Randy Hackney (00:00):

I've been asked to present a case study about a case that was presented to me relative to a chiropractor who was in the prime of his career, excellent reputation, good background, good training, good experience, had been practicing for over 15 years. And then all of the sudden, out of the blue, he receives a notice of intent and that a lawsuit. It came from a 36 year old female who was a patient of his for about six months. She had a master's degree, she was the sole breadwinner for the family, and otherwise a normally healthy individual. He had been treating her for back aches, neck aches, back spasms, and headaches for about six months.

Randy Hackney (00:45):

And then one day in June, he is treating her with the same modalities, same care and treatment that he had been in the past for her same complaints. And she has an episode in the office where she is a little bit dizzy after the treatment. He tends to her, she seems to be okay, it appears to be just an orthostatic situation. After a few minutes, he lets her drive home. The next day, she presents to the hospital and they diagnose a bilateral vertebral artery dissection. And they say in the medical records that it was as a result of the chiropractic treatment. Specifically in the medical records itself, the emergency physician stated that, "After returning home, she had persistent dizziness and vomiting, a sudden spontaneous severe pain and vomiting while at rest." The neurologist who was called in stated, "She presented to the emergency department with severe left sided posterior neck pain, had a headache with associated dizziness that started immediately after having a high velocity, low amplitude, manual manipulation in the cervical spine at her chiropractor's office."

Randy Hackney (02:11):

They both attributed this directly to the chiropractic care and treatment. This became unfortunate because that diagnosis and that record carried through all of the subsequent medical records for this particular patient. So now we have allegations against this chiropractor, who as I've said, had no prior problems indicating that this patient was no longer able to work, she was no longer able to take care of the household, that she had a stroke, that she had cognitive disability, that she had anxiety, stress, depression, that she had an inability to focus. And that basically her life had been turned upside down as a result of improper chiropractic training.

Randy Hackney (03:00):

That was the case, those were the allegations. Now, if that wasn't bad enough, we had a couple of additional hurdles that we had to overcome. The first being that there was this temporal relationship between the treatment that occurred on a Friday and this artery dissection which occurred the following day on a Saturday, with the emergency department and the neurologist both attributing the dissection to the chiropractic treatment. We also had an additional hurdle in that the doctor's medical records, he was just converting over from a written record to an electronic medical record. And in that process, things were not as tight and were not as good and were not as conformed as they should be. His records had some errors in them, his record had some incomplete information in them, some of the things were dropped. There were some carry throughs, one of the most significant ones was in every visit where she visited with him for over six months, it stated that she had acute pain. And this was a carry over that he apparently did not know how to take care of in the medical records.

Randy Hackney (04:16):

Also, we did not have an informed consent form in the chart itself. There was, according to my doctor, an informed consent discussion that took place, but due to the fact that it was now an electronic as opposed to written chart, in the past he would always have a written informed consent form. He did not have that in this particular situation. Therefore, one of the allegations which was a lack of informed consent was difficult to defend because we did not have a written consent. The allegations, the specific

allegations against the doctor were that A, that he improperly performed the chiropractic manipulative therapy on this particular patient, specifically they stated he did it with too much force, and he did it with a rotational component which should not be included. Secondly, that there was no pretreatment diagnostic testing that was done for these acute problems. The acute problems they took right out of the medical records, and they were saying that what needed to be done were x-rays, some additional testing, maybe some referrals, things of that nature, which were never done. Third, as indicated, that this was a lack of informed consent situation. And fourth, that this really wasn't a proper patient to be providing this type of treatment to.
Randy Hackney (05:50):

The plaintiffs had two experts. They had a chiropractic expert, a gentleman that is well known I think to a lot of the defense attorneys. He is very opinionated, he is often of the opinion that unless the chiropractor's doing things exactly the same way that he would do them, there must be a mistake. And he often makes comments during depositions that chiropractors make big decisions, they have big consequences. That's what he was saying in this particular case, is that the decision to go forward and to do the chiropractic manipulative therapy, and to do it improperly on this particular patient, was a mistake that led to disastrous results, namely this dissection, which led to a stroke, which led to all of these alleged disabilities.
Randy Hackney (06:45):

