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**ROSALIND SUTCH, as executrix of The Estate of Rosalind Wilson, Deceased,
Plaintiffs / Appellees v. ROXBOROUGH MEMORIAL HOSPITAL, Defendants /
Appellants**

NO. 0901

**COMMON PLEAS COURT OF PHILADELPHIA COUNTY, PENNSYLVANIA,
CIVIL TRIAL DIVISION**

2013 Phila. Ct. Com. Pl. LEXIS 156

May 28, 2013, Decided

May 28, 2013, Filed

SUBSEQUENT HISTORY: [*1]

SUPERIOR COURT NOS. 3257 EDA 2012, 3255 EDA 2012, 3249 EDA 2012, 3246 EDA 2012

CASE SUMMARY:

PROCEDURAL POSTURE: Defendants, a hospital and other related medical parties, sought review of an order which granted a post-trial motion by plaintiff, a deceased patient's estate executrix (EE), for a new trial. The matter arose in the EE's medical malpractice action, wherein it was alleged that the patient was not properly informed about a suspicious nodule on her lung. The court submitted an opinion in support of an affirmance on appeal under *Pa.R.A.P. 1925*.

OVERVIEW: The patient had a chest x-ray while at the hospital which showed a suspicious nodule. However, she was not informed of that fact. By the time the patient discovered it, the nodule had grown, metastasized, and eventually resulted in her death. The EE brought suit pursuant to the Wrongful Death and Survival Acts. An order by agreement was entered on the EE's motion in limine, which precluded mention of the patient's smoking history. Although one expert mentioned her smoking, a

mistrial was denied and instead, a curative instruction was given. After the jury entered a verdict against, inter alia, the hospital, the EE's new trial motion was granted. In support of an affirmance on appeal, the court noted that the court's decision to grant the new trial was solely based on the fact that the patient's smoking history was mentioned, in violation of the preclusion order. The court found that in the circumstances, unfair prejudice resulted and the EE did not get a fair trial on the merits. The curative instruction was not enough to cure the prejudice, as the fact that the patient was a smoker had absolutely no probative value and could serve only to severely prejudice the EE's claims.

OUTCOME: The court recommended an affirmance on appeal.

JUDGES: PAUL P. PANEPINTO, JUDGE.

OPINION BY: PAUL P. PANEPINTO

OPINION

PAUL P. PANEPINTO, JUDGE,

Defendants /Appellants appeal this Court's Order of October 19, 2012, Granting Plaintiff's Post-Trial Motion for a New Trial.

PROCEDURAL AND FACTUAL BACKGROUND

This medical malpractice action arises from plaintiff's allegations that Defendants failed to inform Plaintiff's mother (decedent, Rosalind Wilson) that a chest x-ray performed at defendant Roxborough Memorial Hospital on May 3, 2007, showed a suspicious nodule, which would have required further examination, including a follow-up CT scan. During Mrs. Wilson's overnight hospitalization, none of the physicians who cared for her advised her of this 2.3 cm nodule in her left lung nor did they advise her to seek follow-up care regarding this finding. Mrs. Wilson left the hospital the next day unaware of the existence of the nodule and did not discover its existence until twenty (20) months later when it was discovered that she had an 8 cm malignant nodule in her left lung which had metastasized to other areas of her body. At that time, she was diagnosed with Stage IV lung cancer. Mrs. Wilson [*2] died on July 21, 2009, some six (6) months after she was diagnosed. Thereafter, Mrs. Wilson's daughter, as executrix of her mother's estate brought suit pursuant to the Wrongful Death and Survival Acts.

Prior to jury selection this Court heard extensive argument on numerous Pre-Trial matters and motions. Most germane to this appeal was Plaintiff's Motion in Limine to preclude any mention of decedent's smoking history. After argument, the parties requested that this Court enter an Order by Agreement of all the parties that Granted Plaintiff's Motion In Limine and thereby precluded the Defendants from "presenting any evidence, testimony, and/or argument regarding decedent's smoking history." This preclusion Order was entered as such on May 16, 2012. Thereafter, on May 18, 2012, a panel of twelve (12) jurors and two (2) alternates was selected and sworn in to hear the case.

