IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAUDIA QEISI,	:	**CIVIL ACTION**
Plaintiff	:	
	:	
v.	:	
	:	
BHUPENDRA PATEL, LEHIGH AVENUE RADIOLOGY ASSOCIATES, EPISCOPAL HOSPITAL, TEMPLE UNIVERSITY HOSPITAL, THE UNITED STATES OF AMERICA,	:	**No. 02-8211**
Defendants.	:	

Gene E.K. Pratter, J. Memorandum and Order February 9, 2007

In this tort action the Plaintiff advances claims of medical negligence that, because the United States of America is a defendant, arise under the Federal Tort Claims Act, 28 U.S.C. § 2671 et. seq. All of the parties have agreed to a non-jury trial.[1]

JURISDICTION

The Court has jurisdiction over this action pursuant to the Federal Tort Claim Act, 28 U.S.C. § 2671 et. seq.

FACTUAL AND PROCEDURAL BACKGROUND

On September 2, 1999, Ms. Julia Davila went to the Maria de los Santos Health Care Center. She saw Dr. Milagros Soto, an internist, for a physical exam. This was the first time

[1] All claims asserted against the United States under the Federal Torts Claims Act ("FTCA") must be decided by the court without a jury pursuant to 28 U.S.C. § 2402. See, e.g., Schetter v. Housing Auth., 132 F. Supp. 149, 154 (W.D. Pa. 1955) (holding that the Federal Tort Claims Act bars the right to jury trial in any action against the United States). By stipulation filed November 13, 2006 (Docket No. 123), all of the parties agreed to a non-jury trial.

Ms. Davila had visited Maria de los Santos and was the first time she had ever been treated by Dr. Soto. Ms. Davila complained of "breast itchiness" and "dizziness." During this visit, Dr. Soto noted that Ms. Davila suffered from dizziness, nasal congestion and headaches. Dr. Soto treated Ms. Davila for certain of her symptoms, including arthritis pain, and gave her a number of referrals, including one for a screening mammogram, and a referral to see Dr. William Matura, a chiropractor. She saw Dr. Matura that same day. Ms. Davila had seen Dr. Matura in the past for treatment for her arthritis pain. On this visit Dr. Matura ordered x-rays of Ms. Davila's cervical and lumbar spine and her knees.

On the following day, September 3, 1999, Ms. Davila went to Episcopal Hospital for a mammogram and x-rays. X-rays were taken. The x-ray reports listed Dr. Matura as the referring physician and were sent to and received by Dr. Matura. Ms. Davila also had a mammogram, and Dr. Matura, a chiropractor, was also listed as the referring physician for the mammogram. Dr. Soto was listed as a "cc" recipient on the second page of the mammogram report. There is no evidence that either Dr. Matura or Dr. Soto actually received the results of Ms. Davila's September 3 mammogram.

Four days later, on September 7, 1999, Dr. Bhupendra Patel read Ms. Davila's mammography results. Dr. Patel noted that the mammography indicated a "2 cm stellate lesion" on Ms. Davila's left breast that was "strongly suspicious for carcinoma." Dr. Patel noted that a "[b]iopsy should be arranged." Dr. Patel did not list a Breast Imaging Reporting and Data System ("BIRADS") category on the report. Dr. Patel noted on the mammogram jacket that a "category 4 card was filled."

Episcopal has three forms of letters that it sends to patients after a mammography is performed. The first letter informs the patient that her mammography was normal. The second letter –the "0-3" letter – informs the patient that her mammogram was inconclusive and that additional imaging is required. The third letter – the "4-5" letter – informs the patient that her mammogram was abnormal and that she should speak with her medical doctor. Episcopal mistakenly sent Ms. Davila an "0-3" letter on September 10, 1999. In fact, Episcopal should have sent Ms. Davila a "4-5" letter. However, of greater immediate importance is the fact that Episcopal sent the "0-3" letter to the wrong address. There is no evidence that Ms. Davila ever received the letter from Episcopal containing information about her mammogram.

There is no evidence that anyone at Episcopal ever followed up with Ms. Davila in any regard concerning the results of her mammogram.

On September 7, 1999, following his review of Ms. Davila's mammography, Dr. Patel called Maria de los Santos and spoke to "Nellie." "Nellie" is Nelly Ruiz, a medical assistant at Maria de los Santos, who has a high school education and one year of post-high school training as a medical assistant. Dr. Patel states that he gave Ms. Ruiz the results of Ms. Davila's mammogram. Ms. Ruiz does not recall speaking with Dr. Patel concerning Ms. Davila or any other patient.

Ms. Davila made a follow-up appointment at Maria de los Santos on September 20, 1999 in response to a September 14, 1999 letter from Maria de los Santos requesting Ms. Davila to make an appointment to review test results from the September 2 tests. Her test results revealed an infection. Dr. Soto gave Ms. Davila an antibiotic for a urinary tract infection.

On the morning of October 11, 1999, Ms. Davila was examined by Dr. Gloria Diaz, a gynecologist, at Maria de los Santos. Dr. Diaz performed a breast exam. It was normal. Later that afternoon, Ms. Davila met with Dr. Soto for a check-up. At this time, Ms. Davila did not complain of any breast pain; her major complaint was "chronic skeletal pain." Neither Dr. Diaz nor Dr. Soto made any effort to locate the mammography report from Ms. Davila's September 3, 1999 mammogram.

Ms. Davila returned to Maria de los Santos over eight months later, on June 23, 2000, with complaints of "allergies and problems with urine." At that time, Dr. Soto performed a breast exam and found a hard mass in Ms. Davila's left breast. Dr. Soto called Ms. Gloria Williams, the radiology file clerk at Episcopal, and obtained a verbal report of the results of Ms. Davila's September 3, 1999 mammogram. Ms. Williams also faxed the mammography report to Dr. Soto. Dr. Soto's review of Ms. Davila's mammography revealed a suspicious lesion in her left breast. Dr. Soto arranged for an appointment for Ms. Davila with Dr. Jan Olenginski, a surgeon at Parkview Hospital for June 27, 2000, and ordered blood work. Dr. Olenginski performed an excisional biopsy that revealed that Ms. Davila had breast cancer.

On August 8, 2000, Ms. Davila came to Maria de los Santos and requested a referral for surgery; she sought a second opinion and Dr. Soto referred her to Dr. Maurice Wilk.

Ms. Davila underwent a mastectomy shortly thereafter, followed by an aggressive chemotherapy regimen.

On May 2, 2002, Ms. Davila filed this action in the Court of Common Pleas for Philadelphia County. On or about August 15, 2002, defendants Dr. Patel and Lehigh Avenue

Radiology Associates ("Lehigh") filed a joinder complaint against third party defendants Delaware Valley Community Health, Inc., Maria de los Santos and Dr. Soto. Certain of the defendants removed the action to this Court on October 29, 2002. On November 12, 2002, the United States was substituted as a defendant in lieu of Delaware Valley Community Health, Inc., Maria de los Santos and Dr. Soto, who were all dismissed from the action.

On July 1, 2003, approximately three years after Ms. Davila's mastectomy, Ms. Davila passed away. On June 6, 2004, counsel for Ms. Davila moved to substitute a successor plaintiff, and on November 12, 2004, Ms. Claudia Qeisi filed an amended complaint as administratrix of Ms. Davila's estate. Ms. Qeisi is Ms. Davila's daughter.

