

**CASE INFORMATION SHEET**  
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**COUNTY AND COURT:**

Sarasota County Circuit Court

**NAME OF CASE:**

Beverly Virgilio, a/k/a Tanya Virgilio v. Richard E. Whisnant, M.D. and Suncoast Pathology, Inc.

**PLAINTIFF(S) ATTORNEY(S)/TRIAL COUNSEL:**

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**DEFENDANT(S) ATTORNEY(S)/TRIAL COUNSEL:**

Richard B. Mangan, Jr., Esquire  
R. Clifton Acord II, Esquire  
Bryan R. Snyder, Esquire  
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1 North Dale Mabry Highway, 11th Floor  
Tampa, FL 33609  
Attorneys for Richard E. Whisnant, M.D., and Suncoast Pathology, Inc.

**AGE/SEX OF PLAINTIFF:**

67 year-old female

**CAUSE OF INJURY:**

On November 29, 2006, Plaintiff presented to the emergency department of Venice Regional Medical Center after injuring her kidney. She was seen by a urologist who diagnosed her with a kidney hematoma and asked her to follow up as an outpatient.

At the time of the outpatient follow-up visit, plaintiff's urologist ordered a CT of the abdomen and pelvis and a CT urogram. The CT scans were performed on January 15, 2007. The interpreting radiologist observed what he described as an ulcerated gastric mass highly suspicious for malignancy. The radiologist recommended a referral to a gastroenterologist for endoscopy and biopsy.

On January 17, 2007, Plaintiff was seen by Ronald DeMasi, M.D., a gastroenterologist, for complaints of abdominal pain and left upper quadrant pain which had been present for quite some time. The gastroenterologist was made aware of the January 15, 2007 CT scan findings. The gastroenterologist recommended proceeding with upper endoscopy and arrangements were made to have the plaintiff added to his schedule that afternoon at Gulf Coast Endoscopy Center of Venice (GCEC).

At the time of endoscopy Dr. DeMasi observed a large gastric ulcer/mass. Tissue biopsies of the gastric antrum and the gastric mass were performed. The tissue samples from these biopsies were sent to Defendant, Suncoast Pathology, Inc., for processing and interpretation by a pathologist.

William Roth, M.D. reviewed the January 17, 2007 biopsies. He did not see any malignant cells. He diagnosed the antral biopsy as showing gastric mucosa with mild chronic inflammation. He diagnosed the gastric body mass as showing gastric mucosa with mild chronic inflammation and fragments of acute inflammatory exudate suggestive of ulcer. Dr. Roth was unable to exclude a submucosal tumor from the material on the gastric body mass.

On January 19, 2007, Plaintiff presented to GCEC for two additional GI procedures which included an endoscopic ultrasound with fine needle aspiration biopsies (EUS-FNA) as well as additional tissue biopsies at the margin of the ulcer. The tissue biopsies were interpreted by Tamara Densmore, M.D. of Suncoast Pathology as being worrisome for neoplasm. Dr. Densmore did not make a definitive diagnosis of malignancy but did recommend correlation with clinical and endoscopic findings.

The FNA required the assistance of a cytotechnologist employed by Suncoast Pathology who participated in the specimen collection and preparation process. The case initially consisted of eleven (11) aspirate smears and one (1) hemotoxylin and eosin (H & E) stained slide cut from a paraffin block. Subsequently eleven (11) additional slides were prepared at the request of Defendant Richard Whisnant, M.D., a cytopathologist with Suncoast Pathology, for the purpose of performing immunohistochemical staining.

These 11 aspirate smears were created by directly smearing the specimen from the needle used to perform the FNA onto a glass slide. The material remaining in the syringe after the smear was prepared was rinsed/injected into a Coplin Jar and subsequently taken back to Suncoast Pathology to be centrifuged and embedded in paraffin.

Dr. Whisnant interpreted the FNA case as showing the presence of malignant cells. In his report, he concluded that **both the aspirate smears and the cell block demonstrated**

**malignant epithelial cells.** The immunohistochemical stains that were ordered supported the impression of carcinoma but the staining pattern and appearance failed to support a primary gastric carcinoma. Dr. Whisnant sent the case in consultation to Dr. Martha Pittman at Massachusetts General Hospital.

On February 2, 2007, Dr. Pittman reported that the FNA case was positive for malignant cells. Her diagnosis was poorly differentiated carcinoma. She favored a gastric primary, although metastasis from elsewhere could not be completely excluded. Her report made it unclear if she had reviewed both the smears and the cell block slide.

