2014 PA Super 52

SUSANNE CORDES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF EDWARD D. CORDES, SR.,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellant	:	
v.	:	
ASSOCIATES OF INTERNAL MEDICINE; TRI-STATE MEDICAL GROUP, P.C.; TRI-STATE MEDICAL GROUP, P.C. D/B/A ASSOCIATES OF INTERNAL MEDICINE, ANN MARIE RAY, M.D.; AND MARTHA LOUISE NEWMAN, P.A.,	:	
Appellees	:	No. 1737 WDA 2011

Appeal from the Judgment entered October 20, 2011,
Court of Common Pleas, Beaver County,
Civil Division at No. 10763-2009

BEFORE: STEVENS, P.J.*, BENDER, BOWES, GANTMAN, DONOHUE, ALLEN, OLSON, OTT and WECHT, JJ.

OPINION IN SUPPORT OF REVERSAL BY DONOHUE, J.:**FILED MARCH 12, 2014**

I join in Judge Wecht's Opinion in Support of Reversal's (W.O.S.R.) holding that Juror Snowden should have been presumed prejudiced and replaced with an alternate juror based upon the physician-patient relationship between Juror Snowden's wife and the defendant Dr. Ray. Further, while I agree with Judge Wecht that the trial court erred by failing to discharge, for cause, Juror Kaelin and Juror Majors, I respectfully disagree in part with the rationale advanced by Judge Wecht in support of his

*Former President Judge Stevens did not participate in the consideration or decision of this case.

decision. I write separately to set forth my reasoning and points of divergence.

Legal Standard

I begin by voicing my emphatic agreement with Judge Wecht that "[t]he critical consideration that animates our ruling regarding all three jurors in this case is the importance of ensuring not only a jury that is impartial in fact, but one that **appears** to be free of the taint of partiality to a disinterested observer[.]" W.O.S.R. at 31 (emphasis in the original). Contrary to this overarching consideration, too often trial courts almost inexplicably find it necessary to shoehorn certain prospective jurors into the jury box when faced with information that at the very least gives the appearance of an inability to be impartial.[1]

In my view, we must be guided by the jury selection principle articulated by our Supreme Court that "no person should be permitted to serve on a jury who stands in any relation to a party to the cause that would carry with it prima facie evident marks of **suspicion of favor**."

[1] I recognize that there are financial considerations associated with bringing citizens to the courthouse to participate in the jury selection process. In my view, however, such considerations do not trump the guarantee provided by both the United States and Pennsylvania constitutions of a trial "by an impartial jury[.]" U.S. CONST. amend. 6; PA. CONST. art. I § 9; ***see also*** PA. CONST. art. I § 6 ("Trial by jury shall be as heretofore, and the right thereof remain inviolate."). Thus, I do not believe that presumptively partial and unfair jurors should be seated if there was no other way to empanel a jury. A trial is either fair or it is not and litigants are entitled to a jury free from bias and prejudice.

Seeherman v. Wilkes-Barre Co., 255 Pa. 11, 14, 99 A. 174, __ (1916) (emphasis added) (internal quotation marks omitted). As succinctly stated by the ***Seeherman*** Court: "[T]he cause should be tried by persons free even from the suspicion of partiality." ***Id.*** at 14-15, 99 A. at __.[2]

Standard of Review

I agree with Judge Wecht that the appropriate standard of review in this case is not driven by the direct/indirect relationship analysis suggested by the learned Dissent. ***See*** Diss. Op. at 2-25.

> The test for determining whether a prospective juror should be disqualified is whether he is willing and able to eliminate the influence of any scruples and render a verdict according to the evidence, and this is to be determined on the basis of answers to questions and demeanor.... A challenge for cause should be granted when the prospective juror has such a close relationship, familial, financial, or situational, with the parties, counsel, victims, or witnesses that the court will presume a likelihood of prejudice or demonstrates a likelihood of prejudice by his or her conduct and answers to questions.