After several procedural detours this action has now reached its current posture. A bench trial is scheduled to commence on February 26, 2007.

The United States has filed a Motion to Preclude Plaintiff's Expert, Dr. James J. Stark, from Testifying (Docket No. 127) on the grounds that Dr. Stark's testimony is not "reliable" under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). Dr. Bhupendra Patel and Lehigh have filed a Motion *In Limine* to Limit and Preclude Cumulative Expert Testimony (Docket No. 129), and a Motion *In Limine* to Preclude Jessica Katz, M.D. from Providing Expert Testimony as to Dr. Patel (Docket No. 135).[2] No hearing has been held on any of these motions, the Court having determined that the papers submitted are sufficient for purposes of the Court's ruling upon these challenges.

[2] Dr. Patel and Lehigh have also filed a Motion *In Limine* to Preclude Evidence Critical of Lehigh (Docket No. 136), and defendant Episcopal Hospital has filed a Motion *In Limine* to Preclude Evidence of Damages Sought Under Plaintiff's Wrongful Death Action (Docket No. 142). The Court will address these motions at a later date.

For the reasons discussed below, all three of these motions will be denied.

DISCUSSION

I. The United States' Motion to Preclude Dr. Stark from Testifying

Plaintiff intends to present testimony from Dr. James J. Stark that the nine month delay between Ms. Davila's initial mammogram in September 1999 and her surgery in June 2000 increased Ms. Davila's risk of harm from breast cancer. The United States[3] asserts that Dr. Stark should be precluded from testifying because his testimony (1) is not "reliable" under Daubert and (2) does not establish "causation" under Pennsylvania law. Dr. Stark's testimony addresses only the issue of causation. He is not testifying as to the applicable standard of care for any of the physicians who treated Ms. Davila.

A. *Dr. Stark's Testimony is Reliable Under Daubert*

Federal Rule of Evidence 702, which governs the admissibility of expert testimony, provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702.

In Daubert, the Supreme Court imposed upon district courts the role of a gatekeeper, in

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[3] Defendant Episcopal Hospital filed a Response in Support of the United States' motion to preclude Dr. Stark's testimony (Docket No. 130). In its response, Episcopal Hospital incorporates the United States' Memorandum of Law in support of its Motion to Preclude Dr. Stark's Testimony in its entirety.

order to "ensure that any and all scientific evidence is not only relevant, but reliable." ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc., 198 F. Supp. 2d 598, 601-02 (E.D. Pa. 2002) (quoting Daubert, 509 U.S. at 589). When "faced with a proffer of expert scientific testimony . . . the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand and determine a fact in issue." Id. at 602 (quoting Daubert, 509 U.S. at 592). This gatekeeping function of the district court extends beyond scientific testimony to "testimony based on . . . 'technical' and 'other specialized' knowledge." Id. (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)).

Federal Rule of Evidence 702 provides "three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability and fit." Id. (quoting Elcock v. Kmart Corp., 233 F.3d 734, 741 (3d Cir. 2000)). The party offering the expert testimony has the burden of establishing that the proffered testimony meets each of the three requirements by a preponderance of the evidence. Id. (citing Paldillas v. Stork-Gamco, Inc., 186 F.3d 412, 418 (3d Cir. 1999)).

The first requirement, whether the witness is qualified as an expert, has been interpreted liberally to encompass "a broad range of knowledge, skills, and training." Id. (quoting In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 741 (3d Cir. 1994)).

The second prong requires the expert's testimony to be reliable. Id. When the expert testifies to "scientific knowledge," the expert's opinions "must be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert

must have 'good grounds' for his or her belief." Id. (quoting In re Paoli, 35 F.3d at 742). In considering whether there are "good grounds" for the expert's opinions, district courts should look at a series of factors:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

Id. (quoting In re Paoli, 35 F.3d at 742 n.8). This list of factors "'is non-exclusive and . . . each factor need not be applied in every case.'" Id. (quoting Elcock, 233 F.3d at 746). The Supreme Court has noted that the district court "must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony." Id. (quoting Kumho Tire, 526 U.S. at 152). However, the factors stated above are "simply useful signposts, not dispositive hurdles that a party must overcome in order to have expert testimony admitted." Heller v. Shaw Indus., Inc., 167 F.3d 146, 152 (3d Cir. 1999). "[R]elevant reliability concerns may focus upon personal knowledge or experience" rather than "scientific foundations." Kumho Tire, 526 U.S. at 150.

The final prong requires that the expert testimony "fit" by assisting the trier of fact. ID Sec. Sys. Canada, 198 F. Supp. 2d at 603 (citing Oddi v. Ford Motor Co., 234 F.3d 136, 145 (3d Cir. 2000)). "Admissibility thus depends in part upon 'the proffered connection between the scientific research or test result to be presented and particular disputed factual issues in the

case.'" Oddi, 234 F.3d at 145 (quoting In re Paoli, 35 F.3d at 743). The "fit" standard does not require a plaintiff to prove its "case twice." ID Sec. Sys. Canada, 198 F. Supp. 2d 603 (quoting Oddi, 234 F.3d at 145). Plaintiffs need not "demonstrate to the judge by a preponderance of evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that they are reliable." Id. (quoting In re Paoli, 35 F.3d at 744). Thus, the test does not require that the opinion have "the best foundation" or be "demonstrably correct," but only that the "particular opinion is based on valid reasoning and reliable methodology." Id. (quoting Oddi, 234 F.2d at 146).

Dr. Stark prepared an expert report dated October 18, 2004. See Pl. Opp'n (Stark) Ex. 1. He was deposed in this case on November 14, 2006. See Pl. Opp'n (Stark) Ex. 9. Following his deposition, Dr. Stark submitted a supplemental expert report dated January 15, 2007. See Pl. Opp'n (Stark) Ex. 10.

Dr. Stark's initial expert report stated Ms. Davila was diagnosed with poorly differentiated breast cancer. Pl. Opp'n (Stark) Ex. 1 at 1. At his deposition, Dr. Stark explained that "poorly differentiated" means that the "tumor cells bear little resemblance to normal breast tissue" and that this "is a sign of aggressiveness" of the cancer. Pl. Opp'n (Stark) Ex. 9 at 46:20–23. Dr. Stark opines that "the presence of microscopic-only metastatic disease in a single lymph node strongly suggests that this lymph node would have been free from cancer nine months earlier." Pl. Opp'n (Stark) Ex. 1 at 2. At his deposition, Dr. Stark supported his opinion stating that "[e]very thing about this case suggests that this was [a] rapidly growing disease, based on all the biochemical markers." Pl. Opp'n (Stark) Ex. 9 at 54:23–25. Dr. Stark notes that

a "wide range of public studies" have found that the growth rate of tumors is correlated to biochemical markers. Pl. Opp'n (Stark) Ex. 10 at 1. He cites three published, peer-reviewed papers by John Spratt, M.D., *et al*. See id. In the first of these papers, entitled, "Decelerating Growth and Human Breast Cancer," the authors note that the "study was designed to determine the best growth rate law . . . for modeling human tumor growth in the early clinically detectable period." John A. Spratt, M.D. et al., Decelerating Growth and Human Breast Cancer, 71 CANCER 2013, 2013 (Mar.15, 1993); Pl. Opp'n (Stark) Ex. 12 at 2013. The study noted that although each cell undergoes a random change in growth rate, "when considered in the aggregate" taking into consideration numerous factors, "tumor growth can be approximated by continuous curves." Id. at 2017. The study found that "breast cancer growth can be modeled better by decelerating growth laws" and that evidence provides that "breast cancers of less than several millimeters in diameter grow rapidly." Id.

