SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

INDEX NO.:1469-06

PRESENT:
HON. DANIEL MARTIN

POST TRIAL MOTION
Date of Trial: 10/24/11

JENNIFER LUNA and ALAN LUNA,

Plaintiff,

-against-

PHILIP F. SPADAFORA, M.D.,
JOHN F. ALOIA, M.D,
LI PROF. MEDICAL SERVICES, P.C.,
WINTHROP UNIVERSITY HOSPITAL,

Defendants.

Motion Date: 03/13/12
Submitted: 04/03/12
Motion Sequence No.: 13 - MG

PLAINTIFF'S ATTY:
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DEFENDANTS ATTYS:
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Keller, O'Reilley & Watson, PC.
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Woodbury, NY 11797

Defendant, Philip F. Spadafora, M.D. (hereinafter referred to as Spadafora) moves the court pursuant to CPLR rule 4404 to set aside a jury verdict rendered in favor of the plaintiffs on a panoply of grounds including that the matter must be dismissed as a matter of law based on the testimony elicited. The court, having reviewed the papers submitted in support and opposition, grants that application on that ground for the reasons stated herein.

The standard of review for this court pursuant to that rule as consistently stated by the courts of this state as it applies to the grounds for dismissal as a matter of law, is that this court must find there is "no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence submitted to them."*Cohen v. Hallmark Cards*, 45 NY2d 493, 499 (1978)(bracketed expression added).

It should be noted that Spadafora made a motion for a directed verdict at the end of the testimony on the grounds that the plaintiffs had not proven their case as a matter of law and that the court reserved decision.

In this medical malpractice action, premised on a failure to diagnose medullary thyroid cancer, the jury returned a verdict after 22 days of trial, including six days of deliberation, apportioning fault among: Dr. John F.Aloia, an endocrinologist; (69%): Dr Spadafora, an internist (22%); and, the plaintiff herself (9%). It was alleged that plaintiff Jennifer Luna, then 12 and a half

weeks pregnant, consulted Dr. Spadafora on November 4, 2003, because she was not feeling well. Dr. Spadafora conducted a physical examination and concluded that she had an enlarged thyroid. He referred her for a thyroid ultrasound which was conducted on November 13, 2003, and resulted in a report which indicated an enlarged thyroid with 5 solid nodules contained in the right lobe of Mrs. Luna's thyroid. She was advised of this finding on November 14, 2003, and referred to an endocrinologist, Dr. Aloia. On November 20, 2003, Dr. Aloia told Mrs. Luna, after an examination, that her thyroid condition was due to her pregnancy and was a benign condition. Though she was advised to have blood tests so that her thyroid hormone levels could be evaluated, she was not alerted to the possibility that she might have cancer. Mrs. Luna cancelled monthly appointments with Dr. Aloia in February and March, choosing to have blood drawn elsewhere. The results of those blood tests were that her thyroid function was normal. In October 2004, she had a benign giant cell tumor on her finger removed, consulted with an oncologist, who upon examination determined that her thyroid was enlarged and recommended that she have it evaluated by an endocrinologist. She returned to Dr. Aloia on November 18, 2003. After further testing it was determined, on December 6, 2004, that Mrs. Luna had medullary thyroid cancer. On January 14, 2005, she had surgery to remove cancerous lymph nodes from her lung, chest, carotid arteries, base of her brain and vocal cord.

The next year, 2006, plaintiffs commenced this action for medical malpractice, for failure to diagnose her cancer, against the defendants Spadafora and Aloia as well as Winthrop Hospital. Thereafter the case proceeded to trial. The matter against Winthrop has been dismissed.

As noted, at the close of evidence, defendants moved for a directed verdict. The court reserved decision, submitted the case to the jury, and the verdict was taken. ***Muszynski v Buffalo***, 49 Misc 2d 957 (Sup Ct, Erie County 1966), *revd* on other grounds 33 AD 2d 648 (4th Dept 1969), *affd* (1971) 29 NY2d 810 (1971).