They also had a neurologist, and this is also a gentleman who's fairly well known to the defense community. Somebody who has studied and written extensively on the medical and temporal relationship between chiropractic treatment and dissections and strokes. He obviously, if you read some of his writings, you read some of his past depositions, he has a bias against chiropractic treatment. And he has written extensively on how chiropractors cause a tremendous amount of problems, and he believed that in this particular case that this is what occurred.
Randy Hackney (07:29):

So those were the allegations that we had. We had the hurdles that we talked about. And the damages that the plaintiff was alleging were as follows. For the loss of earning capacity, because as I indicated she was the main breadwinner for the family, she had a master's degree. For the loss of earnings and the loss of earning capacity, plus the household services that needed to be replaced. They were claiming 2.225 million dollars. In addition to that, for those non economic damages, pain, suffering, loss of consortium, those types of things, they were claiming an additional two million dollars. And they also had a $66,000 medical lien for the care and treatment that they say was caused by the chiropractic treatment. So all told we were in excess of four million dollars. In Michigan what was ultimately could be collected because of a cap on non economic damages would've been somewhere between three, three and a half million dollars.
Randy Hackney (08:35):

The problem was this was in great excess to the doctor's policy limits. It was much more than he had. And he was very concerned about his own personal financial wellbeing, his ability to continue to practice, and the potential for bankruptcy. So with that set up, NCMIC, they noted that this was a severe, significant case. And when they assigned it to the office, they said, "Look it, we need to go after this case aggressively. We need to do whatever is necessary to construct the best defense possible." They indicated you can get whatever experts you need to look at this case. You could do whatever background information, background investigation you need to do, but we need to do what we can to try to protect the doctor.
Randy Hackney (09:27):

So, when we received this case, we started to aggressively defend this case. We met with the physician, we went through his medical records with him, we pointed out the soft spots, we talked about the strong points, we talked about the discovery that was going to be done by way of deposition. We emphasized to him that it was ultimately important for him to be truthful, brutally honest, we had some deficiencies in our medical records, we were not going to run away from those, we were going to be brutally honest and tell, during the deposition and at trial, the jury that yes, we have some deficiencies, but these were as a result of the transfer from paper to electronic medical records.
Randy Hackney (10:09):

Relative to the informed consent, he was going to testify that he had the discussion with the patient about the risk and complications that were possible with this type of treatment. We anticipated and in fact it turned out to be true, that the patient would testify contrary to that. So we wanted to address those and face those head on.
Randy Hackney (10:34):

We obtained two experts, one it was what I call an ivory tower, somebody from academia, somebody who teaches this type of stuff, and the other one was an in the trenches type of expert. And as we went through the specific allegations in meeting with our experts, they were 100% supportive of the care and treatment that was provided. They did recognize that we had some problems. One of the big problems was the inconsistencies in the medical records. Another big problem was the informed consent issue. They both said that the lack of an informed consent, a written informed consent, is not a breach of the standard of care. What is a breach of the standard of care is if you do not inform the patient of the potential risk and complications. We had our doctors saying that he told her, and we anticipated that he plaintiff would say no, she was never told. That's why the lack of the written informed consent form was a significant factor. They both conceded, both of our experts conceded that this was going to be a problem, but it was not an evidence of a breach of the standard of care. It's not the existence of the form, but just the fact that it had been done.
Randy Hackney (11:54):

So we had a he said, she said situation that was generating here. The information or testimony relative to whether or not this was a proper candidate for this type of procedure, both of the experts, especially the in the trenches expert, the one who treats every day, she said this is exactly the type of patient that I see on a daily basis, people that come in repeatedly with neck spasms, with neck pain, with back pain, with headaches, sometimes tension headaches. This is exactly what we see, this was precisely the type of patient that we see. So they were 100% supportive of the fact that this was an appropriate patient for this type of treatment.
Randy Hackney (12:42):

