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From the May 22, 2006 Michigan Lawyers Weekly.

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## Malpractice claim results in 'no cause'

### Decedent had a very rare form of cancer

On May 4, 2000, the plaintiff's decedent — a 59-year-old man — presented to the defendant podiatrist for a 3-centimeter lump on the top of his right foot, which was diagnosed as a ganglion cyst. The doctor attempted to aspirate the lump, but was able to obtain only a very small amount of fluid.

The plaintiff's experts testified that an inability to aspirate fluids should have caused the doctor to consider that the mass could be something other than a ganglion cyst, and that the standard of care required further work-up such as an ultrasound, MRI, CT scan or referral to an orthopedic surgeon.

Defense experts, however, testified that ganglion cysts fail to produce fluid on aspiration approximately 30 to 40 percent of the time.

The plaintiff's decedent returned to see the doctor two weeks later. The doctor felt that the presumed ganglion cyst had decreased somewhat in size as a result of a corticosteroid steroid injection at the first appointment. He told plaintiff's decedent that there was no need to do anything further if the patient did not want to do so, but that the patient should return to have the cyst removed if it got bigger, became painful or if it changed color.

The plaintiff's decedent returned to see the doctor one year later on May 17, 2001. The mass, by that time, had increased dramatically in size and was four to five inches in length and three inches in diameter. Plans were made to remove the cyst but, due to several delays, it was not removed until July 18, 2001.

Thereafter, it was examined by a pathologist who determined that the mass was actually a high-grade myxoid chondrosarcoma. The plaintiff followed up with two oncologists at Karmanos Cancer Institute and the University of Michigan for possible surgical treatment. It was determined that the cancer had already metastasized to the patient's lungs so the surgery would have been futile.

Both treating oncologists testified that, had a proper diagnosis been made during or shortly after May 2000, the patient's chances of survival were in the range of 80 percent to 90 percent, but that the chances of survival when the diagnosis was made approximately a year later were zero.

The plaintiff's decedent died in May 2002. The defendant did not produce any causation experts to contradict the plaintiff's treating oncologists.

Although the doctor's diagnosis in May 2000 that the plaintiff had a ganglion cysts was, in retrospect, incorrect, it was not a violation of the standard of care due to the manner in which the mass presented itself and also because primary cancerous lesions to the foot, particularly chondrosarcoma, are extremely rare.

A motion to tax costs has been filed with the trial court and the plaintiff has appealed the verdict to the Michigan Court of Appeals.

Defense counsel told Lawyers Weekly the key to success in this case was focusing on the fact that this was a very rare form of cancer that had never been diagnosed or treated by any of the podiatry experts who testified at trial and that the jury should not judge the defendant doctor with 20/20 hindsight.

**Type of action:** Podiatric malpractice

**Type of injuries:** Wrongful death

**Name of case:** Chapton v. Oosterhouse, et al.

**Court/case no./date:** Ottawa County Circuit Court; #03-47268-NH; March 3, 2006

**Name of judge:** Calvin L. Bosman

**Verdict amount:** \$0 (no cause of action)

**Attorney for the plaintiff:** Withheld

**Attorney for the defendant:** Robert B. Aardema

**Name/city of most helpful experts:** Charles Kissel, DPM, Warren; Marshall Solomon, DPM, Farmington Hills

**Insurance carrier(s):** ProNational

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