
ALABAMA ASSOCIATION FOR JUSTICE
JOURNAL
Volume 40 • Number 1
Fall 2019
2019-2020 ALAJ PRESIDENT
JOSHUA P. HAYES
and FAMILY

TIPS *from the Trenches*

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WHAT IS PLAINTIFF'S BURDEN OF PROOF TO RECOVER FUTURE MEDICAL EXPENSES?

Alabama Law Regarding Proof of Future Medical Expenses

Alabama law is clear that "[i]n an action for personal injuries" ... "the plaintiff may recover reasonable and necessary medical expenses incurred as a result of the injuries sustained." Jenelle Mims Marsh, *Alabama Law of Damages*, § 36:3 (6th ed. Feb. 2019 update) (listing Alabama decisions). "In estimating the damages to a personal-injury plaintiff, the jury may consider the costs of future medical expenses if the injury is permanent, irremediable, or will require future treatment or nursing." *Id.*

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These vintage rules are settled. In *Fleming v. Knowles*, 272 Ala. 271, 130 So. 2d 326 (1961), the Court stated:

> When the injury is to the person, and the wrong which causes it is not continuous in its nature, then there can be but one action for its redress, no matter how permanent or lasting the disability, pain or suffering may be. Hence, in such action, the party injured may recover in one and the same suit compensation for the disabling effects of the injury, whether past or prospective. In estimating the damages, the jury may consider the expenses of the cure; and if the injury is permanent or irremediable, or will require future treatment or nursing, the proper costs of this may be added....

Id. 272 Ala. at 274, 130 So. 2d at 328 (citations omitted).

Alabama Pattern Jury Instruction-Civil No. 11.15 Personal Injury–Medical Expenses [PL], states the *current* rule:

> (Name of plaintiff) says that (name of defendant)'s conduct caused (him/her) expenses for medical care, treatment, and services.
>
> **The measure of damages for medical expenses is all reasonable expenses for medical care, treatment, and services caused by (name of defendant)'s conduct, (and the amount of reasonable expenses for medical care, treatment and services that (name of plaintiff) is reasonably certain to need in the future.)**
>
> You must decide if the treatment was reasonably necessary, that the expenses for it were reasonable in amount, and that the need for the treatment was caused by (name of defendant)'s conduct.

* * *

Id. According to this "plain language" charge, all a plaintiff must prove is "the amount of reasonable expenses" "for medical care, treatment and services" that [he] is reasonably certain to need in the future." *Id.* Ordinarily, of course, this evidence is provided through an appropriately qualified physician who expresses opinions within a reasonable degree of medical certainty.

In *Zell v. Umphrey*, 250 Ala. 107, 34 So. 2d 472 (1948), the Court held expert testimony sufficient in affirming a judgment for the plaintiff in an action for damages arising from an automobile accident. There, an expert oral surgeon testified over objection that it was "*possible*" that plaintiff's jaw bone was diseased and that there "*could be*" a loss of a part of the jaw such that the surgeon "firmly believed" *there would be trouble in the future, that it could not say how much, that*

only time would tell, but that he was positive that the plaintiff would start having trouble in the jaw. The Court found this sufficient evidence to meet the test of reasonable certainty of need for future care.

In *Elba Wood Products, Inc. v. Brackin*, 356 So. 2d 119 (Ala. 1978), the Court affirmed a judgment on a jury verdict for a log truck driver who injured his leg when a log fell from his truck while offloading at a wood yard. After first reiterating that "[f]uture medical expenses are a proper element of damages in a personal injury action," *id.* at 126, the Court *found plaintiff's own testimony* "a sufficient basis upon which to award as damages such [future medical] expenses as being necessary and reasonable" where the plaintiff testified that his artificial leg was wearing out. *Id.*

In *Owens-Corning Fiberglass Corp. v. James*, 646 So. 2d 669 (Ala. 1994), the Court affirmed multiple judgments entered upon a jury verdict for retired steel workers who each had contracted asbestosis upon finding the trial court properly exercised its discretion in ruling on the admissibility of expert testimony of future medical expenses when their physician testified he examined the plaintiffs and expressed opinions of a range of costs of future physician visits and uses of oxygen breathing apparatus. *Id.* at 671-72.