On this motion the defendant Spadafora contends that the jury's verdict must be set aside and the action dismissed as a matter of law. He asserts, as here relevant, that he neither deviated from good and excepted medical practice, nor were plaintiffs damaged as a result of his actions; and that the plaintiffs' evidence was insufficient to establish a prima facie case of medical malpractice against him. In opposition, plaintiffs maintain that the jury's verdict must stand as it was based on good and sufficient evidence.

Spadafora argues that the jury verdict must be set aside or that his motion at the end of the presentation of evidence must be granted on the theory that, as Mrs. Luna's primary care physician, he cannot be found to have committed medical malpractice where he has referred his patient to a specialist, in this case Dr. Aloia, and relied on that specialist's medical opinion. He cites ample appellate precedent the most recent being ***Burtman v. Brown***, 97 A.D.3d 156 (2d Dept 2012) In opposition thereto, plaintiffs seek to distinguish this matter on the grounds that in this case the jury could conclude that Spadafora made an initial determination that the test that would have diagnosed the cancer be performed and reported same in his notes. Thus, plaintiffs argue that he made this initial determination which conflicted with the decision reached by the specialist to whom he referred

Mrs. Luna and that by affirmatively doing so and not following through on his proposed action, even in light of a different opinion by the specialist, he was negligent.

On November 4, 2003, when Spadafora first saw Mrs. Luna and examined her, his notes reflect the phrase, small needle aspiration. That phrase refers to a test to determine if the swollen nodules were cancerous. It is the test that plaintiffs contended should have been ordered by the doctors in this case and which led to the jury finding on liability. There was an issue as to whether the phrase had a question mark next to it in those notes, but for this court's purposes that issue is not significant.

He thereafter referred Mrs. Luna to Dr. Aloia, an endocronologist. Dr. Aloia did not see a need for that test and communicated that decision to Spadafora. Spadafora argues that he therefore deferred to the medical decision of the specialist to whom he referred the patient and is thus legally immune pursuant to the appellate precedent he cites. Those cases do not directly deal with a primary care doctor making an initial assessment before a referral to a specialist which assessment is then ignored in light of the specialist's opinion. It is the distinguishing factor which the plaintiffs ask the court to consider important enough to reject that precedent. The court declines to do so. The language of the Appellate Division is so clear as to lead this court to conclude that it wishes to have a primary care provider protected by the opinion of a specialist to whom he or she refers a patient under virtually any circumstances and certainly in one such as this. Thus, no liability attaches to Spadafora's actions and the verdict against him on liability is set aside.

The court would be remiss if it did not also consider the second element, the issue of causation. In a failure to diagnose cancer case, the concept of how a plaintiff is damaged is reflected in how the cancer and the potential of surviving same has been changed as a result of the delay of the correct diagnosis. Stated differently, then question on causation to be asked would be, is there a nexus linking defendant's negligence with any injury that was separate and apart from the underlying cancer. *Lyons et al v. McCauley*, 252 A.D.2d 516 (2nd Dept 1998).

What the court finds critical is the discussion of the concept of causation as it applies to certain theories regarding how the specific cancer in this case changes. At issue to this court is the interaction of two concepts posited during the trial: that of metastasis; and, that of "staging" as that term was used in the classification of cancer in this case. Initially, it appeared that at the heart of the plaintiffs' case was the concept and testimony that once the cancer in question had left, broken through or otherwise appeared outside the organ in question, here the thyroid, the chance of it spreading was enhanced and the chance of surviving same was diminished greatly. That process, when cancer has left the organ in question, is called metastasis. Of course, in a matter such as this where the theory of prosecution is that, but for the failure to diagnose the cancer, such a result may have been avoided, such testimony as it applies to the question of causation is essential.

Here then, it initially appeared that the plaintiffs' theory was that if the cancer was diagnosed while it was still contained in the thyroid, i.e., that it had not yet metastasized, the potential for a better recovery was significantly greater. Conversely, as argued by the both defendants at trial and in their papers, when the cancer had spread outside the thyroid the potential for a worse result occurred. Stated another way, if the cancer had already spread outside the thyroid when the plaintiff was first seen by the two doctors in question, then her chances of a worse result were essentially unchanged. Thus, no worse result was caused and, consequently, the plaintiffs suffered no

compensable damages.

