NO. 07-CI-001873 JEFFERSON CIRCUIT COURT
DIVISION EIGHT (8)

DEBORAH DANIELS PLAINTIFF

MARK P. BRYANT and WILLIAM F. McMURRY INTERVENING PLAINTIFFS

vs. **OPINION AND ORDER**

AMERICAN PHYSICIANS ASSURANCE CORPORATION DEFENDANT

and

HANS POPPE and THE POPPE LAW FIRM INTERVENING DEFENDANTS

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Procedural History

This matter came before the Court on January 22, 2010 for a bench trial on issues related to a fee dispute between Intervening Plaintiffs Mark P. Bryant ("Mr. Bryant") and William F. McMurry ("Mr. McMurry"), and Intervening Defendants Hans Poppe ("Mr. Poppe") and the Poppe Law Firm. Post-trial bench briefs having been filed on behalf of the respective parties and a form AOC-280 having been tendered, the matter now stands submitted for a ruling.

Summary of Relevant Facts

Mr. Bryant is, and was at all times relevant to these proceedings, a licensed attorney in Kentucky. In 2003 his practice was primarily focused on personal injury litigation. In the fall of 2003, Plaintiff Deborah Daniels ("Ms. Daniels") sought his legal advice and counsel in reference to potential claims arising out of her treatment under the care of David L. Grimes, M.D. ("Dr. Grimes"). Mr. Bryant referred Ms. Daniels to

Mr. McMurry. Mr. McMurry is, and was at all times relevant to these proceedings, a licensed attorney in Kentucky. In 2003 his practice was likewise focused primarily on personal injury litigation.

Ms. Daniels met with Mr. Bryant and Mr. McMurry on September 26, 2003 at which time she signed a document entitled "Authority to Represent and Civil Contract" with Mr. McMurry. Per the terms of their agreement, Mr. McMurry was hired to "institute a claim for damages against [Dr. Grimes] and any others that [Mr. McMurry] believes may be legally liable to [Ms. Daniels] as a result of medical negligence occurring on the 16th day of July, 2003 …". The particulars of their fee arrangement included a specific reference to "[Ms. Daniels'] understand[ing] that [Mr. Bryant] and [Mr. McMurry] will be sharing any attorney fees paid in this case and that both will remain responsible for [Ms. Daniels'] representation".

Mr. Poppe is, and was at all times relevant to these proceedings, a licensed attorney in Kentucky. In 2003 his practice was, insofar as he was an associate in Mr. McMurry's law firm, primarily focused on personal injury litigation. In that capacity he had had occasion to review Ms. Daniels file but had not done any work on her case. Mr. Poppe left Mr. McMurry's firm on January 30, 2004 to open the Poppe Law Office. At some time in January or early February of 2004, Mr. Poppe and Ms. Daniels spoke about the possibility of Mr. Poppe taking over her

representation. Mr. Poppe later spoke with Mr. McMurry and resolved the situation to their mutual satisfaction.[1]

On February 16, 2004, Mr. Poppe sent Mr. McMurry a letter which contained a "summary of all of the cases from [Mr. McMurry's] office" that Mr. Poppe would be handling at The Poppe Law Firm. Per their agreement, Mr. Poppe would be assuming responsibility for those cases and Mr. McMurry would be entitled to receive "one-half of the fee". A second category of cases, which included Ms. Daniels' "med mal" case, were identified as having been "turned over" by Mr. McMurry to Mr. Poppe "with the agreed upon referral as reflected". The agreed upon referral as reflected for Ms. Daniels' case appears to have been "15% to [Mr. McMurry] and 15% to [Mr. Bryant].

On February 20, 2004, Ms. Daniels signed a document entitled "Authority to Represent and Civil Contract" with Mr. Poppe. Per the terms of their agreement, Mr. Poppe was hired to "institute a claim for damages against [Dr. Grimes] and any others that [Mr. Poppe] believes may be legally liable to [Ms. Daniels] as a result of medical negligence occurring on the 16th day of July, 2003 …". The particulars of their fee arrangement included a specific reference to "[Ms. Daniels'] understand[ing] that [Mr. Bryant], [Mr. McMurry] and [Mr. Poppe] will be sharing any attorney fees paid in this case and that both will remain responsible for [Ms. Daniels'] representation".

[1] Although the particulars surrounding the events giving rise to Mr. Poppe becoming counsel for Ms. Daniels' are very much in dispute, they are of no particular consequence to the Court in light of the subsequent agreement reached by Mr. McMurry and Mr. Poppe with respect to same.

