

MICHIGAN LAWYERS WEEKLY

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Friday, September 2, 2005

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No Recovery For Med-Mal, Wrongful Death

Plaintiff's Experts Made 'Incorrect Assumptions'

The decedent was a 58-year-old woman who had been born with polio and who underwent surgery for scoliosis at age 10. She developed kyphosis later in life.

The defendant internal medicine specialist began treating the decedent after she had presented to the hospital emergency room three times in various degrees of respiratory failure as a result of her asthma/COPD and her kyphoscoliosis, which restricted her ability to breathe. The decedent had obstructive and restrictive airway disease.

The internist felt the decedent's kyphosis developed as a result of osteoporosis, a diagnosis that had previously been made by her family practitioner and through radiological studies. He ordered a DEXA scan, which put the decedent's bone density in the osteopenic range. He prescribed Fosamax, the best medicine available in 1997 for building bone density.

Fosamax is known to cause gastric distress and has been associated with ulcers at the gastroesophageal junction. In 1997, it was only labeled for use to "treat" osteoporosis, not to "prevent" osteoporosis. By 1999, it was authorized for both prevention and treatment, but the care was provided in 1997. Thus, the Fosamax was prescribed off label.

The plaintiff's experts — Dr. Neil Farber (internal medicine) and Dr. John Shane (pathology) — testified that the plaintiff's decedent was not a candidate for Fosamax because she did not have osteoporosis, and because her kyphoscoliosis made it impossible for her to follow the label directions of standing or sitting upright for at least 30 minutes after taking the medication. It was their theory that a person with kyphoscoliosis could never actually sit or stand upright, as his or her spine was curved, which they argued would delay esophageal emptying.

The decedent returned to the internists' office for a routine follow up of one of her subsequent

presentations for respiratory failure (there were six total) and indicated that she was still weak, still nauseated and had tremors. The plaintiff alleged the defendant doctor should have taken the decedent off of the Fosamax and tested her blood level of another medication she was taking (Theophylline).

The decedent subsequently died and the cause of death was contested. The autopsy report indicated the decedent died of respiratory failure in association with gastrointestinal hemorrhage and shock. An erosion was found at the gastroesophageal junction, but it did not penetrate the veins. A significant quantity of blood was suctioned from the decedent's stomach during resuscitation and more blood filled duodenum and the proximal third of her small bowel.

The plaintiff's experts contended that the decedent exsanguinated. The defense experts contended the decedent died a respiratory death with an agonal bleed. The pathologist who performed the autopsy testified in support of the defense position.

According to defense counsel, there were several keys to winning. First, counsel helped the jury understand the propriety of off-label prescription of the medication. Counsel told Lawyers Weekly he pointed out that the largest studies conducted on Fosamax showed it to be no more dangerous than a placebo and unlikely to cause harm when taken as directed. Moreover, counsel said he argued that the plaintiff's experts' assumptions regarding the physiology of kyphoscoliosis were incorrect. Finally, counsel said he showed that the patient in fact had osteoporosis by virtue of the prior radiology reports and the finding of osteoporosis in the ribs (the only bones examined) at the time of the autopsy.

All eight members of the jury were permitted to vote and they returned a no negligence verdict within approximately 20 minutes.

Type of action: Medical malpractice; wrongful death

Type of injuries: The decedent allegedly exsanguinated as a result of an erosion at her gastroesophageal junction due to Fosamax

Name of case: Stevens v. Reed City Hospital

Court/case no./date: Osceola County Circuit Court; #00-8588-NH; Aug. 2, 2004

Name of judge: Lawrence C. Root

Verdict amount: \$0 (no negligence)

Allocation of fault: N/A

Attorney for the plaintiff: Withheld

Attorneys for the defendant: Brian Whitelaw and Timothy Buchalski

Name/city of most helpful experts: Robert VanTuinen, M.D., internal medicine; Michael Bodley, M.D., internal medicine

Insurance carrier(s): Pronational

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