The allegation that the treatment was improperly done, we had the doctor telling me in our meetings that, "I did it exactly the same way that I'd always done it." We were able to get the plaintiff at her deposition to testify that the treatment that she started receiving in January, and she received treatments in January, February, March, April, and May, until this June treatment before she had the hospital admission, that all of those treatments seemed to be identical. That to her recollection, the same thing was done the same way by the doctor at every visit. This was a big admission for the plaintiff, because we were then able to get plaintiff's expert to subsequently concede that he had no evidence whatsoever, he had no information or no basis upon which to form an opinion that the manipulations were done improperly. So we were able to get rid of that allegation.
Randy Hackney (13:39):

What that chiropractor did say, the plaintiff's expert, was, well, if a chiropractor even does manipulations appropriately, if they do it on the wrong patient, it could have severe consequences, and

that's what happened in this case. He did the manipulations appropriately or inappropriately, he didn't know, but it didn't matter because in his opinion it causes all these problems.
Randy Hackney (14:06):

So the next challenge we had was we now had our experts who were going to support our doctor, the plaintiff has an expert who was going to say the contrary. We really didn't think at that point in time that was enough to had a solid basis to go to trial, or even give us a solid negotiating position should we try to resolve this case. So we needed to start to dig into the background of this patient. Her medical background, her educational background, her employment background, her social background, anything that we could find, anything that we could dig into to show that maybe what she was alleging wasn't necessarily true. One of our plans was to take the deposition of the plaintiff and the plaintiff's mother and the plaintiff's husband, who were also very close to her, and let them talk as long as they wanted to talk at deposition. Our thought process was in the past we've been successful with getting plaintiffs to embellish on their injuries, to embellish the severity of things, to really exaggerate a little bit about how it happened and when it happened. And just try to catch them in some inconsistencies. As it turned out, at the plaintiff's deposition, which was very long, and at the husband's deposition, this is where we got really the best information for our defense that we were going to construct in this case.
Randy Hackney (15:36):

She consistently testified at her deposition, the plaintiff, that her headaches, her anxiety, her depression, her migraine headaches, the stroke, the disability, the loss of cognitive function, all of that occurred after this treatment in June by our doctor. We were able to get her to sign releases at her deposition to allow us to get into whatever we wanted to in her background, because at her deposition I asked her, "Well, do you mind signing these releases?" And she said, "Sure, I have nothing to hide." Well, that turned out to be very significant, because what we found out after doing a lot of digging was the following.
Randy Hackney (16:23):

We found out that at age 17, remember she was 36 at the time of this treatment. At age 17, she had been hospitalized and treated for depression. At age 18, she was re-hospitalized and treated again for depression. While in college, she had had what was referred to in the police report as a drunken altercation with a police officer which resulted in a concussion. Following that, she was treated again for anxiety, depression, and now for migraine headaches. We also found out that at age 24, a few years later, she was readmitted to a hospital for depression and anxiety after being physically abused by her boyfriend. We then later found out in some additional medical records that while in college she had been evaluated for the possibility of having Attention Deficit Disorder. This became important because one of the allegations was that one of the injuries was she was no longer able to hold a job because of her inability to focus. Well, in this evaluation that was done in college on her Attention Deficit Disorder, it specifically stated that she had severe Attention Deficit Disorder, which was going to require accommodations at school and at work. That she had an inability to focus, an inability to maintain her focus on things, an inability to organize tasks. And that she did have this deficit in her ability to maintain her attention on things.
Randy Hackney (18:06):

So all of these things predated the care and treatment that was rendered by our doctor. Now, she also indicated that as a result of the stroke, that she said was caused by the vertebral dissection that she said was caused by the chiropractor, she was now having cognitive disorders. And her neurologist testified that based upon his review of the records, that her cognitive ability had decreased following the stroke. We were able to find a neurology evaluation that was done following the treatment for the stroke, about two years later, where it was indicated by a neurologist, an independent treating neurologist that she had no cognitive disability. When we presented that to their neurology expert in this deposition, he

ultimately had to concede that the cognitive function appeared not to be impaired, which was a huge factor in all of these things.
Randy Hackney (19:12):

