SHORT FORM ORDER

INDEX No. 08-25656
CAL No. 12-00659MM

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 8-15-12 (#002)
MOTION DATE 11-13-13 (#004)
ADJ. DATE 2-26-14
Mot. Seq. # 002 - MotD
004 - MG

MARK SHERMAN and GAIL SHERMAN,

Plaintiffs,

- against -

MARGARET S. BRANDWEIN-GENSLER, M.D., THE MOUNT SINAI HOSPITAL, THE MOUNT SINAI SCHOOL OF MEDICINE, NICK FITTERMAN, M.D., GEORGE M. SCHMITZ, M.D., DEBORAH J. WEISS, M.D., MARK SINGER, D.O., NORTH SHORE MEDICAL GROUP, NORTH SHORE MEDICAL GROUP OF THE MOUNT SINAI SCHOOL OF MEDICINE, MOUNT SINAI NORTH SHORE MEDICAL GROUP, XYZ CORPORATION, intended to be the business entity which owns, operates, staffs, manages and otherwise controls a medical practice sometimes known as North Shore Medical Group of the Mount Sinai School of Medicine, PETER DELUCA, M.D., LAKSHMI YELLA, M.D. and HUNTINGTON PULMONARY, P.C.,

Defendants.

THEODORE A. NAIMA, P.C.
Attorney for Plaintiffs
1399 Franklin Avenue, Suite 202
Garden City, New York 11530

SHAUB, AHMUTY, CITRIN & SPRATT, LLP
Attorney for Defendants Mount Sinai Hospital, Mount Sinai School Medicine, Doctors Fitterman, Schmidt, Weiss & Singer, North Shore Medical Group and Mount Sinai Medical Group
1983 Marcus Avenue
Lake Success, New York 11042

FUREY, FUREY, LEVERAGE, MANZIONE, WILLIAMS & DARLINGTON, P.C.
Attorney for Defendants Doctors Deluca & Yella and Huntington Pulmonary
600 Front Street, P.O. Box 750
Hempstead, New York 11550

Upon the following papers numbered 1 to 43 read on these motions for summary judgment and to discontinue; Notice of Motion/ Order to Show Cause and supporting papers (002) 1-19; (004) 20-27; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 28-41; Replying Affidavits and supporting papers 42-43; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that motion (002) by defendants Margaret S. Brandwein-Gensler, M.D. and Nick Fitterman, M.D. for dismissal of the complaint pursuant to CPLR 3211 (a)(5), on the bases that the action against them is precluded by the applicable statute of limitations, is granted as to defendant Margaret S.

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Brandwein-Gensler, M.D., and is denied as to defendant Nick Fitterman, M.D.; for an order precluding reference by the remaining co-defendants during the trial of the action regarding any alleged act of negligence by Margaret Brandwein-Gensler, M.D. and Nick Fitterman, M.D. is denied; and for further order dismissing the action against Mount Sinai Hospital for plaintiff's failure to establish either an independent theory of negligence or a basis for a claim of vicarious liability against the hospital is denied; and it is further

ORDERED that motion (004) by defendants, Peter DeLuca, M.D., Lakshmi Yella, M.D., and Huntington Pulmonary, P.C., pursuant to CPLR 3117 for an order dismissing the complaint as asserted against them on the basis that the plaintiff has signed the stipulation of discontinuance, but co-defendants have failed to sign it, is granted, the complaint as asserted against these moving defendants is dismissed with prejudice, and the remaining co-defendants are precluded from asserting the benefits of Articles 14 and 16 as to these moving defendants at the time of trial.

In this medical malpractice action, Mark Sherman alleges the defendants negligently departed from good and accepted standards of medical care and practice in failing to diagnose and treat him for papillary thyroid cancer which metastasized to his lungs. Causes of action premised upon the defendants' alleged medical malpractice, and a derivative claim on behalf of plaintiff's spouse, Gail Sherman, have been pleaded.

In motion (002), defendants Margaret S. Brandwein-Gensler, M.D., and Nick Fitterman, M.D., seek dismissal of the complaint pursuant to CPLR 3211 (a) (5) as barred by the applicable statute of limitations, and seek to preclude the remaining defendants from making reference against them during the trial. Defendant Mount Sinai Hospital seeks dismissal of the complaint for plaintiff's failure to establish an independent theory of negligence or a basis for a claim of vicarious liability against it. The note of issue was filed on April 5, 2012, and this motion was served thereafter on August 3, 2012. Clearly, this motion is one for summary judgment and the parties have so charted their course for the same. Therefore, this motion is decided pursuant to CPLR 3212 for summary judgment on the issue of the statute of limitations as to defendants Margaret S. Brandwein-Gensler, M.D. and Nick Fitterman, M.D., and on the issue of vicarious and independent liability as to defendant Mount Sinai Hospital.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]; ***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.***, 79 AD2d 1014, 435 NYS2d 340 [1981]).

In support of motion (002), the moving defendants submitted, inter alia, an attorney's affidavit; a copy of the summons and complaint, defendants' answers; plaintiff's verified bill of particulars; copies of the unsigned and uncertified transcripts of the examinations before trial of Nick Fitterman, M.D. dated June 18, 2010, Margaret Brandwein-Gensler dated August 16, 2011, Deborah Weiss, M.D. dated February 22, 2011 on behalf of Mount Sinai Medical Center, George Schmitz dated October 7, 2010; copies of the unsigned but certified transcripts of the examinations before trial of Mark Sherman, and Mark Singer dated February 10, 2011 on behalf of Mount Sinai Medical Group; an uncertified copy of the North Shore Medical Group of the Mt. Sinai School of Medicine record; signed stipulation dated March 31, 2010, wherein it is agreed that Margaret S. Brandwein-Gensler was an employee of the Mt. Sinai School of Medicine at the time she reviewed plaintiff's biopsy specimen taken during the thryroid surgery on November 26, 2003; uncertified copy of a Mount Sinai Hospital admission record of the plaintiff; various uncertified medical records; affidavit of Nick Fitterman, M.D.; and the affidavit of Margaret S. Brandwein-Gensler, M.D. In searching the record, it is determined that the plaintiff has submitted, inter alia, copies of the deposition transcripts of Nick Fitterman, M.D., Margaret Brandwein-Gensler, Mark Sherman, and the plaintiff's medical and hospital records. Thus, they are considered.

