

# The Legal Intelligencer

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## Delayed Diagnosis Lawsuit Results In Defense Verdict

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*Of the Legal Staff*

A 12-woman Philadelphia jury on Monday returned with a defense verdict in a delayed diagnosis of breast cancer case in which the plaintiff had undergone a double mastectomy after learning that invasive cancer originating in her left breast spread to 24 nearby lymph nodes.

After a nine-day trial before Philadelphia Common Pleas Judge Sheldon Jelin in *D'Orazio v. Parlee & Tatem Radiologic Associates Ltd.*, jurors deliberated for two and one-half days before relieving three radiologists and two hospitals of liability for plaintiff Shirley W. D'Orazio's alleged reduced chances of survival due to the advanced stage of the disease at the time of diagnosis.

Attorney Naomi Plakins of Plakins Rieffel & Ray in Doylestown represented defendant radiologist Dr. Henry Randolph Tatem III as well as defendant company Parlee & Tatem Radiologic Associates. Plakins characterized the case as a battle of the experts since the plaintiff and the defendants relied on experts to establish the applicable standard of care as well as causation.

According to Tatem and Parlee & Tatem's trial brief, D'Orazio underwent a series of routine mammograms from 1988 to 1998, when she was diagnosed with infiltrating lobular carcinoma.

Lobular carcinoma, Plakins said, is a relatively rare form of breast cancer, accounting for about 10 percent of all cases. It spreads by proceeding in a single-file fashion, resulting in fingerlike projections into normal tissue.



### PLAKINS

The 1988 mammogram did not show any suspicious abnormality, the defendants' trial brief states. Similarly, a 1990 mammogram conducted at defendant Frankford Hospital-Torresdale Division in Philadelphia and interpreted by defendant radiologist Dr. Robert Bronstein showed no suspicious abnormalities or changes, the document indicates.

D'Orazio's next mammogram was performed in 1994 at the same hospital; radiologist Dr. Bruce Lehrman interpreted the image as normal, the trial brief states. According to Plakins, the plaintiff's expert radiologist agreed with that reading, and Lehrman was released from the case.

It was the 1990 mammogram, along with two more that were conducted in 1995 and 1997, that the plaintiff focused on in her suit.

The 1995 radiograph was reviewed and interpreted by Tatem at defendant Doylestown Hospital's Women's Diagnostic Center, the trial brief states. In 1997, D'Orazio underwent the third mammogram at issue, and it was interpreted by defendant radiologist Dr. Amy Whitley, also an employee of Parlee & Tatem. Both mammograms were interpreted as normal.

But in 1998, the document indicates, the plaintiff found a lump in her breast. A subsequent mammogram at the Women's Diagnostic Center revealed distortion in the left breast, the brief states.

Shortly thereafter, the trial brief states, D'Orazio underwent a breast biopsy and then a modified radical mastectomy. While no residual tumor was found in her left breast, 24 of 34 nearby lymph nodes contained cancerous tissue.

In 2000, Plakins said, D'Orazio underwent removal of her right breast to avoid a recurrence of the cancer.

Tatem and Parlee & Tatem's trial brief states that at the time of trial, four and one-half years after her diagnosis, the plaintiff had not suffered a recurrence.

Plakins said that when D'Orazio's cancer was diagnosed, it had reached Stage 3, which means that the plaintiff's prognosis was poor. According to Plakins, D'Orazio had only a 20 percent chance of event-free five-year survival or, in other words, a 20 percent cure rate.

The plaintiff contended at trial that the films taken in 1990, 1995 and 1997 actually did show a suspicious density that merited follow-up either by ultrasound or by biopsy or by both, Plakins said. Plakins told *The Legal* that the plaintiff's theory was that by delaying the diagnosis of her breast cancer, the defendants had dramatically increased her risk of harm.

If the cancer had been diagnosed in 1990, Plakins said the plaintiff argued, it would not have been invasive, but rather localized, and would have had nearly a 100 percent cure rate. Had the cancer been detected in 1995, the plaintiff claimed, it would have been in Stage 1 and still would have been highly curable, though less than

100 percent. And finally, as to the 1997 mammogram. Plakins said D'Orazio argued that even at that time, her chances for no recurrence would have been better.

Plakins said the case revolved around the radiologists' readings of the mammograms.

According to the attorney, the defendants' three radiological experts agreed that there was an increased density evident in the left breast on the 1990, 1995 and 1997 mammograms. But the defendants contended that the density had remained stable over a long period and did not raise a suspicion of cancer.

According to Plakins, a key break for the defense was the dismissal of the radiologist who read the 1994 mammogram. The fact that that mammogram showed a density, she said, demonstrated to jurors that a mere density was not by itself worrisome.

Additionally, the presence of the cancer in the 1994 radiograph, coupled with the normal interpretation, showed that a physician's missing a diagnosis was not necessarily a violation of the applicable standard of care, Plakins said.

The defense also argued at trial that mammograms are not foolproof since false

negatives occur 10 percent to 15 percent of the time, the attorney said.

Plakins said the defendants additionally emphasized that lobular carcinoma is difficult to detect in mammograms. Kim Plouffe of German Gallagher & Murtagh, who represented Bronstein, said that all the defendants made that argument and that medical literature indicates that lobular carcinoma is hard to find in a mammogram.

Regarding causation, Plakins said she typically does not utilize cancer growth rates to determine when the disease was first detectable because the usual method for doing so — called doubling time theory — is problematic and subject to attack. But in *D'Orazio*, Plakins relied on a modified version of the method.

Instead of trying to pin down the precise rate of growth, the defense sought to demonstrate at trial, using objective tests, that the plaintiff's cancer grew slowly. Turning to the plaintiff's assertion that none of her lymph nodes contained cancer in 1990 but that 24 did in 1998, Plakins said, the defendants' experts argued that given the slow growth of the cancer, the plaintiff's claim

was impossible.

Plakins said that the plaintiff had demanded \$2.5 million and that none of the defendants had offered to settle the case.

The jury verdict ended with a 10-to-2 vote after jury members asked the judge a number of questions during their deliberations.

Richard Kolb of White & Williams, who served as counsel for Whitley, said he thought the verdict reflected an understanding of the inadequacy of medicine in detecting and treating breast cancer. The findings were very subtle, Kolb said, and he speculated that the women jurors were aware that mammograms simply do not pick up every incidence of breast cancer.

Joan Orsini-Ford of Marshall Dennehey Warner Coleman & Goggin in Doylestown represented Doylestown Hospital. Thomas Johanson of Goldfein & Hosmer in Philadelphia served as counsel for Frankford Hospital.

Lawrence Finney and Theresa Corson of Levy Angstreich Finney Baldante Rubenstein & Coren in Philadelphia represented the plaintiff. Finney was in another trial and could not be reached for comment. Corson could not be reached before press time. •