When trial commenced on May 21, 2012, the remaining named defendants were the hospital (Roxborough Memorial), the emergency room physician (Dr. Jeffrey Geller), admitting physician (Dr. Melanio Aguirre), house physician (Dr. Sultana Afroz), and radiologist (Dr. Barbara Goldman-Robbins). Trial continued for the next [*3] eight (8) days until May 31, 2012 when counsel for defendant, Dr. Geller, called Dr. Kelly, an expert in the field of emergency medicine, to

testify on behalf of Dr. Geller. During direct examination, Dr. Kelly was asked whether the decedent had any cardiac risk factors, to which Dr. Kelly responded by informing the jury that decedent was a **smoker**. Dr. Kelly completed his testimony, at which time this Court dismissed the jury and inquired of Dr. Kelly as to whether he was made aware by defendant, Dr. Geller's counsel, of this Court's preclusion Order. Dr. Kelly responded that he could not remember having had a discussion with counsel about the Court's Pre-Trial Order banning the mentioning of decedent's smoking.

The next day, Friday June 1, 2012 and the following Monday, June 4, 2012, this Court heard argument as to what should be done in regard to Dr. Kelly's testimony regarding decedent being a smoker. During this time, Plaintiff's counsel made the appropriate motion to declare a mistrial. However, it was this Court's decision that a curative instruction would be given, and thus, this Court denied Plaintiff's request for a mistrial. Trial continued and on June 7 the jury rendered [*4] a verdict against Roxborough Memorial Hospital and Dr. Melanio Aguirre only, each being found to be fifty (50) percent causally negligent. The jury assessed damages at One Hundred Thousand (\$100,000.00) dollars under the Survival Act and Ninety Thousand (\$90,000.00) dollars under the Wrongful Death Act. The jury found the remaining Defendants not negligent.

Plaintiff filed Post-Trial Motions for a New Trial, which were Granted by this Court pursuant to an Order dated October 19, 2012. On November 15 and 19, 2012 all named Defendants filed with the Superior Court Notices of Appeal of this Court's Order Granting Plaintiff's Post-Trial Motion for a New Trial. All four (4) appeals have been consolidated for purposes of review by the appellate (PA Superior) court. On March 1, 2013, this Court entered an Order pursuant to *PA R.A.P. 1925(b)* requiring Defendants to file Concise Statements of Errors Complained of on Appeal. All defendants timely filed their 1925(b) Statements and this opinion follows.

ALLEGATIONS OF ERROR

Defendants' Rule 1925(b) statements raise numerous allegations of error on the part of this Trial Court in Granting Plaintiff's request for a New Trial. There were several allegations [*5] of error contained in those Statements of Error which will not be addressed herein as they did not provide the basis for this Court's Granting of a New Trial. These two (2) issues of error will be

addressed initially.

First, all defendants raised as error the possibility that this Court, in Granting a New Trial, did so based upon the "grossly inadequate" amount of the verdict, that being One Hundred and Ninety Thousand (\$190,000.00) dollars. However, this Court did not base its decision to Grant a New Trial on the possible inadequacy of the jury verdict. As will be discussed below, this Court, in reaching its decision to Grant a New Trial did so solely for reason that its Pre-Trial Order precluding the mentioning of decedent's smoking history was violated, resulting in unfair prejudice to the plaintiff and therefore failed to allow her to have a fair trial on the merits.

Second, appellant, Barbara Goldman Robbins, M.D., Statement of Errors sets forth, inter alia, that it was an error of law or abuse of discretion for this Court to have concluded that the verdict finding her not negligent was not supported by the evidence, or was contrary to the weight of the evidence. This Court, as [*6] stated previously, in reaching its decision to Grant a New Trial did so solely for reason that it's Pre-Trial Order precluding the mentioning of decedent's smoking history was violated resulting in unfair prejudice to the plaintiff and therefore failed to allow Plaintiff to have a fair trial on the merits.