After receiving the diagnosis of gastric cancer, Plaintiff and her family decided to have her evaluated at Memorial Sloan-Kettering Cancer Center in New York, New York by Vivian Strong, M.D., a surgeon specializing in gastric cancers. Dr. Strong had the FNA case interpreted by Dr. Whisnant re-reviewed by a cytopathologist at Sloan, who agreed that malignant cells were present. Again, there was no specific indication as to whether the Memorial Sloan-Kettering Cancer Center pathologist had reviewed both the aspirate smears and the cell block slide.

Plaintiff ultimately opted to undergo laparoscopic gastric resection. This was performed by Dr. Strong on March 12, 2007. The procedure performed was a laparoscopic subtotal gastrectomy with Roux-en-Y anastomosis and modified D2 lymphadenectomy.

The entire removed portion of the plaintiff's stomach was sectioned and microscopically examined. No evidence of malignancy was identified. Nearly 100 slides were made and no cancer was found. Plaintiff was discharged from Memorial Sloan-Kettering on March 15, 2007 with plans to follow-up with Dr. Strong in her office on April 3, 2007.

At the time of the April 3, 2007 follow-up visit with Dr. Strong, Plaintiff and her family were advised that the final pathology report revealed no residual cancer. This finding had been reviewed in detail with Dr. David Klimstra, a GI pathologist at Memorial Sloan-Kettering. According to Dr. Strong's record, the patient and her family were informed that she very likely had a very early gastric cancer that was taken as a sample from the ulcer. However, in order to rule out a slide mix up, Plaintiff requested to have DNA testing performed.

Molecular analysis was subsequently performed by Redpath Integrated Pathology in order to determine the genetic relatedness between Ms. Virgilio's gastric biopsy/FNA and her gastric resection specimens. Sydney Finkelstein, M.D. interpreted the DNA data comparing the FNA specimen collected on January 19, 2007 interpreted by Dr. Whisnant, and representative tissue sections of Ms. Virgilio's stomach from her subtotal gastrectomy. Dr. Finkelstein concluded that the cell block slide contained tissue fragments from two different patients. He concluded that the benign tissue fragments in the cell block specimen matched Ms. Virgilio's subtotal gastrectomy specimen and the malignant cells in the specimen were from another female patient.

After receiving the results of the Redpath DNA testing, the pathologists and treating doctors at Memorial Sloan-Kettering **amended their final official reports** to reflect that the actual diagnosis was a benign gastric ulcer rather than gastric cancer, concluding that Ms. Virgilio never had cancer. The DNA test results and amended reports were provided to Dr. Whisnant who, in turn, sent them to the plaintiff's treating doctors in Florida. Dr. Whisnant did not contact the patient or amend his initial diagnosis.

**NATURE OF INJURY:**

Plaintiff alleged that her FNA specimen became cross-contaminated with cancer cells from another female patient most likely due to the failure of a histotech employed by Suncoast Pathology to wipe down their forceps at the time of embedding. She further alleged that this caused her to undergo an unnecessary subtotal laparoscopic gastrectomy. She alleged that the correct diagnosis was a benign gastric ulcer that could have been treated with medical management rather than surgical resection.

**PLAINTIFF'S EXPERT WITNESSES:**

Sydney Finkelstein, M.D.  
816 Middle Street  
Pittsburgh, PA 15212

Dr. Finkelstein testified as an expert in solid tissue molecular pathology. He founded RedPath after spending 20 years as a practicing academic surgical pathologist. His most recent academic appointment prior to founding RedPath was a full professor at the University of Pittsburgh, where he also served as the Director of the Division of Molecular and Anatomic Pathology.

Dr. Finkelstein did not charge Plaintiff's counsel for his preparation time or trial testimony and only asked to be reimbursed for his air travel and lodging because he felt so strongly that Ms. Virgilio's findings demonstrated contamination.

Dr. Finkelstein testified that based upon his interpretation of Ms. Virgilio's DNA data, there was a genetic mismatch which, more likely than not, meant that the FNA specimen was contaminated with cancer cells from another female patient.

William Frable, M.D.  
Professor of Pathology  
Department of Pathology  
Virginia Commonwealth University  
The Gateway Building  
Room 6205  
200 East Marshall Street  
Richmond, VA 23219

Dr. Frable is a board-certified cytopathologist. He testified that Dr. Whisnant misread the aspirate smears as showing evidence of malignancy. He did not feel any cancer cells were present on the smears. However, the slides prepared from the cell block processed at Suncoast Pathology showed malignant cells. This inconsistency should have alerted Dr. Whisnant to a possible contamination.

Dr. Frable also testified that Suncoast Pathology and ultimately, Dr. Whisnant, had insufficient policies and procedures for the tracking of cell blocks and that, in his opinion, the cross-contaminant was introduced into the cell block as a result of one of the Suncoast Pathology employees failing to wipe their forceps at the embedding station in between cases.

