

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

NANCY NEFF and MICHAEL NEFF,	:	JURY TRIAL DEMANDED
Plaintiffs	:	
	:	
vs.	:	NO. 07 – 01,056
	:	
LEONARD R. COLLINS, M.D., and WOMEN’S	:	CIVIL ACTION
HEALTH CARE ASOCIATES, P.C.,	:	
Defendants	:	

OPINION IN SUPPORT OF ORDER OF JULY 29, 2010, IN COMPLIANCE WITH
RULE 1925(A) OF THE RULES OF APPELLATE PROCEDURE

Plaintiffs appeal the judgment entered July 29, 2010, which in effect denied by operation of law their post-trial motions.¹ In their Statement of Matters Complained of on Appeal, Plaintiffs raise two issues: they argue the court erred in admitting evidence which had previously been ruled inadmissible, and in denying their Batson² challenge to defense counsel’s striking of the only African-American juror on the panel. These issues will be addressed seriatim.

Plaintiff Nancy Neff (hereinafter “Mrs. Neff”) underwent a hysterectomy performed by Defendant Leonard Collins, M.D. (hereinafter “Dr. Collins”), and it was subsequently discovered that an obstructed ureter had caused some damage to her left kidney. She had the kidney removed but at the time of its removal, it was contributing 22% to her overall kidney function. In response to a pre-trial motion in limine, the Court ruled inadmissible “any evidence related to alternatives Plaintiff Nancy Neff may have had to undergoing the left

1 Plaintiffs post-trial motions were filed March 29, 2010, but because the necessary transcripts were not prepared within the requisite time period, the Court was unable to issue a decision within the 120-day period provided for by Pa.R.C.P. 227.4(b), and pursuant to that section, Defendants moved for entry of final judgment, which was entered July 29, 2010.

2 Batson v. Kentucky, 476 U.S. 79 (1986).

nephrectomy.”³ Plaintiffs now argue that the Court erred in admitting evidence in contravention of this ruling.

Plaintiffs presented the testimony of Dr. Jonathan Vapnek, a urologist who, with respect to the issue at hand, testified as follows:

So basically the findings were between the retrograde pyelogram and the ureteroscopy that there was complete blockage in the distal ureter. So she ends up having a couple of days later what’s called a percutaneous nephrostomy. What is a percutaneous nephrostomy? If you want to drain the urine out of the kidney and can’t get up from below, you really don’t have any choice, you have to come in through the flank. So the interventional radiologist will go ahead and put a small needle into the kidney and once they are in there they will leave a little tube so the urine will actually drain out through the flank allowing the kidney to recover function because obviously it’s 100 percent blocked.

He puts the tube in, allows the kidney to start making urine, that urine is now coming outside into a bag. And then after two weeks they do what’s called a renal scan, which is another kind of x-ray which is a way of determining relative kidney function, left vs. right, in the normal situation where about 50/50 – somewhere between 45 and 50 percent on each side.

In this case, the renal scan showed that the left kidney, despite having had a tube in place for the last two weeks allowing it to drain urine into the outside, is now really only 22 percent of the total function.

And then after that, they discussed options for treatment and elected, because of the damage that had occurred to the left kidney, to just go ahead and remove it. That surgery was done on March 7th. She was discharged home on March 11th.

N.T., March 15, 2010, at pp. 115-16. It thus appears that the evidence that the left kidney was functioning at the time of its removal was first introduced by Plaintiffs. Plaintiffs may therefore not complain that defense counsel elicited

³ Order of January 21, 2010.

from other witnesses the same information. The Court does agree, however, that the follow-up questions which elicited the information that the kidney was removed in spite of increased functioning, was not relevant and should not have been asked. For example, defense counsel cross examined Dr. Polis, Mrs. Neff's treating urologist, presented by Plaintiffs, as follows:

Q. You also noted in the next paragraph underneath there – and Stacey, pull this out – the left kidney was providing 22 percent of her total renal function.

A. Correct.

Q. What you're talking about there was a study was done to determine how much load each of these kidneys was taking?

A. Correct.

Q. And in a normal, let's say, regular everyday person, of there is such a thing, each kidney takes about 50 percent of the load, all things being equal?

