

1730 DAMAGES: DUTY TO MITIGATE: PHYSICAL INJURIES

A person who has been injured must use ordinary care to mitigate or lessen (his) (her) damages. This duty to mitigate damages requires an injured person to use ordinary care to seek medical (and surgical) treatment and to submit to and undergo recommended medical (or surgical) treatment within a reasonable time to avoid or minimize any damage from physical injuries. "Ordinary care" is the degree of care usually exercised by a person of ordinary intelligence and prudence under the same or similar circumstances.

An injured person is only required to submit to those medical (or surgical) treatments to which a reasonable person would have submitted. [A person is not required to undergo treatment if it will not improve (his) (her) condition.] [Also, a person is not required to undergo treatment if treatment is unreasonably dangerous or is not reasonably within his or her means.]

In determining damages, you should keep in mind this duty of (plaintiff) to use ordinary care to mitigate damages. If you find that (plaintiff) did not do so, you should not include in your answer to this damage question any amount for consequences of the injury which reasonably could have been avoided.

The burden of proof on this issue is on (defendant) to satisfy you to a reasonable certainty, by the greater weight of credible evidence, that (plaintiff) did not use ordinary care in mitigating damages.

COMMENT

The instruction and comment were originally published in 1978 and revised in 1988 and 2011. The comment was updated in 1980, 1988, and 2011. This instruction was revised in 2002 to conform the language

regarding the burden of proof to the Committee's 2002 revisions to Wis. JI-Civil 200 and 205, the instructions on the civil burdens of proof. See Wis. JI-Civil 200, Comment.

This instruction is taken from Lobermeier v. General Tel. Co. of Wisconsin, 119 Wis.2d 129, 349 N.W.2d 466 (1984); Loser v. Libal, 269 Wis. 418, 424, 69 N.W.2d 463, 465 (1955). See also Collova v. Mutual Serv. Casualty Ins. Co., 8 Wis.2d 535, 539, 99 N.W.2d 740, 743 (1958); Hargrove v. Peterson, 65 Wis.2d 118, 123, 221 N.W.2d 875 (1974). The general rule and exceptions are discussed in two annotations: "Duty of injured person to submit to surgery to minimize tort damages," 62 A.L.R.3d 9 (1975); "Duty of injured person to submit to nonsurgical medical treatment to minimize tort damages," 62 A.L.R.3d 70 (1975).

Affirmative Defense. Failure to mitigate damages is an affirmative defense which must be raised by answer. Lobermeier v. General Tel. Co. of Wisconsin, *supra* at 148. Peeples v. Sargent, 77 Wis.2d 612, 631, 253 N.W.2d 459 (1977). If it is not raised, it is deemed waived. When properly raised, the burden of proving failure to mitigate is upon the party asserting it. Kuhlman, Inc. v. G. Heileman Brewery Co., 83 Wis.2d 749, 752, 266 N.W.2d 382 (1978); Howard v. State Farm Mut. Auto Liab. Co., 70 Wis.2d 985, 236 N.W.2d 643 (1975).

Reasonable Efforts to Mitigate. There is no need to instruct on the duty of a party to mitigate damages where the issue as to the reasonableness of the party's course of action was not raised at trial. Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 607, 182 N.W.2d 448 (1971).

It is a matter of fact to be determined by the jury whether a reasonable person under the circumstances should have undergone medical treatment. Lobermeier v. General Tel. Co. of Wisconsin, *supra* at 143.

In Hargrove v. Peterson, *supra* at 123, the plaintiff contended that the trial judge erred in giving a similar instruction on duty to mitigate, in conjunction with the standard instruction on the duty of the jury not to speculate (Wis JI-Civil 1740). The court rejected the argument, noting the precedent in Loser v. Libal, *supra*, that applied the duty to mitigate to elective surgery in the future. The court specifically declared that the duty to mitigate instruction was appropriate where the situation presented involves future surgery or future medical treatment. Hargrove, *supra* at 126.

The court in Hargrove, *supra*, further stated that in the case of future medical treatment "the standard as to reasonableness involved is the adult standard as to what is reasonable in the acceptance or rejection of elective surgery to mitigate damages," 65 Wis.2d at 126. The adult standard applies even where the injured party is a minor.

The proper period for which damages are allowed is only for the length of time reasonably required to effect a cure. Lobermeier v. General Tel. Co. of Wisconsin, *supra* at 149.

Duty to Mitigate by Retraining. It is for the jury to determine whether the plaintiff should have sought vocational retraining as a part of the plaintiff's duty to mitigate damages. Garceau v. Bunnell, 148 Wis.2d 146, 434 N.W.2d 794 (Ct. App. 1988). In Garceau, the court said the trial court's instruction erroneously placed on the plaintiff a duty to seek and obtain vocational retraining as a matter of law.

For the duty to mitigate losses from negligent acts or breach of contract, see Wis JI-Civil 1731.