Dr. Grimes was insured by Defendant American Physicians Assurance Corporation ("APAC"). Mr. Poppe, in the course of negotiating a potential settlement for Ms. Daniels with APAC, became concerned that APAC was not negotiating in good faith. On June 5, 2006, Mr. Poppe sent APAC a letter in which he advised that he "will be asserting a bad faith claim for [APAC's] post-litigation handling practices". Mr. Poppe discussed his concerns and the potential impact of APAC's conduct with Ms. Daniels. On August 19, 2006, Ms. Daniels and APAC entered into a settlement agreement wherein APAC paid Ms. Daniles $650,000 on a $1,000,000 Dr. Grimes' medical malpractice insurance policy. As part of that agreement as negotiated by Mr. Poppe and with the intent to preserve her potential bad faith claim against APAC, Ms. Daniels did "not release any claims [she] may have for claims directly against [APAC] separate from those claims of liability against [Dr. Grimes]".

On or about September 16, 2006, Mr. Poppe notified Mr. Bryant and Mr. McMurry that the case had been settled and provided them with their respective shares of the attorney's fees in keeping with the terms of Mr. Poppe's February 16, 2004 letter to Mr. McMurry and Mr. Poppe's February 20, 2004 agreement with Ms. Daniels. The tendered "Settlement Receipt" did not include reference to the reservation of rights with respect to Ms. Daniels' bad faith claim and did not indicate that $30,000 of the settlement proceeds had been held in reserve towards the anticipated expenses associated with prosecuting same.

On February 1, 2007, Ms. Daniels signed a document entitled "Authority to Represent and Civil Contract" with Mr. Poppe and the law firm of Friedman, Rubin & White ("Friedman"). Per the terms of their agreement, Mr. Poppe and Friedman were hired to "institute a claim for damages against [APAC] and any others that [Mr. Poppe and Friedman] believe may be legally liable to [Ms. Daniels] as a result of [APAC's] bad faith dealings with [Ms. Daniels] …". The particulars of their fee arrangement included a specific reference to "[Ms. Daniels'] understand[ing] that [Mr. Poppe] and [Friedman] will be sharing any attorney fees paid in this case and that both will remain responsible for [Ms. Daniels'] representation".

Mr. Poppe and Friedman thereafter filed Ms. Daniels' third-party bad faith claim against APAC. The case proceeded to trial and, on June 2, 2009, the jury returned a verdict in Ms. Daniels favor and awarded her $3,879.277 in damages. Mr. McMurry, upon learning of the verdict, contacted Mr. Poppe and provided him with a copy of their "fee sharing agreement and the last disbursement sheet as a reminder of [Mr. Byrant's] and [Mr. McMurry's] interest in the fees earned in this aspect of [Ms. Daniels'] case".

At legal issue before the Court is whether Mr. Bryant and Mr. McMurry have any interest in the fees earned in the prosecution of Ms. Daniels' bad faith claim against APAC. However, and prior to addressing those issues, the Court is compelled to address certain underlying issues raised both

implicitly and, to the Court's great displeasure, *explicitly* in the briefs filed on behalf of the parties. The Court is very much aware that each of the parties in this case genuinely feel genuinely aggrieved. Mr. Bryant and Mr. McMurry sincerely believe that Mr. Poppe has sought to actively defraud them of money to which they believe they are legitimately entitled. Mr. Poppe sincerely believes that Mr. Bryant and Mr. McMurry have conspired to dispossess him of money to which they are *not* legitimately entitled. While the Court, from the perspective of a neutral, detached and objective observer, does not share those beliefs, the animus the parties clearly feel is, unfortunately and to varying degrees, reflected in the briefs filed on their behalves.

The fifty (50) page brief filed on behalf of Mr. Poppe, for example, includes some forty (40) instances (conservatively calculated) of what the Court considers to be gratuitous, disrespectful and/or offensive language. Insofar as this Court is very familiar with the hard-earned and well-deserved excellent reputations of Mr. Bryant, Mr. McMurry and Mr. Poppe in the legal community, the Court finds the bombast and vitriol of the briefs filed on their behalves to be totally unwarranted and completely unacceptable. While the form of the pleadings will not ultimately inure to the detriment of the parties in terms of the Court's ruling on the substantive legal issues raised therein, the lack of respect was, to say the least, not well-received.