A. Never seen it. Theoretically, yes.

Q. It probably varies depending on which kidney is better than the other but –

A. Yes.

Q. This kidney, let's assume it was getting somewhere, before this operation, somewhere close to 50 percent, it's down about –

A. I don't know that. I'm afraid I can't answer that. I don't know – I don't have any knowledge of that. I don't have any renal function studies.

Q. I understand. Let's just assume that.

A. Okay.

Q. Let's assume it was taking 50 percent of the load.

A. Hypothetical situation?

Q. Yeah.

A. Great, I'm on the same page now.

Q. It is now taking 22 percent so that's just under half of what it had been if it had been doing 50 percent of the work load before, right?

A. Okay.

Q. If it had been doing less than 50 percent of the work load maybe it's more than half of what it had been?

A. Sure.

Q. And a decision was made after that point to remove that kidney, correct?

A. Yes.

N.T., March 15, 2010, at pp. 193-94. Defense counsel also questioned Dr. Polis as follows:

Q. The time you took the left kidney out, correct?

A. Yeah, yeah.

Q. It had – it had been functioning 22 percent, correct?

Mr. Rieders: Objection. Same objection that I made earlier.

The Court: No, I think he can answer that question, Mr. Rieders.

A. I think that single scan represents a parameter that is not a definitive measurement of exactly what the GFR – glomular filtration rate – is. That particular scan on that particular day said 22 percent, yes.

Q. And after you put the nephrostomy tube in creatinine got better, didn't it?

A. Yes.

Q. And then the kidney was taken out?

A. Yes.

Id. at p. 216. Defense counsel explained in an in-chambers discussion, held in response to one of Plaintiffs' counsel's objections, that he was "simply establishing the level of the function prior to its removal", N.T., March 18, 2010, at p. 67, and in closing arguments he did argue that "the etiology of the obstruction may never be known" and that "[i]t's still a functioning kidney months later, which would be, I suggest, unusual if it was a complete acute obstruction way back in September of '05." Id. at p. 118. Thus, his contention that the information was elicited to defend against Plaintiffs' claim of a complete obstruction caused by Dr. Collins has some merit. The follow-up questions lend nothing to that defense, however, and while not in direct violation of the Court's pre-trial order, the Court understands how Plaintiffs could find fault with them.

Because the evidence objected to by Plaintiffs goes to the issue of causation and/or damages, however, and the jury found Dr. Collins not negligent

and did not reach those issues, the Court believes any error to be harmless.⁴

The Batson challenge arose when defense counsel exercised one of his peremptory challenges to strike the sole African-American from the venire.⁵ When challenged, defense counsel offered the explanation that the juror's testimony that she was a nurse's aid was conflicting with information previously received that she "stays at home", N.T., February 24, 2010, at p. 74, that she had previous jury experience, Id. at p. 78, and that as a nurse's aid, she "probably is dealing with those sorts of patients [those with end stage renal disease similar to Plaintiff] in a nursing home." Id. at p. 79. The Court found this to be a race-neutral explanation. Although Plaintiffs argue that the explanations are not supported by the record, specifically that the juror questionnaire indicates that the juror was a "certified nurse assistant" which is not inconsistent with a "nurse's aid", the jury panel list does indicate that the juror is a "houseperson". Defense counsel's explanation is, therefore, indeed supported by the record. Plaintiffs also argue that the explanation is pre-textual because defense counsel did not strike similarly situated venire members who were not African-American, specifically others who had a connection with Dr. Collins and/or the health care profession. This argument is without merit as the juror in question did not indicate she had a connection with Dr. Collins, and the other jurors who had a connection with the health care profession did not indicate that they worked in a nursing home.⁶ The Court accepted the explanation as credible and did not find purposeful discrimination. For that reason, the Court denied counsel's challenge.

4 Contrary to counsel's assertions, there was no indication that the improper questioning confused the jurors regarding the concepts of negligence and causation.

5 The Court wishes to note that none of the parties in this matter is African-American.

6 The juror in question testified that she was employed by Sycamore Manor, N.T., February 24, 2010, at p. 45, which the Court judicially notices is a nursing home in the Williamsport area.

Dated: November 4, 2010

Respectfully Submitted,

Dudley N. Anderson, Judge

cc: Clifford Rieders, Esq.
Leigh Ellis, Esq., Foulkrod Ellis, 4000 Market Street, Camp Hill, PA 17011
Gary Weber, Esq.
Hon. Dudley Anderson