Further, all party Defendants in the underlying trial must be parties to the New Trial. The foundation for this Court's determination that a New Trial be granted is due to what occurred during the trial itself, and if a mistrial had been declared at that moment (as this Court now opines should have been so declared) a New Trial would have been had prior to the jury reaching its verdict. Moreover, the violation of this Court's Pre-Trial Order barring plaintiff's smoking habit from trial, may have, in fact, had some impact on the jury's verdict finding two (2) of the defendant doctors to be not negligent.

The remaining errors complained of on appeal that were raised by all Defendants in their respective Statements of Errors complained of on Appeal can be summarized by setting forth below appellant, Melanio Domingo Aguirre, D.O. Error Complained of on Appeal No 1:

1. Whether the trial [*7] court reversibly abused its discretion when it granted plaintiff's Motion for Post-Trial relief and ordered a new trial on the

basis that it erred in denying Plaintiff's purported motion for mistrial based on the purported fact that Co-defendant's emergency medicine expert witness, John Kelly, D.O. testified that the decedent was a 'smoker' in violation of the Court's pre-trial order, on the single fleeting occasion, despite the fact that:

(a) the trial court gave an extremely detailed curative instruction as to the import of that testimony; and/or

(b) Plaintiff failed to timely and appropriately move for a mistrial after Dr. Kelly purportedly testified in violation of the court's pre-trial Order; and/or

(c) The utterance of 'smoking' is not so unfairly prejudicial, in the context of all of the evidence in this case, such that plaintiff was unable to receive a fair trial.

DISCUSSION

On the eighth (8th) day of trial, Defendant, Dr. Geller, called Dr. Kelly to testify as an expert witness in the field of emergency medicine to rebut plaintiff's contentions that Dr. Geller's care of plaintiff, as an emergency room physician, was below the standard of care. Both parties had agreed that Plaintiff's [*8] decedent had presented herself to the emergency room of Defendant, Roxborough Memorial Hospital, complaining of chest pain. During direct examination Dr. Geller's counsel posed the following question to Dr. Kelly:

Q. Did [plaintiff/decedent] have any cardiac risk factors

A. The patient was a smoker. The patient was hypertensive. So yes, I mean, those are big risk factors. {Remainder of answer omitted}

(See N.T., May 31, 2012 P.M. transcript at pp. 106, line 25 - 107 line 4)

There can be no doubt that Dr. Kelly's response, stating to the jury that Mrs. Wilson was a smoker, was a direct and unequivocal violation of this Court's Pre-Trial Order precluding the mentioning during trial that Mrs. Wilson was a **smoker**. Although no objection was made immediately after Dr. Kelly gave his response that Mrs. Wilson was a smoker, counsel for plaintiff did request a sidebar with the Court and advised that Dr. Kelly had violated this Court's preclusion Order and requested relief. This Court, immediately following Dr. Kelly's testimony, asked Dr. Kelly to remain on the stand and dismissed the jury. This Court then conducted a colloquy of the witness regarding his knowledge or lack thereof of this Court's [*9] Pre-Trial Order precluding any mentioning of Mrs. Wilson's smoking habits. Dr. Kelly's answers to this Court's inquiry clearly stated that he had no recollection of and could not remember ever discussing this Court's preclusion Order with Dr. Geller's counsel prior to testifying that day. However, this Court will limit this opinion to the issue on Appeal, that is, the granting of a New Trial. Accordingly, this opinion will not discuss any possible sanction against Dr. Geller or his counsel with regard to the violation of this Court's Pre-Trial Order.