The second and third papers are parts one and two of a two-part series entitled "Rates of Growth of Human Solid Neoplasms." See John S. Spratt, M.D. et al., Rates of Growth of Human Solid Neoplasms: Part I, 60 J. Surgical Oncology 137-46 (1995); Pl. Opp'n (Stark) Ex. 13; John S. Spratt, M.D. et al., Rates of Growth of Human Solid Neoplasms: Part II, 61 J. Surgical Oncology 68-83 (1996); Pl. Opp'n (Stark) Ex. 14. The first part of this study reviewed reports considering the mathematical growth of a neoplasm or tumor, and reported the actual doubling time of benign and malignant colonic tumors. The second part provided cumulative observations on the actual doubling times for various types of cancer, including breast cancers, and concluded that the breast cancer growth curve is a decelerating curve with great natural

variance.

In his supplemental expert report, Dr. Stark stated that he considered the doubling times for pulmonary metastasis that were discussed in Dr. Spratt's articles, Ms. Davila's biochemical markers, and the correlation between tumor growth rate and biochemical markers, and concluded that he would have expected Ms. Davila's tumor to grow fairly quickly. Pl. Opp'n (Stark) Ex. 10 at 1. In addition, Dr. Stark considered Dr. Spratt's observations about growth rates of metastasis, and methods for determining when a tumor begins, and concluded that Ms. Davila's lymph node would have been cancer free in September 1999. Id.

Dr. Stark concludes that the nine month delay between Ms. Davila's mammogram in September 1999 and when her tumor was removed in June 2000 placed Mr. Davila at an increased risk of harm from cancer, a risk that Dr. Stark quantified "as real and substantial." Pl. Mem. Opp'n (Stark) Ex. 1 at 2. Dr. Stark stated that "the amount of cancer in a lymph node gives the clinician a powerful clue as to how long that node had been involved." Pl. Opp'n (Stark) Ex. 1 at 2. Dr. Stark stated that the biochemical markers uncovered in her tumor in June 2000 "predicts for an outlook worse than normal." Id. He stated further that those biochemical markers ("biochemical markers of tumor aggressiveness") "impl[y] rapidly growing cancer." Pl. Mem. Opp'n (Stark) Ex. 10 at 1. He noted that women with breast cancer whose lymph nodes are free from cancer may enjoy a better outcome than when lymph nodes are infected with cancer. Id. at 1. Dr. Stark stated that the opinions in his expert report were "expressed to a reasonable degree of medical certainty." Pl. Mem. Opp'n (Stark) Ex. 1 at 2.

The United States contends, however, that Dr. Stark is unable to state that the nine month

delay had any effect on Ms. Davila's chances of survival *to any degree of scientific certainty*. The United States argues that Dr. Stark's opinion that the delay in treating Ms. Davila put her at a real, substantial and increased risk of harm from cancer is "mere speculation," and that his opinion is not grounded in any scientific research, and must be excluded as unreliable under Daubert and its progeny. United States Mem. Supp. (Stark) 5. In support of its motion, the Government attached two exhibits, Dr. Stark's expert report dated October 19, 2004 (Exhibit A) and portions of Dr. Stark's November 14, 2006 deposition (Exhibit B).

The United States challenges Dr. Stark's testimony under the "reliability" and "fit" prongs of the Daubert analysis, essentially arguing that his testimony is not the "product of reliable principles and methods" and he has not "applied the principles and methods reliably to the facts of the case." Fed. R. Evid. 702.

The United States does not contest Dr. Stark's qualifications and medical experience.[4]

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[4] Nevertheless, a recitation of Dr. Stark's academic and professional qualifications is in order. Dr. Stark graduated from Yale University, *cum laude*, in 1967, and from Harvard Medical School, *cum laude*, in 1971. Pl. Mem. Opp'n (Stark) Ex. 8 (*Curriculum Vitae* of James J. Stark, M.D., F.A.C.P.). From 1971 to 1973, Dr. Stark served his internship and residency in internal medicine at Barnes Hospital and Washington University in St. Louis, Missouri; from 1973 to 1975, he was on active duty in the United States Public Health Service; from 1975 to 1977, he served a fellowship in medical oncology at Dana-Farber Cancer Institute, Harvard Medical School and Brigham and Women's Hospital. Id. From 1977 to 1988, Dr. Stark was in private practice as a staff physician at the NDC Medical Center in Norfolk, Virginia. Dr. Stark has long maintained a relationship with Eastern Virginia Medical School. Id. He was an Assistant Professor of Medicine there from 1978 to 1982, an Associate Professor of Medicine from 1983 to 1988, and a member of the full-time faculty as Chief, Hematology and Medical Oncology from 1988 to 1992. Id. From 1992 to 1993, Dr. Stark was the Chief of Medical Oncology, Midwestern Regional Medical Center, Cancer Treatment Centers of America ("CTCA") in Zion, Illinois; from 1993 to 2002, he was the Medical Director of CTCA; and from 1995 to 1998, he was the Medical Director of Integrated Oncology Networks at CTCA. Id. From 1997 to 2002, Dr. Stark returned to Eastern Virginia Medical School as an Associate Professor of Medicine. Id. Since 2001, Dr. Stark has been the Medical Director of the Cancer Program at Maryview

Instead, the United States contends that Dr. Stark's testimony rests on two "pillars": (1) the delay in diagnosis caused the cancer to spread to Ms. Davila's lymph nodes, and (2) Ms. Davila had a lower likelihood of survival at the time she was informed of the results of the mammography in June 2000 that at the time of her mammogram in September 1999. United States' Reply (Stark) 4. These are related points because the argument follows that because the nine-month delay caused the cancer to spread from Ms. Davila's breasts to her lymph nodes, her likelihood of survival worsened as a result of her delay. The United States argues that there is no scientific evidence – and, according to the United States, Dr. Stark cannot testify to a medical certainty – that "[t]he presence of microscopic-only metastatic disease in a single lymph node strongly suggests that this lymph node would have been free of cancer nine months earlier." United States Mem. Supp. (Stark) Ex. A at 2. Next, the United States argues that Dr. Stark's methods produce the conclusion that Ms. Davila's condition would not have "changed in any meaningful way" between September 1999 and June 2000 so any delay in informing Ms. Davila of the results

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Medical Center in Portsmouth, Virginia, and since 2002, he has maintained a private practice in Hematology and Medical Oncology and worked as a Professor of Clinical Internal Medicine at Eastern Virginia Medical School. Id. He is board certified in internal medicine and in the subspeciality of medical oncology. Id. He is currently a member of several professional organizations, including the American College of Physicians and the American Society of Clinical Oncology. Id. Dr. Stark has served on the board of directors of numerous professional and community organizations, he has lectured frequently on a wide range of topics, including cancer prevention, cancer detection, and topics related to internal medicine, and has authored or co-authored numerous papers, reviews and abstracts. Id. At his deposition, Dr. Stark described himself has "an internist who subspecializes in the diagnosis and treatment of people with cancer." Pl. Opp'n (Stark) Ex. 9 (Nov. 14, 2006 Tr. J. Stark) at 12:9-12. He testified that approximately 80% of his current private practice is devoted to treatment of cancer, id. at 15:20–23, and that 25-30% of his practice involves treating women with breast cancer, id. at 16:10–12. Further, Dr. Stark noted that while only about 5% of his time is currently spent teaching, 25% of that time is spent teaching medical oncology, specifically breast cancer, to medical students, interns and residents. Id. at 88:9–25.

of her mammography would "obviously not have increased the risk of harm."