Therefore, in this "failure to diagnose cancer" medical malpractice lawsuit, the question of what would have been different but for the failure to diagnose is critical to the issue of causation and damages. The plaintiffs must show to the trier of fact that if the cancer had been diagnosed sooner the plaintiff's prognosis would be better. Stated in the converse, the plaintiffs must show that because the cancer was not diagnosed promptly, Ms. Luna's prognosis worsened.

In an attempt to meet that burden the plaintiffs looked to studies comparing the prognoses of cancer patients in similar situations. Those studies, used to compare and predict those prognoses, were offered by the plaintiffs to show what other outcomes occurred in similar situations. The vehicle posited by plaintiffs to establish that fact was the introduction of evidence regarding tests and surveys conducted in the medical community nationwide on the prognosis of a patient with a particular cancer based on that cancer's state of spread. Thus, particular cancers are studied at various times in their growth and the resulting effects are measured. Medical professionals have chosen certain points in the process to signify a significant change in the spread of the cancer for labeling and quantification purposes which is called "staging.". As stated by Dr. Meek, the plaintiffs' expert on the issue of causation, in his testimony on November 4th, at page 36, line 23, "Well, the prognosis, in general, for thyroid cancer and medullary thyroid cancer specifically, is related to what we call the stage, which is how advanced the cancer is at the time of diagnosis." (Emphasis added) . The stages put before the jury were as follows:

Stage I: a small tumor still confined to the thyroid gland

Stage II: a little bit larger tumor still confined to the thyroid gland

Stage III: the cancer has begun to break out of the thyroid gland and may involve some very local lymph nodes.

Stage IV: the cancer has spread to more general lymph nodes in the neck and other parts of the body.

The use of staging for its intended purpose of having a guideline to inform patients as to their diagnoses appears to have the need for strict guidelines to insure that the comparisons are accurate. Thus plaintiffs' expert Dr. Meek, testified that a person, for purposes of determining where that person would be classified for study purposes, would need to have been clinically diagnosed and based on that clinical evidence a particular stage can be assigned. He suggested that that was the only way such studies could be considered scientifically useful to the medical community nationwide. Based on those studies, the medical community, as indicated above, established categories for various "stages" of the progression of a particular cancer and then would assign various prognoses to those various stages. Thus the stages above mentioned.

This court points out these issues and the distinction between them because it finds them critical to its analysis and the parties' positions. Put succinctly, now, in these papers, Aloia argues metastasis and plaintiffs argue staging. The court believes that the staging concept cannot be confused with the metastasis concept. Thus the question is not what stage the plaintiff was at a particular time but whether the cancer had metastasized at a particular time.

As stated above, plaintiffs seemed to initially argue that metastasis was the key evidence regarding the issue of a worse result and that staging was introduced to exhibit to the triers of fact

some information regarding studies that could be used to quantify the change. Now, however they argue that their expert's testimony regarding staging should be accepted as the evidentiary basis for showing that the Mrs. Luna's condition had worsened as a result of Spadafora's failure to question Dr. Aloia's failure to diagnose the cancer.

However difficult it may be to discern, the distinction is most certainly important. Thus, when the cancer cell or cells have left the organ, called metastasis, and same can be clinically identified as such, it is said, among other things, that the cancer has entered a different stage, with the cancer in this case, at least stage III. It is not disputed here that the plaintiff suffered from medullary thyroid cancer. It would also appear to be not disputed that such a cancer's growth has been divided into four parts or stages. It is lastly not disputed that the tests or surveys conducted assign different prognoses to each stage. The dispute arises from the application of the concept of the need for an expert to identify whether the cancer has or has not entered a different stage.