Initially, this Court will discuss the Statement of Error concerning Plaintiff's alleged failure to timely and appropriately move for a mistrial following Dr. Kelly's purported violation of this Court's Pre-Trial Order. As previously set forth, jury selection occurred on Friday, May 18, 2012 with Trial itself beginning on Monday, May 21, 2012. Although there was an off day for the Memorial Day holiday, trial was into its eighth (8th) full day when Defendant Dr. Geller's expert, Dr. Kelly took the stand. Although Plaintiff's counsel did not immediately stand and request a mistrial, at that precise moment, Plaintiff's counsel did request [*10] a sidebar with the Court and raised the issue of a mistrial due to the fact that Dr. Kelly's testimony had violated this Court's Pre-Trial Order. As counsel who try matters before this Court are aware, it has always been this Court's policy and practice that these issues be raised at an appropriate

time out of the presence of the jury.

Following this Court's colloquy of the witness, Dr. Kelly, regarding his knowledge of the smoking preclusion Order, this Court then held lengthy discussions with all counsel regarding whether a mistrial should be declared. Given the late hour of the day, Plaintiff's counsel was granted permission by this Court to confer with their client regarding how to proceed and specifically, whether to proceed with a formal request for a mistrial.

The following day, Friday June 17, 2012, discussions were had with all counsel regarding potential settlement in light of what had occurred and the propriety of declaring a mistrial given that trial was into its ninth (9th) day and expected to last only a few days more. Defendants are correct that Plaintiff's were somewhat equivocal in their request that a mistrial be declared, and so advised this Court as to the significant [*11] monetary costs that had been outlaid to date, as well as the personal, monetary and emotional toll the trial had taken on the numerous family members who were in attendance during the long Trial period. This Court was mindful of these costs and so granted all counsel, plaintiff and defendants, the opportunity to consider their respective positions and in so doing, specifically advised and directed plaintiff's counsel to take the weekend to once again consult with their client and advise the Court on Monday, June 4, 2012 as to their decision to formally request a mistrial. Given this Court's directive, Plaintiff's counsel can not and should not be held accountable for this Court's attempts at reaching a well thought out decision with regard to the declaration of a mistrial.

On Monday, June 4, 2012, in response to this Court's inquiry, counsel for Plaintiff's advised this Court that they were making a request for a mistrial due to Dr. Geller's violation of this Court's Pre-Trial Order. After additional argument and discussion, this Court denied Plaintiff's request that a mistrial be declared and decided to provide the jury with a curative instruction. In light of the above discussion, [*12] Appellant / Defendants complaint of error, that is, the alleged failure of plaintiffs to timely and appropriately move for a mistrial, was without merit and was denied by this Court.

Appellant / Defendants also contend that this Court erred in Granting Plaintiffs a New Trial when, following the testimony of Defendant Dr. Geller's emergency medicine expert, Dr. Kelly, this Court gave "an extremely

detailed curative instruction as to the import of that testimony." During this Court's discussions with counsel regarding Plaintiff's request for a mistrial, counsel raised the possibility of providing the jury with a strongly worded curative instruction as an option to the declaration of a mistrial regarding the smoking issue. As stated above, this Court determined that a curative instruction would be given to the jury. Accordingly, prior to any testimony commencing on June 4, 2012, this Court read the following to the jury as a curative instruction:

"I do have something that's very important to read to you...Ladies gentlemen of the jury. I need to address you at this point. Lung cancer can be caused by many things. This case is not about its causes. The cause of Ms. Wilson's specific type [*13] of lung cancer is not known. Further, smoking should not be considered in this case. Whatever may have caused the lung cancer has nothing to do with the issues of whether the defendant's breached their standard of care and caused the harm suffered by Rosalind Wilson. It has nothing to do with the issues you are considering in this case.

For that reason, before I started this trial, I Ordered and the parties agreed that no party was allowed to discuss any potential reason for the cause of Ms. Wilson's lung cancer. I instructed all counsel to advise their witnesses of the Court's Order before taking the stand. Last Thursday afternoon, Dr. Geller and REPA violated the Court's Order through the testimony introduced by Dr. Kelly. You are instructed to disregard that portion of Dr. Kelly's testimony because it is irrelevant and misleading.

