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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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 RAPHAEL J. OSHEROFF, :  
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 Plaintiff, :  
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 v. :  
 :  
 CHESTNUT LODGE, INC., :  
 MANUEL ROSS, M.D., :  
 C. WESLEY DINGMAN, M.D, :  
 :  
 Defendants. :  
 :  
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Law No. 66024

MOTION FOR RECONSIDERATION

Rockville, Maryland

July 27, 1984

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 ALL INQUIRIES  
 CONTACT  
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 TRANSCRIPT DESK  
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IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

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 Plaintiff, :  
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 MANUEL ROSS, M.D., :  
 C. WESLEY DINGMAN, M.D., :  
 :  
 Defendants. :  
 :  
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Rockville, Maryland

July 27, 1984

WHEREUPON, proceedings in the above-entitled matter commenced

BEFORE: THE HONORABLE RICHARD B. LATHAM, Judge

APPEARANCES:

FOR THE PLAINTIFF:

BURT KAHN, Esq.  
 1345 University Boulevard  
 Hyattsville, Maryland 20783

JOHN D. GRAD, Esq.  
 108 North Columbus Street  
 P.O. Box 1226  
 Alexandria, Virginia 22313

FOR THE DEFENDANTS:

ALFRED L. SCANLAN, JR., Esq.  
 2000 First Maryland Building  
 25 South Charles Street  
 Baltimore, Maryland 21201

WILLIAM A. EHRMANTRAUT, Esq.  
 51 Monroe Street, Suite 700  
 Rockville, Maryland 20850

P R O C E E D I N G S

1  
2 THE CLERK: Law 66024, Osheroff v. Chestnut Lodge.

3 THE COURT: You gentlemen want to identify  
4 yourselves, please, as to who you are and who you represent  
5 in this matter? Let me have the file.

6 MR. KAHN: Certainly, Your Honor. My name is  
7 Burt Kahn, and I am here as Co-Counsel for Plaintiff.

8 MR. GRAD: My name is John Grad, Your Honor. I  
9 am Co-Counsel for Plaintiff, and this is Dr. Osheroff, the  
10 Plaintiff.

11 MR. SCANLAN: Alfred Scanlan, Jr., Your Honor. I  
12 represent Chestnut Lodge.

13 MR. EHRMANTRAUT: William Ehrmantraut, attorney  
14 for Ross and Dingman.

15 MR. HALL: John Hall, Co-Counsel for Ross and  
16 Dingman.

17 THE COURT: Mr. Kahn, I do not know whether you  
18 are the Lead Counsel in this matter here today, but we are  
19 here essentially on the Motion for Reconsideration that  
20 had filed in this matter in connection my ruling back on  
21 May 2nd, and I will hear you.

22 MR. KAHN: Thank you, Your Honor. Your Honor,  
23 there has been extensive memoranda filed, obviously before  
24 the May 2nd ruling and since, and since my office only got  
25 into this case actually earlier this week, we felt compelled

1 to file yet another supplemental memorandum in support of  
2 the Motion to Reconsider. The memorandum, which I delivered  
3 to the Court only approximately 20 or 30 minutes ago and  
4 hand-delivered to Counsel only five minutes ago, goes really  
5 into two issues.

6 The first issue is an analysis of the Trenan  
7 decision which was delivered to the Court by Counsel for  
8 Chestnut Lodge, and the second issue that the memorandum  
9 addresses is some Court of Appeals cases which were not  
10 briefed before Your Honor previously, and we feel that those  
11 are, indeed, dispositive of the issue before Your Honor.

12 I think to start with it might be appropriate to  
13 just briefly go through what the facts have been up till now  
14 in terms of the pleadings in this case. Obviously a Health  
15 Claims Arbitration matter was heard in December of 1983 for  
16 three straight weeks, resulting in an award ultimately for  
17 the Plaintiff in that matter in the amount of a quarter of  
18 a million dollars.

19 The Defendants in this case, as the rules  
20 require, filed an Action to Nullify and a Notice of  
21 Rejection of the Award with the Director of the Health  
22 Claims Arbitration Office. Following that on I believe it  
23 was January 31st, Plaintiffs in this action filed a  
24 pleading which they titled an Action to Nullify, and that  
25 was on January 31st, well within the 30 day period that

1 Rule B-Y-2 commands for the filing of a declaration in order  
2 to commence the proceedings in this case and following the  
3 Action to Nullify filed by the Defendants.