The requisite elements of proof in a medical malpractice action are (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of injury or damage (***Holton v Sprain Brook Manor Nursing Home***, 253 AD2d 852, 678 NYS2d 503[1998], *app denied* 92 NY2d 818, 685 NYS2d 420). To prove a prima facie case of medical malpractice, a plaintiff must establish that defendant's negligence was a substantial factor in producing the alleged injury (*see* ***Derdiarian v Felix Contracting Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Prete v Rafla-Demetrious***, 221 AD2d 674, 638 NYS2d 700 [1996]). Except as to matters within the ordinary experience and knowledge of laymen, expert medical opinion is necessary to prove a deviation or departure from accepted standards of medical care and that such departure was a proximate cause of the plaintiff's injury (*see* ***Fiore v Galang***, 64 NY2d 999, 489 NYS2d 47 [1985]; ***Lyons v McCauley***, 252 AD2d 516, 517, 675 NYS2d 375 [1998], *app denied* 92 NY2d 814, 681 NYS2d 475; ***Bloom v City of New York***, 202 AD2d 465, 465, 609 NYS2d 45 [1994]).

"The affidavit of a defendant physician may be sufficient to establish a prima facie entitlement to summary judgment where the affidavit is detailed, specific and factual in nature and does not assert in simple conclusory form that the physician acted within the accepted standards of medical care" (***Toomey v Adirondack Surgical Assoc.***, 280 AD2d 754, 755, 720 NYS2d 229 [3d Dept 2001][citations omitted]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]; ***Machac v Anderson***, 261 AD2d 811, 812-813, 690 NYS2d 762 [3d Dept 1999]).

Expert testimony is limited to facts in evidence (*see also* ***Allen v Uh***, 82 AD3d 1025, 919 NYS2d 179 [2d Dept 2011]; ***Marzuillo v Isom***, 277 AD2d 362, 716 NYS2d 98 [2d Dept 2000]; ***Stringile v Rothman***, 142 AD2d 637, 530 NYS2d 838 [2d Dept 1988]; ***O'Shea v Sarro***, 106 AD2d 435, 482 NYS2d 529 [2d Dept 1984]; ***Hornbrook v Peak Resorts, Inc.***, 194 Misc2d 273, 754 NYS2d 132 [Sup Ct, Tomkins County 2002]).

To rebut a prima facie showing of entitlement to an order granting summary judgment by the defendant, the plaintiff must demonstrate the existence of a triable issue of fact by submitting an expert's affidavit of merit attesting to a deviation or departure from accepted practice, and containing an opinion that the defendant's acts or omissions were a competent-producing cause of the injuries of the plaintiff (*see*

Lifshitz v Beth Israel Med. Ctr-Kings Highway Div., 7 AD3d 759, 776 NYS2d 907 [2d Dept 2004]; ***Domaradzki v Glen Cove OB/GYN Assocs.***, 242 AD2d 282, 660 NYS2d 739 [2d Dept 1997]).

Patrick Sherman testified to the extent that he was born on December 5, 1949. He first saw Dr. Fitterman in 2001 or 2002, who told him that he had depression, placed him on medication, but did not refer him to a psychiatrist. He was referred for a CT scan in about September 2002. He had another CT scan when he was hospitalized for pneumonia, but did not remember when it was. A nodule was found in his right lung. Dr. Fitterman told him it was nothing to worry about as the new technology detects lots of different things not previously detected years ago. He saw Dr. DeLuca, a pulmonologist, who recommended periodic scans to follow the nodules in his chest. After that, he began having sore throats and bronchitis more frequently, then pneumonia. In 2003, he began to experience difficulty clearing his throat, constant swallowing, and he felt fatigued. He was told he had postnasal drip. At some point, Dr. Fitterman noticed a bulge in his throat. CT scans were done and Dr. Fitterman advised him that he had a growth the size of an orange on the left side of his thyroid, and referred him to Dr. Arcane at Mount Sinai Hospital. An ultrasound and needle biopsy of his thyroid was obtained by Dr. Mechanic. He was told by Dr. Arcane that the biopsy by Dr. Mechanic was benign, and a thyroidectomy was performed in November, 2003. Dr. Brandwein-Gensler performed the pathology review of the specimens obtained during surgery. Dr. Arcane advised him the specimens were benign. Five days after surgery, he began to experience difficulty breathing and saw Dr. Arcane, but thereafter began experiencing more difficulty breathing. Dr. Fitterman then referred him to Dr. Feld who found a hematoma had formed in his throat, and had to be drained. Thereafter, in 2004, he continued to feel obstructed in his throat and was seen by Dr. Fitterman and Dr. Feld. At some point, Dr. Fitterman left his practice to take a position at Huntington Hospital, and Dr. Schmitz took over Dr. Fitterman's practice.

The plaintiff continued to testify about his ongoing complaints of fatigue, obstruction in his throat, and phlegm. CT scans were taken at Huntington Hospital, revealing additional nodules in his lungs. He followed with Dr. DeLuca from 2002 to 2006. In January 2007, he had another CT scan of his chest and was advised by Dr. DeLuca that the nodules were too small to be concerned with, and they had not changed. In the summer of 2007, he was admitted to Huntington Hospital with pneumonia. Dr. Yella was covering for Dr. DeLuca, and told him that the CT scan showed a giant mass in his chest and to repeat the CT scan in six weeks. About six to eight weeks later, he had a PET scan and was advised that there was no mass in his lungs, and to repeat the scan in January 2008. His throat was still bothering him, and he was feeling fatigued and sick from pneumonia. The CT scan was repeated in January 2008 and he was advised that one of the nodules in his lungs had increased dramatically in size, and that a biopsy was needed, so he was referred to Dr. Daniel Schwartz. Dr. Schwartz resected his lungs and took biopsies at Huntington Hospital. He was told by Dr. Schwartz that the biopsies were positive for thyroid cancer in his lungs.