This becomes important because the plaintiffs' expert, Dr. Meek, seems, at first blush, to offer inconsistent testimony regarding the two issues of metastasis and staging. As emphasized by the defendants in this case, Meek stated , as this court would paraphrase it, that it was more than likely that the cancer had metastacized at the time of the failure to diagnose and thus adopted the appellate courts' definition of the phrase within a reason able degree of medical certainty that such metastasis had occurred . However, as emphasized by the plaintiffs in their opposition here, in the very next question put to him he could and did explain that he could not however change his testimony offered on direct examination that such an opinion would not change the stage because there was a lack of clinical evidence to that effect in November, 2003. Thus he could offer his medical opinion regarding the fact that the cancer was outside the organ at the time of first diagnosis but could not assign the stage that would appear to correspond to same (Stage III) because of artificial rules established by the medical community regarding the need for some "clinical proof" of same. A doctor's considered medical opinion would appear to be insufficient.

The difference between the two, as presented here, is that for purposes of offering a medical opinion within a reasonable degree of medical certainty, there is not a need for "clinical evidence" but for purposes of classifying a particular cancer to be in a particular stage, the rules of the medical community which established the studies required such a clinical diagnosis.
Thus, plaintiffs could and did elicit testimony from their experts that in their opinion within a reasonable degree of medical certainty Mrs. Luna suffered from medullary thyroid cancer at the time of initial treatment by Dr Aloia and Dr. Spadafora without any clinical evidence to support same. The only basis for those opinions was that the nodules in question were enlarged and, based on those experts experience with respect to this type of cancer, the cancer must have been there in November, 2003, if it was there in December, 2004, when it was diagnosed based on pathology findings. This testimony formed the basis for plaintiff's position on the issue of causation.

Although plaintiffs attempt to argue that it is inaccurate and unfair to indicate that the parties' experts concurred in the opinions they offered as there were many instances of disagreement, on this issue, that of the fact that the cancer had metastasized at the time the doctors first saw Ms. Luna for her concerns, there was actually no disagreement. In fact, one of the plaintiffs' experts could and did say, based on his review of all of the records in the case, that, within a reasonable degree of medical certainty, the cancer would have had to have spread outside the thyroid sometime before the plaintiff saw either of the two defendants doctors. As quoted by each of the defendant doctors in their briefs,

Dr. Meek, an oncologist and plaintiff's causation expert, testified that, more than likely, metastasis had occurred prior to the failure to diagnose. That opinion concurred with the defendants' experts. Dr. Meek would not, however, say that she was stage III at that time citing as his basis that there was no clinical evidence, consistent national criteria, .to that effect. Thus, though he could opine that the cancer had already metastasized outside the thyroid at the time of the failure to diagnose based on the evidence of the pathology findings from her operation in January, 2005, he could not "stage" the cancer in November, 2003, as such, for want of nationally recognized clinical findings.

The court believes that the testimony of Dr. Meek that it was his opinion within a reasonable degree of medical certainty that the cancer had spread at the time of the initial consultations is the critical evidence in the case and compels the granting of Spadafora's motion.

Ordered, that the motion of Dr. Spatafora to set aside the jury verdict and dismiss the lawsuit on the grounds that the plaintiffs have failed to prove their case as a matter of law in granted.

Submit judgment on notice.

Dated: April 4, 2013
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.

COPY

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 9 SUFFOLK COUNTY

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PLAINTIFF'S ATTY:
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Bay Shore, NY 11706-7306

Keller, O'Reilley & Watson, PC.
242 Crossways Park West
Woodbury, NY 11797

Defendant John F. Aloia, M.D. (hereinafter referred to as Aloia) moves the court pursuant to CPLR rule 4404 to set aside a jury verdict rendered in favor of the plaintiffs on a panoply of grounds including that the matter must be dismissed as a matter of law based on the testimony elicited. The court, having reviewed the papers submitted in support and opposition, grants that application on that ground for the reasons stated herein.

The standard of review for this court pursuant to that rule as consistently stated by the courts of this state as it applies to the grounds for dismissal as a matter of law, is that this court must find there *is* "no valid line of reasoning and permissible inferences which could possibly lead rational men [and women] to the conclusion reached by the jury on the basis of the evidence submitted to them." *Cohen v. Hallmark Cards*, 45 NY2d 493, 499 (1978)(bracketed expression added).