The Government attempts to show that Dr. Stark is "unreliable" under Daubert, essentially by plucking isolated portions of Dr. Stark's deposition testimony where, in response to questions from the Government's counsel, Dr. Stark may have equivocated, was unable to cite specific medical literature, or testified that there was "no way to know" the answer to a posed hypothetical question. For example, the United States points to two instances where Dr. Stark was unable to cite medical literature to support his opinion as evidence that Dr. Stark's testimony is mere "speculation."

> Q: All right. Tell me all of the evidence that you have that the metastasis first became detectable between October and June – October of '99 and June of 2000.
> A. A, that her cancer was described biochemically as aggressive, rapidly growing, and B, that it was a micrometastasis in June of 2000. That's it.
> Q. And you have no medical literature to support that conclusion?
> A. Well, I think the – not that I can cite to you as I sit here today.

United States' Mem. Supp. 8 (quoting J. Stark Dep. Tr. 117:9-20).

> Q: You say the fact that it took three years from the time of diagnosis and almost four years from the time her cancer should have been diagnosed for her to develop metastasis argues strongly for the concept that her cancer was almost eradicated by the adjuvant chemotherapy she received. Did I read that right?
> A: You did. . . .
> Q: Do you have any medical literature to support that statement? . . .
> A: All right. I think – all right. As I sit here today, I cannot quote a specific quotation.

United States' Mem. Supp. (Stark) 9-10 (quoting J. Stark Dep. Tr. 124:21–125:17).

An expert may be found reliable based on "personal knowledge or experience." Kumho Tire, 526 U.S. at 150. Pointing to the symptoms a patient exhibits (in this case, certain biological markers), and making an evaluation or diagnosis based on those symptoms is precisely the type

of "opinion" that doctors make every day in practice. Courts within the Third Circuit permit experts to testify even if the expert's opinions are not supported by medical research. See, e.g., Heller, 167 F.3d at 155 ("Given the liberal thrust of the Federal Rules of Evidence, the flexible nature of the Daubert inquiry, and the proper roles of the judge and the jury in evaluating the ultimate credibility of an expert's opinion, we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness."). The Court notes that the United States, for the most part, is not arguing that Dr. Stark's opinions are not supported by medical research, only that he was unable to cite such research in response to counsel's question during a deposition. "Gotcha" advocacy, however, will not carry the day.

Furthermore, the United States does not challenge, in any substantial way, the *bona fides* of the three studies by Dr. Spratt. Dr. Stark describes the Spratt studies as "landmark" or "seminal," and the United States does not refute those characterizations. At most, the United States refers to one block quotation from one of Dr. Spratt's studies and notes that Dr. Spratt "himself concludes that the time of metastasis cannot be predicted by his growth models." United States Reply Br. (Stark) 5. The quote the United States refers to, however, merely notes that not all cancers metastasize, and if they do metastasize, they will do so at different rates, that is, "non-metastasizing cancers" do not metastasize, some "early metastasizing cancers" metastasize before they are detectable, and some "late metastasizing cancers" metastasize further along in the development of the cancer. Spratt et al., Rates of Growth of Human Solid Neoplasms: Part II at 79. The United States does not dispute the fact that these studies are

published, peer-reviewed studies that are precisely the type that would pass muster in federal court. See Kannankeril v. Terminix Int'l, 128 F.3d 802, 809 (3d Cir. 1997) ("Two other factors that a district court can take into account in assessing reliability are peer-review and publication. They may not, however, in every case be necessary conditions of reliability." (citing Daubert, 509 U.S. at 593; Paoli, 35 F.3d at 742)); cf. Schneider v. Fried, 320 F.3d 396, 406 (3d Cir. 2003) (noting that expert testimony does not have to obtain general acceptance or be subject to peer review to be admitted under Rule 702);

In addition, counsel for the Government posed the following hypothetical question to Dr. Stark:

> Q: Well, let's be hypothetical for a moment, Doctor.
> Hypothetically assuming that [the hospital] was actually going to try to detect a single cancer cell in the lymph node in September or October of 1999, are you saying that it could have been – it would have been there and it could have been detected?
> A: I'm saying it might have been there. There's no way to know. I'm not ruling out the possibility.

United States' Mem. Supp. (Stark) 8 (citing J. Stark Dep. Tr. 120:11-20). Dr. Stark's opinion, which he stated quite frankly, was that if the hospital had tried to detect cancer in Ms. Davila's lymph nodes in September 1999, it *may* have been there and it *may* have been detectable. Dr. Stark had testified previously that either no cancer existed in Ms. Davila's lymph nodes in September 1999, or if it did exist, it would not have been detected based on the practices and technology available in 1999. Further, he testified that based on Ms. Davila's biochemical markers and other symptoms, Ms. Davila's cancer was aggressive and grew very quickly. Without determining whether these are the best conclusions, the Court finds that these are

certainly "reliable" opinions. Responding that there is "no way to know" an answer to a hypothetical question, and not being able to cite a specific medical literature at a deposition do not disqualify an expert as "unreliable" under Daubert and under conventional case law.

The Court's role under Rule 702 and Daubert is to serve as a "gatekeeper" to ensure that Dr. Stark is a *reliable* expert witness. This role is as "gatekeeper" is a flexible one. Daubert, 509 U.S. at 594 & n.12; see also Heller, 167 F.3d at 152. The Court acknowledges that it must "examine the expert's conclusions in order to determine whether they could reliably follow from the facts known to the expert and the methodology used." Heller, 167 F.3d at 153. However, at this juncture the Court's role is not to determine that the expert witness's testimony is correct, or that his conclusions are the best conclusions that result from the underlying medical data and research. See Kannankeril, 128 F.3d at 806 ("Daubert does not set up a test of which opinion has the best foundation, but rather whether any particular opinion is based on valid reasoning and reliable methodology.").