Mr. Sherman continued that he then saw Dr. Ahmed, an oncologist, who referred him to Dr. Tamara Weiss. Dr. Weiss advised him that he had papillary thyroid carcinoma, and that she would have a surgeon remove his thyroid, followed with a dose of radioiodine, followed by a scan one year later to see the effect it had. He did a self-referral to Dr. Shaha, who specializes in thyroid cancer at Memorial Sloan Kettering, and who had a different protocol for treating the cancer and determining the dose of radio iodine. Dr. Shaha removed his thyroid gland and some other tissue, and advised him that he had papillary and medullary cancer. The medullary cancer was not treatable with radioiodine. He then met with Dr. Tuttle for the treatment and was advised that success with radioiodine was about 40%, and that he thought the

medullary cancer might be contained. After a full body scan was done. Dr. Tuttle told him he believed the papillary thyroid cancer had metastasized to his lungs. Dr. Tuttle obtained and reviewed the slides from Mount Sinai relating to the 2003 thyroid surgery, and advised him that there was no doubt he had papillary cancer in 2003, and that there was no way that the pathologist from Mount Sinai couldn't tell it was papillary carcinoma. He added that Sloan Kettering did not find any medullary cancer in the 2003 biopsy. He then underwent therapy with the radioiodine by pill. He stated that he has Stage 4 lung cancer.

As set forth in ***Gomez v Katz***, 61 AD3d 108, 874 NYS2d 162 [2d Dept 2009], pursuant to CPLR 214-a, an action for medical malpractice must be commenced within two years and six months of the act, omission or failure complained of. However, the statute has a built-in toll that delays the running of the limitations period where there is continuous treatment for the same illness, injury or condition which gave rise to the said act, omission, or failure. Under the continuous treatment doctrine, the 2 ½ year period does not begin to run until the end of the course of treatment, when the course of treatment which includes the wrongful acts or omissions has run continuously and is related to the same original condition or complaint. The underlying premise of the continuous treatment doctrine is that the doctor-patient relationship is marked by continuing trust and confidence and that the patient should not be put to the disadvantage of questioning the doctor's skill in the midst of treatment, since the commencement of litigation during ongoing treatment necessarily interrupts the course of treatment itself. Implicitly, the doctrine also recognizes that treating physicians are in the best position to identify their own malpractice and to rectify their negligent acts or omissions.

The court continued that the continuous treatment doctrine applicable to medical malpractice actions contains three principal elements. The first is that the plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period. The term, course of treatment, speaks to affirmative and ongoing conduct by the physician such as surgery, therapy, or the prescription of medications. A mere continuation of a general doctor-patient relationship does not qualify as a course of treatment for purposes of the statutory toll. Similarly, continuing efforts to arrive at a diagnosis fall short of a course of treatment, as does a physician's failure to properly diagnose a condition that prevents treatment altogether.

The second element of the continuous treatment doctrine applicable to medical malpractice actions is that the course of treatment provided by the physician be for the same conditions or complaints underlying the plaintiff's medical malpractice claim.

The third element of the continuous treatment doctrine applicable to medical malpractice actions is that the physician's treatment be deemed continuous. Continuity of treatment is often found to exist when further treatment is explicitly anticipated by both physician and patient as manifested in the form of a regularly scheduled appointment for the near future, agreed upon during the last visit, in conformance with the periodic appointments which characterized the treatment in the immediate past. The law recognizes, however, that a discharge by a physician does not preclude application of the continuous treatment toll if the patient timely initiates a return visit to complain about and seek further treatment for conditions related to the earlier treatment.

Margaret Brandwein-Gensler, M.D. testified to the extent that she is board certified, but did not testify to the area of certification, and that she was grandfathered in and did not recertify. She set forth her

employment, including Mount Sinai Medical School of Medicine where she worked as an employee as an instructor, as head of Head and Neck Pathology, and as associate professor. She did not testify as to the dates of her employment and referred to her curricculum vitae. She testified to reviewing pathology slides for Mark Sherman, but did not know how many slides she reviewed. By looking at the reports for slides MS-0340178, she indicated that there were ten slides. She could not tell if she reviewed the whole case or not. There were three specimens: two slides of a paratracheal mass; one slide to rule out parathyroid; and seven slides of the left thyroid lobe and isthmus, incorrectly set forth as left parathyroid lobe.

In 2003, she reviewed histology and generated reports for all of the specimens from head and neck surgeons, but the thyroid was usually excluded; and the thyroid cases were divided up between her and another colleague. She could not remember if any of her colleagues reviewed the original pathology in this case. She was not routinely involved when a specimen is being grossed or dissected, but a resident who is doing so, can ask her questions. She would have looked at the case during the frozen section. She would not generate the gross description. Usually, the resident then comes to her for her to sign out. On November 26, 2003, when the specimens were sent to the frozen section lab and examined, a preliminary diagnosis was rendered by her, before the grossing out. The specimen was further examined, further dissected, and more slides produced from the frozen section. She would have reviewed all the slides from the ten blocks.

Dr. Brandwein-Gensler, M.D. continued that after she reviewed the frozen section and came up with the initial preliminary diagnosis, she would have then reviewed the slides and arrived at a final diagnosis, which may take a day or more than one day. Her permanent diagnosis is then translated into a report. In examining the paratracheal mass thyroid tissue, she noted Hurthle cell change, which is similar to oncocytic change, but specific to the thyroid, and means that the cells are larger than the usual thyroid cell, with abundant pink granular cytoplasm and contain a lot of mitochondria. Hurthle cells can be associated with benign or malignant entities and do not commit any risk. Some findings may not be included in a report if she feels it would not have any impact on the prognosis or impact on the overall diagnosis. In 2003, it was not appreciated by her that the finding of necrosis in and of itself could be indicative of malignancy for thyroid. That appreciation changed in 2005 with new WHO textbooks from the World Health Organization, published in Lyon, France. It was a new entity described and formalized, which is poorly differentiated thyroid carcinoma. Prior to that, one looked in terms of well-differentiated thyroid cancer, which would include papillary thyroid cancer and follicular carcinoma. In 2003, she would not have used the finding of necrosis to substantiate the diagnosis of cancer, unless she was dealing with a type of invasive follicular carcinoma. When she reviewed the slides on November 26, 2003, she was of the opinion that the slides revealed benign multinodular goiter with a diffuse Hurthle cell change and micro follicular features, meaning it was very solid, not vacant, an unusual growth pattern for malignancy, and did not indicate either benign or malignant. She never spoke with Mark Sherman, but may have spoken with his surgeon, Dr. Arcane. She was not familiar with the North Shore Medical Group of the Mount Sinai School of Medicine and did not know Dr. Fitterman.