It should be noted that Aloia made a motion for a directed verdict at the end of the testimony on the grounds that the plaintiffs had not proven their case as a matter of law and that the court reserved decision. It is of little moment which application is considered and addressed here as the factors determining each of them are essentially the same.

In this medical malpractice action, premised on a failure to diagnose medullary thyroid cancer, the jury returned a verdict after 22 days of trial, including six days of deliberation, apportioning fault among: Dr. Aloia, an endocrinologist; (69%): Dr Philip F. Spadafora, an internist (22%); and, the plaintiff herself (9%). It was alleged that plaintiff Jennifer Luna, then 12 and a half

weeks pregnant, consulted Dr. Spadafora on November 4, 2003, because she was not feeling well. Dr. Spadafora conducted a physical examination and concluded that she had an enlarged thyroid. He referred her for a thyroid ultrasound which was conducted on November 13, 2003, and resulted in a report which indicated an enlarged thyroid with 5 solid nodules contained in the right lobe of Mrs. Luna's thyroid. She was advised of this finding on November 14, 2003, and referred to an endocrinologist, Dr. Aloia. On November 20, 2003, Dr. Aloia told Mrs. Luna, after an examination, that her thyroid condition was due to her pregnancy and was a benign condition. Though she was advised to have blood tests so that her thyroid hormone levels could be evaluated, she was not alerted to the possibility that she might have cancer. Mrs. Luna cancelled monthly appointments with Dr. Aloia in February and March, choosing to have blood drawn elsewhere. The results of those blood tests were that her thyroid function was normal. In October 2004, she had a benign giant cell tumor on her finger removed, consulted with an oncologist, who upon examination determined that her thyroid was enlarged and recommended that she have it evaluated by an endocrinologist. She returned to Dr. Aloia on November 18, 2003. After further testing it was determined, on December 6, 2004, that Mrs. Luna had medullary thyroid cancer. On January 14, 2005, she had surgery to remove cancerous lymph nodes from her lung, chest, carotid arteries, base of her brain and vocal cord.

The next year, 2006, plaintiffs commenced this action for medical malpractice, for failure to diagnose her cancer, against the defendants Spadafora and Aloia as well as Winthrop Hospital. Thereafter the case proceeded to trial. The matter against Winthrop has been dismissed.

As noted, at the close of evidence, defendants moved for a directed verdict. The court reserved decision, submitted the case to the jury, and a verdict was taken. *Muszynski v Buffalo*, 49 Misc 2d 957 (Sup Ct, Erie County 1966), *revd* on other grounds 33 AD 2d 648 (4th Dept 1969), *affd* (1971) 29 NY2d 810 (1971).

On this motion the defendant Aloia contends that the jury's verdict must be set aside and the action dismissed as a matter of law. He asserts, as here relevant, that he neither deviated from good and accepted medical practice, nor were plaintiffs damaged as a result of his actions; that the plaintiffs' evidence was insufficient to establish a prima facie case of medical malpractice against him; and, that the interests of justice dictate the jury's verdict should be set aside. In opposition, plaintiffs maintain that the jury's verdict must stand as it was based on good and sufficient evidence.

The court believes that there was ample evidence from which a jury could conclude that Aloia departed from good and accepted medical practice in his treatment of the plaintiff, Jennifer Luna, in failing to conduct a small needle aspiration in November, 2003. This court need not agree with the jury but must merely find that the jury's decision was not irrational. The court finds that was the case on the issue of medical negligence. Thus, the first of the two elements for a finding of liability against Aloia was met. At issue here is the question of causation, i.e. is there a nexus linking defendant's negligence with any injury that was separate and apart from the underlying cancer. *Lyons et al v. McCauley*, 252 A.D.2d 516 (2nd Dept 1998).

The second element is the issue of causation. In a failure to diagnose cancer case, the concept of how a plaintiff is damaged is reflected in how the cancer and the potential of surviving same has been changed as a result of the delay of the correct diagnosis.