The Court finds that the United States' arguments are unavailing. Plaintiff has set forth Dr. Stark's initial expert report, which states Dr. Stark's conclusions, the three articles by Dr. Spatt, which explain the methods that Dr. Stark employed to determine the growth rate of Ms. Davila's cancer cells, and Dr. Stark's supplemental expert report, which explains how Dr. Stark tied the methods discussed in the Spatt papers to Ms. Davila's case. The Court has taken into consideration Dr. Stark's education and three decades of experience as an internist and an oncologist, his numerous speaking engagements and academic interests centered on oncology, and the fact that Dr. Stark actively practices medicine with a substantial focus on treating patients

with breast cancer. Given Dr. Stark's experience in the field of oncology, and his exposure to hundreds of patients with breast cancer, the Court finds that Dr. Stark's testimony is reliable under Daubert.[5] The Court of Appeal's statement in Heller is especially pertinent here. The Court of Appeals stated:

> In the actual practice of medicine, physicians do not wait for conclusive, or even published and peer-reviewed, studies to make diagnoses to a reasonable degree of medical certainty. . . . [E]xperience with hundreds of patients, discussions with peers, attendance at conferences and seminars, detailed review of a patient's family, personal, and medical histories, and thorough physical examinations are the tools of the trade, and should suffice for the making of a differential diagnosis even in those cases in which peer-reviewed studies do not exist to confirm the diagnosis of the physician. The Federal Rules of Evidence recognize as much.

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[5] Plaintiff advances the rather perplexing argument that the Supreme Court's holding in Daubert, as well as Daubert's progeny, do not apply to a medical negligence case brought in federal court under Pennsylvania law's increased risk of harm standard of causation. Pl. Opp'n (Stark) 10–15; Pl. Surreply (Stark) 1. Plaintiff's argument in this respect is entirely wrong.

Under Daubert, as discussed above, a party seeking to offer expert testimony must establish that the testimony is reliable, i.e., that there are "good grounds" for the expert's conclusions. The Court of Appeals for the Third Circuit has noted, contrary to Plaintiff's argument in this case, that Pennsylvania law on the degree of certainty required of an expert's opinion applies *in addition to* Daubert's "good grounds" requirement. Heller, 167 F.3d 153 n.4. In the seminal case of In re Paoli, the court of appeals recognized that Pennsylvania's "reasonable degree of medical certainty" standard is both "a rule of admissibility" and "part of the plaintiff's burden of proof." In re Paoli, 35 F.3d at 751; see also Fabrizi v. Rexall Sundown, Inc., 2004 U.S. Dist. LEXIS 9859, at *17 (W.D. Pa. June 2, 2004) (citing same). Thus, in a case involving Pennsylvania's "reasonable degree of medical certainty" standard, a federal court may find that a plaintiff's medical expert's testimony is "unreliable" under Daubert, and, therefore, is inadmissible, notwithstanding the expert witness's willingness to testify that the plaintiff's injury was caused by the defendant with a "reasonable degree of medical certainty." Conversely, if a federal court were to find that a plaintiff's expert testimony is admissible under Daubert, a defendant would still be entitled to summary judgment under Pennsylvania law if the plaintiff's expert is unable to testify that the plaintiff's injury was caused by the defendant with a "reasonable degree of medical certainty." See In re Paoli, 35 F.3d at 752; Fabrizi, 2004 U.S. Dist. LEXIS 9859, at *17.

Heller, 167 F.3d at 155-56.[6]

The United States will have ample opportunity to challenge Dr. Stark's methods, opinions, and credibility[7] at trial. The United States' motion on Daubert grounds will be denied.

B. Whether Dr. Stark's Testimony Establishes Causation Under Pennsylvania Law

The United States next argues that Dr. Stark cannot reliably testify (and therefore, that

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[6] In addition, in Schneider, the court of appeals held that "[w]here there are other factors that demonstrate the reliability of the expert's methodology, an expert opinion should not be excluded simply because there is no literature on point." Schneider, 320 F.3d at 406. The court of appeals noted that the medical expert had stated that he based his opinion not only upon medical literature, which the Magistrate Judge had discounted, but also upon his own experience as a cardiologist. The court of appeals cited the doctor's credentials, including his impressive education and professional qualifications, and his vast experience as an invasive cardiologist. See id. ("The record establishes that as an invasive cardiologist, who normally diagnoses heart conditions, Dr. Semigran was routinely present during surgical procedures and regularly advised interventional cardiologists during the course of those procedures. Dr. Semigran also testified that he would consult with interventional cardiologists about which drugs should or should not be given to patients undergoing angioplasties."). The court of appeals concluded that the doctor's experience "renders his testimony reliable [and] demonstrates that his testimony is based on 'good grounds.'" Id.

In another case, the court of appeals stated:

> Based on the record before us, we conclude that Dr. Gerson's opinion on causation has a factual basis and supporting scientific theory. Dr. Gerson based his opinion on Dr. Kannankeril's medical records, Dr. Grober's reports confirming her medical condition, and Terminix's application receipts. He also relied on general experience and readings, general medical knowledge, standard textbooks, and standard references.

Kannankeril, 128 F.3d at 809. The court of appeals noted that after considering all the relevant facts, the expert witness stated his opinion to a reasonable degree of medical certainty. It concluded that the expert's testimony was "neither conjecture nor speculation." Id.

[7] See, e.g., Kannankeril, 128 F.3d at 807-08 (noting that the issue of whether the results of one test, which was one of the factors relied upon by the expert witness, outweighs the other factors relied upon by the expert and undermines his opinion is an issue of credibility, not an issue of admissibility).

Plaintiff cannot prove), that the delay in treating Ms. Davila's breast cancer increased her risk of harm and that the increased risk of harm was a substantial factor in causing Ms. Davila's death.

Under Pennsylvania law, to demonstrate a *prima facie* case of medical malpractice, a plaintiff must establish that: (1) the medical practitioner owed a duty to the plaintiff; (2) the practitioner breached that duty; (3) the breach of duty was a proximate cause of, or a substantial factor in, bringing about the harm the plaintiff suffered; and (4) the damages suffered were the direct result of the harm. Habel v. Temple Univ. Hosp., 2005 U.S. Dist. LEXIS 4372, at *7-8 (D. Del. 2005) (citing Montgomery v. S. Phila. Med. Group, 656 A.2d 1385, 1390 (Pa. Super. 1995); Mitzelfelt v. Kamrin, 584 A.2d 888, 891 (Pa. 1990). In a case such as this one, if a physician increases a patient's risk of harm by failing to inform the patient of the results of her mammogram, the plaintiff must prove that the increased risk of harm is a substantial factor contributing to the injuries sustained. Mitzelfelt, 584 A.2d at 892; see id. ("[O]nce there is testimony that there was a failure to detect the cancer in a timely fashion, and such failure increased the risk that the woman would have either a shortened life expectancy or suffered harm, then it is a question for the jury whether they believe, by a preponderance of the evidence, that the acts or omissions of the physician were a *substantial factor* in bringing about the harm.") (emphasis added).[8]

[8] In Mitzelfelt, the court specifically used the case of the failure of a physician to timely diagnose breast cancer diagnosis as an example for Pennsylvania's relaxed standard of causation. Mitzelfelt, 584 A.2d at 892. The court noted that the plaintiff is "required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." Id. (citing Brannan v. Lakenau Hosp., 490 Pa. 588, 417 A.2d 196 (1980). After noting that this standard would not pose a problem for many cases, the court noted that "certain cases make this an impossible standard," i.e., certain cases that, "irrespective of the

In Mitzelfelt, the plaintiff underwent a surgery after which she developed partial paralysis of all four extremities, was thereafter substantially confined to a wheelchair and was unable to care for herself. Mitzelfelt, 584 A.2d at 890. The issue on appeal – at trial the jury rendered a verdict for the plaintiffs against a defendant doctor – was "what standard of proof is required in medical malpractice cases when there is a percentage of risk that harm would occur, even in the absence of negligence." Id. at 889. The court employed a two part test. Id. at 894. The first step is to determine whether the medical expert for the plaintiff "could testify to a reasonable degree of medical certainty that the acts or omissions complained of could cause the type of harm that the appellant suffered." Id. Secondly, the court must "determine whether the acts complained of caused the actual harm suffered by the appellant." Id. As to the second part of the test, Pennsylvania courts apply a "relaxed standard," requiring only a finding that the physician's action (or omission) was a *substantial factor* in causing the injury. Id. In other words, a plaintiff is not required to show, to a reasonable degree of medical certainty, that the acts or omissions of the physician *actually* caused the harm to the plaintiff. Id.