4 The Defendants, I think coyly -- somewhat coyly --  
5 filed a Motion to Extend the Time within which they were  
6 required to respond to that pleading, indicating to the  
7 Court that they were both in trial and could not possibly  
8 file memorandums timely, I guess, and therefore, asked for  
9 an enlargement of time. That request was filed on  
10 September 7th, Well, again it was within the 30 day  
11 period in which Plaintiffs were required to file a  
12 declaration. They asked until March 9th to file their  
13 response to pleadings, and they walked that motion through  
14 and had it signed by Judge Raker on the same day that they  
15 filed it, February 7th.

16 On March 8th, both Defendants filed with this  
17 Court two pleadings, one a Motion to Strike the Plaintiff's  
18 Request for a Jury Demand based on their amended Action to  
19 Nullify -- again, filed within the 30 day period, and a  
20 Motion Raising Preliminary Objection in which they pointed  
21 out to this Court that insofar as the Plaintiffs did not  
22 file a "declaration" within the 30 day period commanded by  
23 Rule B-Y-2, this case ought to be dismissed with prejudice.

24 They further indicated to this Court that the  
25 arbitration award should be vacated based on alleged

1       improprieties on the part of Mr. Tabler, Director of the  
2       Health Claims Arbitration Office. That matter came on for  
3       hearing apparently on May 2nd, and it is the adverse rulings  
4       from that hearing that we are here today requesting  
5       reconsideration on.

6                 Now, first I think that I would like go over a  
7       little bit the Trenan decision which was presented to Your  
8       Honor by way of supplemental memorandum by Counsel for  
9       Chestnut Lodge. Apparently Defendant, Chestnut Lodge,  
10      believes that the Trenan decision, number one, is on all  
11      fours with this case, and number two, is helpful to their  
12      position. I disagree on both counts, and I would like to go  
13      over that if I may.

14                First, the Trenan decision is not on all fours  
15      with this case for a very specific and obvious reason. In  
16      Trenan, the Plaintiffs below, i.e. the Plaintiffs before  
17      the Heath Claims Arbitration Panel, lost. There was a  
18      verdict or an award by the panel for the Health Care  
19      providers; therefore, under the rules, in order to perfect  
20      an appeal and to prevent the award from becoming a final  
21      judgment, it was incumbent upon the Claimants in that case  
22      to file both a Notice of Rejection before the Director and  
23      an Action to Nullify before this Court. Actually, it was  
24      the Court in Howard County, but before the Circuit Court.

25                They did not do either one of those things. There

1 was not the question of them having filed the pleading and  
2 missfiled. They simply filed no pleadings whatsoever. No  
3 Action to Nullify was filed. No Notice of Rejection was  
4 filed. The Defendants, who had won below at the arbitration  
5 level -- the health care providers -- then came in with a  
6 Motion Raising Preliminary Objection, indicating to the  
7 Circuit Court that the matter should be dismissed for  
8 failing to comply with the rule, and the Trial Court agreed  
9 and dismissed the case.

10 It was appealed to the Court of Special Appeals  
11 who, I believe on June 11th of this year, filed a slip  
12 opinion, and it is that slip opinion that was provided to  
13 Your Honor. In that opinion, the Court of Appeals went  
14 through a rather interesting analysis both of the statute,  
15 the 32A Statute, the Health Claims Arbitration Statute, and  
16 the B-Y Rules which are, of course, the Maryland rules which  
17 are intended to give guidance to the Court and to the  
18 parties under the statute.

19 The Court noted obviously that the Plaintiffs had  
20 failed to file either of the motions or the pleadings that  
21 they were supposed to file, and accordingly, found that  
22 there had been a violation of both the statute and the rule.  
23 The Court then went, however, to analyze what sanctions  
24 ought to be applied under those circumstances, noting and  
25 quoting from a variety of cases, that if at all possible,

1 they should, in order to do substantial justice to the  
2 parties, permit them to litigate if at all possible, meaning  
3 that if there was no specific sanction set forth either  
4 under the rule or under the statute, then it would be  
5 possible for them to overlook the technical errors and  
6 permit the parties to have their day in Court, but they  
7 analyzed, i.e. the Court of Appeals analyzed the arbitration  
8 statute and found that there was no discretion vested in the  
9 Court, and in fact, the Court was without jurisdiction to do  
10 anything in that case because no pleading had been filed  
11 within the times prescribed under the statute.

12 The analysis by the Court of Special Appeals  
13 indicated that where an award is issued by a Health Claims  
14 Arbitration panel and where no rejection of that award is  
15 filed with the Director and no Action to Nullify filed with  
16 the Circuit Court, by definition -- by statutory definition  
17 under the rules, that award became a final judgment, and  
18 once it became final judgment, the Court -- the Trial  
19 Court -- the Circuit Court had no jurisdiction to exercise  
20 its discretion should it have wanted to exercise its  
21 discretion.