So, we had all this background information, relative to her prior anxiety, prior depression, prior migraines, the concussion, had all of that information, but we were not going to disclose it until the right time. The court kept pushing us closer and closer to trial, and ultimately ordered us to go to a facilitation to try to resolve the case. At facilitation, we disclosed all of this information. We disclosed the information to the plaintiff's attorney through the facilitator. The plaintiff herself, she was absolutely furious. The husband was also furious, because one of the things that we had disclosed was not only all of this past information, but there was another medical record we discovered which showed that she had been treated again for migraines, and depression two years before she saw our doctor, and that this was brought on by an abusive attack by her husband while she was pregnant. So the husband was noticeably upset about that as well.
Randy Hackney (20:24):

While at facilitation, we obviously were not able to get this case resolved. But, about two weeks later the plaintiff's attorney contacted me because he now realized that his client's credibility, her reliability, her truthfulness, had been severely damaged, along with her ability to sustain the damages that she had talked about. We sent the plaintiff's attorney a notification of an employment history, which we found through a search of some of the Social Security records for this patient, that she had lost four prior jobs due to her ability to maintain her attention, focus on the job. This was all before our doctor's care and treatment. So all of this information together obviously led the plaintiff's attorney to the belief that his case was not as strong as he originally thought, it certainly was not a 3.5 million dollar case at that point in time. In fact, it wasn't worth a fraction of that. And that's what I told the plaintiff's attorney. I said, "It's not worth a fraction of that amount of money."
Randy Hackney (21:33):

Like I said, about two weeks after the facilitation he gave me a call. We were able to go back to facilitation and we were able to ultimately resolve this case for a fraction of the amount of money that was originally claimed. And more importantly, much, much less than the doctor's policy limits. The doctor wanted out of this case, he did have to face trial. We knew we had some shortcomings, that we were able to make the good, solid decision that this is a good case to resolve and this is a good resolution point. So we were able to settle the case for an amount, as I indicated, was much less than was originally demanded.
Randy Hackney (22:12):

Now, NCMIC spent a lot of time and a lot of money and a lot of expense on this case because they recognized the seriousness of these allegations up front, allowed us to get out in front of this, allowed us to do what we needed to do to defend this case. And the doctor also realized the shortcomings in this case, and I think learned a few things from this case, which the one thing that we've all heard over and over is that the medical records are vitally important. Because those medical records, they're made at the time of the care and treatment. There's an aura of authenticity to those medical records that you cannot recreate with just later testimony. So he understood, I think, a little better the importance of the medical records. And he understood that in this transition from paper to electronic medical records, he needed to really pay more attention to that, and to go back retrospectively and to make sure that there weren't any other holes in the cases.
Randy Hackney (23:19):

He also learned the importance of having the signed, written informed consent. Before this time he would do it for consent, but he wouldn't necessarily have a written statement, he would just have it

written in his record that informed consent was obtained. He then now has an informed consent form that he signs and the patient signs and initials every paragraph. He learned those two things, and he also learned that in this case, one of the things that he was going to testify to was that one of the reasons he did not do x-rays on this patient pre-operatively, which was one of the sub allegations, the plaintiff said, "You didn't do additional testing to make sure that this was an appropriate patient." He said, "I did not want to have her expend extra money." If he ordered the x-rays, she would have to pay for them. If her primary care physician ordered the x-rays, she could get it paid for through her insurance. But he never told her that, he just decided I don't think I want to ... I don't think I need the x-rays, and I don't think I want to put her to the expense.

Randy Hackney (24:31):

I informed him, the fact that you made that decision for her, you arbitrarily took that away from her, while you thought you were doing something good for her, that was going to come back as a negative allegation against him. So he then realized that he needs to document, "Look it, I offered her x-rays, told her she was going to have to pay for them, she declined." That is then in the records. He also has to explain whether the x-rays are or are not needed. So there were some very good learning points that he took away from this. And I think we all took away from this that in a case like this, when you have a patient and everything seems to be going well, and you don't anticipate that there is going to be a problem. The problems could crop up at any time, and can create a difficult situation for the practitioner.