The United States only cited one case, namely, Mitzelfelt, in support of its position that Dr. Stark's testimony is insufficient to establish causation under Pennsylvania law. Mitzelfelt

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quality of the medical treatment, a certain percentage of patients will suffer harm." Id. The court offered the example of breast cancer, and stated that even with timely detection of breast cancer "and optimal treatment, a certain percentage of patients unfortunately will succumb to the disease." Id. Notable, the court stated that this "statistical factor" will not doom a plaintiff's law suit. Id. If a plaintiff offers testimony that there was "a failure to detect the cancer in a timely fashion, and such failure increased the risk that the woman would have either a shortened life expectancy or suffered harm, then it is a question for the jury whether they believe, by a preponderance of the evidence, that the acts or omissions of the physician were a substantial factor in bringing about the harm." Id.

was an appeal of a decision after a full trial on the merits. In particular circumstances, summary judgment[9] may be appropriate when a plaintiff is unable to produce an expert to testify that to a "reasonable degree of medical certainty" that the physician's actions were a "substantial factor" in causing the plaintiff's harm. See In re Paoli, 35 F.3d at 752; Fabrizi, 2004 U.S. Dist. LEXIS 9859, at *17. However, this is not one of those cases because Dr. Stark reaches precisely that conclusion. In his reports and at his deposition, Dr. Stark clearly opines "to a reasonable degree of medical certainty" that the the nine month delay between Ms. Davila's mammogram in September 1999 and her surgery in June 2000 placed her at an increased risk – a "real and substantial" risk – of harm from cancer, which at June 2000 had spread from her breasts to her lymph nodes. Pl. Mem. Opp'n (Stark) Ex. 1 at 2. Under Mitzelfelt, Plaintiff has met her burden of proving a *prima facie* case and is entitled to a trial on the merits. Therefore, the United States' motion, which is in joined by Episcopal Hospital, to preclude Dr. Stark's expert testimony will be denied in its entirety.

At trial, the fact finder – in this case, the Court – will hear evidence presented by the Plaintiff and all of the defendants, assess the credibility of the witnesses presented, and weigh all of the evidence, including the testimony of the expert witnesses in order to determine whether the delay in treatment was a "substantial factor" in bringing about the harm to Ms. Davila.

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[9] Although the United States' current motion is pertains to the admissibility of expert testimony and is not a motion for summary judgment, the practical result if the Court were to grant the United States' motion and preclude Dr. Stark from testifying, would be to eviscerate any chance for Plaintiff to prove the element of causation in this case. If the Court were to grant the United States' motion, the United States would likely move for summary judgment immediately thereafter.

II. Motions to Preclude Filed by Dr. Patel and Lehigh

Defendants Dr. Patel and Lehigh bring two related motions to exclude expert testimony that the United States intends to present with respect to Dr. Patel. The United States intends to submit expert reports from Jessica B. Katz, M.D., an internist, and Jennifer D. Tobey, M.D., a radiologist. Primarily, Dr. Katz will testify that Dr. Soto, the internist who treated Ms. Davila and referred her to get a mammogram, acted properly and did not breach the standard of care that an internist owes to her patients. Dr. Tobey will primarily testify that Dr. Patel, a radiologist, breached the standard of care that a radiologist owes to his patients. As the Court understands the motion papers, Dr. Patel and Lehigh do not object to each expert testifying as noted above. Dr. Patel and Lehigh do object, however, to the United States offering both Dr. Tobey, in her capacity as a radiologist, and Dr. Katz, in her capacity as an internist who regularly interacts with radiologists in the course of her practice, to testify that Dr. Patel breached a *radiologist*'s standard of care.

Dr. Patel and Lehigh present one motion to preclude cumulative expert testimony, in which they argue that both Dr. Katz and Dr. Tobey will provide practically identical opinions critical of the care and treatment provided by Dr. Patel, and, therefore, one of these experts is superfluous. Dr. Patel and Lehigh present a second motion to preclude the testimony of Dr. Katz in which they argue that Dr. Katz must be precluded from testifying because Dr. Katz does not meet the expert qualification requirements for a radiologist under Section 512 of the Pennsylvania Medical Care Availability and Reduction of Error Act, 40 Pa. Conn. Stat. Ann. § 1303.512 (West 2003) ("MCARE Act").

In response, the United States argues that even though Dr. Tobey will provide an expert opinion on Dr. Patel's treatment with respect to the standard of care for a radiologist, Dr. Katz's testimony, as an internist, is necessary to supply the appropriate context to explain the typical interaction between a radiologist to whom a patient has been referred and the patient's primary care physician.

A. *Cumulative Testimony*

Rule 403 of the Federal Rule of Evidence provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, *or needless presentation of cumulative evidence.*

Fed. R. Evid. 403 (emphasis added). Rule 403 recognizes that the Court must employ a cost / benefit analysis in order to determine whether or not to admit evidence; relevance alone does not ensure its admissibility. Coleman v. Home Depot, Inc., 306 F.3d 1333, 1343 (3d Cir. 2002).[10] Evidence may be excluded if its probative value is not worth the problems that its admission may cause, e.g. unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. Id. However, the court of appeals has recognized that there is a "strong presumption that relevant evidence should be admitted, and thus for exclusion under Rule 403 to be justified, the probative value of evidence must be

[10] Our court of appeals noted that Rule 403 necessarily requires that a district court engage in balancing to determine whether the probative value of the evidence is "substantially outweighed" by the negative factors listed in Rule 403. Coleman, 306 F.3d at 1344. The Court stated that balancing test ensures that "juries are not presented with evidence that is far less probative than it is prejudicial," by balancing "'the maximum reasonable probative force for the offered evidence,'" with "'the likely prejudicial impact of the evidence.'" Id. (quoting Federal Rules of Evidence Manual 242 (Stephen A. Saltzburg et al. eds., 7th ed. 1998)).

'substantially outweighed' by the problems in admitting it." Id. at 1343-44. As a result, evidence that is highly probative is exceptionally difficult to exclude. Id. at 1344; see also Suter v. Gen. Accident Ins. Co. of Am., 424 F. Supp. 2d 781, 790 (D.N.J. 2006) (providing that "evidence should be excluded under Rule 403 'only sparingly since the evidence excluded is concededly probative. The balance of the rule should be struck in favor of admissibility.'" (quoting Blancha v. Raymark Indus., 972 F.2d 507, 516 (3d Cir. 1992) (citations omitted))).

