

A thirty-two year old woman, Allison, sees her doctor (“Dr. Bob”) after locating a lump in her right breast while doing a self breast examination. Dr. Bob orders a mammogram, which is interpreted as normal by the radiologist, Dr. Charles. Unfortunately for the woman, Dr. Charles is wrong. The lump is infiltrating ductal carcinoma.

Thereafter, the lump grows. Allison becomes concerned and presents to Dr. Bob three more times in the nine months following her “normal” mammogram; each time, Dr. Bob informs her it is a benign fatty tumor, a lipoma. Dr. Bob never refers her to a specialist for an excisional biopsy or further follow-up. Therefore, her cancer grows, undetected.

Two years later, Allison is diagnosed with breast cancer at stage III. Faced with few options at that point, she elects to undergo a surgical radical mastectomy at age thirty-four.

Allison files suit against Dr. Bob and his employer; Dr. Charles and his employer; and, the hospital that operates the imaging center in which her mammogram was performed. Allison claims Dr. Bob was negligent in failing to refer her to a specialist for an excisional biopsy. Allison claims Dr. Charles was negligent in interpreting her original imaging study, and further, the employers of both physicians are vicariously liable for the physicians’ negligence under the theory of respondeat superior. Finally, Allison claims liability is imputed to the hospital under one or more theories of agency.

Defense counsel enters appearances for Dr. Bob, Dr. Charles, their employers and the hospital. The parties agree to waive the statutory expert disclosure requirements under RSA 516:29-b. During discovery, Allison’s attorney hires Nurse Diane, a nurse practitioner, who will opine that Dr. Bob violated the standard of care in failing to refer her to a specialist for further testing after the lump grew. Nurse Diane will also opine that, had Allison’s cancer been detected, it could have been treated conservatively. Nurse Diane has limited experience as an expert witness so Allison’s attorney engages in extensive email communications to prepare Nurse Diane.

Along with Nurse Diane, Allison's attorney hires an expert radiologist, Dr. Edward, who will testify that Dr. Charles violated the standard of care in interpreting Allison's mammogram. Allison's expert disclosure is due June 1st and the defense disclosure is due August 1st. Allison's attorney goes on vacation on May 30th and forgets to send her formal disclosure. Therefore, she emails defense counsel with only the names of her expert witnesses on June 1st.

Dr. Bob timely discloses his experts on August 1st, naming a physician, Dr. Frank, who specializes in internal medicine. Dr. Frank will testify that Dr. Bob did not violate the standard of care. Dr. Bob does not ask Dr. Frank to approve his expert disclosure.

On September 15th, Dr. Charles, his employer and the hospital each indicate they intend to call their own radiologist expert witness at trial to testify that Dr. Charles did not violate the standard of care in interpreting Allison's mammogram. Dr. Charles also reserves the right to testify regarding liability. They also disclose a medical oncologist, who will testify that the delayed diagnosis would not have resulted in a different outcome.

Neither party asks to depose each other's expert witnesses. Allison's attorney does, however, depose Allison's treating oncologist, Dr. Gary, who is employed by the defendant hospital. During the deposition, Allison's attorney asks Dr. Gary questions regarding the standard of care for a primary care physician. Dr. Gary refuses to answer the question.

Discovery ends on December 1st and trial is scheduled for February 1st. At trial, Dr. Frank (Dr. Bob's expert) opines that the outcome would have been the same with earlier detection. Following Dr. Frank's testimony, Allison's attorney seeks to call Dr. Holmes, an expert in internal medicine, to rebut Dr. Frank's testimony. Following an objection, the Court rules that Dr. Holmes may not testify.