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Pennsylvania judge takes a bold stand against unprofessional conduct

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Over 80 years ago the Illinois Supreme Court held "An attorney's zeal to serve his client should never be carried to the extent of causing him to seek to accomplish his purpose by a disregard of the authority of the court ***. Unless lawyers, who are officers of the court, show respect to its orders and judgments, how can it be expected that laymen will do so?"[1] Judge Cardozo once observed: "Membership in the bar is a privilege burdened with conditions."[2]

Obedience to a trial court's orders *in limine* is one such condition.[3] Recently, Judge Paul Panepinto, presiding over a Philadelphia, Pennsylvania, medical malpractice action, imposed a sanction of almost $1 million upon an attorney due to her expert witness' violation of an agreed order *in limine*.[4] Could such a sanction be imposed in Illinois to promote attorney professionalism?

$1 million sanction in *Sutch v. Roxborough Memorial Hospital, et al.*

It started modestly enough. On May 3, 2007, Rosalind Wilson went to Roxborough Memorial Hospital complaining of headache, chest pains and shortness of breath. An x-ray revealed that she had a potentially cancerous 2.3 cm nodule on her lung, but her doctors failed to notify her. In January 2009, 20 months later, Ms. Wilson learned that she had Stage IV lung cancer. The malignant nodule had grown to eight centimeters and metastasized. Seven months after that, she died of lung cancer. Her estate sued the hospital and doctors.[5]

Before trial, the plaintiff filed a motion *in limine* with the trial court[6] seeking to prevent the introduction of evidence of Ms. Wilson's smoking. On May 16, 2012, after argument, the parties agreed to the entry of an order precluding the defendants from "presenting any evidence, testimony, and/or argument regarding decedent's smoking history"[7] ("Smoking Preclusion Order"), since the defendants had not named any expert to connect the plaintiff's lung cancer to her smoking. Moreover, the cause of the cancer was not at issue—the failure to diagnose/inform was.

The jury trial commenced on May 21, 2012. On May 30, 2012, before the beginning of the defendants' case in chief, plaintiff's attorney brought to the trial court's attention that almost all of the defendants' experts mentioned smoking in their reports, and he wanted the record to be clear that defendants' attorneys must speak with their experts about the Smoking Preclusion Order. The trial court responded that the defendants knew the rules and they were on notice of the need to advise their experts of the Smoking Preclusion Order prior to taking the stand.[8]

The next day, May 31, 2012, Dr. John Kelly, one of the experts retained by Nancy Raynor ("Raynor"), the attorney for one of the emergency room physician defendants, testified that one of Ms. Wilson's cardiac risk factors was her smoking. Plaintiff's counsel objected to this testimony and requested a sidebar. Upon questioning outside of the jury's presence, Dr. Kelly testified that he could not remember any discussion with Raynor regarding the Smoking Preclusion Order. Raynor did not request to question Dr. Kelly regarding his assertion. Rather, she told the Court that she had discussed the preclusion order with Dr. Kelly when they had met two weeks earlier.[9] That day, and at the next two court dates, the trial court heard argument as to how to proceed in light of the violation of the Smoking Preclusion Order. During this time, plaintiff made a motion for a mistrial. The trial court denied the request and, instead, read a curative instruction to the jury.[10] Four days later, on June 7, 2012, the jury returned a verdict for $100,000 under the Survival Act, and $90,000 under the Wrongful Death Act,[11] which was only slightly more than plaintiff's actual out-of-pocket costs.[12]

Plaintiff filed timely post-trial motions seeking a new trial and sanctions for Raynor's violation of the Smoking Preclusion Order. A new trial was

granted[13] and the order was affirmed by the Appellate Court.[14] Two years after the initial trial, the jury in the second trial returned a verdict in plaintiff's favor of $1,975,713.[15]

