

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TRAUMA SERVICE GROUP, P.C.,	:	
	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	NO: 99-CV-5979
	:	
HUNTER, MACLEAN, EXLEY	:	
& DUNN, P.C.,	:	
	:	
Defendants.	:	
	:	

MEMORANDUM

ROBERT F. KELLY, J. JUNE , 2000

This is a motion to recover attorney's fees and costs pursuant to 28 U.S.C. section 1927 ("section 1927") and this Court's inherent power to award fees and costs, filed by the Defendant law firm of Hunter, MacLean, Exley & Dunn, P.C. ("Hunter Maclean"). By Memorandum and Order dated March 23, 2000, this Court granted summary judgment in favor of Hunter Maclean with respect to a legal malpractice lawsuit filed by Trauma Service Group, P.C. ("Trauma"). That lawsuit followed and was predicated upon Hunter Maclean's successful defense of Trauma in a medical malpractice lawsuit and the fees charged for that representation. Hunter Maclean now seeks to recover attorneys fees and costs for defending the legal malpractice suit filed against it by Trauma. A hearing was held on this matter on June 9, 2000. For the reasons that follow, Hunter Maclean's motion is granted.

I. BACKGROUND.

The facts relevant to this discussion are as follows. Trauma is a professional corporation with its primary business location in Coatesville, Pennsylvania. Hunter Maclean is also a professional corporation with its primary place of business located in Savannah, Georgia. On January 30, 1995, Trauma entered into an Agreement for Attorney Services ("the agreement") which authorized Hunter Maclean, as local counsel, to defend Trauma in a medical malpractice action filed in the United States District Court for the Southern District of Georgia.¹ The case was captioned Patrick M. Branham, Individually and as Administratrix of the Estate of Frankie J. Branham, Deceased v. Trauma Service Group, P.C. and S.C. Love, M.D. (the "Branham action").

Pursuant to the agreement, Hunter Maclean agreed to submit to Trauma monthly statements representing the bill for Hunter Maclean's services in connection with the Branham action, and it explained Hunter Maclean's hourly billing rates. The agreement provided that payment was to be due upon receipt of each monthly statement, and any objection to a particular statement was to be made within fifteen days of its receipt.

On August 7, 1995, approximately six and a half months

¹ Trauma's General Counsel, Diana Kadash, Esquire, served as lead counsel.

after being retained by Trauma, Hunter Maclean filed a Motion for Summary Judgment on Trauma's behalf as defendant in the Branham action, which was granted on January 3, 1996. At that time, the bill for Hunter Maclean's services was approximately \$17,095.79, and had not been paid. By letter dated January 18, 1996, Hunter Maclean requested payment in full of the bill, pursuant to the agreement.

On approximately March 4, 1996, Trauma made a partial payment toward the outstanding bill.² However, after nearly six months passed without receiving further payment, by letter dated September 6, 1996, Hunter Maclean again requested payment in full of the \$15,647.86 past due bill. However, no further payment was forthcoming.

Subsequently, in October of 1997, Hunter Maclean filed an action in the State Court of Georgia, Chatham County, ("the Georgia fee action"), seeking to recover the outstanding balance

² In an accompanying letter, Dr. Joseph Nowoslowski, medical director of Trauma, promised to furnish Hunter Maclean with a schedule of payment by late summer of 1996, and to pay Hunter Maclean the remaining balance on the bill at an interest rate of eight percent "for [Hunter Maclean's] kindness." The letter also expressed Trauma's thanks for "the fine job that you did for the group," and stated that Hunter Maclean's "work is very extraordinary in its professional approach and excellent technical ability." Further, by letter dated March 21, 1996, Dr. Nowoslowski again apologized for Trauma's late payment record, and inquired into obtaining Hunter Maclean's services in connection with another lawsuit. Dr. Nowoslowski also claimed that Trauma expected to be able to "get current" with its financial obligations within several months.

of \$15,647.86 owed by Trauma. Trauma's Answer was stricken by the state court due to the failure of two of Trauma's witnesses to appear for depositions, and a default judgment was entered in favor of Hunter Maclean in the amount of \$15,647.86.