McHugh v. Proctor & Gamble Paper Products Co., 776 A.2d 266, 270 (Pa. Super. 2001) (citation omitted). Therefore, there are two circumstances that warrant removal of a juror from the venire for cause:

[2] This long-standing principle conforms to the closely related standard for judicial recusal. The inquiry for a judge is not whether he or she is actually biased or prejudiced, but whether "a significant minority of the lay community could reasonably question the court's impartiality," based on the **appearance of impropriety**. ***Commonwealth v. Darush***, 501 Pa. 15, 24, 459 A.2d 727, 732 (1983); ***In the Interest of McFall***, 533 Pa. 24, 31, 617 A.2d 707, 711 (1992).

(1) the juror has a close familial, financial, or situational relationship with a case participant such that a presumption of prejudice exists ("the first category"), or (2) the juror exhibits a likelihood of prejudice through his or her conduct and answers to questions during *voir dire* ("the second category"). ***See Commonwealth v. Colon***, 299 A.2d 326, 327 (Pa. Super. 1992) (*en banc*). "Our standard of review of a denial of a challenge for cause differs, depending upon which of these two situations is presented." ***McHugh***, 776 A.2d at 270. Critically for this discussion, as in every case that comes before us, the standard of review we employ is determined by how the appellant frames and argues the issue. ***See, e.g., Lanning v. West***, 803 A.2d 753, 766 (Pa. Super. 2002) (although listed as a weight of the evidence claim, argument was a challenge to the sufficiency of the evidence, which required a different standard of review); ***Commonwealth v. Howard***, 540 A.2d 960, 961 (Pa. Super. 1988) ("[a] **contention** that the sentence imposed constitutes cruel and unusual punishment is a challenge to the legality of sentence which may be appealed as of right on direct appeal") (emphasis added).

Here, Appellant unquestionably raises and argues trial court error based upon its failure to **presume prejudice** because of the relationships the jurors had with a case participant pursuant to the first category of challenges for cause. Therefore, "[our] determination is practically one of law, and as such, is subject to ordinary review," which the ***McHugh*** Court

defined as "whether the trial court abused its discretion or erred as a matter of law." ***McHugh***, 776 A.2d at 270, 270 n.3. Both Judge Wecht and the Dissent agree that our standard of review under the first category is *de novo*. ***See*** W.O.S.R. at 7; Diss. Op. at 4. This is akin to "ordinary review" as defined in ***McHugh***, as both are premised on determining whether the trial court committed an error of law. ***See McEwing v. Lititz Mut. Ins. Co.***, 77 A.3d 639, 646 (Pa. Super. 2013) ("To the extent that the trial court's findings are predicated on errors of law, we review the court's findings de novo."); ***see also In re Doe***, 613 Pa. 339, 355-56, 33 A.3d 615, 625-26 (2011) (a court abuses its discretion, in relevant part, by misapplying or overriding the law).

By not recognizing the requirement that this Court conduct a *de novo* review, in my assessment, the learned Dissent conflates our **standard of review** with what the Dissent believes is the appropriate **outcome of our review** which, according to the Dissent, is that the trial court did not err as a matter of law or abuse its discretion by failing to find a presumption of prejudice that warranted the exclusion of the jurors at issue. The Dissent repeatedly asserts that because none of the jurors in question had a direct relationship with a case participant, it is improper for this Court to apply a *de novo* standard of review pursuant to the first category of challenges for cause. However, the evidence presented regarding the relationship between the juror and a case participant determines whether the trial court should

have presumed prejudice because of the relationship. The parameters of the juror's alleged disqualifying relationship do not determine the standard of review we employ to decide whether prejudice should have been presumed. If the Dissent is correct in the determination of our standard of review, we would never have new case law recognizing additional relationships that warrant a presumption of prejudice and, of course, our jurisprudence is to the contrary.[3]