Conclusions of Law

In keeping with the express terms of February 16, 2004 letter from Mr. Poppe to Mr, McMurry and/or (by extension) the February 20, 2004 agreement between Mr. Poppe and Ms. Daniels, counsel were retained by Ms. Daniels to pursue claims for damages "as a result of" the medical negligence alleged to have occurred on July 16, 2003. The representation was intended to extend to claims against anyone and everyone who may be liable to Ms. Daniels for that medical negligence, but it did not extend to anyone for anything *beyond* that medical negligence. While APAC was legally liable to pay for the damages caused to Ms. Daniels as a result of any medical negligence on the part of its insured (Dr. Grimes), the third-party bad faith claim against APAC is not a claim for damages caused to Ms. Daniels as a result of any medical negligence on the part of Dr. Grimes. Rather, it is a claim for damages to Ms. Daniels as a consequence of her subsequent treatment by Dr. Grimes' insurance carrier. As such, it is not a claim covered under either the February 16, 2004 letter from Mr. Poppe to Mr. McMurry or the February 20, 2004 agreement with Ms. Daniles.

However, and assuming that Ms. Daniels' third-party bad faith claim against APAC was not covered *explicitly* under the aforementioned agreements, the question arises as to whether it was covered *implicitly* because it constituted a "derivative matter". In the broadest possible sense, and as understood and practiced by a goodly number of very good lawyers in Kentucky, a "derivative matter" *may* include just about any subsequent case a

lawyer would not have had but for the referral of the original case from another lawyer. The Kentucky Lawyer Referral Service (KLRS) more precisely defines a "derivative matter" as "any action, cause of action, controversy, dispute, or matter involving a Derivative Client which arises out of the same operative facts or transactions as a Referred Matter". Assuming *arguendo* that referring counsel would be entitled to a share of fees derived from derivative matters, Ms. Daniels' third-party bad faith claim against APAC is not a derivative matter.

The "Referred Matter" in this case is Ms. Daniels' medical malpractice claim. Typical actions, causes of action, controversies, disputes, or matters arising out of "the same operative facts or transactions" as a medical malpractice case include a products liability claims (i.e. causes of action against the manufacturer and/or provider of a medical device or pharmaceutical used in the course of the patient/plaintiff's treatment) or a *first*-party bad faith (i.e. causes of action based on the defendant's assignment of his or her right to sue his or her insurance company for bad faith to plaintiff following an excess verdict). Such was not the case in the instant case.

Ms. Daniels' third-party bad faith claim against APAC does not arise out of the same operative facts or transactions as her medical malpractice claim. The operative facts and transactions in Ms. Daniels' medical malpractice case arise out of her treatment by Dr. Grimes and other health care providers. The operative facts and transactions in Ms. Daniels' third-party bad

faith claim arise out of her treatment by her health care provider's insurance company. As such, and while Ms. Daniels' third-party bad faith claim cannot be divorced entirely from her medical malpractice claim, it is not, strictly speaking, a *derivative* matter. Moreover, it must be said that Ms. Daniels' third-party bad faith claim is a unique if not unprecedented cause of action in Kentucky. Unlike the aforementioned *first*-party bad faith claims, which are essentially a mechanism for collecting on judgments for damages awarded for the underlying negligence claim, the *third*-party bad faith claim is a wholly separate cause of action giving rise to a wholly separate set of damages.

Although Ms. Daniels' third-party bad faith claim is neither explicitly nor implicitly covered by the February 16, 2004 letter from Mr. Poppe to Mr. McMurry nor the February 20, 2004 agreement between Mr. Poppe and Ms. Daniels, a particular interesting argument remains as to whether, and to what extent, the damages awarded to Ms. Daniels' by the jury on her third-party bad faith claim should be considered as consideration for her settlement of her medical malpractice claim.

The Court recognizes that, insofar as consideration may include the relinquishment of a party's right to engage in an activity or practice that it would otherwise be legally entitled to perform, Ms. Daniels' reservation of her right to sue APAC for bad faith was a part of the consideration negotiated for in the settlement of her medical malpractice claim. See *Central*

Adjustment Bureau, Inc. v. Ingram Associates, Inc., 622 S.W.2d 681 (Ky.App.1981); *Higdon Food Service v. Walker*, 641 S.W.2d 750, 752(Ky.1982). If so, then Mr. Bryant and Mr. McMurry are, in keeping with the fee sharing arrangement set out in the February 16, 2004 letter and February 20, 2004 agrement, arguably entitled to their contractual share of Mr. Poppe's interest in that consideration (i.e. the fees ultimately realized by Mr. Poppe as a consequence of his pursuit of that claim on Ms. Daniels' behalf). Because this is a singularly novel argument tailored to a set of singularly novel circumstances, no legal precedents have been offered (or otherwise discovered by the Court) in its support. There would appear, moreover, to be a fundamental difference between consideration that has intrinsic value (i.e. the functional equivalent of cash) and consideration with conditional value (i.e. *not* the functional equivalent of cash). While the Court appreciates the argument that a reservation of a right to sue has the same intrinsic value as a lottery ticket or a treasure map, the Court is not prepared in the absence of legal precedent or persuasive legal authority to extend the fee sharing arrangement to include Mr. Poppe's interest in Ms. Daniels' right to sue APAC for bad faith.

