ceejaye S. Peters
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ, PC
4268 I-55 North
Meadowbrook Office Park
Jackson, MS 39211
Post Office Box 14167 (39236)
Telephone: (601) 351-2400
Facsimile: (601) 351-2424
cpeters@bakerdonelson.com
www.bakerdonelson.com

I. MEDICAL EXPENSES

A. Requirements for Recovery of Medical Expenses

1. Past Medical Expenses

To recover past medical expenses from an accident or otherwise, a Plaintiff must show that the medical expenses incurred were both reasonable and necessary. *Haggerty v. Foster*, 838 So.2d 948, 956 (Miss. 2002); *Jackson v. Brumfield*, 458 So.2d 736, 737 (Miss. 1984). Miss. Code Ann. § 41-9-119 states, "Proof that medical, hospital, and doctor bills were paid or incurred because of any illness, disease, or injury shall be prima facie evidence that such bills so paid or incurred were necessary and reasonable."³⁹¹ Once the plaintiff introduces medical bills as evidence of expenses incurred, the burden shifts to the opposing party to show that the bills were not reasonable. *Purdon, et al. v. Locke, et al.*, 807 So.2d 373, 378 (Miss. 2002) (citing *Green v. Grant*, 641 So.2d 1203, 1209 (Miss. 1994)).

A medical bill which fails to indicate the type of treatment, the diagnosis, the extent of injury, or

³⁹¹ The Mississippi Supreme Court has held that medical bills must only be "incurred," not paid, before they can be introduced as evidence. *Purdon, et al. v. Locke, et al.*, 807 So.2d 373, 378-79 (Miss. 2001).

the reason for the treatment is insufficient. *Drumwright v. Drumwright*, 812 So.2d 1021, 1029 (Miss. 2001). In such circumstances, without expert medical testimony explaining the treatment, the Court cannot determine if the treatment rendered "was reasonably necessary or even related to the incident." *Id.* at 1030-31. The plaintiff must provide evidence linking the medical treatment to the injury that he or she claims to have suffered.

2. Future Medical Expenses

There must be some testimony or evidence to support an award for future damages. *Graves v. Graves*, 531 So.2d 817, 821 (Miss. 1988). While a plaintiff may testify as to his own pain and suffering and describe his physical injuries, he is "clearly incompetent to testify regarding his own medical prognosis and treatment." *Id.* at 822. Accordingly, expert testimony is often utilized to present the jury with the necessary future medical treatment and the estimated expenses. *See McClatchy Planting Co., et al. v. Harris*, 807 So.2d 1266, 1269 (Miss. 2001) (plaintiff offered testimony of plastic surgeon establishing that she would require additional expensive surgeries).

Under Mississippi law, "[d]amages cannot be based on mere speculation but must be proved to a reasonable certainty." *Courtney v. Glenn*, 782 So.2d 162, 166 (Miss.Ct.App. 2000). The plaintiff must prove his damages by a preponderance of the evidence. *TXG Intrastate Pipeline Co. v. Grossnickle*, 716 So.2d 991, 1016 (Miss. 1997). The Mississippi Court of Appeals recently affirmed the denial of future medical expenses because the plaintiff's evidence of the need for future medical treatment "only rose to the level of speculation, not to the level of reasonable certainty." *Potts v. Mississippi Dept. of Transp.*, 3 So.3d 810, 813 (Miss. Ct. App. 2009) (noting that plaintiff's expert never unequivocally stated that the accident accelerated plaintiff's need for a total knee replacement); *see also City of Jackson v. Spann*, 4 So.3d 1029, 1038-39 (Miss. 2009) (holding that the "mere guess" about the cost of surgery by plaintiff's expert who had not practiced surgery for eight or nine years was insufficient to support damage award).

B. Collateral Source Rule and Exceptions

"The collateral source rule in Mississippi provides that compensation or indemnity for the loss received by plaintiff from a collateral source, wholly independent of the wrongdoer, as from insurance, cannot be

set up by the [defendant] in mitigation or reduction of damages." *Burr v. Mississippi Baptist Med. Ctr.*, 909 So.2d 721, 728 (Miss. 2005) (quoting *Busick v. St. John*, 856 So.2d 304, 309 (Miss. 2003)). The rule applies only when the compensation is for the same injury for which damages are sought. *Geske v. Williamson*, 945 So.2d 429, 433 (Miss. Ct. App. 2006) (citing *Baugh v. Alexander*, 767 So.2d 269, 272 (Miss. Ct. App. 2000)) (admitting evidence of health insurance and workers' compensation benefits for a separate and distinct injury than the injuries at issue).