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[3] Pennsylvania courts have recognized categories of relationships that require a juror's exclusion from a jury based solely on the nature of the relationship. ***See, e.g., Silvis v. Ely***, 3 Watts & Serg. 420, 424 (Pa. 1842) (a stockholder of a corporation cannot sit as a juror in a case in which the corporation has an interest); ***McHugh***, 776 A.2d at 271 (finding an employer/employee relationship between a party and a prospective juror to require the juror's automatic exclusion from the venire). We have likewise recognized fact-specific (non-categorical) relationships that required the presumption of prejudice and a strike for cause. ***See, e.g., Commonwealth v. Jones***, 477 Pa. 164, 169, 383 A.2d 874, 877 (1978) (plurality) (deciding that police officer should have been automatically excluded from the jury based on the facts of the case, not pursuant to a *per se* rule); ***Schwarzbach v. Dunn***, 381 A.2d 1295, 1298 (Pa. Super. 1977) (*en banc*) (juror excluded for cause where juror's wife was employed by plaintiff's counsel and indeterminate circumstances of employment required presumption of prejudice); ***Commonwealth v. Johnson***, 445 A.2d 509, 512-14 (Pa. Super. 1982) (the fact that the juror's daughter had previously been the victim of a crime would not necessarily have mandated exclusion, but under the facts as presented, a presumption of prejudice was warranted).

Judge Wecht refers to all of the cases where prejudice is presumed as "*per se*" prejudice situations. ***See*** W.O.S.R. at 9, 15. Black's Law Dictionary defines "*per se*" as "[o]f, in, or by itself; standing alone, without reference to additional facts. As a matter of law." BLACK'S LAW DICTIONARY, per se (9th ed. 2009). While all of the above referenced cases were decided "as matter of law," in my view, only ***Silvis*** and ***McHugh*** are aptly described as case law recognizing a *per se* presumption of prejudice since the other referenced

As a result, I agree with Judge Wecht's conclusion that a potential juror's familial, financial or situational relationship with a party, victim, witness, or attorney involved in the case need not be direct in order to warrant his or her disqualification as a matter of law. ***See*** W.O.S.R. at 13-20. A potential juror may testify to a relationship with a party or case participant that, on its face, does not appear to be sufficiently close to warrant a presumption of prejudice, but when the juror reveals more information, a presumption of prejudice arises. As the situational relationship is flushed out, striking the juror for cause is required regardless of whether the juror believes the relationship would affect his or her ability to be fair and irrespective of whether there is a direct relationship between the potential juror and the party, participant or the case. ***See, e.g., Schwarzbach v. Dunn***, 381 A.2d 1295, 1298 (Pa. Super. 1977) (*en banc*) and n.3, ***supra***. Indeed, when a presumption of prejudice applies, there is no place for a juror's assertion of fairness because an inability to be fair is presumed.

Analysis

When presented with the situational and financial relationship-based challenges for cause to the prospective jurors at issue in this appeal, the distinguished trial court substituted acceptance of each of the challenged

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cases required facts outside of the relationship itself to establish the presumption of prejudice.

juror's statement that he or she could be fair and impartial for an analysis of the need for a presumption of prejudice. N.T., 5/6/11, at 118 ("I have to assume that [a juror] will be fair when he answers 'fair,'" and stating that defense counsel risked his ability to make a challenge for cause because he "took [Juror Majors] too far" by asking him whether he could be fair and impartial); ***id.*** at 186-87 ("The cases say that if a prospective juror answers that, 'Yes, I can put aside any prejudices that I have prior to the case and decide the case only on what I see and hear in the courtroom,' those cases say that [the trial court is] not to strike them for cause"); N.T., 5/11/11 (in chambers) at 6 (trial court stating that because Juror Snowden said "he can be fair and impartial," it would not substitute an alternate); ***id.*** at 7-8 (same).