Dr. Brandwein-Gensler testified that she reviewed the slides again in 2005 after the lawsuit was commenced, and noted necrosis that she did not see on the first review in 2003. At the time of the second review in 2005, she was working at Montefiore Hospital. Upon the review of the slides in 2005, she was of the opinion that the slides indicated malignant carcinoma.

In her supporting affidavit, defendant Brandwein-Gensler averred that on November 26, 2003, in her capacity as an employee of Mount Sinai School of Medicine, she performed a pathological examination of the plaintiff's surgical specimen obtained during his thyroidectomy. Thereafter, she had no further involvement in his care. She left her position as an attending physician with Mount Sinai School of Medicine in August 2004 and no longer had a relationship with Mount Sinai School of Medicine, Mount Sinai Medical Center, or North Shore Medical Group, or the co-defendants in this action. She concluded that after she left employment with Mount Sinai School of Medicine, she was employed by Montefiore Medical Center, which is separately owned and distinct from Mount Sinai School of Medicine, Mount Sinai Medical Center, and North Shore Medical Group.

In the instant action, it is set forth in the plaintiff's verified bill of particulars that Mark Sherman came under the care and treatment of Margaret Brandwein-Gensler, M.D. on November 26, 2003 through December 1, 2003. Based upon the record, it is noted that Dr. Brandwein-Gensler, an employee of defendant Mount Sinai School of Medicine, Mount Sinai Hospital, reviewed the ten pathology slides generated from specimens obtained during the plaintiff's surgery by Dr. Urken on November 26, 2003. This action was commenced by the filing of the summons and complaint on August 4, 2008. It is determined that there was a one-time review by Dr. Brandwein-Gensler of the slides generated from the specimens taken. She did not provide ongoing and continuing review or additional medical review after November 26, 2003. There was no agreed upon or scheduled doctor/patient relationship between the plaintiff and Dr. Brandwein-Gensler thereafter. More than two and one-half years lapsed between November 26, 2003 and commencement of this action on August 4, 2008.

The plaintiff submitted the expert affirmation of George K. Turi, M.D., a physician who is board certified in pathology and licensed to practice medicine in New York State. He set forth his education and training, the materials and records which he reviewed, including the original pathology slides of November 26, 2003 at Mount Sinai School of Medicine, and the basis for his opinions, which he set forth within a reasonable degree of medical certainty. Dr. Turi stated that those slides reviewed and reported by Dr. Brandwein-Gensler were of the plaintiff's paratracheal mass, parathyroid tissue and left hemithyroid tissue specimens. He also reviewed the pathology report of Patricia Skypala, M.D. of the wedge resection of the lung performed at Huntington Hospital on February 19, 2008, and the pathology report of Memorial Sloan Kettering by Ronald Ghossein, M.D. for the consultative review of the plaintiff's initial pathology thyroid tissue specimens dated March 25, 2008. It is Dr. Turi's opinion that based upon his review and interpretation of the re-cuts of the original pathology slides of the tissue specimens obtained from the plaintiff's left thyroidectomy surgery and biopsy of November 26, 2003 at Mount Sinai Medical Center, that the paratracheal tissue specimen demonstrated malignant papillary thyroid carcinoma involving the fibrous tissue mass with vascular invasion of the blood vessels, and the left hemithyroid tissue specimen demonstrates poorly differentiated malignant papillary thyroid carcinoma growing as a follicular variant. He continued that the tissue specimens demonstrate vascular invasion of the blood vessels, increased mitological activity and focal tumor necrosis, confirming a malignant diagnosis.

Dr. Turi also affirmed that his opinion, as such, wholly agrees with Dr. Ghossein's interpretation and review of the plaintiff's pathology tissue specimens as contained in his report of March 25, 2008, which confirmed papillary thyroid carcinoma involving the fibrous tissue mass with vascular invasion of the blood vessels and poorly differentiated papillary thyroid carcinoma growing as a follicular variant, confirming malignant thyroid cancer. Dr. Turi concluded that it is his further opinion that Dr. Brandwein-Gensler

departed from the good and accepted standards of care and practice in failing to correctly diagnose and interpret the specimens, interpreting them as benign, and that this was a substantial factor in causing and contributing to the further spread of the plaintiff's thyroid cancer, precluding earlier treatment and oncologic intervention, resulting in a substantial loss of opportunity for a cure and a decreased survival rate.

For purposes of the statute of limitations, it is determined that Dr. Brandwein-Gensler was an employee of Mount Sinai Hospital, Mount Sinai School of Medicine on November 26, 2003, and as such, it may be charged with vicarious liability for any alleged malpractice by defendant Brandwein-Gensler. It is determined that because defendant Brandwein-Gensler reviewed the pathology slides on November 26, 2003, and provided no further care and treatment to the plaintiff thereafter, that this action was not timely commenced against defendant Dr. Brandwein-Gensler within the applicable two and one-half year statute of limitations as this action was not commenced until August 4, 2008. No basis for a finding of continuous treatment has been found to permit extension of commencement of the action for Dr. Brandwein-Gensler. The failure to timely commence the action against Dr. Brandwein-Gensler, however, does not preclude, nor compel dismissal of, plaintiff's vicarious liability claim against the defendant Mount Sinai Hospital and Mount Sinai School of Medicine with respect to any liability as to defendant Brandwein-Gensler (***Shapiro v Good Samaritan Regional Hospital Medical Center***, 55 AD3d 821, 865 NYS2d 680 [2d Dept 2008]), as set forth by Dr. Turi.

