

COMMONWEALTH OF KENTUCKY

JEFFERSON CIRCUIT COURT

NO. 10CI01516

DIVISION SEVEN

JUDGE AUDRA ECKERLE

KRISTIN BLINCOE, as administratrix of the
OF ESTATE OF RICHARD GLENN EMBRY

PLAINTIFF

vs.

OPINION AND ORDER

UNIVERSITY MEDICAL CENTER, INC.
d/b/a UNIVERSITY OF LOUISVILLE HOSPITAL

and

RYAN ANDREW LEGRAND, M.D.

DEFENDANTS

KENTUCKIANA MEDICAL
RECIPROCAL RISK RETENTION GROUP

INTERVENING PLAINTIFF

vs.

HANS G. POPPE

INTERVENING DEFENDANT

**** *

This matter is before the Court on motions by Intervening Plaintiff, Kentuckiana Medical Reciprocal Risk Retention Group (hereinafter, "KMRRRG"), and Intervening Defendant, Hans G. Poppe (hereinafter, "Poppe"), for summary judgment. After having carefully considered and thoroughly reviewed the record, parties' arguments, and applicable law, the Court will deny KMRRRG's motion, but grant Poppe's motion.

OPINION

The motions for summary judgment currently before the Court stem from events that occurred at the underlying jury trial regarding alleged medical malpractice. Poppe was the attorney for Plaintiff, Kristin Blincoe (hereinafter, "Blincoe"). KMRRRG insured

both Defendant, Ryan A. LeGrand, M.D. (hereinafter, "LeGrand"), and Defenant, University Medical Center, Inc. d/b/a University of Louisville Hospital (hereinafter, "the Hospital"), and was thus obligated to pay the fees and expenses incurred defending the action.

On the tenth day of trial, Poppe expressed his desire to play LeGrand's video deposition. LeGrand objected because he was available to offer live testimony at trial as a party Defendant. The Court overruled the objection and permitted the playing of this video with the expectation that it would be edited to comply with the Court's prior Order granting the Hospital's motion in limine forbidding any mention of malpractice insurance coverage. The video depicted LeGrand's testimony at his deposition and also showed a written transcript of the testimony at the bottom of the video. Counsel for LeGrand was apparently reading ahead and noticed that the deposition had not been edited in compliance with the Court's Order and that Poppe was about to play the portion in which LeGrand testified about his malpractice insurance. LeGrand's counsel contemporaneously objected and called out for Poppe to stop the video. However, Poppe continued to review his notes and did not stop the deposition before the Jury saw, heard, and read the reference to insurance coverage. The Court immediately held a bench conference, at the conclusion of which the Court granted LeGrand's and the Hospital's joint motions for mistrial.

The Hospital then filed a post-mistrial motion in which it argued that Poppe's intentional, reckless, wanton, and/or careless conduct justified an award of attorneys' fees and costs that the Hospital had incurred defending the action. LeGrand also filed a

motion for fees and costs in trying the case. It excluded amounts for preparing the defense in light of the continuing need for preparation for the scheduled retrial.

Poppe indicated to the Court that he would treat the motion as one for contempt, hire his own attorney, and file a joint response in which he would fault a technological mistake for playing LeGrand's unedited deposition. He claimed that miscommunication with his hired court reporter created confusion as to which file on his computer's hard drive contained LeGrand's properly edited deposition. As a result, he mistakenly clicked on a file containing a version of LeGrand's deposition without striking the insurance reference. The Court allowed Poppe to hire separate counsel.

KMRRRG then moved to intervene for the purpose of recovering the costs and attorneys' fees it incurred. Poppe objected to the addition of another party and counsel. The Court found that the Civil Rules allowed KMRRRG to intervene permissively and as a matter of right and entered an Order granting KMRRRG's motion "for the limited and sole purpose of seeking the repayment of costs and fees incurred as a result of the mistrial." (See Opinion and Order, entered August 15, 2013.)

KMRRRG then filed a complaint seeking recover of costs and attorneys' fees. KMRRRG alleged that Poppe, "in keeping with the good faith standard of care of an attorney and officer of the Court," had to take reasonable care to avoid injecting indemnity into the case. (See KMRRRG Complaint, at ¶ 11.) By failing to do so, KMRRRG alleged that Poppe's conduct was "willful, wanton, and/or reckless, constituting bad faith conduct by an officer of the Court, authorizing the Court to impose sanctions including the award of attorney's fees and costs." (Id. at ¶ 29.) Poppe subsequently moved to dismiss and limit discovery. The Court denied the motion.

The litigation regarding the medical malpractice claims, as well as the fees and costs, continued. KMRRRG deposed Poppe. The parties to the original case, however, settled. The Court entered an Agreed Order dismissing all claims Blincoe raised against LeGrand and the Hospital. (See Agreed Order, entered September 23, 2014.) The tendered Agreed Order also provided that "Each party shall bear their [sic] own costs herein." Id.