This rule applies to private insurance, Medicare, and Medicaid and has also been applied to a victim's rights fund which paid a portion of the decedent's funeral expenses. *Gatlin v. Methodist Medical Ctr.*, 772 So.2d 1023, 1031 (Miss. 2000). The Mississippi Supreme Court has held that there is no reason to treat Medicaid or Medicare benefits any differently than private insurance payments which are subject to the collateral source rule. *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1140 (Miss. 2002); *Brandon HMA, Inc. v. Bradshaw*, 809 So.2d 611, 618-20 (Miss. 2001). The collateral source rule applies to both gratuitous medical care and gifts received by the plaintiff. *Brandon HMA*, 809 So.2d at 618.

Mississippi law permits the introduction of evidence of payments typically barred by the collateral source rule if the evidence is introduced for a purpose other than to mitigate damages. *Geske v. Williamson*, 945 So.2d 429 (Miss. Ct. App. 2006) (citing *Burr*, 909 So.2d at 272). For example, Mississippi law permits the introduction of evidence of collateral source payments for the purpose of impeaching false or misleading testimony. *Robinson Property Group, L.P. v. Mitchell*, 7 So.3d 240, 245, 247 (Miss. 2009) (overruling *McCary v. Caperton*, 601 So.2d 866 (Miss. 1992) (which rejected an "impeachment" exception to the collateral source rule)).

C. Treatment of Write-downs and Write-offs

1. Private Insurance

The collateral source rule applies equally to expenses paid and expenses written off by medical providers. *Knox v. Ferrer, et al.*, 2008 WL 4446534 (S.D. Miss. Sept. 25, 2008) (citing *Brandon HMA*, 809 So.2d at 618; *Wal-Mart v. Frierson*, 818 So.2d at 1139-40; *Purdon v. Locke*, 807 So.2d 373, 378-79 (Miss. 2002)). In *Knox*, the defendants moved to exclude evidence of medical bills written off by the

plaintiff's medical providers as a result of negotiations with plaintiff's private insurer. *Id.* at *1. The defendants argued that Miss. Code Ann. § 11-1-60 (2002) defines "actual economic damages" as "objectively verifiable pecuniary damages arising from medical expenses and medical care" The defendants also referenced Miss. Code Ann. § 41-9-119 which states, "Proof that medical, hospital, and doctor bills were paid or incurred . . . shall be prima facie evidence that such bills . . . were necessary and reasonable." The defendants argued that medical expenses billed but never incurred by the plaintiff or a third-party payor do not constitute recoverable damages. *Id.* The Court held that the plaintiff's medical bills were "incurred" by him when he received the necessary treatment, and that a subsequent write-off of the expenses does not remove the amounts from the operation of the collateral source rule. *Id.* (citing *Purdon*, 807 So.2d at 378). The Court also held that under §11-1-60, the plaintiffs' bills were "objectively verifiable" by reference to the bills themselves, the treatment rendered and the reasonableness thereof" and that a subsequent write-off of the bills does not make them any less objectively verifiable. *Id.* at *2.

2. Medicare and Medicaid

The Mississippi Supreme Court has reached the same conclusion with regard to Medicare and Medicaid payments. *Wal-Mart Stores, Inc. v. Frierson*, 818 So.2d 1135, 1140 (Miss. 2002). The Court rejected defendant's argument that because the expenses not paid by Medicaid or Medicare were "written off" by the medical providers pursuant to Medicaid/Medicare regulations, evidence of the eradicated expenses should be inadmissible. *Id.* at 1138, 1140. *See also Brandon HMA*, 209 So.2d at 618 (even plaintiff's medical bills which exceed the amount paid by Medicaid are admissible).