What the court finds critical is the discussion of the concept of causation as it applies to

certain theories regarding how the specific cancer in this case changes. At issue to this court is the interaction of two concepts posited during the trial: that of metastasis; and, that of "staging" as that term was used in the classification of cancer in this case. Initially, it appeared that at the heart of the plaintiffs' case was the concept and testimony that once the cancer in question had left, broken through or otherwise appeared outside the organ in question, here the thyroid, the chances of it spreading was enhanced and the chance of surviving same was diminished greatly. That process, when cancer has left the organ in question, is called metastasis. Of course, in a matter such as this where the theory of prosecution is that, but for the failure to diagnose the cancer, such a result may have been avoided, such testimony as it applies to the question of causation is essential.

Here then, it initially appeared that the plaintiffs' theory was that if the cancer was diagnosed while it was still contained in the thyroid, i.e., that it had not yet metastasized, the potential for a better recovery was significantly greater. Conversely, as argued by the both defendants at trial and in their papers, when the cancer had spread outside the thyroid the potential for a worse result occurred. Stated another way, if the cancer had already spread outside the thyroid when the plaintiff was first seen by the two doctors in question, then her chances of a worse result were essentially unchanged. Thus, no worse result was caused and, consequently, the plaintiffs suffered no compensable damages.

Therefore, in this "failure to diagnose cancer" medical malpractice lawsuit, the question of what would have been different but for the failure to diagnose is critical to the issue of causation and damages. The plaintiffs must show to the trier of fact that if the cancer had been diagnosed sooner the plaintiff's prognosis would be better. Stated in the converse, the plaintiffs must show that because the cancer was not diagnosed promptly, Ms. Luna's prognosis worsened.

In an attempt to meet that burden the plaintiffs looked to studies comparing the prognoses of cancer patients in similar situations. Those studies, used to compare and predict those prognoses, were offered by the plaintiffs to show what other outcomes occurred in those similar situations. The vehicle posited by plaintiffs to establish that fact was the introduction of evidence regarding tests and surveys conducted in the medical community nationwide on the prognosis of a patient with a particular cancer based on that cancer's state of spread. Thus, particular cancers are studied at various times in their growth and the resulting effects are measured. Medical professionals have chosen certain points in the process to signify a significant change in the spread of the cancer for labeling and quantification purposes which is called "staging.". As stated by Dr. Meek, the plaintiffs' expert on the issue of causation, in his testimony on November 4, at page 36, line 23, "Well, the prognosis, in general, for thyroid cancer and medullary thyroid cancer specifically, is related to what we call the stage, which is how advanced the cancer is at the time of diagnosis." (Emphasis added). The stages put before the jury were as follows:

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Stage IV: the cancer has spread to more general lymph nodes in the neck and other parts of the body.

The use of staging for its intended purpose of having a guideline to inform patients as to their diagnoses appears to have the need for strict guidelines to insure that the comparisons are accurate.

Thus plaintiffs' expert, Dr. Meek, testified that a person, for purposes of determining where that person would be classified for study purposes, would need to have been clinically diagnosed and based on that clinical evidence a particular stage can be assigned. He suggested that that was the only way such studies could be considered scientifically useful to the medical community nationwide. Based on those studies, the medical community, as indicated above, established categories for various "stages" of the progression of a particular cancer and then would assign various prognoses to those various stages. Thus the stages above mentioned.

This court points out these issues and the distinction between them because it finds them critical to its analysis and the parties' positions. Put succinctly, now, in these papers, Aloia argues metastasis and plaintiffs argue staging. The court believes that the staging concept cannot be confused with the metastasis concept. Thus the question is not what stage the plaintiff was at a particular time but whether the cancer had metastasized at a particular time.

As stated above, plaintiffs seemed to initially argue that metastasis was the key evidence regarding the issue of a worse result and that staging was introduced to exhibit to the triers of fact some information regarding studies that could be used to quantify the change. Now, however they argue that their expert's testimony regarding staging should be accepted as the evidentiary basis for showing that the Mrs. Luna's condition had worsened as a result of Aloia's failure to initially diagnose the cancer.