I am instructing you that you are to consider in your deliberations only; one, whether the defendants breached the standard of care by failing to advise Ms. Wilson, her family or her family physician about the nodule on her lung. Two, whether any such failure

increased the harm to Mrs. Wilson, or decreased her chance of survival. And three, the amount of [*14] damages caused by any such failure. And I am asking you to follow these instructions as I am giving them to you, and that's your sworn duty as jurors in this case. (See N.T., June 4, 2012 A.M. transcript at pp. 29-31)

Upon reflection, this Court does not agree with Appellant / Defendants that the above curative instruction was enough to cure the prejudice resulting from defendant's violation of this Court's preclusion Order. This Court at the time it rendered its decision not to grant a mistrial determined that only a strongly worded instruction to the jury could cure the violation of this Court's Pre-Trial Order banning the mentioning of decedent's smoking history. However, as will be discussed below, this Court, after reflection and due consideration, does not believe that even a strongly worded curative instruction such as the one given to the jury in the instant matter could have cured the prejudicial effect that was created when they were told that Plaintiff's decedent was in fact a **smoker**. As some legal minds have proffered, a curative instruction may unfortunately sometimes serve to highlight to the jury a fact (**decedent was a smoker**) that the Court was attempting to eradicate [*15] from their collective memory and thought process. In addition, as will be discussed below, it is this Court's determination that in a failure to warn medical malpractice matter involving a death from lung cancer, advising the jury that decedent was a smoker, **when all parties agreed prior to trial to ban decedent's smoking history**, is so egregious that there can be no cure to the resulting prejudice, other than a New Trial. For these reasons, Appellant / Defendants contention that this Court erred in Granting a New Trial in following a strongly worded curative instruction is without-merit and was denied by this Court.

Finally, appellant / defendants argue that this Court erred in Granting Plaintiff a New Trial, in that the "utterance of 'smoking' is not so unfairly prejudicial, in the context of all of the evidence in this case, such that the Plaintiff was unable to receive a fair trial." As Plaintiff / Appellee address in their Post-Trial brief, following Dr. Kelly's testimony wherein he advised the jury that decedent was a smoker, the Plaintiff had "no

effective way of addressing the smoking issue with the jury or softening its impact." (Plaintiff / Appellee Post-Trial Brief, p. 13). [*16] Plaintiff had already presented its case-in-chief and had rested. Other than the curative instruction, the jury was not provided with any other testimony or evidence that decedent's smoking history was absolutely irrelevant to their legal and factual determinations. Moreover, Plaintiff / Appellee had no ability to gauge its effect on the jury. Given this Court's Pre-Trial Order precluding any evidence of decedent's smoking, Plaintiff / Appellee could not and did not during voir dire inquire as to the jury panel's potential biases toward smokers in general, and specifically, smokers who develop lung cancer in light of the warnings surrounding smoking being the number one cause of lung cancer.

Appellants argue in their briefs and set forth in their Statement of Errors that, given all of the extensive evidence in the case that a "single and fleeting utterance of the word 'smoking' was not so unfairly prejudicial" such that plaintiff was unable to receive a fair trial. After much reflection, this Court does not believe that Dr. Kelly's mentioning of the word "smoking" was a "fleeting utterance." Dr. Kelly began an answer to a question posed on direct examination clearly and unequivocally, [*17] testifying that:

"The patient was a smoker. The patient was hypertensive. I mean, those are big risk factors."

As Appellees point out, this response was to a question posed concerning cardiac risk factors not lung cancer risk factors. However, this does not change the prejudicial effect on plaintiff's case. The jurors now had knowledge that despite the overwhelming evidence that smoking causes cancer, plaintiff decedent decided to smoke and died from lung cancer.