II. EX PARTE COMMUNICATIONS WITH NON-PARTY TREATING PHYSICIANS

A. Scope of Physician-Patient Privilege and Waiver

Discovery is only allowed of relevant, non-privileged information. Miss. R. Civ. P. 26(b)(1). Certain medical information, such as communications between a patient and his medical providers, is privileged. Therefore, even if it is relevant, it is both non-discoverable and inadmissible. The scope of the physician-patient privilege and the conditions under which it could be waived were concepts

originally governed by statute. *See* Miss. Code Ann. § 13-1-21 (Rev. 2002). Effective January 1, 1986, Mississippi adopted formal Rules of Evidence, including Rule 503, governing this privilege and its waiver. There is currently a conflict in the case law as to whether the Rules of Evidence supercede prior evidentiary statutes such as Miss. Code Ann. § 13-1-21, or whether both the rule and the statute govern issues of privilege. *See Franklin Collection Service, Inc. v. Kyle*, 955 So.2d 284, 288 (Miss. 2007) (“Because Section 13-1-21 is an evidentiary statute, its provisions are subject to, and superseded by, provisions of the Mississippi Rules of Evidence.”). *But see Thornton v. Statcare, PLLC*, 287, 290 (Miss. 2009) (applying both the statute and the rule to privilege issue and citing *Kyle* as support). There is at least an argument that either or both can be applicable to any issue of privilege.

1. Miss. R. Evid. 503 and Waiver

The privilege created by Rule 503 is seemingly broader than the privilege created by statute. It allows a patient to refuse to disclose (and prevent others from disclosing): 1) knowledge derived by the treater by virtue of his professional relationship with the patient; and 2) confidential communications made for the purpose of diagnosis or treatment of his physical, mental or emotional condition. Miss. R. Evid. 503(b).

Knowledge derived by the treater has been held to include such things as test names and results. *Kyle*, 955 So.2d at 289. A communication is deemed confidential if it was not intended to be disclosed to a third person except in the context of facilitating treatment. The third persons to whom disclosures can be made without destroying confidentiality include not only the treaters themselves, but also other persons needed to facilitate the treatment or the communication such as family members. Miss. R. Evid. 503(a)(4); *Roman Catholic Diocese of Jackson v. Morrison*, 905 So.2d 1219, (Miss. 2005) (disclosure to Diocese of priests’ counseling for sexual molestation of children did not waive privilege). The privilege applies to communications with licensed physicians treating physical, mental or emotional conditions, as well as licensed or certified psychologists, and thus, it is more properly referred to as the “Physician and Psychotherapist – Patient Privilege.” Miss. R. Evid. 503(a)(1) and (2). The privilege also applies to

communications with any person a patient reasonably believes to be such a treater. *Id.* The privilege does not apply to communications with licensed social workers. *Touchstone v. Touchstone*, 682 So.2d 374, 376 (Miss. 1996).

The privilege belongs only to the patient. *Scott v. Flynt*, 704 So.2d 998, 1004-05 (Miss 1996). It can be claimed by a living patient, by a living patient's guardian or conservator, or by the personal representative of a deceased patient. Miss. R. Evid. 503(c). A treater may claim the privilege, but only on behalf of the patient. *Id.*

Miss. R. Evid 503(d) sets forth four specific instances when the privilege is held not to exist: 1) commitment proceedings; 2) court-ordered physical or mental examinations; 3) a breach of duty dispute between the physician/psychotherapist and the patient (i.e., a malpractice claim or a medical fee dispute); and 4) communications that a court, in its discretion, deems relevant to certain custody, visitation, adoption or termination actions. *Id.*

Because the privilege belongs to the patient, only the patient can waive it. Miss. R. Evid 503(c). The rule describes two specific actions by a patient that constitute waiver: 1) delivery of written notice or the filing of a claim against a person for professional services rendered (i.e., a malpractice claim); and 2) placing any aspect of his physical, mental or emotional condition at issue in his pleadings (such as by a request for damages). Miss. R. Evid. 503(e) and (f). Waiver of the privilege, however, is limited and conditional in both personal injury actions and medical malpractice actions. *Scott*, 704 So.2d at 1000-01, 1003. The party is deemed to have waived the privilege only to the extent he places his condition at issue, and thus, only information relevant to that specific condition is discoverable. Any aspect of his condition that is not placed at issue in his pleadings remains privileged. *Id.* Statements about non-medical issues, such as the cause of the accident that led to the condition at issue, also remain privileged. *Sessums v. McFall*, 551 So.2d 178 (Miss. 1987) (filing of suit for injuries sustained in motorcycle accident did not waive privilege as to statements made to physician about cause of accident).