22 Now, those facts are quite different, and the  
23 analysis in that case is quite different than what we have  
24 here. Here, first of all and I think most compellingly,  
25 the Plaintiff here, the Claimant below prevailed. He won a

1 a quarter of a million dollars before the arbitration panel.  
2 is I think the most compelling distinction, but there are  
3 other distinctions which are I think just as important.  
4 In the Trenan decision again, no pleading whatsoever was  
5 filed within the prescribed time limits. Here the  
6 Plaintiffs filed a pleading which I will term misstyled,  
7 i.e. they filed what they called an Action to Nullify, but  
8 they filed it timely, and they appended and incorporated by  
9 reference in that pleading a statement of claim from the  
10 health claims arbitration action below.

11 Now, the rules clearly set forth that one can  
12 incorporate by reference in a pleading another pleading or  
13 another document and that those documents shall be  
14 construed as part of the pleading. So that when the  
15 Plaintiffs here filed their Action to Nullify, which I agree  
16 and admit was misstyled -- it should have been styled as a  
17 declaration -- in essence, they complied with the rules of  
18 this Court, i.e. certainly Rule 301C and Rule -- well,  
19 primarily, Rule 301C in terms of what a pleading should be.

20 Rule 301C says that any pleading which contains a  
21 clear statement of the facts necessary to constitute a  
22 cause of action shall be construed that way without  
23 reference to form. That is actually not a direct quote.  
24 That is a paraphrase. The actual quote, which I am sure  
25 the Court is eminently familiar with, is that the -- this is

1 301(b) -- "The contents of a pleading or of an exhibit  
2 attached thereto or any part thereof may be adopted by  
3 reference." That is my point earlier about the  
4 incorporation by reference to the statement of claim, and  
5 further under sub-section C of 301, it states, "Any  
6 pleading which contains a clear statement of the facts  
7 necessary to constitute a casue of action shall be deemed  
8 sufficient without reference to mere form".

9 Now again, I agree that what the Plaintiffs  
10 should have done was to style the pleading that they  
11 filed timely as a declaration, but I would submit to this  
12 Court that the pleading that they filed could be construed  
13 and should, under justice, be construed to be in form --  
14 I'm sorry -- in substantance, if not in form, a declaration  
15 because what did they do? They attached to it and  
16 incorporated by reference the statement of claim from the  
17 Healt Claims Arbitration Office which set forth in 12  
18 pages specific facts, specific averments and specific  
19 causes of action against these Defendants.

20 That pleading was not only sufficient in form  
21 before the Health Claims Arbitration Office, but resulted  
22 in a quarter of a million dollar judgment in the Plaintiff's  
23 favor. So what is the distinction between Trenan and what  
24 we have here? Mainly this -- you have a here a pleading  
25 which was timely filed, but misstyled, and that is the most

1 important distinction with Trenan.

2 Now if we look at the analysis in Trenan, what do  
3 we find? We find that the Trenan Court specifically quoted  
4 from the case of State v. Barnes, and the quote is as  
5 follows. "Where there had been compliance with the  
6 substance of the requirements of statutes or rules by one  
7 party and the other party has not been prejudiced, we have  
8 held that technical irregularities will not be permitted to  
9 deprive persons of an opportunity to assert their legal  
10 rights." How is that important here? Nothing could be  
11 more important than to allow Dr. Osheroff to pursue the  
12 quarter of a million judgment that he won before the Health  
13 Claims Arbitration Office.

14 How have these Defendants been prejudiced because  
15 the Plaintiffs filed what they styled as an Action to  
16 Nullify instead of what they should have styled as a  
17 declaration? How have they been prejudiced? Have they not  
18 been told what the cause of action is? Of course they have.  
19 The statement of claim which was appended to that document  
20 and incorporated by reference clearly told them what the  
21 facts which he was alleging were; moreover, for three  
22 straight weeks, not 45 days prior to the filing of that  
23 pleading, they had litigated these exact same issues. So  
24 there is obviously no prejudice to the Plaintiffs -- I'm  
25 sorry -- to the Defendants because the pleadings was

1 misstyled.

2 Clearly the intent of the parties to prevent --  
3 I'm sorry -- was to preserve the appeal which the Defendants  
4 themselves filed, and that is another irony in this case.  
5 It is really the Defendants here that appealed. They filed  
6 an Action to Nullify to prevent that \$250,000 award from  
7 becoming a final judgment. Now, what does B-Y-2 say? It  
8 says that after the losing party files their Action to  
9 Nullify, the Plaintiff shall file and serve a declaration.