Based upon the affirmation by Dr. Turi, plaintiff's expert, it is determined that the plaintiff has demonstrated that defendant Brandwein-Gensler departed from good and accepted standards of care and practice and that she failed to correctly read and interpret the pathology of the slides from November 26, 2003. The plaintiff argues that this negligent departure by Dr. Brandwein-Gensler in failing to correctly interpret the slides of November 26, 2003 as papillary thyroid carcinoma is imputed to her employer, defendant Mount Sinai Hospital and the Mount Sinai School of Medicine, which had a continuing relationship with the plaintiff and continued to provide a course of medical care and treatment for the plaintiff's thyroid cancer, well within the relevant statute of limitation. Mount Sinai Hospital and School of Medicine not only owned and operated the laboratory responsible for the interpretation and proper diagnosis of the surgery and biopsy of pathology tissue specimens and employed Dr. Brandwein-Gensler, who allegedly misdiagnosed the pathology tissue specimens, but it also owned and operated the medical group, North Shore Medical Group of the Mount Sinai School of Medicine. Defendant hospital has failed to submit an affirmation or affidavit from an expert in support of its application for dismissal of the complaint on the bases that it bears no independent or vicarious liability for the alleged negligent departures by Dr. Fitterman, or to refute plaintiff's expert with regard to the alleged negligent departures from the accepted standard of care by Dr. Brandwein-Gensler. Thus, dismissal of the complaint as to defendant Mount Sinai Hospital is precluded.

Accordingly, that part of motion (002) which seeks dismissal of the complaint as asserted against Margaret Brandwein-Gensler, M.D. for failure of the plaintiff to commence this action within the statutory two and one-half year limitation from accrual of the cause of action against her is granted. That part of motion (002) by Mount Sinai Hospital for dismissal of the complaint asserted against it on the issues of vicarious and independent liability is denied. That part of motion (002) to preclude reference by the remaining co-defendants during the trial regarding any alleged act of negligence by Margaret Brandwein-Gensler, M.D. is therefore denied as well.

Nick Fitterman, M.D. testified to the extent that he is Chief of Staff and a hospitalist at Huntington Hospital. Prior to that, he was a physician employee with the North Shore Medical Group of the Mount Sinai School of Medicine from July 1992 through April 2006. He stated that the North Shore Medical Group was owned by the Mount Sinai School of Medicine, which employed physicians of different specialties. He was in the Department of Internal Medicine. He is board certified in internal medicine. At the time of that employment, Dr. Fitterman had a concierge practice, or VIP practice, wherein he took a retainer from patients, thus limiting his practice to fewer patients. The plaintiff was part of that concierge practice.

Dr. Fitterman stated that he first saw the plaintiff as his primary care physician on an acute care visit August 29, 2002 for elevated blood pressure, nausea, and tingling or neuropathic symptoms in his feet, with a history of diabetes. He ordered various laboratory tests, and reviewed the results on September 5th and 7th, 2002, and authored a note. Other reports dated August 29, 2002 and September 13, 2002 were received by him. He had ordered an ultrasound which was done on September 7, 2002, and which result he discussed with the plaintiff as it demonstrated a lesion in the liver, notably, a nodule on the right lobe of the liver. Therefore, a CT scan of the plaintiff's liver and pelvis were ordered and performed on September 12, 2002 at Huntington Hospital. On September 13, 2002, he received the CT result and spoke with the plaintiff to advise him that there was an incidental nodule noted in his lung, and thickening in the sigmoid area of the colon. His differential diagnosis concerning the lung nodule was that it was most likely a granuloma or benign finding in the lung. His plan was for a repeat CT scan which was done on November 27, 2002, at Huntington Hospital, and indicated small nodules in the right lung were unchanged when compared to the scan of September 12, 2002. The plaintiff then presented to a nurse practitioner at the group, Jennifer Bellia (now Jennifer Fitterman), on December 9, 2002 as he had a cough. He next saw the plaintiff on April 14, 2003 for upper respiratory complaints of cough, congestion, and some malaise for four to five days, which he diagnosed as tracheal bronchitis and prescribed antibiotics, Tussi-12, and an Albuteral inhaler. On April 18, 2003, the plaintiff presented again to Jennifer Bellia at which time she noted he was visibly fatigued, and ordered a chest x-ray which was reviewed by Dr. Seller from the North Shore Medical Group. On April 18th and 28th, 2003, Dr. Fitterman had telephone conversations with the plaintiff concerning an upper respiratory infection and blood pressure, respectively. Laboratory tests taken May 22, 2003, showed the liver enzymes were slightly elevated.

There were four telephone contacts with the plaintiff before he was next seen by Dr. Fitterman on August 26, 2003 for cough, congestion, and sore throat for three days. Dr. Fitterman stated that when he palpated the plaintiff's neck, he noted a new mass in the left area of the thyroid, which he did not measure, but noted that there was no bruit (whooshing noise), and that there was "no peripheral stigmata of thyroid disease otherwise appreciated." He ordered an ultrasound of the thyroid and blood tests. The August 27, 2003 thyroid function tests were normal, but the ultrasound revealed a highly vascular mass of the left lobe of the thyroid, for which his differential diagnoses were thyroid cancer or goiterous thyroid. Dr. Fitterman testified that there was no good test for thyroid cancer, unless it were a hereditary/medullary type of thyroid cancer. The plan was to get a nuclear scan of the thyroid to delineate the mass in the left lobe to determine if it was a hot spot consistent with a benign toxic goiter, or a cold spot which could possibly be cancer, and then a referral to a surgeon. The scan, dated October 30, 2003, was taken at Huntington Hospital and interpreted by Dr. Blando, a radiologist, whose impression was suggestive of a nontoxic multilnodular goiter with a dominant hypofunctioning region, lower pole, left thyroid, with the possibility of a malignancy which cannot be excluded. Dr. Fitterman conducted a complete physical examination of the plaintiff on

October 30, 2003, as it had not yet been done since the plaintiff's first visit in 2002. Dr. Fitterman testified that he did not make a connection between the mass in the plaintiff's thyroid and the nodules in plaintiff's left lung as they had a benign appearance. He stated that he was aware that thyroid cancer could go to the lung.