It is also important to note that in addition to the sanction for her activities at trial, Raynor was also sanctioned before the second trial for her pre-trial discovery tactics. The trial court described this conduct and sanction as follows: "On January 13, 2012, Raynor sent a letter to the Senior Counsel for the University of Pennsylvania, advising her that Stephanie Porges, MD., a physician at U Penn and one of Plaintiff's expert witnesses, would be testifying to the liability of ER doctors which, in Raynor's words, could potentially expose U Penn to significant liability. As a result, Raynor was sanctioned in an August 28, 2012 Order (following the first trial) for violating ethical rules and attempted witness intimidation, in the amount of $44,603.25, and disqualifying her from representing the Defendants in the retrial."[16]

Also prior to the second jury trial, the trial court conducted a two-day hearing on sanctions arising out of the violation of the Smoking Preclusion Order. At the hearing, Raynor's client and an insurance adjuster testified that on the day of his trial testimony, Dr. Kelly had been instructed by Raynor not to testify about plaintiff's smoking.[17] Raynor also testified she went over the Smoking Preclusion Order in detail the night before Dr. Kelly's testimony, as well as the day of his testimony, and Dr. Kelly had a piece of paper in his jacket pocket which said "no smoking."[18] In contrast, Dr. Kelly testified he did not know about the Smoking Preclusion Order, did not knowingly violate it and did not recall Raynor telling him that he could not mention smoking in his testimony.[19] On May 2, 2014, the trial court entered an Order imposing sanctions against attorney Raynor only, not her client, nor her expert.[20] On October 31, 2014, Raynor was sanctioned $946,197.16—the attorney fees and costs of the first trial, post-trial motions and appeal—based upon a finding that she was "dilatory, vexatious and obdurate" in failing to properly instruct her expert witness regarding the exclusion of plaintiff's smoking.[21] The amount of the sanction was determined by a review of the plaintiff's attorneys' actual time sheets and invoices for costs, expenses and experts' fees.[22] The sanction is currently on appeal in the Appellate Court.

Trial court Sanctions in Illinois

It is well established that an Illinois trial court has the power to sanction litigants for failure to comply with the Court's Order.[23] The power of an Illinois trial court to sanction litigants was set forth by our Supreme Court in People v. Warren,[24] which held that the trial court "is vested with inherent power to enforce its orders and preserve its dignity by the use of contempt proceedings," both civil and criminal, direct and indirect.[25] A trial court's power to sanction was further explained by the Appellate Court in *Santiago v. E.W. Bliss Co.*,[26] which held that the power to sanction is also found in its inherent power to control its docket. Because contempt power is inherent, trial courts may exercise broad discretion in fashioning appropriate remedies to a party's contumacious behavior.[27]

The appropriate method of controlling behavior, such as occurred in Pennsylvania, is through a finding of direct criminal contempt.[28] Illinois case law supports a sanction of attorney fees and costs after a mistrial, when there is a finding of direct criminal contempt.[29] To date, no reported Illinois case has upheld an award of attorney fees due to a mistrial caused by a violation of an order *in limine*. However, that is only because in those cases no direct criminal contempt was found by the trial court. In *Helm v. Thomas*,[30] an automobile personal injury case, plaintiff and his attorney had asked a member of one of the defendant's attorneys' firm advice on pursuing an uninsured motorist claim. Once the conflict was brought to the trial court's attention, the defendant's attorney was given leave to withdraw and a mistrial was declared. The trial court found plaintiff's attorney and his clients in indirect civil contempt for causing a mistrial by failing to disclose this conflict of interest until after a jury had been impaneled but before opening statements, and ordered the attorney and his client to reimburse the County for juror fees and to reimburse the defendant for all of its future attorneys' fees and costs. In reversing, the Appellate Court observed that "the trial court did not impose sanctions to compel a future act, but to punish [the attorney] and [his clients] for prior conduct that they could not undo."[31] Thus, the Appellate Court concluded that the trial court improperly entered a criminal contempt judgment.[32] Therefore, the defect in the Helm sanction was that the trial court used a direct criminal contempt remedy when it only found an indirect civil contempt had occurred.[33]