While the Georgia fee action was pending, Trauma filed a Writ of Summons against Hunter Maclean in the Chester County Court of Common Pleas in Pennsylvania on December 5, 1997 ("the Chester County action").³ However, Trauma failed to prosecute this action and the Chester County Prothonotary entered a judgment of non pros against Trauma on August 31, 1998.

Over one year later, on October 28, 1999, Trauma instituted another action, the instant action, against Hunter Maclean in the Chester County Court of Common Pleas, which Hunter Maclean removed to this Court.⁴ The Complaint alleged: (1) negligence/breach of contract; (2) fraudulent misrepresentation; (3) fraudulent inducement; (4) negligent misrepresentation; and (5) punitive damages, all in connection with Hunter Maclean's representation of Trauma in the Branham

³ Significantly, Trauma filed the Chester County action, its first action against Hunter Maclean, only two months after Hunter Maclean filed the Georgia fee action.

⁴ By letter dated November 30, 1999, in which Hunter Maclean notified Trauma that it had filed a Petition for Removal to this Court, Hunter Maclean advised Trauma that because the allegations in the Complaint, verified by Trauma's counsel, appeared meritless, all procedures authorized by Federal Rule of Civil Procedure 11 ("Rule 11") would be pursued.

action and the fees charged therein.

This Court granted summary judgment in favor of Hunter Maclean on March 23, 2000. Hunter Maclean now seeks to hold Trauma Service Group, P.C.; Trauma's counsel, Mark E. Johnston, Esquire; and the law firm of Johnston & Associates, P.C., jointly and severally liable for its attorney's fees and costs in defending against this action. Hunter Maclean has provided its attorneys' schedule of fees and costs for this Court's review.⁵

II. DISCUSSION.

Section 1927 provides that

[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927. Courts may award fees under section 1927 only if there is a finding of bad faith on the part of an offending attorney. In re Orthopedic Bone Screw Prods., 193 F.3d 781, 795 (3d Cir. 1999) (citations omitted). The principal purpose of imposing sanctions under section 1927 is "the deterrence of intentional and unnecessary delay in the proceedings." Zuk, 103

⁵ Hunter Maclean seeks to recover \$8,140.85 in attorney's fees and costs for defending in this action. However, a review of the schedule of fees and costs reveals that \$5,400.00 represents the reasonable attorney's fees and costs incurred.

F.3d at 297 (quoting Beatrice Foods v. New England Printing, 899 F.2d 1171, 1177 (Fed. Cir. 1990)). Therefore, "imposition of attorney's fees and costs under section 1927 is reserved for behavior 'of an egregious nature, stamped by bad faith that is violative of recognized standards in the conduct of litigation.'" In re Orthopedic Bone Screw Prods., 193 F.3d at 795.

In order to impose sanctions under section 1927, the court must find: (1) a multiplication of proceedings by an attorney; (2) by conduct that can be characterized as unreasonable and vexatious; with (3) a resulting increase in the cost of proceedings; and (4) bad faith or intentional misconduct. In re Prudential Ins. Co. of America Sales, 63 F.Supp.2d 516 (D.N.J. 1999) (citing Williams v. Giant Eagle Mkts., Inc., 883 F.2d 1184, 1191 (3d Cir. 1989)). The intentional advancement of a baseless contention that is made for an ulterior purpose, i.e., harassment or delay, may support a finding of bad faith. Ford v. Temple Hosp., 790 F.2d 342, 347 (3d Cir. 1986) (citations omitted). Further, "[w]hen a claim is advocated despite the fact that it is patently frivolous or where a litigant continues to pursue a claim in the face of an irrebuttable defense, bad faith can be implied." Loftus v. SEPTA, 8 F.Supp.2d 458, 461 (E.D.Pa. 1998)(citations omitted). "A district court may award fees and costs for the entire course

of proceedings when it appears that the entire action was unwarranted." Woods v. Adams Run Assocs., et al., No.Civ.A. 96-6111, 1997 WL 256966, at *4 (E.D.Pa. May 13, 1997)(citing Browning v. Kramer, 931 F.2d 340, 345 (5th Cir. 1991)).

