

Jury Instructions and Statute of Limitations with Chiropractic Malpractice

The Wisconsin Court of Appeals decision of Arnez, (citation needed) clarified which statute of limitations is applicable to malpractice claims brought against chiropractors. A statute of limitations is a period of time stated in the statutes in which a party may file a lawsuit or be forever barred from pursuing a claim. The Court determined that parties filing malpractice claims against chiropractors are limited by the shorter statute of limitations similar to that found in medical malpractice claims.

The Court had to determine whether Wisconsin Statutes §893.54 or §893.55 applied to chiropractic malpractice claims. Section 893.54 requires that an action for personal injury be filed within three (3) years from the date of the **negligent act**. In contrast, §893.55 requires that malpractice actions arising from treatment by a “health care provider” be commenced three (3) years from the **date of injury** or one (1) year from the date the injury is **discovered**, but no more the five (5) years from the day of the negligent act.

In reaching its decision, the Court had to determine whether chiropractors are “health care providers” under the provisions of §893.55. The Court concluded that the term “health care provider” applies to individuals who are (1) involved in the diagnosis, treatment, or care of a patient and (2) licensed by a state examining board to provide such care. Given this definition, the Court concluded that chiropractors are “health care providers”. **Consequently, malpractice claims brought against chiropractors must be brought within the shorter statute of limitations provided under §893.55.**

The jury instructions in a chiropractic malpractice case were most recently revised in 1998 following the Supreme Court decision in Kerkman v. Hintz. The applicable Jury Instructions are numbers 1023.8 and 1023.9. Those Jury Instructions are listed below:

(J.I. 1023.8) PROFESSIONAL NEGLIGENCE: CHIROPRACTOR — TREATMENT

In providing chiropractic care to (plaintiff), (chiropractor) was required to use the degree of care, skill, and judgment which reasonable chiropractors would exercise in the like or similar circumstances, having due regard for the state of chiropractic knowledge at the time (plaintiff) was treated. A chiropractor who fails to conform to this standard is negligent. The burden is on (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor is not negligent, however, for failing to use the highest degree of care, skill, and judgment or solely because a bad result may have followed (his) (her) care and treatment. The standard you must apply in determining if (chiropractor) was negligent is whether (chiropractor)

failed to use the degree of care, skill, and judgment which reasonable chiropractors would exercise given the state of chiropractic knowledge at the time of the treatment in issue.

If you find from the evidence that more than one method of chiropractic treatment for (plaintiff)'s condition was recognized as reasonable given the state of chiropractic knowledge at that time, (chiropractor) was at liberty to select any of the recognized methods. (Chiropractor) was not negligent because (he) (she) chose to use one of these recognized treatment methods rather than another recognized method if (he) (she) use reasonable care, skill, and judgment in administering the method.

You have heard testimony during this trial from witnesses who have testified as experts. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by the testimony of experts. You, therefore, may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

[The cause question asks whether there was a causal connection between negligence on the part of (chiropractor) and (plaintiff)'s (injury) (condition). A person's negligence is a cause of a plaintiff's (injury) (condition) if the negligence was a substantial factor in producing the present condition of the plaintiff's health. This question does not ask about "the cause" but rather "a cause". The reason for this is that there can be more than one cause of (an injury) (a condition). The negligence of one (or more) person(s) can cause (an injury) (a condition), or (an injury) (a condition) can be the result of the natural progression of the (injury) (condition). In addition, (an injury) (a condition) can be caused jointly by a person's negligence and the natural progression of the (injury) (condition).]

[If you conclude from the evidence that the present condition of (plaintiff)'s health was caused jointly by (chiropractor)'s negligence and the natural progression of (plaintiff)'s (injury) (disease), you should find that (chiropractor)'s negligence was a cause of the (plaintiff)'s present condition of health.]

[The evidence indicates without dispute that when (plaintiff) retained the services of (chiropractor) and placed (himself) (herself) under (chiropractor)'s care, (plaintiff) was suffering from some (disability resulting from injuries sustained in an accident) (illness or disease). (Plaintiff)'s then physical condition cannot be regarded by you in any way as having been caused or contributed to by any negligence on the part of (chiropractor). This question asks you to determine whether the condition of (plaintiff)'s health, as it was when (plaintiff) placed (himself) (herself) under (chiropractor)'s care, has been aggravated or further impaired as a natural result of the negligence of (chiropractor)'s treatment.]

(J.I. 1023.9) PROFESSIONAL NEGLIGENCE: CHIROPRACTOR — DETERMINING TREATABILITY BY CHIROPRACTIC MEANS

A chiropractor is required to use the degree of care, skill, and judgment which is exercised by a reasonable chiropractor under the like or similar circumstances. A chiropractor who fails to conform to this standard is negligent. The burden is on the (plaintiff) to prove that (chiropractor) was negligent.

A chiropractor may only treat a patient within the scope of chiropractic knowledge and training. If the patient has a problem which is treatable through chiropractic means, the chiropractor may provide chiropractic treatment to the patient. However, the chiropractor may not provide chiropractic treatment when a reasonable chiropractor would be aware that the patient's

condition will not be responsive to chiropractic treatment. A chiropractor's decision to treat or to stop treatment must be tested according to chiropractic standards.

If the patient's condition is outside the scope of chiropractic treatment, a chiropractor must inform the patient that the condition presented is not treatable through chiropractic means. The chiropractor does not have the duty to refer the patient to a medical doctor.

Expert witnesses have testified concerning the standard of care applicable to chiropractors. The reason for this is because the degree of care, skill, and judgment which a reasonable chiropractor would exercise is not a matter within the common knowledge of laypersons. This standard is within the special knowledge of experts and can only be established by testimony of experts. Therefore, you may not speculate or guess what the standard of care, skill, and judgment is in deciding this case but rather must attempt to determine it from the expert testimony that you heard during this trial.

Hopefully, the chiropractors reading this newsletter will never find themselves in the situation where they actually hear these words spoken in the presence of a jury. Nevertheless, we believe that any Wisconsin chiropractor should have a good understanding of the accepted "standard of care" developed through these Jury Instructions. It would be wise for any chiropractor to "save" a copy of these Jury Instructions and review them periodically. We plan to further explore the "standard of care" concerns in future issues of this newsletter.

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