On October 6, 2014, KMRRRG moved for summary judgment concerning Poppe's alleged liability. KMRRRG argued that Kentucky Trial Courts have the inherent power to impose sanctions on an attorney who has caused a mistrial by engaging in misconduct that amounts to "bad faith." (See KMRRRG Mem. In Supp. of Motion for Summary Judgment, at pp. 14–19.) Although KMRRRG did not explicitly accuse Poppe of intentional misconduct, it posited that a party's counsel acts in bad faith by engaging in conduct that, derived from the surrounding, narrowly limited circumstances, "indicates a degree of recklessness and lack of care which results in prohibited conduct." (Id., at p. 12, citing Roadway Express, Inc. v. Piper, 447 U.S. 752, 765-67 [1980]).

KMRRRG averred that the following factors proved Poppe acted with the requisite reckless disregard for its rights: (1) he admitted in his deposition that he is an experienced trial attorney who knew that a mistrial was probable following an insurance reference; (2) the Court warned him three different times that insurance coverage could not be referenced in front of the jury; (3) he did not monitor LeGrand's video deposition while playing it to the jury; (4) he did not make any member of his staff available to stop the video deposition in case there was an objection; and (5) he failed to heed counsel's contemporaneous request to stop the video deposition even though doing so would

have prevented the jury from seeing, hearing, or reading the reference to insurance coverage and thus obviated the mistrial. (Id. at p. 19 –20.)

Poppe responded to KMRRRG's motion and filed his own motion for summary judgment, raising multiple grounds that allegedly precluded KMRRRG from recovery. First, he argued that a Trial Court does not have the inherent power to award attorneys' fees to an intervening insurer. Poppe also rehashed an argument previously rejected in his motion to dismiss: that Kentucky law does not recognize a claim for bad faith unless it involves an obligation an insurer owes to its insured. Poppe re-iterated that KMRRRG is not a real party in interest and cannot pursue a claim for attorney fees. Furthermore, he claimed that the Kentucky Rules of Civil Procedure permit a Court to impose sanctions on an attorney only when the violation occurs during the pre-trial, discovery process. Poppe also alleged that KMRRRG did not suffer damages because the parties' settlement before the second trial eliminated the need to incur additional expenses necessitated by the mistrial. Regardless, Poppe claimed that any right to pursue sanctions was extinguished by a release signed by Blincoe, LeGrand, and the Hospital in which the parties agreed to pay their own costs. (Id., at p. 21.)

Poppe countered KMRRRG's accusation of bad faith by asserting that the evidence proved that he had played LeGrand's unedited deposition unintentionally. He insisted that mishaps in technology are not uncommon, but are understandable in large, complex, multi-party cases like this one, especially because he had to edit LeGrand's deposition at the last minute in light of defense objections at trial. Furthermore, he argued that his court reporter's deposition proves that Poppe played LeGrand's unedited deposition due to confusion. Therefore, he suggested that there was no

evidence to support KMRRRG's bad-faith claim because the "overwhelming and undisputed" evidence demonstrated that he played LeGrand's unedited deposition to the jury unintentionally. (Id., at p. 12–13.)

KMRRRG replied that Poppe's delay in editing was reckless, regardless of any claimed, technological errors, because it was clear, based on the Court's prior Order and the rules of evidence, that he could not reference insurance coverage at trial. KMRRRG noted that it was not asserting that its claim against Poppe arose out of a contract dispute in which Poppe violated his duty to act in good faith. Rather, it was requesting that the Court use its inherent power to impose sanctions for conduct that put the integrity of the Court at stake. KMRRRG also noted, as it had previously in responding to Poppe's motion to dismiss, that it was the real party in interest for the purposes of its complaint because it was obligated to pay the fees and costs incurred in defending the underlying case; therefore, "any actual damages suffered by the Defendants were borne by KMRRRG which was in a sense subrogated to the rights of the Defendants." (Id., at 14.)

As set forth in Civil Rule 56, summary judgment is granted when there is "no genuine issue as to any material fact," and "the moving party is entitled to a judgment as a matter of law." In determining whether to grant a motion for summary judgment, this Court is to view the record "in a light most favorable to the party opposing the motion . . . and all doubts are to be resolved in his favor." Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991). "A party opposing a properly supported summary judgment motion cannot defeat it without presenting at least some affirmative evidence showing that there is a genuine issue of material fact for trial." Id. at 482.

Thus, "[t]he party opposing summary judgment cannot rely on [its] own claims or arguments without significant evidence in order to prevent a summary judgment." Wymer v. JH Properties, Inc., 50 S.W.3d 195, 199 (Ky. 2001). Furthermore, "the movant should not succeed unless his right to judgment is shown with such clarity that there is no room left for controversy." Id. at 482.

A Kentucky Court may "invoke its inherent power to impose attorney's fees and related expenses on a party as a sanction for bad faith conduct, regardless of the existence of statutory authority or remedial rules." Lake Village Water Ass'n, Inc. v. Sorrell, 815 S.W.2d 418, 421 (Ky. 1991). Awarding attorneys' fees as a sanction is appropriate only when "the very the integrity of the court is in issue." Bell v. Cabinet for Health & Family Servs., 423 3d. 742, 749 (Ky. 2014). Thus, "attorney's fees may be awarded in a contempt action because the conduct undermined the authority of the court." Id. Trial Courts have "almost unlimited discretion" in determining when to apply their contempt powers. Smith v. City of Loyall, 702 S.W.2d 838, 839 (Ky. App. 1986).