Dr. Fitterman testified that he referred the plaintiff to Dr. Arcane for surgical evaluation, and mailed a letter to Dr. Arcane on November 5, 2003. He did not speak with Dr. Arcane at any time until after the surgery of November 26, 2003, a subtotal thyroidectomy, which was done in New York at Mount Sinai Hospital. He faxed a correspondence to Dr. Arcane on November 7, 2003 giving medical clearance for the surgery. Postoperatively, he stated, the plaintiff had some complications, so, on December 1, 2003, he admitted him to Huntington Hospital, due to chills, shortness of breath, and dizziness. The plaintiff had seen Dr. Arcane earlier in the day. He called Dr. Arcane and was advised the thyroid mass was benign on the pathology review, so far. Dr. Fitterman stated that he did not receive or review a copy of the preliminary or final pathology report of November 26, 2003 from Mount Sinai Hospital or Dr. Arcane. He did not recall speaking with Dr. Arcane after December 1, 2003. During the admission of December 1, 2003, the plaintiff was treated for a hematoma or collection of blood from the surgery. Dr. Feld decompressed the hematoma.

Dr. Fitterman saw the plaintiff on December 9, 2003. His plan was to monitor the plaintiff's thyroid function, and treat him according to what Dr. Arcane and his pathologist told him. He ordered blood tests consisting of a blood count with TSH and calcium level, which are regulated by the parathyroid glands in the thyroid gland. He did not speak to the pathologist concerning the pathology review of the plaintiff's thyroid specimen. On December 19, 2003, he saw the plaintiff for episodes of breathlessness and a weakened voice, which the plaintiff did not have prior to surgery. He was to follow up with Dr. Feld and have the thyroid tests rechecked. On January 22, 2004, the plaintiff complained of spots on his throat for a few days which he noted to be ulcers in healing stages due to a viral infection, and some weakness in his voice for which he referred him to a speech pathologist for some voice therapy. The blood work of January 23, 2004, was normal, and he was instructed to have the tests repeated in three months. On February 25, 2004, the plaintiff called to advise that he started some herbal regimen and had a low blood sugar and blood pressure, so Dr. Fitterman adjusted his medication. He stated that while the hormones excreted by the thyroid gland can have an effect on the blood pressure, and the plaintiff's thyroid hormones were normal.

Dr. Fitterman saw the plaintiff on March 11, 2004, for respiratory symptoms. The laboratory reports of March 16, 2004 were normal, he stated. The plan with regard to the plaintiff's thyroid was to continue to monitor him clinically and biochemically on a periodic basis. On April 27, 2004, the plaintiff presented with complaints that he was feeling a little anxious, and was having trouble sleeping and concentrating since stopping his Zoloft. He also noted a lump at the edge of his surgical scar and some drainage. Dr. Fitterman noted a small papule in the lateral aspect of the scar for which he recommended wound care and placed him on an antibiotic; Zoloft was restarted, and lab work ordered. He called the plaintiff on May 20, 2004 with the results of the lab work and ordered Ambien to help him sleep, and adjusted his cholesterol medication. On July 1, 2004, the plaintiff presented with anxiety and decreased hearing in his right ear, for which he was referred to Dr. Feld. Dr. Fitterman testified that he was still monitoring the plaintiff's thyroid, and that if there were no symptoms, that maybe once a year there would be a check of the labs, unless something evolved clinically. On October 28, 2004, the plaintiff called complaining of feeling anxious and having difficulty sleeping, for which a tranquilizer was ordered.

Dr. Fitterman testified that on November 22, 2004, he was still treating the plaintiff for a thyroid condition, but stated that the plaintiff did not actually have one. Monitoring the thyroid consisted of evaluating symptoms that the plaintiff brought to his attention, and performing periodic blood tests. At this point, Dr. Fitterman stated, there was no thyroid condition, but he was following him by rechecking to see if symptoms appeared. He continued that it was acceptable to recheck him once a year, and that the plaintiff was still under his care for the thyroid to the degree that he just mentioned. At this visit, the plaintiff presented with feeling weak and episodes of sweatiness, which Dr. Fitterman stated were not symptoms related to a possible thyroid abnormality in the context of the rest of his visit and history. Dr. Fitterman stated that he did not notice a rash when the plaintiff complained of feeling itchy. On December 2, 2004, the plaintiff presented with weight loss, but Dr. Fitterman did not know how much. On December 6, 2004, the plaintiff called about his blood sugar running high, and on December 17, 2004, about his blood pressure increasing. Blood work was done on February 1, 2005. On February 22, 2005, the plaintiff presented with fluttering in his chest and right-sided chest discomfort. He suspected PVCs (premature ventricular contractions) and recommended a halter monitor if the symptoms recurred.

The TSH on May 10, 2005 was normal at 2.8, and his last value was 0.9, which Dr. Fitterman testified was not significant. The plaintiff had tingling on his right face on May 10, 2005. Shallow ulcers were noted on the palate in his mouth. It was his impression that the plaintiff was developing shingles or varicella zoster. On May 10, 2005, it was still his intention to monitor the plaintiff's thyroid. On May 26, 2005, the plaintiff had a cough and upper respiratory tract infection symptoms for one week despite having been placed on Zithromax, but Dr. Fitterman did not know who ordered the antibiotic. Chest x-ray was normal, he stated. On August 19, 2005, the plaintiff presented with a growth on his foot, for which he referred him to a podiatrist. The plaintiff also complained of wooziness, fatigue, and malaise, which Dr. Fitterman testified were nonspecific complaints, manifestations of almost any disease, and were very vague, so he did not consider those symptoms to be evidence of hypothyroidism. In response to the complaint, he cut back the blood pressure medication as it was a beta blocker which can cause those symptoms. He stated that there was no indication to examine his neck.

Dr. Fitterman testified that on October 13, 2005, the plaintiff presented with difficulty sleeping, and clearing his throat, and was worried about a thyroid lesion. He examined the plaintiff, but found no masses, and did not think his symptoms were related to thyroid. His assessment was that of postnasal drip syndrome. He did not consider thyroid cancer in his differential. On February 3, 2006, the plaintiff again presented with complaints of cough and frequent clearing of his throat, and difficulty sleeping, which the plaintiff related were severe. Dr. Fitterman did not feel that these symptoms were related to thyroid disease. His diagnosis was postnasal drip and tracheitis. He did not order any laboratory tests. This was the last date that Dr. Fitterman saw the plaintiff in his office. He stated that as of that date, if any thyroid symptoms presented, he would have checked the thyroid tests again. Dr. Fitterman testified that he did not know exactly when he left private practice, but as late as March 2006, the plaintiff would have still been his responsibility. Other than the TSH thyroid test, he did not repeat any of the other thyroid tests during his care and treatment of the plaintiff, such as the thyroid antibodies, or thyroid globulin. After he was given the report in 2003 that there was no cancer, he had no need to check it. However, he stated that he would not have told the plaintiff that he was going to stop monitoring for thyroid disease.