In a bench trial, however, courts have favored the practice of admitting evidence even though such evidence may be prejudicial "'because the Court is capable of assessing the probative value of the [evidence] and excluding any arguably improper inferences.'" Suter, 424 F. Supp. 2d at 790 (quoting Tracinda Corp. v. DaimlerChrysler AG, 362 F. Supp. 2d 487, 497 (D. Del. 2005); see also Gulf States Utils. Co. v. Ecodyne Corp., 635 F.2d 517, 519 (5th Cir. 1981) (stating that Rule 403 assumes that a trial judge can "discern and weigh the improper inferences that a jury might draw from certain evidence, and then balance those improprieties against probative value and necessity. Certainly, in a bench trial, the same judge can also exclude those improper inferences from his [or her] mind in reaching a decision.").[11]

[11] In Suter, the plaintiff was the liquidator of an insurance company who insured Pfizer, which owned a company that made a certain faulty, mechanical heart valve, and the defendant was company that reinsured the plaintiff insurance company. Suter, 424 F. Supp. 2d at 784. A reinsurance contract enables the reinsured (the original insuring entity) to transfer some part of its risk to another entity, the reinsurer. Id. The defendants sought to exclude a portion of the plaintiff's expert's testimony which referred to the mechanical heart valve as a "ticking time bomb." The defendant argued that "'the sole purpose of the 'time bomb' metaphor is to inflame and to cause confusion on the primary issue of whether bodily injury takes place upon valve implantation.'" Id. (citation omitted). The court noted that while it was "sympathetic to Defendant's concern that the use of such a powerfully descriptive phrase may lead to prejudice," in a bench trial "the Court is quite capable of distinguishing rhetoric from reality." Id. The court concluded that because "the Rule 403 balancing test favors admissibility, and since in the case of

B. *Dr. Katz's Qualifications Under Pennsylvania Law*

In a medical malpractice case under Pennsylvania law, a plaintiff must provide a medical expert to testify to the applicable standard of care. Amaya v. York Hosp., 2006 U.S. Dist. LEXIS 2133, at *2 (M.D. Pa. Jan. 3, 2006). Under MCARE,[12] an expert must have the following

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a bench trial it is reasonable to believe that the trial judge will not be moved by improper inference, the 'ticking time bomb' metaphor will be included, and Defendant's motion as to [the plaintiff's expert witness] is denied." Suter, 424 F. Supp. 2d at 790-791.

[12] Section 512 of MCARE, entitled "Expert qualifications," provides:

> (a) GENERAL RULE.– No person shall be competent to offer an expert medical opinion in a medical professional liability action against a physician unless that person possesses sufficient education, training, knowledge and experience to provide credible, competent testimony and fulfills the additional qualifications set forth in this section as applicable.
>
> (b) MEDICAL TESTIMONY. – An expert testifying on a medical matter, including the standard of care, risks and alternatives, causation and the nature and extent of the injury, must meet the following qualifications:
>
> (1) Possess an unrestricted physician's license to practice medicine in any state or the District of Columbia.
>
> (2) Be engaged in or retired within the previous five years from active clinical practice or teaching.
>
> Provided, however, the court may waive the requirements of this subsection for an expert on a matter other than the standard of care if the court determines that the expert is otherwise competent to testify about medical or scientific issues by virtue of education, training or experience.
>
> (c) STANDARD OF CARE.– In addition to the requirements set forth in subsections (a) and (b), an expert testifying as to a physician's standard of care also must meet the following qualifications:
>
> (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
>
> (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e).

qualifications to testify as to a standard of care:

> (1) Be substantially familiar with the applicable standard of care for the specific care at issue as of the time of the alleged breach of the standard of care.
>
> (2) Practice in the same subspecialty as the defendant physician or in a subspecialty which has a substantially similar standard of care for the specific care at issue . . . .
>
> (3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board . . . .

40 Pa. Conn. Stat. Ann. § 1303.512(c). An exception exists where a physician "possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period." Id. § 1303.512(e). Dr. Patel and Lehigh

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> (3) In the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e).
>
> (d) CARE OUTSIDE SPECIALTY. – A court may waive the same subspecialty requirement for an expert testifying on the standard of care for the diagnosis or treatment of a condition if the court determines that:
>
> (1) the expert is trained in the diagnosis or treatment of the condition, as applicable; and
>
> (2) the defendant physician provided care for that condition and such care was not within the physician's specialty or competence.
>
> (e) OTHERWISE ADEQUATE TRAINING, EXPERIENCE AND KNOWLEDGE. – A court may waive the same specialty and board certification requirements for an expert testifying as to a standard of care if the court determines that the expert possesses sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine within the previous five-year time period.

40 Pa. Conn. Stat. Ann. § 1303.512 (West 2003).

argue that Dr. Katz, as an internist, lacks the relevant qualifications to opine as the applicable standard of care for a radiologist.[13]

C. *Analysis*

Dr. Katz will testify that it was not Dr. Soto's responsibility to follow up on Ms. Davila's mammogram. United States Opp'n 4. Rather, Dr. Katz will testify it was Dr. Patel's responsibility (as the radiologist) to notify Dr. Soto of the results of any tests, including the mammography, that he performed. Id. 4-5. Further, Dr. Katz will testify that Dr. Patel's actions fell below the requisite standard of care because Dr. Patel failed to contact an appropriate person in Dr. Soto's office to inform Dr. Soto of Ms. Davila's test results. *This is exactly the same testimony that Dr. Tobey will provide*. See Def. Mem. Supp. (Cumulative Testimony) Ex. B (June 2, 2006 Expert Report of J. Tobey, M.D.) ("Nelly Ruiz was not the appropriate person to communicate mammogram results; she was not a 'responsible designee'; and failure to contact an appropriate person falls below the standard of care."); United States Mem. Opp'n (Katz) 6 n.2 (noting that Dr. Tobey will "testify concerning all of the actions of Dr. Patel which fell below the standard of care, which includes his failure to communicate the mammography results to Dr. Soto but which also have several other aspects."). Further, it seems that the gist of Dr. Katz's testimony with respect to Dr. Patel's actions, amounts to the proposition that, in general, internists expect that radiologists will follow their standard of care and contact the internist if there is a suspicious mammography. United States Opp'n (Katz) 6.

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[13] Defendants Dr. Patel and Lehigh challenge only Dr. Katz's competency to testify to the applicable standard of care under section 512(c) of MCARE. Dr. Patel and Lehigh do not challenge Dr. Katz's designation as an expert under the Federal Rules of Evidence.

The United States argues that "[i]n this case, the standard of care at issue is not the diagnosis or treatment of Ms. Davila's breast cancer. Rather it is the standard of care which requires a radiologist, who has read a mammography and determined that a patient appears to have breast cancer, to notify the referring physician, an internist." United States Opp'n (Katz) 2. The United States explains that Dr. Katz will testify that Dr. Soto acted properly and that "[i]n order to understand why the standard of care for an internist makes sense, the standard of care of the radiologist must be explained." United States Opp'n (Katz) 5. The United States argues that "[w]ithout understanding that the responsibility lies with the radiologist to communicate with the referring physician, the standard of care for the internist may not make sense." United States Mem. Opp'n (Katz) 6 n.2. The Court is confident, however, that it will manage to grasp the "sense" of the interactive relationship between radiologists and internists by hearing the testimony of both a radiologist and an internist. Obviously, there is some overlap between the standards of care involved in this case, but if a radiology expert testifies that it is the radiologist's role to do "X" and the internal medicine expert testifies that it is not the internist's job to do "X", the Court can understand the appropriate standards of care without the internal medicine expert also testifying that it was the radiologist's job to do "X".