In *Dempsey v. Phelps*, 700 So. 2d 1340 (Ala. 1997), the Court affirmed a judgment entered upon a jury verdict in a medical negligence case where future medical care was at issue. The Court found plaintiff's expert's testimony about future medical needs sufficient:

> Dr. Dempsey next contends that the trial court erred in submitting to the jury a charge regarding future damages, as well as a charge stating that the child's preexisting condition did not excuse negligence or wantonness on Dr. Dempsey's part. However, the Phelpses submitted expert testimony indicating that the child could later need an artificial foot for lower leg because there is now "nothing on the inner side" of his foot, and that, therefore, **his entire foot might have to be amputated. The trial court did not err in charging the jury regarding future damages.**

Id. at 1347-48 (emphasis added).

In *Phillips v. Tays*, 555 So. 2d 1096 (Ala. Civ. App. 1989), the Court of Civil Appeals reversed a judgment entered on a defense verdict upon concluding the trial court exceeded its discretion when it excluded testimony of a treating physician about future medical care and then charged the jury that they could not award any damages for future medical costs:

The pertinent part of the doctor's deposition excluded by the trial court is as follows:

> "A. Two things were done further in this visit. One, an impairment rating and two, in the other order first – in the reverse order in which I described them, to the discussion with him about corrective surgery. It's a judgment call. In a matter of settlement it is indicated to take into account surgery for this, such as cutting the extensor tendon to the third toe and perhaps the joint covering in an attempt to bring it downward.
>
> Perhaps a syndactyly, that is, surgically joining the third toe perhaps with the second in the proper weight-bearing position so that by joining them permanently, this second toe might hold the third in better weight-bearing alignment. These procedures mentioned are ones that can be done in an attempt to correct this. I did not press the matter. I gave him the information for his consideration.
>
> "I did not press a decision on the surgery for a couple of reasons. One is that although he had symptoms such as wanting to take his shoe off when standing, for instance, at work some period of time. That's a pertinent symptom regarding this complaint.
>
> "The other is the fact that this surgery is difficult to do effectively so it fully corrects the changes. Therefore, an experienced surgeon will recommend these only when the patient feels he must and wants to have something done about it.
>
> "The third, urgent, reason for waiting in his case was that he's undergone a long period of treatment here and at the University of Alabama, Birmingham with antibiotics for a staph infection of a cyst; evidently a pilonidal cyst. And so we know the skin is heavily colonized by staph and he would be at greater risk than normal for a postop infection."

After the exclusion of this testimony, the trial court then charged the jury that they could not award any damages for any future doctor, hospital or medical expenses since there was no evidence presented of any future expenses to be incurred.

> The excluded part of the doctor's deposition was relevant and had probative value with respect to future pain, future medical expenses, and the extent and permanency of the injury. Future medical expenses are a proper element of damages in a personal injury action. *Elba Wood Products, Inc. v. Brackin*, 356 So.2d 119 (Ala.1978).
>
> Accordingly, we find that the trial court erred in excluding the doctor's testimony pertaining to the necessity of future surgery to correct the permanently injured foot, and we reverse for a new trial as to Phillips.

Id. at 1097 (emphasis added).

In *Posey v. McCray*, 594 So. 2d 152 (Ala. Civ. App. 1992), the Court of Civil Appeals reversed a trial court's denial of a motion for a new trial where the plaintiffs contended the jury's verdict inadequately compensated them for their pain and suffering and past and future medical expenses incurred in an automobile collision. The only testimony about future medical expenses came from one of the plaintiffs, Mrs. Posey, who suffered a scar on her forehead and explained that a plastic surgeon indicated it would cost $3,200 to correct the scar. Reversing and remanding with instructions to afford the plaintiffs a new trial, the Court of Civil Appeals stated "[w]e find the damages awarded to [plaintiffs] to be inadequate. The evidence concerning the amount of past and future medical expenses was uncontroverted ... the jury's award should have included a sum in excess of the compensatory damages." *Id.* at 154.

Conclusion

Future medical expenses are recoverable upon proof of the reasonable expenses for medical care, treatment, and services reasonably certain to be needed in the future.