As stated above, however, a juror's assurance that he or she can be fair and impartial is not relevant when considering whether prejudice should be presumed based on the juror's relationship with someone involved in the case. Although the trial court's opinion reflects a consideration of the factual testimony of each of the jurors, the record does not reflect such an analysis during *voir dire*. There is no indication that the trial court considered the substance of the jurors' statements during *voir dire* to decide whether a disqualifying situational, familial, or financial relationship existed. Instead, the trial court incorrectly assumed that any disclosed conflict could be cured with the juror's affirmation that he or she could be fair and impartial. This

was clear error. Given our *de novo* standard of review, I agree with Judge Wecht that for each of the challenged jurors, a relationship existed – directly or indirectly – between each juror and a party to the case such that the appearance of partiality that arose as a result of those relationships required disqualification. ***See Seeherman***, 255 Pa. at 14-15, 99 A. at __. My departure from Judge Wecht's decision is in the breadth of the holding as to each of the jurors.

Juror Snowden

Juror Snowden learned after trial began that his wife was not only a patient of the defendant, Dr. Ray, but that she was going to obtain a prescription from Dr. Ray for Chantix, a smoking cessation drug, which was the subject of testimony in the case. N.T., 5/11/11 (in chambers), at 2-4, 7. I agree with Judge Wecht that Juror Snowden's wife's relationship with Dr. Ray warrants the recognition of a *per se* categorical rule that calls for the removal of a juror from the venire and I specifically join in that holding. And while Judge Wecht may be correct that "it cannot be gainsaid that the spousal relationship … is among the closest of human connections,"[4] I

[4] Judge Wecht holds:

> Ms. Kaelin's and Mr. Snowden's close familial relationships with patients of Dr. Ray warrant a finding of *per se* prejudice. We do not posit that no one may be qualified to sit in judgment of a physician simply for knowing or being related in some way to a patient thereof. But the bonds between parent and child, and husband and wife, are

embrace the conclusion because the law has long recognized the confidential bond between spouses[5] and the sharing of confidences attendant to the relationship. The recognition of the closeness of the relationship and the loyalty of spouses to each other should logically be extended here to recognize the impact of the relationship on a juror's ability to be impartial.[6] To presume that a juror has a prejudice based on a relationship that his or her spouse has with a party or other case participant is warranted under

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> too strong, and the attendant interests too inextricably intertwined, to allow us to draw the distinction between direct and vicarious clinical relationships that we would require in order to affirm the trial court's decision. It cannot be gainsaid that the spousal and filial relationships are among the closest of human connections. Accordingly, the trial court erred when it declined to disqualify Ms. Kaelin and Mr. Snowden as jurors.

W.O.S.R. at 25-26 (footnote omitted).

[5] ***See, e.g.,*** 42 Pa.C.S.A. § 5913 ("Except as otherwise provided in this subchapter, in a criminal proceeding a person shall have the privilege, which he or she may waive, not to testify against his or her then lawful spouse […]."); 42 Pa.C.S.A. § 5914 ("Except as otherwise provided in this subchapter, in a criminal proceeding neither husband nor wife shall be competent or permitted to testify to confidential communications made by one to the other, unless this privilege is waived upon the trial."); ***Commonwealth v. Lewis***, 39 A.3d 341, 351 (Pa. Super. 2012), *appeal denied*, 616 Pa. 667, 51 A.3d 838 (2012) (trial court erred by compelling husband to testify against wife in a criminal trial when husband invoked spousal privilege).

[6] In my assessment, this is a commonsense expansion of our holding in ***Schwarzbach***, where the decision to exclude the juror in question was based upon the Court's conclusion that it was "quite possible" that a wife could influence her husband in deciding the matter before the court based upon her prior employment relationship with counsel for one of the parties. ***Schwarzbach***, 381 A.2d at 1298.

long standing legislative and jurisprudential principles recognizing the special bond between husband and wife and I agree with the adoption of that categorical presumption of prejudice here. As in ***Schwarzbach***, the risk is too great that this juror's wife could influence him in deciding a case where her physician is the defendant. ***See Schwarzbach***, 381 A.2d at 1298. Juror Snowden should have been replaced with one of the alternate jurors. This type of development is precisely the reason alternate jurors are chosen and the failure here to seat an alternate was error.[7] ***See*** W.O.S.R. at 26.

