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Sanctions Rejected for Hand-Delivery Of Post-Trial Motion to Defense Expert

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Of the Legal Staff

A Philadelphia judge has rejected a motion for reconsideration by a defense attorney — who the judge found should be sanctioned for contacting the employer of a plaintiff's expert witness in a medical malpractice case — to have opposing counsel also sanctioned.

The exact sanctions the defense attorney will face still must be determined by Philadelphia Court of Common Pleas Judge Jacqueline F. Allen.

In issuing an order rejecting the motion for reconsideration filed by Nancy K. Raynor and Judy May Packett of Raynor & Associates about Raynor's letter to the general counsel of the Hospital of the University of Pennsylvania, Allen did not detail her reasoning.

Raynor & Associates had asked that plaintiff's counsel, Messa & Associates and Klehr Harrison Harvey Branzburg, be sanctioned for filing a motion for sanctions against Raynor.



ALLEN

Raynor & Associates also had asked that plaintiff's counsel be sanctioned for directly contacting defense expert Dr. John Kelly "for the sole purpose of bullying, harassing and intimidating Dr. Kelly and, concomitantly,

attempting to chill his trial testimony."

Raynor & Associates said Kelly was contacted by plaintiff's counsel because the doctor was hand-delivered the plaintiff's post-trial motion, as well as the reply in support of the post-trial motion.

"This is significant because the pleading contained extremely inflammatory and threatening allegations directed against Dr. Kelly," Raynor & Associates said in court papers of the post-trial motion.

Plaintiff's counsel Joseph L. Messa Jr. and his co-counsel at Messa & Associates are

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seeking a new trial, arguing that Kelly testified their client was a smoker in response to a question if she had cardiac risk factors — despite an order granting a motion in limine to preclude mentioning that part of her medical history.

In *Sutch v. Roxborough Memorial Hospital*, the plaintiff's allegation is that Dr. Jeffrey Geller of Roxborough Memorial Hospital failed to obtain diagnostic testing that could have resulted in the timely diagnosis of Rosalind Wilson's ultimately fatal lung cancer. Raynor is Geller's counsel.

Wilson's lung cancer went undiagnosed between May 2007 and January 2009, the plaintiff's papers said.

The plaintiff's 43-page post-trial motion also said that Kelly, when questioned by Philadelphia Court of Common Pleas Judge Paul P. Panepinto, said he did not remember if he was told by Raynor not to address smoking.

He further testified, according to the plaintiff's motion for a new trial, that on the day of his testimony "I did have some brief discussion with Ms. Raynor today, but not regarding smoking, no."

"The prejudice to plaintiff was especially acute because plaintiff has no effective way of addressing the smoking issue with the jury or softening its impact," plaintiff's counsel said. "By the time smoking was injected into the case, plaintiff had already rested, without having her experts explain (as they did in their reports, un rebutted) that Mrs. Wilson's smoking had no effect whatsoever on the progress of the cancer from May 2007 until her death. Nor could plaintiff point out to

the jury that whatever caused the cancer was irrelevant to the pertinent issue in this case, which is the defendant negligently failed to inform her of the cancer when it was curable."

The plaintiff's counsel also are seeking an award of sanctions of their costs and counsel fees against Raynor, Raynor's firm, Raynor's client and/or Kelly.

Raynor's counsel, George Bochetto of Bochetto & Lentz, argued that Raynor's letter to HUP's general counsel was a normal part of conversations between health care institutions and defense counsel.

In Raynor & Associates' motion for reconsideration, they characterized the contact with Kelly in stronger terms.

"Such improper, unprofessional, unethical and vexatious conduct by plaintiff's counsel — especially when, at the same time, plaintiff's counsel seeks to impose harsh sanctions against defense counsel for merely contacting a disinterested third party (i.e., the employer of an expert retained by plaintiff) — simply cannot be countenanced," Raynor & Associates said in court papers. "Nor can plaintiff's counsel's wild, uncorroborated, self-serving and baseless accusations against defense counsel and her alleged motives with respect to sending that correspondence be believed."

Bochetto and one of the plaintiff's counsel, Jenimae Almquist of Messa & Associates, did not respond to requests for comment last week.

Raynor is facing sanctions because she wrote to the senior counsel in the Office of General Counsel for the Hospital of the University of Pennsylvania, Mary Ellen Nepps.

Raynor wrote, according to an exhibit attached to court papers, that Dr. Stefanie B. Porges was retained by the plaintiff.

Raynor wrote to Nepps, according to the

letter, "The case involves an acknowledged failure to relay concerning X-ray findings to the patient's physicians and the patient herself, resulting in a lengthy delay in the diagnosis of her cancer. ... Nevertheless, the plaintiff has retained one of Penn's emergency room physicians ... who has offered the untenable opinion that because Dr. Geller ordered the test, it was his responsibility to follow through on obtaining the results and advising the patient of them.

"Dr. Porges has clearly overlooked the well-established concept of hand-off to an accepting inpatient team and I thought you might want to know that, if this is her position and plaintiff's attorneys become aware of it, it could expose the Hospital of the University of Pennsylvania to significant liability."

Porges did testify at trial.

Bochetto argued that Raynor's letter was written to alert HUP that one of its experts professed an opinion that could reflect a change in medical standards of care.

But plaintiff's counsel said such an action casts "great doubt on the sanctity of the litigation system" and should be sanctioned by the defense attorney being disqualified from representing her client in any retrial of the case; by having to disgorge any fees she was paid for writing the letter; and by paying \$45,000 in the plaintiff's costs in litigating the sanctions motion.

The case went to trial in May. The jury found a defense verdict in favor of Geller and Roxborough Emergency Physician Associates, but the jury returned a plaintiff's verdict of \$190,000 against Dr. Melanio Aguirre and Roxborough Memorial Hospital, according to court papers.

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