In *Juarez v. Commonwealth Medical Associates*,[34] a medical malpractice action, plaintiff's counsel repeatedly violated evidentiary and procedural rules, as well as the court's order granting defendant's motion *in limine*.[35] On the second day of trial, the judge *sua sponte* declared a mistrial and sanctioned counsel by ordering her to pay all attorney fees and costs incurred by the defense during trial.[36] The defendant's attorney did not move for a finding of contempt, and the trial court made no such finding.[37] The Appellate Court reversed, holding there was no agreement or statutory authority allowing the assessment of litigation costs for purposely causing a mistrial,[38] and Supreme Court Rule 219 does not allow sanctions for violating an order *in limine* during trial.[39] The Appellate Court concluded: "Though we do not condone [the attorney's] conduct, the trial court had no authority for its entry of sanctions in the form of attorney fees and costs. [Citations omitted.] We understand our conclusion in this case leaves a trial court little room, short of a contempt finding, to deal with a lawyer who purposely creates conditions for a mistrial."[40] Thus, the *Juarez* court stated it would have upheld the sanction if the trial court had, in fact, made a finding of contempt.[41]

In *Thomas v. Koe*,[42] a dental malpractice action, plaintiff's attorney violated the trial court's order *in limine*, after which the court entered an order

of direct criminal contempt against the attorney. During trial, the plaintiff's attorney continued to pursue questions that were inadmissible despite warnings from the trial court.[43] The trial court then held counsel in direct criminal contempt, finding that the attorney's conduct "which occurred in the presence of this court while the court was in open session, impeded and interrupted the proceedings, lessened the dignity of the court, and tended to bring the administration of justice into disrepute," and levied a $500 fine.[44] In affirming the sanction, the Appellate Court found that the attorney had not acted in good faith and that his belief that the trial court's ruling was erroneous was "utterly irrelevant."[45] It cautioned that: "It would be intolerable to permit an attorney to disregard a trial court's ruling that the jury should not hear certain evidence by nonetheless getting that evidence before the jury because the attorney believes that the court is *really* wrong about the issue."[46]

Conclusion

In Illinois, trial court judges are vested with broad discretion as to the sanctions they can impose. While we have not found any instance in which an Illinois judge imposed a direct criminal contempt sanction awarding the attorneys' fees and costs of a trial, post-trial motions and appeal in response to a violation of a Court order, that power certainly exists. The sanctions entered in Pennsylvania arose out of unique facts. Nevertheless, the actions of Judge Panepinto serve as a wake-up call for trial attorneys who might stray from acceptable professional conduct in the preparation and trial of a cause. ■

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1. *People ex rel. Fahey v. Burr*, 316 Ill. 166, 182 (1925).

2. *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783 (1917).

3. *Thomas v. Koe*, 395 Ill.App.3d 570, 580 (4th Dist. 2009), *appeal denied*, Ginzkey v. Koe (In re Thomas), 235 Ill.2d 606 (2010).

4. *Sutch v. Roxborough Mem. Hosp.*, 2014 Phila. Ct. Com. Pl. LEXIS 432 (Pa. C.P. NO. 009001, October 31, 2014) ("*Sutch II*").

5. *Sutch v. Roxborough Mem. Hosp.*, 2013 Phila. Ct. Com. Pl. LEXIS 156, *1-2 (Pa. C.P. NO. 0901, May 28, 2013) ("*Sutch I*"); *Sutch v. Roxborough Mem. Hosp.*, 2015 Phila. Ct. Com. Pl. LEXIS 116, *3-4 (Pa. C.P. NO. 901, May 15, 2015) ("*Sutch IV*").

6. In Pennsylvania, the trial court is the Courts of Common Pleas, the intermediate appellate court is the Superior Court, and the highest court is the Supreme Court. We will refer to the Courts of Common Pleas as the "trial court" and the Superior Court as the "Appellate Court" to avoid any potential confusion to Illinois practitioners.

7. *Sutch v. Roxborough Mem. Hosp.*, 2015 Phila. Ct. Com. Pl. LEXIS 26, *3 (Pa. C.P. NO. 00901, February 3, 2015) ("*Sutch III*").