Juror Kaelin

Juror Kaelin, testified, in relevant part, that Dr. Ray is her parents' physician. Her parents have told her that they "see Dr. Ray a lot," and that "[t]hey like her." N.T., 5/6/11, at 180. Juror Kaelin further testified that she transported her mother to see Dr. Ray on one occasion but remained in the waiting room during the visit. Despite her knowledge of her parents' relationship with Dr. Ray, Juror Kaelin testified that she thought she could be a fair and impartial juror.

[7] The failure to replace Juror Snowden with an alternate is, from my perspective, a glaring example of shoehorning a juror into service on the jury. Not only was the juror's wife treating with the defendant doctor, the juror, after being presented with the defendant's disclosure that his wife was a patient, admitted having a conversation with his wife after the commencement of trial concerning the defendant and a prescription for a drug at issue in the case. The decision to allow this juror's continued service on this case seems to turn a blind eye to an obvious appearance of partiality.

While I agree with Judge Wecht that Juror Kaelin should have been disqualified, I disagree with Judge Wecht that the simple fact that the juror's parents were patients of the defendant doctor in this medical malpractice case required her exclusion from the jury. ***See*** W.O.S.R. at 24-26; ***supra*** n.4. I cannot embrace Judge Wecht's definition of this category of persons presumed to be prejudiced because, from my perspective, not all parents and adult children enjoy the closeness of relationship, loyalties and sharing of confidences assumed by Judge Wecht. Moreover, I am not aware of anything in our jurisprudence recognizing a broad acceptance of Judge Wecht's view of the relationship between an adult child and a parent.[8]

[8] Judge Wecht confines his holding to the relationship between an adult child and his or her parent and not a parent to his or her adult or minor child. ***See*** W.O.S.R. at 26, 33 n.13. While I cannot accept Judge Wecht's adoption of the adult child-parent relationship as a basis for a presumptively prejudicial situation, like the spousal relationship discussed *supra*, there are other familial relationships recognized in the law that, in my view, deserve a finding of a presumption of prejudice. Thus, for example, despite the contrary conclusion of our sister court in ***Estate of Hannis v. Ashland State Gen. Hosp.***, 554 A.2d 574 (Pa. Cmwlth. 1989), *appeal denied*, 524 Pa. 632, 574 A.2d 73 (1989), I believe that a presumption of prejudice would be warranted where the minor child of a juror is a patient of a defendant or witness in a medical malpractice action. A child's treating physician is generally chosen by, and serves at the pleasure of, a minor child's parent. Opinions of the parent formed as a result of the child's treatment are at least as strongly held as those held as a result of the parent's own treatment. Such a presumption is in keeping with the Pennsylvania Legislature's recognition that parents generally have control over their minor children's medical care. ***See, e.g.,*** 11 P.S. § 2513(a) (stating, in relevant part, that a parent whose parental rights to his or her child has not been terminated has the power to consent to the child's medical and mental health treatment); ***see also*** 35 P.S. § 10101 ("Any minor who is eighteen years of age or older, or has graduated from high

From my observation and perspective, not all adult children have an on-going interest in their parents' medical treatment, speak to their parents about their medical treatment or providers, or know their parents' perceptions of their physicians. In this case however, Juror Kaelin's involvement in her parents' medical affairs and knowledge about her parents' positive perception of the defendant gives the appearance of favor and partiality, warranting a presumption of prejudice. Juror Kaelin's testimony revealed a prejudicial taint based on an intimacy with her parents that included knowledge of their medical treatment and their positive perception of Dr. Ray. The purpose of *voir dire* is not served where, as here, a juror is empaneled who comes to the case imbued with her parents' preconceived impression of a party who is their active treating physician.