2. Miss. Code Ann. § 13-1-21 and Waiver

The privilege created by the statute seems more narrow. It applies only to communications made

to certain treaters during their course of care of the patient. Miss Code Ann. § 13-1-21(1); *Kyle*, 955 So.2d at 289. The statute specifically enumerates a variety of treaters providing physical care: physicians, osteopaths, dentists, hospitals, nurses, pharmacists, podiatrists, optometrists, and chiropractors. Miss. Code Ann. § 13-1-21(1). No privilege is enumerated, however, for mental health professionals. *Id.* Further, the statute does not protect communications to persons reasonably believed to be treaters or communications to third parties, other than treaters, needed to facilitate treatment.

The statute provides that a living person and the personal representative or legal heirs of a deceased person may waive the privilege created by the statute. *Id.* The statute provides three specific instances in which the privilege will be deemed to be waived. First, waiver will be implied as to the release of medical information to health care personnel, the State Board of Health or local health departments to comply with certain public health regulations such as those pertaining to the reporting of communicable diseases. Second, delivery of written notice of a claim or commencement of an action against a treater for professional services rendered constitutes waiver of the privilege as to all medical information relevant to the allegations. Miss. Code Ann. § 13-1-21(4). Lastly, waiver – except as to information identifying the plaintiff – is implied in any disciplinary action commenced against a treater. Miss. Code Ann. § 13-1-21(5). Again, however, the waiver is limited to only the condition placed at issue. *Scott*, 704 So.2d at 1003.

The statute, although evidentiary in nature, expressly authorizes both criminal and civil liability for its violation. Miss. Code Ann. § 13-1-21(5). Rule 503, on the other hand, does not expressly do so, although the Mississippi Court of Appeals has held at least once that the rule also creates a cause of action for civil liability. *See Thornton v. Statcare, PLLC*, 988 So.2d 387, 390 (Miss. 2009) (citing *Kyle*, 955 So.2d 284 (Miss 2007)).

3. Waiver or Abrogation of Privilege for Public Policy Reasons

Although important, the physician-patient privilege is not absolute. Courts interpreting both the rule and the statute have held that the privilege must yield when it blocks the search for the truth and the administration of justice. *Baptist Memorial Hospital – Union County v. Johnson*, 754 So.2d 1165 (Miss.

2000) (patient's identity must be disclosed to parent plaintiffs where patient was given wrong infant to breast feed); *State v. Baptist Memorial Hospital – Golden Triangle*, 726 So.2d 554 (Miss. 1998) (identities of all patients treated at hospital for lacerations on date of stabbing must be disclosed).

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

The Mississippi Supreme Court has made little comment about the waiver of the privilege and HIPAA except one small mention of the issue in a collection action. The patient/defendant filed a counterclaim against a collection agency/plaintiff for violating the privilege by attaching medical bills to the complaint. *Kyle*, 955 So.2d. 284. In a footnote, the majority noted that HIPAA guidelines “have no relevance to the state law [privilege] claims.” *Id.* at 290, n.7. The dissent noted, however, that, “while HIPAA does not control, it provides highly persuasive evidence that a patient does not waive her medical privilege simply by failing to pay a bill.” *Kyle*, 955 So.2d at 298.

C. Authorization of Ex Parte Physician Communication by Plaintiff

Miss. R. Evid. 503(f), which recognizes the conditional waiver made when a party places his physical, mental or emotional condition at issue, expressly states: “This exception does not authorize *ex parte* contact by the opposing party.” *Id.* This sentence, however, has created confusion as to whether *ex parte* contacts are actually *prohibited* under Mississippi law. Lack of authorization is not the equivalent of an actual prohibition. Even without an express prohibition in the rule, the Mississippi Supreme Court has stretched Rule 503 to effectively prohibit *ex parte* contacts. *Scott*, 704 So.2d at 1007. In *Scott*, the Supreme Court noted that Rule 503 expressly declares the patient as the holder of the privilege and the comment to the rule expressly provides that only the patient can waive the privilege. *Id.* at 1004-05; Miss R. Evid. 503(c) and comment. The Court reasoned that to allow a physician to speak *ex parte* with opposing counsel would place the physician, rather than the patient, in control of determining what information is or is not privileged and thus is or is not able to be disclosed. *Id.* at 1005.