Pursuant to SCR 3.130-1.5(e) lawyers who are *not* in the same law firm may only share fees where, among other requirements, the lawyers assume joint responsibility for the representation and the client agrees to the arrangement in writing. Conversely, SCR 3.130.1-5(e) does not apply to fee sharing arrangements for

lawyers who are in the same firm. If the fee paid upon settlement of the third-party bad faith claim is considered to be consideration for the settlement of Ms. Daniels medical malpractice claim then, in light of the February 20, 2010 agreement between Mr. Poppe and Ms. Daniels, the requisites of SCR 3.130.1-5 have been met regardless of whether Mr. Bryant, Mr. McMurry and Mr. Poppe were in the same or separate firms. If however, and in keeping with this Court's finding, the third-party bad faith claim is a separate and distinct cause of action from the medical malpractice case, then whether Mr. Bryant, Mr. McMurry and Mr. Poppe were in the same or separate firms would matter for purposes of SCR 3.130.1-5. If they were *not* in the same firm, then a separate and distinct representation agreement would be required in which Mr. Bryant, Mr. McMurry and Mr. Poppe assumed joint responsibility for the representation and Ms. Daniels agreed to the arrangement in writing.

The primary purpose for the SCR 3.130.1-5 is to protect the client by allowing an attorney recoup a fee from a case that (s)he has referred to another attorney. This has the effect or promoting such referrals in cases where the client would likely be better served by counsel with more experience or greater expertise than referring counsel in the area of practice called for in the representation. Both the public and the legal profession have been well-served by this practice. The referral of Ms. Daniels' medical malpractice case is in keeping with what happens when a lawyer leaves a law firm. As a rule there are

cases/clients a lawyer leaves behind and cases/clients a lawyer takes with him or her when (s)he leaves one professional situation for another. Typically a separation or termination agreement is executed which sets out the fee sharing arrangement between and among the lawyers involved. In the instant case the February 16, 2004 letter from Mr. Poppe to Mr. McMurry effectively sets out their agreement with respect to Ms. Daniels' medical malpractice case. The February 20, 2004 agreement between Mr. Poppe and Ms. Daniels memorializes Ms. Daniels' acceptance of that fee sharing arrangement with respect to her medical malpractice case.

However, and insofar as the Court has found that Ms. Daniels' third-party bad faith claim was not a part of her medical malpractice claim, SCR 3.130.1-5 requires that a separate agreement be entered into with respect to the bad faith claim. While a second agreement was entered on February 1, 2007, that agreement did not authorize Mr. Bryant or Mr. McMurry to share in any fees. Be that as it may, the Court finds that the Rules of Professional Conduct do not, as a matter of *law*, operate as a bar to Mr. Bryant and Mr. McMurry from collecting on the fee sharing agreement set out in the February 16, 2004 letter from Mr. Poppe to Mr. McMurry and the February 20, 2004 agreement between Mr. Poppe and Ms. Daniels. Pursuant to SCR 3.130, the rules establish standards of conduct to be used to provide guidance to lawyers and to provide a structure for regulating lawyer's conduct through disciplinary agencies. As such, a lawyer's

alleged violation of a rule may be evidence that (s)he breached the applicable standard of care in a legal malpractice case or otherwise subject him or her to disciplinary action but are not intended to supplement or supplant the otherwise applicable law. Accordingly, the Court finds that SCR 3.130.1-5, while instructive, has no binding application in the instant case.

Wherefore, and for all of the reasons set out above, **THE COURT FINDS** that Mr. Bryant and Mr. McMurry do not have a legally recognized interest in the legal fees earned in the prosecution of Ms. Daniels' bad faith claim against APAC.

There being no just cause for delay, this is a **FINAL and APPEALABLE** Order.

SO ORDERED this _____ day of December, 2010.

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A.C. MCKAY CHAUVIN, JUDGE

ec: Hon. Bryan J. Dillon
Hon. Peter Ostermiller

This is an electronic courtesy copy of an order signed on the date of transmission. The original is on file with the Jefferson Circuit Court clerk and is available for inspection and copy.