Lukejohn Day, M.D.  
Assistant Clinical Professor of Medicine  
Division of Gastroenterology  
San Francisco General Hospital  
1001 Protero Avenue  
Unit 3D-5  
San Francisco, CA 94110

Dr. Day is a board-certified gastroenterologist. He served as a causation expert. In his opinion, Ms. Virgilio had an unnecessary subtotal gastrectomy presuming the results of the DNA testing performed at RedPath were accurate. He opined the gastric ulcer could have been treated by conservative medical management alone.

**DEFENDANT'S EXPERT WITNESSES:**

Rajesh Dash, M.D.  
Department of Pathology  
Division of Pathology Clinical Services  
Duke University Medical Center  
Box 3712  
Durham, NC 27710

Dr. Dash is a fellowship-trained and board-certified cytopathologist. He reviewed the aspirate smears, as well as the slides created from the cell block and concluded that **both** the aspirate smear slides, as well as the cell block slides, demonstrated malignant cells. It was his opinion that Dr. Whisnant's interpretation complied with the standard of care.

Jennifer Hunt, M.D.  
Chairmen of the Department of  
Pathology and Laboratory Services  
College of Medicine  
University of Arkansas for Medical  
Sciences

Dr. Hunt is a molecular genetic pathologist. She and Dr. Finkelstein worked together at the University of Pittsburgh prior to the time that Dr. Finkelstein left the University of Pittsburgh to found RedPath. She took over as the Director of the Division of Molecular Pathology after Dr. Finkelstein left the university. She is board-certified in molecular genetic pathology by the American Board of Medical Genetics.

Dr. Hunt re-reviewed all of the RedPath data. It was her opinion that Dr. Finkelstein/RedPath misinterpreted the electropherograms prepared in this case. It was her opinion that all of the cells on the slides from the FNA case were more likely than not Ms. Virgilio's cells. It was her opinion that Dr. Finkelstein failed to appreciate and properly account for the fact that what he felt to be a genetic mismatch was actually the result of DNA changes caused by the cancer itself.

Stephen M. Butler, M.D.  
1602 West Timberlane Drive  
Plant City, FL 33566

Dr. Butler is a board-certified general surgeon. It was his testimony that Ms. Virgilio's ulcer, whether malignant or benign, required surgical resection.

**CHECK APPROPRIATE SPACE:**   X   Verdict

**DATE OF VERDICT:** Wednesday, October 26, 2011

**VERDICT:** For the defense

**JUDGMENT:** Judgment pending

**DATE OF JUDGMENT:** pending

**DEFENDANT'S OFFER:** 0

**PLAINTIFF'S LAST DEMAND:**

Originally, plaintiff's demand was the \$2,000,000 policy limits, and then \$1,000,000 immediately prior to trial.

**ATTORNEY COMMENTS:**

The jury deliberated for approximately four and a half hours before returning a defense verdict. Plaintiff originally sued Gulf Coast Endoscopy Center of Venice, Gary Wright, M.D. (radiology) and Gulf Coast Digestive Health. Each of these defendants was granted summary judgment unopposed by Plaintiff. At trial, the court granted Plaintiff's request for a special jury instruction to be read, advising the jury that Gulf Coast Endoscopy Center of Venice was not the source of any alleged cross-contamination. Given this

instruction, if the jury were to have concluded that a cross-contamination occurred, the only potential source of that contamination would have been Suncoast Pathology.

Plaintiff argued that Dr. Whisnant never objected to the results of the DNA testing until “lawyers” got involved. In addition, Plaintiff’s counsel argued that Dr. Whisnant, if he did not agree with the DNA results, should have contacted Ms. Virgilio to advise her to seek a second opinion. Not having done so must have meant that he agreed with the findings at the time.

Plaintiff also contended that the Defendants could have but did not perform their own DNA testing. The trial court permitted Plaintiff to make this argument over defense objection.

The defense focused on two arguments. First, if cancer cells were present on the cell block **and** aspirate smears, then no contamination existed. Since the aspirate smears were prepared at the endoscopy center, there could be no claim that Suncoast Pathology, Inc. contaminated the smears.

Second, the DNA results from RedPath Integrated Pathology, Inc. could be explained by the changes in DNA caused by cancer. Dr. Finkelstein acknowledged those changes can occur but claimed the findings in this case were not the type seen with cancer. He acknowledged he never told Memorial Sloan-Kettering Cancer Center that the DNA results (those accepted as accurate and which served as the basis for Memorial Sloan-Kettering Cancer Center to change its diagnosis) could be impacted by the presence of cancer.

**Submitted By:** Richard B. Mangan, Jr., Esq.  
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**Date:** December 5, 2011

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