In the instant case, there are a number of facts which indicate that this action was unwarranted, and that Trauma's counsel and/or Trauma acted in bad faith. At the outset, although not necessarily indicative of bad faith in itself, it must be noted that this Court could find, and Trauma's counsel has provided, no authority standing for the proposition that a legal malpractice claim may be brought by a prevailing party. Moreover, although Trauma was or should have been aware of the malpractice or contract claims alleged against Hunter Maclean by January, 1996, when Hunter Maclean requested payment for its services in the Branham action, Trauma's counsel did not file its first Chester County lawsuit until nearly two years later, and even then not until Hunter Maclean filed the Georgia fee action. Moreover, after allowing a default judgment to be entered against Trauma in the Georgia fee action which Hunter Maclean was forced to bring, Trauma's counsel allowed a judgment of non pros to be entered against Trauma in its first Chester County action, against which Hunter Maclean initially had been forced to defend. Trauma's counsel then instituted the current action alleging malpractice and breach of contract

despite the fact that Trauma had been entirely successful in the Branham action, and despite the statements of Trauma's President, after Trauma received Hunter Maclean's bill, commending Hunter Maclean's representation and promising to pay the bill in full.⁶

In Trauma's opposition to this motion, Trauma's counsel argues, remarkably, that Hunter Maclean should not be reimbursed for its fees and costs incurred in defending this legal malpractice action essentially because Hunter Maclean breached its agreement with Trauma by charging fees that were higher than anticipated, and because Hunter Maclean failed to seek to recover those fees following the Branham action.⁷ This argument ignores the glaring facts that not only did Trauma have

⁶ Trauma's counsel attempts to diminish the significance of these facts by asserting that "a non-lawyer, the medical director for Trauma did complement (sic) on Mr. Phillips (sic) individual work in this matter. This letter related to Mr. Phillips work as evaluated by a non-attorney, lay person who concluded a satisfactory long term pay schedule of the bill. This schedule was made in anticipation of Hunter making the required motions for attorney costs in the Branham action." (Pl.'s Br. at unnumbered p.3). Trauma's counsel ignores the fact that the letters, for there were more than one, from Dr. Nowoslawski, are interspersed with expressions of satisfaction with the representation of Trauma and promises to make the payment owed. They contain no mention of dissatisfaction with Hunter Maclean as a firm, nor of payment being contingent on the filing of post-trial motions.

⁷ Trauma's counsel, in Trauma's brief, erroneously argues almost entirely in opposition to sanctions being imposed under Rule 11. Hunter Maclean has not brought this motion pursuant to Rule 11.

the opportunity to pursue these theories in the Chester County action which Trauma's counsel failed to prosecute, but a default judgment has already been entered in favor of Hunter Maclean in the Georgia fee action with respect to those fees. As such, we find that by bringing the present action, Trauma's counsel and/or Trauma increased Hunter Maclean's expenses by unnecessarily, unreasonably, and vexatiously multiplying the proceedings either in retaliation for Hunter Maclean bringing the Georgia fee action, or in a bad faith attempt to avoid paying the fees already determined to be owed to Hunter Maclean, or both. As such, pursuant to section 1927 and this Court's inherent power,⁸ Hunter Maclean is entitled to recover from Trauma and Mark E. Johnston, Esquire its reasonable attorney's fees and costs in defending against this action, which amount to \$5,400.00.

⁸ We note that section 1927 "is designed to discipline counsel only and does not authorize imposition of sanctions on the attorney's client." Zuk v. Eppi of the Med. College of Pennsylvania, 103 F.3d 294, 297 (3d Cir. 1996). Moreover, section 1927 imposes liability directly upon counsel and not counsel's law firm. Jones v. Pittsburgh Nat'l. Corp., 899 F.2d 1350, 1359 n.4 (3d Cir. 1990) (rejecting appellant's argument that section 1927 is unconstitutional because it authorizes sanctions against attorneys personally, rather than their law firms).

However, this Court's inherent power allows the imposition of costs and attorney's fees upon either the client or the attorney where a party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons." United States v. Int'l. Bhd. of Teamsters, 948 F.2d 1338, 1345 (2d Cir. 1991). Accordingly, Hunter Maclean's Motion is granted with respect to both Mr. Johnston and Trauma.

An appropriate Order follows.