To protect the patient's privilege, the Court held it necessary for a patient to be given notice of any *ex parte* contacts with his physicians and the right to prevent them. *Id.* at 1006. The Court further held that even though the privilege may be conditionally waived (e.g., by a request for damages in a

lawsuit), the relevant medical information will only be admissible if it is acquired through: 1) a voluntary and consensual disclosure by the patient; or 2) the formal discovery mechanisms provided in the Rules of Civil Procedure. *Id.* at 1007. *Ex parte* communications are not a formal discovery mechanism. By erecting this evidentiary barrier to evidence gathered through *ex parte* communications, the Court has effectively used an evidentiary rule to prohibit *ex parte* contacts even though they occur outside a courtroom. *Scott*, 704 So.2d at 1006-1007 (reaffirmed in *Johnson v. Mem. Hosp. at Gulfport*, 732 So.2d 864 (Miss. 1998)). *But see, Griffin v. McKenney*, 877 So.2d 425, 442 (Miss. Ct. App. 2003) (holding that the *Scott* opinion does not prohibit *ex parte* communications but simply makes them inadmissible.) The evidentiary barrier, however, applies only to *ex parte* contacts without prior patient consent. *Scott*, 804 So.2d at 1007. Thus, a patient himself can authorize such contacts, but this rarely, if ever, happens.

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

Court authorization of *ex parte* communication was a common practice prior to the holding in *Scott*. Per the *Scott* opinion, however, the highest court in the state now either strongly discourages or actually prohibits *ex parte* communications. Thus, Mississippi courts no longer authorize such contacts.

E. Local Practice Pointers

Regardless of any uncertainty surrounding the precise mandate of *Scott*, it is simply unwise in Mississippi to have any type of *ex parte* communication with a plaintiff's treaters. Moreover, patients almost never consent to allow *ex parte* contacts.

III. OBTAINING TESTIMONY OF NON-PARTY TREATING PHYSICIANS

A. Requirements to Obtain Testimony of Non-party Treating Physicians

A Mississippi litigant wishing to obtain testimony from a treater who resides in Mississippi must simply notice the deposition and subpoena that treater, or subpoena the treater to trial. Miss. R. Civ. P. 30(b) and 45(a). The treater can be compelled to attend a deposition in the county where he resides, where he is employed, or where he transacts business, or at another convenient place fixed by court order. Miss. R. Civ. P. 45(b). The court "shall quash or modify the subpoena if it (i) fails to allow reasonable time for compliance, (ii) requires disclosure of privileged or other protected matter and no exception or

waiver applies, (iii) designates an improper place for examination, or (iv) subjects a person to undue burden or expense." Miss. R. Civ. Proc. 45(d)(1)(A).

A Mississippi court has no authority to issue process to another state requiring a person in that state to appear to testify in the State of Mississippi. *Thorson v. State*, 653 So.2d 876, 892 (Miss. 1994). A Mississippi litigant wishing to obtain testimony from a non-resident, non-party treatee likely can only do so by complying with the rules of that other state for securing deposition testimony at a location in that other state. In Mississippi, however, the deposition of a medical doctor may be used for any purpose at trial. Miss. R. Civ. P. 32(a)(3)(E). Thus, if deposition testimony is secured from an out of state, non-party treatee and the opposing party participated, the deposition testimony can be used at trial, in accordance with the rules of evidence, as if the witness were present and testifying at trial. *Id.*

B. Witness Fee Requirements and Limits

A subpoena must be served upon a witness personally, and at the time of service, the serving party must tender to the non-party witness the fee for one day's attendance plus mileage. Miss. R. Civ. P. 45(c)(1). The fees are set by statute and are currently \$1.50 per day and \$.05 per mile, plus tolls, for travel to the courthouse or presumably the chosen deposition location.

C. Local Custom and Practice

Rather than simply serving a non-party treating physician with a deposition notice and subpoena, as a matter of local custom, most attorneys first call the treatee's office to notify him that testimony is needed and to arrange the deposition to suit the treatee's schedule. The same is true for trial testimony to the extent the attorney has any control over the trial schedule. In light of the prohibition against *ex parte* contacts, it is prudent to make all such scheduling arrangements by contacts with the treatee's staff, not with the treatee himself. Practically speaking, in order to secure the cooperation of a treatee in providing testimony, a fee more reasonable than the statutory fee must be paid. There is no case law in Mississippi defining a "reasonable" fee for a treatee. The local custom and practice is simply to pay the treatee his requested hourly rate for time spent giving testimony, regardless of how unreasonable it seems.