I have little doubt that if Juror Kaelin had testified, for example, that her parents were dissatisfied with Dr. Ray's treatment and that they only continued to treat with her because of insurance policy limitations, the trial court would have granted the defendant's challenge for cause based upon her preconceived negative impression of the defendant. Excusing Juror Kaelin for cause under those hypothetical circumstances would have been required. Here, it was equally an error of law for the trial court to deny Appellant's challenge for cause under the circumstances presented.

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school, or has married, or has been pregnant, may give effective consent to medical, dental and health services for himself or herself, and the consent of no other person shall be necessary.").

Juror Majors

The final juror at issue is Juror Majors, who testified that his employer is Heritage Valley Health Systems, which is the parent company of Tri-State Medical Group, a named defendant that owns Dr. Ray's medical practice. When asked, Juror Majors testified that he believed the outcome of the case could have a financial impact on his employer. N.T., 5/6/11, at 112. It does not matter if his assessment was accurate. It is also irrelevant that he later stated that he could nonetheless "be just," and that his belief that the outcome of the case could financially impact his employer would not affect his decision as a juror in the case. ***See id.*** On its own, his belief that his employer would be impacted by the verdict establishes an impermissible financial link between Juror Majors and this case. I agree with Judge Wecht that this requires a presumption of prejudice and Juror Majors' exclusion from the jury for cause. ***See*** W.O.S.R. at 29.

I do not believe that Juror Majors' employer's ownership interest in Tri-State supports a challenge for cause and, to the extent that Judge Wecht holds that it does, I disagree. ***See id.*** at 29-30 ("The prospect or appearance of bias not only was implicit as a consequence of Mr. Majors' employment by an entity with an ownership interest in the defendants, but was made explicit when Mr. Majors shared his subjective belief regarding the consequences of a plaintiff's verdict."). The purported employment

relationship between Juror Majors and Dr. Ray,[9] standing alone, is too attenuated to warrant the grant of a challenge for cause in this case.[10] Rather, as Judge Wecht recognizes, the presumption of prejudice here derives from Juror Majors' perception of the financial impact the verdict could have on his employer. I believe that disqualification based on this perception is consistent with and required by ***McHugh***, which is premised on the notion that a person cannot render an impartial verdict where his or her livelihood will be impacted by it. ***See McHugh***, 776 A.2d at 272.

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[9] Juror Majors testified, in relevant part, as follows:

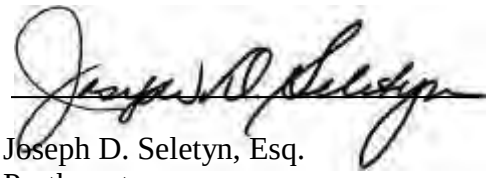
> [Juror Majors]: […] I work for Heritage Valley Health System, and I manage the leases where Heritage Valley is landlord. […] I know Dr[s]. Ray, Heinle and Farland have a company that they lease their office back to the, their office back to Tri-State Medical Group.
>
> * * *
>
> [Counsel]: Sir, do you know who owns Dr. Ray and Dr. Heinle and Dr. Farland's medical practice?
>
> [Juror Majors]: It's Tri-State Medical Group, which is an entity of Heritage Valley Health System.
>
> [Counsel]: So do you understand that you and Dr. Ray technically have the same employer?
>
> [Juror Majors]: I do.

N.T., 5/6/11, at 107-08, 111.

[10] Here, Juror Majors purportedly understood the intricacies of the inter-related corporate structure of this integrated health care system. If a co-employee relationship between a party and a juror is not obvious and a prospective juror is not aware of the potential economic impact of a verdict, I do not see a basis for a presumption of prejudice.

For the foregoing reasons, I concur in the result reached by Judge Wecht and agree that Appellant is entitled to a new trial.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 3/12/2014