As a practical matter, however, both of Dr. Patel and Lehigh's motions *in limine* will be denied. The United States argues, on the one hand, that Dr. Katz's report must discuss Dr. Patel's actions in defending Dr. Soto's actions because Dr. Soto's actions, as Ms. Davila's primary care physician, "are predicated on the expectation that Dr. Patel (and all radiologists) will follow his standard of care." United States Opp'n (Cumulative Testimony) 5-6. Then, on

the other hand, the United States argues that "[t]he proper expert to testify concerning Dr. Patel's actions is a radiologist." Id. at 6. The only reasonable conclusion is that testimony from both Dr. Katz and Dr. Tobey is necessary in this case, albeit for different reasons. Therefore, Dr. Patel and Lehigh's motion to preclude cumulative testimony will be denied. In addition, at this stage the Court will decline to determine that Dr. Katz is, or is not, qualified to testify as to the standard of care for a radiologist under Pennsylvania's MCARE Act.[14] The Court is confident that Dr. Katz's testimony will center on the standard of care for an internist, which Dr. Katz is

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[14] Although, the Court declines to address Dr. Patel and Lehigh's argument that Dr. Katz is not qualified to testify as a radiologist under Pennsylvania's MCARE Act, the Court notes that that the United States has not presented a convincing argument that Dr. Katz should be permitted to testify as to why, in her opinion, Dr. Patel's actions fell below the standard of care for a radiologist. The United States argues simply that because the standard of care pertains to a radiologist's duty to notify an internist of the results of a mammography, "Dr. Katz, who has sufficient training, experience and knowledge in a related field (internal medicine) is qualified under MCARE to offer an opinion in this case on the issue of Dr. Patel's communication responsibilities." United States Opp'n (Katz) 3. Even though Dr. Katz is not a board certified radiologist and the United States does not argue that Dr. Katz has any discernable experience in radiology, the United States contends that Dr. Katz is "certainly qualified to testify concerning the requirement placed upon the radiologist to communicate the results to an internist." United States Opp'n (Katz) 7.

The Court does not accept the proposition, standing alone, that because it is typical for an internist to interact with a radiologist, that the internist possesses the requisite "sufficient training, experience and knowledge to provide the testimony as a result of active involvement in or full-time teaching of medicine in the applicable subspecialty or a related field of medicine " to testify as to a radiologist's standard of care. 40 Pa. Conn. Stat. Ann. § 1303.512(e) (West 2003). The United States does not explain how radiology is "related to" internal medicine aside from the fact that radiologists and internists communicate with one another. Section 512(e) of MCARE requires much more than that. The logic advanced by the United States would lead to the conclusion that an internist in Dr. Katz's position would be competent to testify as to the standard of care for every physician to whom the internist refers a patient for further tests. After Ms. Davila's initial appointment with Dr. Soto, Dr. Soto gave Ms. Davila multiple referrals, including one for a screening mammogram, an eye exam, a gynecologic exam and a referral to see a chiropractor. United States' Pretrial Mem. 2. Would, according to the United States' logic, a internist be competent to testify as to an ophthalmologist's standard of care?

qualified to offer.[15] The testimony offered by Dr. Tobey will primarily focus on the standard of care for a radiologist. The Court is confident that it is capable of parsing the testimony from both Dr. Katz and Dr. Tobey and that the probity of their testimony will not be doubled merely because it may be presented twice.

CONCLUSION

For the reasons stated above, the United States' Motion to Preclude Plaintiff's Expert, Dr. James J. Stark, from Testifying, Dr. Patel and Lehigh's Motion *In Limine* to Limit and Preclude Cumulative Expert Testimony, and Dr. Patel and Lehigh's Motion *In Limine* to Preclude Jessica Katz, M.D. from Providing Expert Testimony as to Dr. Patel will be denied. An appropriate order follows.

S/Gene E.K. Pratter
Gene E.K. Pratter
United States District Judge

February 9, 2007

[15] Dr. Patel and Lehigh do not argue that Dr. Katz is not qualified under MCARE to testify as to the appropriate standard of care for internal medicine. A review of Dr. Katz's curriculum vitae reveals that this argument would likely fail. Dr. Katz is licensed in Pennsylvania and is board certified in internal medicine. Mot. to Preclude (Cumulative Testimony), Ex. A (Curriculum Vitae, J. Katz, M.D., Ph.D., F.A.C.P.) at 1. She performed her residency in internal medicine at New York University Hospital and Bellevue Hospital Medical Center in New York City. Id. She is currently involved in private practice in internal medicine, is a Clinical Assistant Professor of Medicine in the Associate Faculty of Pennsylvania Hospital in Philadelphia, and holds an active clinical staff appointment in the Department of Medicine at the Lankenau Hospital in Wynnewood, Pennsylvania. Id. at 1-2.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CLAUDIA QEISI,	**:**	**CIVIL ACTION**
Plaintiff	**:**	
	:	
v.	**:**	
	:	
BHUPENDRA PATEL, LEHIGH	**:**	
AVENUE RADIOLOGY	**:**	
ASSOCIATES, EPISCOPAL	**:**	
HOSPITAL, TEMPLE	**:**	
UNIVERSITY HOSPITAL,	**:**	
THE UNITED STATES OF AMERICA,	**:**	**No. 02-8211**
Defendants.	**:**	

O R D E R

AND NOW, this 9th day of February, 2007, upon consideration of the Motion to Preclude Plaintiff's Expert, Dr. James J. Stark, from Testifying filed by the United States (Docket No. 127) and joined by Episcopal Hospital (Docket No. 130), Plaintiff's Response thereto (Docket No. 137), the United States Reply (Docket No. 141), and the Plaintiff's Surreply (Docket No. 145), the Motion *In Limine* to Limit and Preclude Cumulative Expert Testimony filed by Dr. Bhupendra Patel and Lehigh Avenue Radiology Associates (Docket No. 129), the United States' Response there to (Docket No. 134), the Motion *In Limine* to Preclude Jessica Katz, M.D. from Providing Expert Testimony as to Dr. Patel filed by Dr. Bhupendra Patel and Lehigh Avenue Radiology Associates (Docket No. 135), and the United States' Response thereto (Docket No. 138), it is hereby **ORDERED** that:

1. the Motion to Preclude Plaintiff's Expert, Dr. James J. Stark, from Testifying filed by the United States (Docket No. 127) and joined by Episcopal Hospital (Docket No. 130) is **DENIED**;

2. the Motion *In Limine* to Limit and Preclude Cumulative Expert Testimony filed by Dr. Bhupendra Patel and Lehigh Avenue Radiology Associates (Docket No. 129) is **DENIED**;

3. the Motion *In Limine* to Preclude Jessica Katz, M.D. from Providing Expert Testimony as to Dr. Patel filed by Dr. Bhupendra Patel and Lehigh Avenue Radiology Associates (Docket No. 135) is **DENIED**.

BY THE COURT:

S/Gene E.K. Pratter
GENE E.K. PRATTER
United States District Judge