



Melissa Feldman, Appellant, v Susan M. Levine, M.D., Respondent.

6305, 103962/07

**SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST
DEPARTMENT**

**90 A.D.3d 477; 935 N.Y.S.2d 12; 2011 N.Y. App. Div. LEXIS 8813; 2011 NY Slip Op
8972**

December 13, 2011, Decided

December 13, 2011, Entered

SUBSEQUENT HISTORY: Leave to appeal granted by *Melissa Feldman, etc. v Susan M. Levine, M.D., 2012 N.Y. LEXIS 559 (N.Y., Mar. 29, 2012)*

costs, the judgment vacated, defendant's motion denied and the jury verdict awarding plaintiff the principal sum of \$ 1,200,000 reinstated. The Clerk is directed to enter judgment accordingly.

HEADNOTES

Evidence--Scientific Evidence--Estimation of Rate of Progression of Cancer Did Not Involve Scientific Methodology

COUNSEL: [***1] Pollack, Pollack, Isaac & De Cicco, New York (Brian J. Isaac of counsel), for appellant.

Callan Koster Brady & Brennan, LLP, New York (Michael P. Kandler of counsel), for respondent.

JUDGES: Gonzalez, P.J., Friedman, Moskowitz, Acosta, Richter, JJ. Concur--Gonzalez, P.J., Friedman, Moskowitz, Acosta, and Richter, JJ.

The oncological issues presented by the competing causation experts, namely, the estimation of the rate of progression of decedent's cancer, do not involve the type of novel scientific methodology contemplated for a *Frye* hearing (see *Frye v United States, 293 F 1013 [DC Cir 1923]*). Rather, the experts' disagreement as to whether decedent's lung cancer was present and could have been diagnosed during her treatment [***2] with defendant prior to her diagnosis of Stage IV lung cancer, was a jury issue (see *Marsh v Smyth, 12 AD3d 307, 785 NYS2d 440 [2004]*). Moreover, the medical literature cited by plaintiff supported the methodology used by her expert to estimate the progression of decedent's cancer (see *Leffler v Feld, 51 AD3d 410, 856 NYS2d 106 [2008]*).

OPINION

[**12] [*477] Judgment, Supreme Court, New York County (Karen S. Smith, J.), entered May 13, 2009, dismissing the complaint and bringing up for review orders, same court and Justice, entered on or about March 26, 2009 and April 29, 2009, which granted defendant's motion for, inter alia, judgment notwithstanding [*478] the verdict, unanimously reversed, on the law, without

Accordingly, defendant's motion for judgment notwithstanding the verdict [**13] should have been denied. It cannot be said that "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational men to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards, 45 NY2d 493, 499, 382 NE2d 1145, 410 NYS2d 282 [1978]*). Here, there is evidence from which the jury reasonably could have concluded

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that the delay in diagnosis and treatment of the decedent's lung cancer caused her pain and suffering, diminished her chance of survival and hastened her death (*see Schaub v Cooper*, 34 AD3d 268, 824 NYS2d 241 [2006]).

Concur--Gonzalez, P.J., Friedman, Moskowitz, Acosta, and Richter, JJ.

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