8. *Id.*, *4-5.

9. *Id.*, *5-8.

10. *Sutch I*, *3.

11. *Id.*, *4.

12. *Sutch III*, *40.

13. *Sutch I*, *4.

14. *Sutch v. Roxborough Mem. Hosp.*, 91 A.3d 1273 (Pa. Super. Ct. 2013) (published without opinion). Opinion found at *Sutch v. Roxborough Mem. Hosp.*, 2013 Pa. Super. Unpub. LEXIS 2824 (Pa. Super. Ct. No. 3246 EDA 2012, No. 3249 EDA 2012, No. 3255 EDA 2012, No. 3257 EDA 2012, November 4, 2013).

15. *Sutch IV*, *4-5.

16. *Sutch III*, *4, n. 1.

17. *See*, Witness: Lawyer Raynor warned expert not to talk of smoking, <http://www.philly.com/philly/business/20150305_Trial_technician__Raynor_warned_expert_not_to_offer_banned_testimony.html> ("In addition to Chapman, two other witnesses, an emergency room doctor who is a client of Raynor's and an insurance adjuster, have testified that they heard Raynor advising Kelly that smoking testimony was precluded.").

18. *Sutch III*, *9-10.

19. *Id.*, *10-11.

20. Id., *11; *see also*, May 2, 2014, electronic docket entry for *Wilson v. Roxborough Mem. Hosp.*, case no. 090700901, <https://fjdefile.phila.gov/> (last visited July 27, 2015).

21. *Sutch II*.

22. *Sutch III*, *33.

23. *People v. Warren*, 173 Ill.2d 348, 368, 370 (1996) ("A court is vested with inherent power to enforce its orders and preserve its dignity by the use of contempt proceedings. * * * The power to punish for contempt does not depend on constitutional or legislature grant."); *Sander v. Dow Chem. Co.*, 166 Ill.2d 48, 64 (1995) ("… limiting the sanctions available under [Supreme Court] Rules 218 and 219 to violations of 'pretrial conference' orders would be an arbitrary limitation which fails to consider the practical aspects of pretrial procedure."); Supreme Court Rules 137, 218, 219, 415. However, Supreme Court Rule 137 "does not provide a sanction against all asserted violations of court rules and for all acts of professional misconduct of an attorney." *In re C.K.*, 214 Ill.App.3d 297, 300 (2nd Dist. 1991).

24. *People v. Warren*, 173 Ill.2d 348, 368-69 (1996).

25. The seminal decision of *In re Marriage of Betts*, 200 Ill.App.3d 26 (4th Dist. 1990), *appeal denied*, 136 Ill.2d 541 (1991), sets forth in explicit detail: (1) the difference between civil and criminal contempt, (2) the difference between direct and indirect contempt, and (3) the procedural rights that apply to those charged with any form of contempt.

26. *Santiago v. E.W. Bliss Co.*, 406 Ill.App.3d 449, 457 (1st Dist. 2010), *rev'd on other grounds*, 2012 IL 111792 ("In this situation, the circuit court has relatively broad inherent authority to sanction plaintiff if it finds that plaintiff's actions demonstrated deliberate and continuing disregard for its authority."). *See also, Cronin v. Kottke Assocs., LLC*, 2012 IL App (1st) 111632, ¶ 38, *appeal denied*, 2012 IL 114813 (holding that Supreme Court Rule 219 was applicable to "plaintiffs' claimed disregard of the trial court's scheduling order and its standing order for trial preparation").

27. *Welch v. Evanston*, 181 Ill.App.3d 49, 56 (1st Dist.), *appeal denied*, 127 Ill.2d 611 (1989); *Holtkamp Trucking Co. v. David J. Fletcher, M.D., L.L.C.*, 402 Ill.App.3d 1109, 1117(4th Dist.), *appeal denied*, 238 Ill.2d 651 (2010) ("The types of sanctions and whether to impose any sanction at all lie within the sound discretion of the court.").