There are no Kentucky cases directly addressing the issue currently before the Court, i.e., whether a Trial Court's inherent powers extend to imposing attorneys' fees and costs as a sanction when an attorney causes a mistrial by violating an Order regarding a motion in limine. However, this issue has been addressed in other jurisdictions. See e.g. Roman Cathoilic Diocese of Burlington, Vermont, 987 A.2d 960, 967 (Vt. 2009) (award of attorney fees after mistrial caused by in limine violation upheld because "the court has inherent power to sanction a party to protect the integrity of the judicial system."); Persichini v. William Beaumont Hosp., 607 N.W.2d 100, 109 (Mich. App. 1999) ("a court's inherent power to sanction misconduct and to control the

movement of cases on its docket includes the power to award attorney fees as sanctions when the egregious misconduct of a party or an attorney causes a mistrial"); Walker v. Ferguson, 102 P.3d 144, 147 (Ok. 2004) (holding that trial court must make a finding of bad faith before imposing sanctions); cf. Clark v. Optical Coating Lab., Inc., 165 Cal. App. 4th 150, 164, 80 Cal. Rptr. 3d 812, 828 –29 (2008) (holding that California's civil rules forbid awarding attorneys' fees as a sanction for misconduct absent explicit statutory authority to do so).

The Court synthesizes the holdings from those jurisdictions as follows: (1) a Court's inherent power to protect the integrity of the judicial system permits it to impose attorneys' fees against a party or counsel for causing mistrials by violating an Order regarding a motion in limine; and (2) a Court should impose such a sanction only when the conduct causing the mistrial is egregious or taken in bad faith. In these other cases, the conduct that constituted bad faith or egregious behavior involved either repeated violations of Orders on motions in limine, or statements or questions by counsel that were obviously improper. See Good, 919 N.E.2d at 147 (defendant's witnesses repeatedly violated Order of motion in limine); Turner, 987 A.2d at 404 (repeated inquiries by counsel during cross-examination involving matter excluded by in limine Order); Walker, 102 P.3d at 145 (counsel began opening statement by violating Trial Court's Order); Terry, 10 P.3d at 556 57 (two violations of Orders on motion in limine before mistrial declared); Persichini, 607 N.W.2d at 630 (mistrial declared after counsel asked a live witness an obviously improper question).

Based on the Kentucky Supreme Court's prior holdings, as well as the case law from other jurisdictions, the Court concludes that it may, under its inherent powers,

sanction Poppe by awarding attorneys' fees and costs to KMRRRG if it concludes that his actions in causing the mistrial constituted egregious or bad faith conduct. However, the Court finds that no such conduct occurred here.

Indeed, KMRRRG has conceded that it has no evidence that Poppe acted intentionally, and he has denied same. It is likewise clear that Poppe should not have played the portion of LeGrand's deposition testimony regarding existing medical malpractice insurance sufficient to cover Blincoe's claims. That point is beyond argument. His failures to edit the video properly (or supervise adequately any redaction) and to stop the recording immediately upon objection were negligent, wrongful, and careless acts. Yet, the Court does not find that they were reckless, wanton, egregious, or taken in bad faith. The Court observed Poppe's conduct with its own eyes. It saw the color pass from Poppe's face when he realized what he had done. And, of course, it witnessed him faint when the full gravity of his malfeasance hit him. His subsequent actions and apology seemed genuine. The Court accepts that, as well as the mitigating circumstances that Poppe has offered.

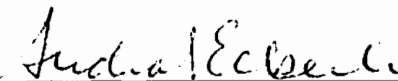
Poppe's misdeed occurred during the third week of a hotly disputed, highly contentious, multi-million dollar claim. Many lawyers battled. Discovery had consumed several years and several thousand pages of documents. Witnesses and exhibits were legion. One error occurred. While it was colossal, it was singular. The Court cannot conclude, under the totality of the circumstances, that the conduct was anything other than a horrible mistake, brought on by fatigue, weariness, and exhaustion, and not by malice, egregiousness, or bad faith. Without question, Poppe's actions came at a cost to his opponents, and to himself, in a rather public and humbling fashion. But Poppe did

not impugn the integrity of the Court or undermine its authority. Accordingly, no sanctions are warranted.

ORDER

Wherefore, IT IS HEREBY ORDERED that the Court denies the motion for summary judgment by Intervening Plaintiff, Kentuckiana Medical Reciprocal Risk Retention Group, and grants the motion for summary judgment by Intervening Defendant, Hans G. Poppe. It thus dismisses KMRRRG's Complaint. There being no just cause for delay, this is a final and appealable Order.

A rectangular box containing a handwritten signature that appears to read "Hans".


AUDRA J. ECKERLE, JUDGE
Jefferson Circuit Court

2.13.15
Date

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