However difficult it may be to discern, the distinction is most certainly important. Thus, when the cancer cell or cells have left the organ, called metastasis, and same can be clinically identified as such, it is said, among other things, that the cancer has entered a different stage, with the cancer in this case, at least stage III. It is not disputed here that the plaintiff suffered from medullary thyroid cancer. It would also appear to be not disputed that such a cancer's growth has been divided into four parts or stages. It is lastly not disputed that the tests or surveys conducted assign different prognoses to each stage. The dispute arises from the application of the concept of the need for an expert to identify whether the cancer has or has not entered a different stage.

This becomes important because the plaintiffs' expert, Dr. Meek, seems, at first blush, to offer inconsistent testimony regarding the two issues of metastasis and staging. As emphasized by Aloia here, Meek stated, as this court would paraphrase it, that it was more than likely that the cancer had metastacized at the time of the failure to diagnose and thus adopted the appellate courts' definition of the phrase within a reasonable degree of medical certainty that such metastasis had occurred. However, as emphasized by the plaintiffs in their opposition here, in the very next question put to him he could and did explain that he could not however change his testimony offered on direct examination that such an opinion would not change the stage because there was a lack of clinical evidence to that effect in November, 2003. Thus he could offer his medical opinion regarding the fact that the cancer was outside the organ at the time of first diagnosis but could not assign the stage that would appear to correspond to same (Stage III) because of artificial rules established by the medical community regarding the need for some "clinical proof" of same. A doctor's considered medical opinion would appear to be insufficient.

The difference between the two, as presented here, is that for purposes of offering a medical opinion within a reasonable degree of medical certainty, there would appear not to be a need for "clinical evidence" but for purposes of classifying a particular cancer to be at a particular stage, the

rules of the medical community which established the studies required such a clinical diagnosis. Thus, plaintiff could and did elicit testimony from her experts that in their opinion within a reasonable degree of medical certainty plaintiff suffered from medullary thyroid cancer at the time of initial treatment by Dr Aloia and Dr. Spadafora without any clinical evidence to support same. The only basis for those opinions was that the nodules in question were enlarged and, based on those experts' experience with respect to this type of cancer, the cancer must have been there in November, 2003, if it was there in December, 2004, when it was diagnosed based on pathology findings. This very testimony formed the basis for plaintiff's position on the basic issue of causation yet would appear to have no clinical basis for staging. Dr. Meek would not, however, say that she was stage III at that time citing as his basis that there was no clinical evidence, consistent with national criteria, to that effect. Thus, though he could opine that the cancer had already metastasized outside the thyroid at the time of the failure to diagnose based on the evidence of the pathology findings from her operation in January, 2005, he could not "stage" the cancer in November, 2003, as such, for want of nationally recognized clinical findings.

The court believes that the testimony of Dr. Meek that it was his opinion within a reasonable degree of medical certainty that the cancer had spread at the time of the initial consultations is the critical evidence in the case and compels the granting of Aloia's motion.

Although plaintiffs attempt to argue that it is inaccurate and unfair for the defendants to indicate that the parties' experts concurred in the opinions they offered as there were many instances of disagreement, on this issue, that of the fact that the cancer had metastasized at the time the doctors first saw Ms. Luna for her concerns, there was actually no disagreement. In fact, one of the plaintiffs' experts could and did say, based on his review of all of the records in the case, that, within a reasonable degree of medical certainty, the cancer would have had to have spread outside the thyroid sometime before the plaintiff saw either of the two defendants doctors. As quoted by each of the defendant doctors in their briefs, Dr. Meek, an oncologist and plaintiff's causation expert, testified that, more than likely, metastasis had occurred prior to the failure to diagnose. That opinion concurred with the defendants' experts.

Ordered, that the motion of Dr. Aloia to set aside the jury verdict and dismiss the lawsuit on the grounds that the plaintiffs have failed to prove their case as a matter of law in granted. His motion seeking dismissal on other grounds is denied as moot.

Submit judgment on notice.

Dated: April 4, 2013
Riverhead, NY

HON. DANIEL MARTIN, A.J.S.C.