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[Back to Article](#)

New Trial Awarded After Expert's Smoking Reference

A Philadelphia judge has granted a new trial in a medical malpractice case over an alleged delayed diagnosis of lung cancer after a defense expert testified in violation of the court's order that the plaintiff was a smoker.

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A Philadelphia judge has granted a new trial in a medical malpractice case over an alleged delayed diagnosis of lung cancer after a defense expert testified in violation of the court's order that the plaintiff was a smoker.

Philadelphia Court of Common Pleas Judge Paul P. Panepinto's order sets the stage for the trial court to hear arguments that defense counsel, Nancy K. Raynor of Raynor & Associates, her client and the defense expert should be sanctioned or found in contempt of court and that they should pay for \$810,304 in attorney fees, costs and expenses incurred for the first trial.

Plaintiff Rosalind W. Sutch, the executrix of Rosalind Wilson's estate and Wilson's daughter, has argued that malpractice was committed against Wilson because X-rays taken during her visit to a hospital emergency room showed a "suspicious nodule on her lung," but because Wilson was not advised of the need to get a CT scan, there was a delay of 20 months in the diagnosis of her lung cancer, according to the plaintiff's court papers.

By the time Wilson's cancer was diagnosed, she had stage IV lung cancer that metastasized throughout her body, court papers said. Wilson died July 21, 2009.

Counsel for Sutch sought a new trial on two grounds: one, that the violation of the in limine order not to reference that Sutch was a smoker prejudiced the plaintiff, and, two, that the verdict was grossly inadequate. In May, the jury entered a defense verdict in favor of Raynor's clients Dr. Jeffrey Geller and Roxborough Emergency Physician Associates, but returned a plaintiff's verdict of \$190,000 against defendants Dr. Melanio D. Aguirre and Roxborough Memorial Hospital. Aguirre was the attending physician when Wilson was discharged, and Geller was the physician who decided to admit Wilson into the hospital, according to defense papers.

Raynor already was sanctioned in the case by Philadelphia Court of Common Pleas Judge Jacqueline F. Allen because Raynor wrote a letter to the employer of a plaintiff's expert witness. Allen ordered that Raynor be disqualified from representing her clients and that Raynor pay the plaintiff's costs and attorney fees of

\$44,693 in litigating the motion.

Plaintiff dismissed Dr. Riti Patel, the only defendant with an expert who sought to "exonerate his client by blaming Mrs. Wilson's death on her smoking, or who opined that smoking would impact life expectancy," according to the plaintiff's court papers.

When Geller's emergency medicine expert, Dr. John J. Kelly, testified, Raynor asked him if Wilson had any "cardiac risk factors" and Kelly replied, according to court papers, "'The patient was a smoker. The patient was hypertensive. So, yes, I mean, those are big risk factors.'"

When Kelly was questioned outside of the presence of the jury by Panepinto, Kelly testified that he did not remember talking with Raynor and being told by Raynor not to discuss Wilson's smoking in his testimony, according to court papers.

"I can't remember," Kelly said, according to court papers.

Judy May Packett, also of Raynor & Associates, said that when Kelly made the comment, "Ms. Raynor was in shock for a moment and paused from her questioning, looking at the judge for a cue as to how to handle the inadvertent reference to smoking. It is significant to point out that, upon hearing the reference to smoking, Ms. Raynor appropriately paused ... and, when no objection was made, she continued her questioning — without referring to the 'smoker' comment, and, in fact, by continuing with her examination sought to minimize any effect that single reference to smoking might have had."

Packett also argued on Raynor's behalf that there is no evidence that prejudice resulted from the reference to smoking, and it is only an assumption that there is a "direct linear relationship between the single utterance of the word 'smoker' and the trial outcome."

The prejudice was cured by a curative jury instruction, Raynor's defense papers said.

Packett also argued on Raynor's behalf in court papers that plaintiffs counsel Matthew D'Annunzio of Klehr Harrison Harvey Branzburg and Joseph Messa of Messa & Associates waived their request for a mistrial because they did not request a mistrial right away.

"It cannot be disputed that plaintiff failed to make a timely and specific request for a mistrial, as required under Pennsylvania law. Such failure forever waives her right to complain," Packett wrote.

Packett also argued on Raynor's behalf that Kelly probably made the reference because it is stressful to give testimony.

Jeffrey B. McCarron and Kathleen M. Carson, Raynor's counsel from Swartz Campbell, on the request that Raynor and her firm be sanctioned by paying the plaintiffs counsel fees, wrote in opposition that, while the plaintiff's request for criminal or civil contempt and sanctions is based upon Raynor's alleged failure to advise Kelly of the order not to testify about Wilson's smoking, there "is no evidence that Ms. Raynor violated the" order and there is no evidence that Kelly referenced smoking intentionally.

When Kelly was questioned by Panepinto, Raynor said she told Kelly, "'The only way we can talk about these cardiac risk factors or social habits is by using the term 'social habits,' that smoking's out of the case. I thought I made myself clear. I certainly would never violate a court order or instruct a witness to do so,'" Raynor's defense papers said.

Raynor's actual question "intended to address issues related to the decedent's peripheral vascular disease," the defense papers said. Wilson smoked one pack of cigarettes a day, according to defense papers.

In another filing, Raynor and Packett argued that Messa and D'Annunzio's trial tactics "coupled with interjecting condescending, arrogant and smarmy comments to defense witnesses were not well received

by the jury. ... The fact that plaintiffs counsel invested approximately \$1 million in costs and fees in this case is outrageous given that, despite counsel's statement to the contrary, this is not a complex case ... but, rather, a standard medical malpractice action involving a straightforward fact pattern."

The reference to Wilson's history of smoking was prejudicial because it made it look to the jury like the plaintiffs were hiding something when smoking was not an issue in the case, Messa said in an interview.

When the reference was made, the plaintiff's entire case had been put on, and the defense oncologist expert, Dr. David Harris, had been impeached because he acknowledged that he had testified on a plaintiff's side of a case against the "doubling theory," which is a concept that it can be determined when metastatic tumors spread from a primary tumor by comparing their growth rates, D'Annunzio said in an interview.

"When it gets dropped like a bomb in the middle of the defense case, it destroyed the jury's trust in us," D'Annunzio said.

McCarron did not respond to a request for comment and another of Raynor's attorneys, George Bochetto of Bochetto & Lentz, did not immediately provide a comment.

The plaintiff argued in court papers that her counsel did not have the chance to point out to the jury that whatever caused Wilson's cancer was irrelevant to whether she was negligently informed of her cancer.

"The only explanation for the shockingly low verdict is that the jury punished Mrs. Wilson for being a smoker, and improperly blamed her for causing her metastatic illness and death. ... In doing so, the jury improperly injected negligence concepts into their deliberations," the plaintiff's court papers said.

Packett, however, argued in court papers that there are numerous variables and unknowns in every trial, including the skill of the lawyers in questioning witnesses, in persuading the jury and presenting evidence, the credibility of the experts, and the attention spans, backgrounds and life experiences of jurors.

Raynor's counsel from Swartz Campbell also argued in court papers that under the "American rule" there can be no recovery of attorney fees from an opposite party absent express authorization in a statute.

Other defendants in the case also opposed the plaintiff's request for a new trial.

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