28. In *People v. Simac*, 161 Ill.2d 297, 306 (1994), our Supreme Court Stated: "Direct criminal contempt is contemptuous conduct occurring 'in the very presence of the judge, making all of the elements of the offense matters within his own personal knowledge.' *(People v. Harrison* (1949), 403 Ill. 320, 323-24.) Direct contempt is 'strictly restricted to acts and facts seen and known by the court, and no matter resting upon opinions, conclusions, presumptions or inferences should be considered.' ([*People v.*] *Loughran,* 2 Ill.2d [258] at 263 [(1954)].)"

29. The Appellate Court in *In re Marriage of Betts*, 200 Ill.App.3d 26, 45 (4th Dist. 1990), *appeal denied*, 136 Ill.2d 541 (1991), explained that sanctions for criminal contempt are appropriate to ensure that (1) judges and other court officials are shown the respect to which they are entitled when performing their judicial duties, (2) judicial proceedings are conducted in an orderly fashion, (3) court orders are obeyed, and (4) individuals are not permitted to commit fraud upon the court. A party may be found in direct criminal contempt when, in the judge's presence, that party's action is disrespectful, disruptive, deceitful, or disobedient to the extent that such action affects the court's proceedings.

30. *Helm v. Thomas,* 362 Ill.App.3d 331, 332-33 (4th Dist. 2005).

31. *Id.*, at 334.

32. Id., *citing*, *People v. Lindsey*, 199 Ill.2d 460, 468 (2002) ("Criminal contempt sanctions are retrospective in nature and punish the contemnor for past acts which he cannot undo") and *Pancotto v. Mayes,* 304 Ill.App.3d 108, 111 (2nd Dist. 1999) ("Civil contempt proceedings have two fundamental attributes: (1) the contemnor must be capable of taking the action sought to be coerced, and (2) no further contempt sanctions are imposed upon the contemnor's compliance with the pertinent court order.").

33. The Appellate Court in *Holloway v. Sprinkmann Sons Corp*., 2014 IL App (4th) 131118, ¶ 126, noted that "a criminal contempt proceeding could shift these additional expenses [arising out of a mistrial] onto a party who deliberately sabotaged a trial."

34. *Juarez v. Commonwealth Medical Associates,* 318 Ill.App.3d 380 (1st Dist. 2000).

35. *Id*., at 383-85.

36. *Id*.

37. *Id*., at 386.

38. Id., at 385, *citing*, *Freeman v. Myers,* 191 Ill. App.3d 223, 226 (4th Dist. 1989), *appeal denied*, 129 Ill.2d 563 (1990).

39. *Id*., 318 Ill.App.3d 386 - 87.

40. *Id*., at 386-87 (emphasis added).

41. Similarly, in *Freeman*, 191 Ill.App.3d at 227, a personal injury action, the Appellate Court held Supreme Court Rule 63 and old Code of Professional Conduct Rule 1-102 (now Rule of Professional Conduct 8.4) "do not provide for the trial court to order its own independent sanctions." The *Freeman* Court also held that where an intentional violation of an order *in limine*, without a finding of contempt, causes a mistrial, an award of attorneys' fees is not appropriate. 191 Ill.App.3d 227 - 28.

42. *Thomas v. Koe*, 395 Ill.App.3d 570, 572 (4th Dist. 2009), *appeal denied*, *Ginzkey v. Koe* (In re Thomas), 235 Ill.2d 606 (2010).

43. *Id.*, at 573-76.

44. *Id.*, at 576.

45. *Id.*, at 580-81 ("Whether the trial court's underlying decision – which precipitated the contemnor's action – is 'wrong' is of no consequence in contempt proceedings and, therefore, does not justify disobedient behavior. We emphasize that even when a court's decision is erroneous, the court is entitled to – and, indeed, our system of justice requires – dignity and obedience. Trial courts will occasionally make erroneous rulings, particularly in cases that involve complicated questions regarding the admissibility of evidence, like this case. However, our system of justice deals with such errors by providing for appeals.").

46. *Id.*, 395 Ill.App.3d 581 (Emphasis in original).