This Court entered an Order with the agreement of all counsel (Defendants included) that plaintiff's smoking habits were prohibited from being mentioned during the trial due to the reality that jurors may hold Plaintiff's decedent accountable to some extent for her developing her own lung cancer. As all counsel agreed, none of the defendants that remained in the case when trial commenced had any meaningful or relevant interest in advising the jury that Plaintiff was a **smoker**. Therefore,

the fact that Plaintiff was a **smoker** had absolutely no probative value and could serve only to severely prejudice Plaintiff's claims before the jury. As such, for Defendants to now argue that a single utterance of the word smoking was not so prejudicial [*18] so as to prevent Plaintiff from a fair trial is not meritorious. The jurors did not simply hear the word "smoking," but were told that decedent herself smoked and that it was a big risk factor, albeit in the context of cardiac issues.

This Court is mindful of our Superior Court's decision in *Poust v. Hylton*, 2007 PA Super 370, 940 A.2d 380 (Pa.Super. 2007), appeal denied, 598 Pa. 782, 959 A.2d 320, 2008 Pa LEXIS 1707. In that case, similar to the instant matter, this Court entered a Pre-Trial Order precluding the mentioning of the word "cocaine" during trial. In *Poust*, Plaintiff's decedent was riding his bicycle when he was allegedly run over by a tractor-trailer. Liability in that case was hotly contested as defendant contended that the decedent negligently operated his bicycle causing it to collide with and/or into the tractor-trailer. In *Poust*, counsel, for defendant posed the following question to Plaintiff's pain expert, "Now, Doctor, in your report, the fact that he [Plaintiff's decedent] had a cocaine metabolite in his system, does that have any effect on -- his pain?" (See *Poust v. Hylton*, Trial Transcript, 12-05-05, pp. 51-52) In *Poust*, this trial court, fearing the effect of calling the jury's attention once again to the [*19] word "cocaine," did not give a curative instruction. However, in that case, the use of the word cocaine was in fact, in the humble opinion of this trial court, a fleeting, although clear, mention of the word "cocaine. In the *Poust* case, this Court's Pre-Trial ruling barring the use of the word cocaine from trial was based upon the fact that, although it may have had some probative value, that is, decedent's ability to feel pain and his ability to operate his bicycle, its use would be more prejudicial than probative. Therefore, the single mentioning of the word cocaine was not relevant to the issues of who had the right of way and who caused the accident.

In the instant matter, this Court's Pre-Trial Order precluding the mentioning of decedent's smoking history was based upon its potential to seriously prejudice and undermine Plaintiff's case. Further, and just as importantly, advising the jury that plaintiff smoked had absolutely no probative value. As trial was in its eighth (8th) day when the violation occurred, this Court in addressing the mistrial issue, gave great weight to the fact

that all parties, but in particular Plaintiff, had already expended a great amount of time and expense. [*20] In addition, this Court was acutely aware of the toll the trial was taking on Plaintiff's family, many of whom were at trial every day, as well as its toll on the Defendants themselves. As such, this Court, with heavy hesitation, decided to give the jury a strongly worded curative instruction.

Upon great reflection, it is this Court's determination that in the case at bar, a curative instruction would not serve to insure that Plaintiff was given a fair trial, unblemished by the prejudice that resulted, from Defendant Dr. Geller's violation of this Court's Pre-Trial Order. The PA Rules of Civil Procedure require the filing of Post-Trial motions so as to help formulate any issues for possible appeal, but also to permit the trial court to reflect upon what occurred during trial, and if necessary, enter an Order that will in effect clear up any errors that

occurred during trial. It is upon this reflection that this Court entered its Order Granting Plaintiff / Appellant's Post-trial Motion for a New Trial.

CONCLUSION

For all of the above reasons, this Court's Order of October 19, 2012 Granting Plaintiff/Appellee's Post-Trial Motion for a New Trial should be AFFIRMED.

5/28/2013

Dated

BY [*21] THE COURT,

/s/ Paul P. Panepinto

PAUL P. PANEPINTO, J