Dr. Fitterman also testified, upon being shown the pathology report by Dr. Margaret Brandwein-Gensler, that there was an indication of Hurthle cell findings, which he was not familiar with. He testified

that he does not read slides and relies on experts, such as the surgeon and pathologist. It was Dr. Fitterman's opinion that the plaintiff's complaints relating to his ear, nose, and throat, and upper respiratory complaints were not related to thyroid cancer, as those symptoms were consistent with postnasal drip syndrome, rhinosinusitis, upper respiratory tract infections, and were episodic and not continuous. He had a conversation with Dr. Schwartz about the plaintiff before the plaintiff called him in February 2008 to advise that he was diagnosed with metastatic papillary thyroid cancer. Dr. Fitterman stated that he was shocked and dismayed when he learned of the diagnosis. He stated that the plaintiff wanted him to help navigate this next phase of his health care, even though he was no longer his primary care physician. He gave the plaintiff his home phone number, and the plaintiff called him at home, and he called the plaintiff from home. He referred the plaintiff to Dr. Weiss. He may have had a hallway conversation during the midst of a diagnosis with Dr. DeLuca concerning the plaintiff after he was diagnosed with cancer in February 2008. Dr. Fitterman stated that when he was served process in this action, he called the plaintiff to ask him why he was being sued. He was aware at the time that the plaintiff had metastatic thyroid cancer. Dr. Fitterman testified that he stopped taking care of the plaintiff in early 2006, and that after the diagnosis of cancer was made in February 2008, he "helped and guided him in those initial stages in terms of follow-up, and who to see." He had about two to four conversations with the plaintiff up until the point he was served in this action.

In his supporting affidavit, defendant Fitterman averred that he joined the North Shore Medical Group of the Mount Sinai Medical Center in 1992 as an attending internist and served as the plaintiff's primary care physician from August 29, 2002 through February 3, 2006. He ceased employment with the North Shore Medical Group of the Mount Sinai Medical Center on March 20, 2006, and became an employee of Huntington Hospital about April 1, 2006. As an employee of Huntington Hospital, he did not have a relationship of any kind with the North Shore Medical Group, the Mount Sinai Medical Center or the Mount Sinai School of Medicine, or his co-defendants. Dr. Fitterman further averred that as late as March 2006, the plaintiff would have still been his responsibility. He averred that other than obtaining TSH thyroid tests, he did not repeat any of the other thyroid tests during his care and treatment of the plaintiff, such as the thyroid antibodies, or thyroid globulin. After he was given the pathology report that indicated there was no cancer, he had no need to order those tests. However, he stated that he would not have told the plaintiff that he was going to stop monitoring for thyroid disease.

The plaintiff has submitted the expert affirmation of Stephen A. Falk, M.D., a physician licensed to practice medicine in New York State, who is board certified in the field of otolaryngology-head and neck surgery. Dr. Falk set forth his education and training, and work experience, as well as the records and materials which he reviewed. He opined within a reasonable degree of medical certainty that defendant Margaret Brandwein-Gensler, M.D. departed from good and accepted standards of medical care in failing to correctly interpret and diagnose the plaintiff's thyroid cancer from a review of pathology tissue specimens obtained from left thyroidectomy surgery and biopsy performed on November 26, 2003. He opined that the defendants departed from the applicable standards of medical care, that the plaintiff's thyroid cancer went undiagnosed and untreated, and was allowed to further progress and metastasize to the plaintiff's lung over the following four and a half year period, until his eventual diagnosis of metastatic thyroid cancer on February 19, 2008. Dr. Falk opined within a reasonable degree of medical certainty that the defendants' departures from the applicable standards of care were a substantial contributing cause of progression of plaintiff's thyroid cancer and metastasis to his lungs, deprived the plaintiff of a substantial opportunity for a cure and resulted in a reduced life expectancy. Dr. Falk also opined that following the defendants' initial

diagnosis of the thyroid mass on August 23, 2003, that the plaintiff received a course of continuous medical treatment from the defendants for his thyroid mass/cancer and for ongoing complaints and symptoms of thyroid cancer and metastatic disease until the plaintiff's eventual diagnosis of metastatic thyroid cancer on February 19, 2008.

Dr. Falk set forth the plaintiff's care and treatment with the various defendants herein, as well as the diagnostic testing and complaints, signs and symptoms offered to the defendants by the plaintiff during their respective care and treatment. He set forth the basis for his opinion that the plaintiff in fact had thyroid carcinoma present on the November 25, 2003 slides, and while under the care and treatment of the various defendants. He set forth the progression of the disease and metastasis based upon plaintiff's various diagnostic studies and findings. He opined that had defendant Brandwein-Gensler correctly interpreted and diagnosed the plaintiff's thyroid pathology on November 26, 2003, that the plaintiff would have promptly received a full work up and immediate treatment for thyroid cancer, most likely including a resection of the right thyroid and administration of radioactive iodine therapy, and the cancer would not have extensively progressed and metastasized to the plaintiff's lungs, and he would not have had to undergo the right upper and lower lobe lung wedge resection surgery on February 19, 2008, and the sequelae therefrom.

Dr. Falk continued that had the plaintiff been properly treated following the surgery of November 26, 2003, that he would have had an excellent opportunity for complete remission of the disease, and that the four and one-half year delay in diagnosing his condition deprived him of a substantial cure and decreased life expectancy. He stated that following the initial diagnosis of thyroid mass on August 26, 2003, Dr. Fitterman and the defendant physicians and medical personnel at Mount Sinai Medical Group embarked on a course of medical treatment for the thyroid mass in the form of ordering initial thyroid related blood testing, ultrasound and thyroid uptake nuclear scan, and referred the plaintiff to Dr. Arcane, then provided postoperative care for thyroid surgery. Testimony by Dr. Fitterman established that part of the future plan of care with him and Mount Sinai Medical Group included instructing the plaintiff to return for periodic examination, monitoring, laboratory testing, and treatment of his thyroid condition. Dr. Falk continued that the plaintiff's complaints to Dr. Fitterman and physicians at the Mount Sinai Medical Group of persistent and chronic cough, throat pain and discomfort, difficulty swallowing, frequent clearing of his throat and myalgia, on an increasing basis, were signs and symptoms of progression of the plaintiff's thyroid cancer and metastasis to his lungs.

Dr. Falk continued to set forth the plaintiff's visits with the various defendants, including his additional complaints of submaxillary tenderness on the left side of the neck, post nasal drip, bronchitis, throat pain, increased congestion, and upper respiratory infections, and findings of bilateral pulmonary nodules in his lungs. On July 23, 2007, a CT chest gave the impression of a large right hilar mass suspicious for metastatic disease when compared to the CT scan of October 1, 2003. Thereafter, additional visits were described, as well as the additional findings upon CT scan of the lungs on January 17, 2008. Dr. Falk opined that these findings, and the treatment of the plaintiff's symptoms as relayed to Dr. Fitterman and the physicians at Mount Sinai Medical Group, both prior to and after the thyroid surgery and biopsy of November 26, 2003, were indicative of thyroid cancer and its progression, and represent continuous treatment for this condition.

Based upon the foregoing, it is determined that the action against Dr. Fitterman has been timely commenced withing the applicable two and one half year statute of limitations. This action was

commenced by the filing of the summons and complaint on August 4, 2008. By Dr. Fitterman's own testimony, he anticipated further treatment through March 20, 2006. The course of treatment provided by Dr. Fitterman was for the same conditions or complaints underlying the plaintiff's medical malpractice claim. The plaintiff continued to seek, and in fact obtained, an actual course of treatment from the defendant physician during the relevant period, including Dr. Fitterman's affirmative and ongoing conduct to navigate him through the "next phase of his health care" after March 20, 2006. Thereafter, the plaintiff initiated the intercession and professional relationship with Dr. Fitterman so that Dr. Fitterman could navigate him for further treatment for conditions related to the earlier treatment provided by Dr. Fitterman. Therefore, it is deemed that this action was timely commenced as to Dr. Fitterman.

Regardless of the absence of physical or personal contact between the plaintiff and the defendant in the interim, where the physician and patient reasonably intended the patient's uninterrupted reliance upon the physician's observation, directions, concern, and responsibility for overseeing the patient's progress, the requirement for continuous care and treatment for the purpose of the statue of limitations is certainly satisfied (***Richardson v Orentreich***, 64 NY2d 896, 487 NYS2d 731 [1985]; ***Balaban v Bachrach***, 2011 NY Slip Op 32734(U) [Sup Ct, New York County 2011]). It is apparent that there was an ongoing and continuing physician-patient relationship, even beyond March 20, 2006, wherein the plaintiff sought guidance and counsel, and medical direction by defendant Fitterman for the same conditions for the purpose of satisfying the statute of limitations (*see* ***Stilloe v Contini***, 190 AD2d 419, 599 NYS2d 194 [3d Dept 1993]).

Based upon plaintiff's expert affirmation by Dr. Falk, it is determined that the plaintiff has also demonstrated factual issues concerning continuous treatment with regard to the alleged departures from good and accepted standards of care and treatment by Mount Sinai Hospital, Nick Fitterman, M.D., North Shore Medical Group of the Mount Sinai School of Medicine (***Kletnieks v Hertz***, 54 AD3d 660, 863 NYS2d 487 [2d Dept 2008]). Mount Sinai Hospital and North Shore Medical Group of the Mount Sinai School of Medicine do not dispute that they employed defendant Fitterman. The hospital seeks dismissal of the complaint as asserted against it for plaintiff's failure to establish either an independent theory of negligence or a basis for a claim of vicarious liability against the hospital as to defendant Fitterman. Defendant hospital has not submitted an expert affirmation or affidavit on its own behalf in support of the appliation for dismissal of the complaint. Based upon the issues raised by plaintiff's expert, Dr. Falk, unrefuted by Mount Sinai Hospital, dismissal of the complaint as asserted against defendant Mount Sinai Hospital on the bases it bears no vicarious liability for the alleged negligent departures by Dr. Fitterman, or independent liability, is precluded.

Accordingly, that part of motion (002) by defendant Nick Fitterman, M.D. for dismissal of the complaint as asserted against him as barred by the applicable statute of limitations is denied. That part of motion (002) by defendant Mount Sinai Hospital for dismissal of the complaint on the bases that it bears no independent liability and is not vicariously liable for the alleged negligent departures from the standard of care by defendant Nick Fitterman, M.D. is denied. That part of motion (002) to preclude reference by the remaining co-defendants during the trial regarding any alleged act of negligence by Nick Fitterman, M.D. is therefore denied as well.

Turning to motion (004), defendants, Peter DeLuca, M.D., Lakshmi Yella, M.D., and Huntington Pulmonary, P.C., seek an order pursuant to CPLR 3117 dismissing the complaint as asserted against them

on the basis that the plaintiff has signed the stipulation of discontinuance, but co-defendants have failed to sign it. The moving defendants have submitted the stipulation signed by them and by the plaintiff. The remaining co-defendants have not submitted an expert affirmation or affidavit to oppose this application to demonstrate that there is any basis for liability as to the moving defendants.

Accordingly, motion (004) is granted and the complaint and any cross claims as asserted against Peter DeLuca, M.D., Lakshmi Yella, M.D., and Huntington Pulmonary, P.C. are dismissed with prejudice, and the the remaining co-defendants are precluded from asserting the benefits of Articles 14 and 16 as to Peter DeLuca, M.D., Lakshmi Yella, M.D., and Huntington Pulmonary, P.C. at the time of trial.

Dated: APR 15 2014

HON. JEFFREY ARLEN SPINNER, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**