10 Why? What is the purpose of that rule? Because  
11 this is one of the unique circumstances where the Plaintiff  
12 has already won their award. The action is actually begun  
13 by the Defendant. When the Defendants in this case filed  
14 their Action to Nullify, that set up the file. That gave  
15 this case its civil action number. The only purpose of  
16 filing a declaration is because we know, as a matter of  
17 practical import, that Defendants cannot initiate an action.  
18 They initiated an Action to Nullify, but after all, a case  
19 must proceed first on a declaration and be put at issue by  
20 an answer. So for really practical purposes, the Plaintiff  
21 is required whether they won or lost to file a declaration  
22 which will then have the effect having the Defendant file  
23 an answer and put the case at issue. The purpose of the  
24 rule was certainly complied with here, in substance if not  
25 in technical form.

1                   Now, I would submit to Your Honor that certainly  
2 substantial compliance with the rule was had with the  
3 pleading that was timely filed. The Defendants have stated  
4 over and over again in their pleadings, and I was not in  
5 Court on May 2nd, but I would assume in open Court, that the  
6 Plaintiffs did not file a declaration on time, and they keep  
7 stressing the time rule, and my answer to that is the  
8 Plaintiffs filed a pleading which in substance is or should  
9 be construed as a declaration to do substantial justice,  
10 and that that certainly was filed timely; moreover, if the  
11 Defendants were really so concerned with form, they would  
12 not have told this Court that they were both so busy in  
13 trial that they could not file their memorandums of law  
14 with respect to that.

15                   Had the Defendants filed their memorandum of law  
16 within 15 days of the time that they received the  
17 Plaintiff's "Action to Nullify," they would have informed  
18 this Court and the Plaintiffs of the technical irregularity,  
19 i.e. that it should have been styled declaration instead of  
20 Action to Nullify, and then the Plaintiffs would have  
21 simply come in within the 30 days and said, "You are right.  
22 We will call it a declaration. We will add full names and  
23 addresses of the parties even though we all know who they  
24 are. We have all litigated this issue for three straight  
25 weeks, but we will go in and change it within the 30 days,"

1 but the Defendants did not want to do that because they are  
2 not really interested in substantial justice. What the  
3 Defendants are interested in doing is escaping from the  
4 \$250,000 award.

5 So instead they played coy with the Plaintiffs in  
6 this case and with this Court, and they told the Court that  
7 because they were both so busy in trial, they could not  
8 possibly file responsive pleadings before March 9th and  
9 walked through that Motion to Enlarge and got it signed by  
10 Judge Raker on the day they filed, without even giving the  
11 Plaintiff 15 days to respond to their Motion to Enlarge, and  
12 then what did they do? When it is too late for the  
13 Plaintiffs to then go back within the 30 day period and say,  
14 "Okay, we will call this a declaration," they then notify  
15 this Court and the Plaintiffs here that they had misstyped  
16 the pleading, and therefore, the entire quarter of a million  
17 dollar judgment should be ~~dismissed with prejudice.~~

18 Why is that unfair? For a number reasons.

19 First --

20 THE COURT: Wait a minute, Mr. Kahn. This is a  
21 short motion, and you have used just about all your time up.

22 MR. KAHN: All right. Let me move on to one other  
23 point, and then I will be finished.

24 THE COURT: Quickly.

25 MR. KAHN: Okay. We indicated to the Court in

1 the memorandum that was just recently filed that there is a  
2 whole series of cases culminating in Institutional  
3 Management Corporation. That case and its predecessors  
4 hold quite clearly that where an appeal is attempted to be  
5 perfected by an appealing party -- and actually what  
6 happened in International Management was that the Court made  
7 an oral opinion on one day, and it did not become a final  
8 judgment until about seven days later.

9 The Plaintiff in that case filed an order of  
10 appeal from the oral opinion, i.e. the judgment nisi rather  
11 than from what became the final judgment seven days later,  
12 and the Court of Appeals held specifically in that case that  
13 where the pleading is timely filed, i.e. within the 30  
14 day period, to perfect an appeal, the Court will ignore the  
15 text of the order and give effect to the intent of the  
16 party, and the Court of Appeals specifically directed the  
17 Court of Special Appeals to hear that appeal, and they go  
18 through in that case, and of course, the case is available  
19 to the Court to read.

20 All of the cases, and the cases are legion in the  
21 State of Maryland, which hold exactly that, i.e. where the  
22 intent of the party is clear, and the pleading simply  
23 contains a technical irregularity, the Court will ignore  
24 the text of the pleading and give effect to what the intent  
25 of the parties were in order to do substantial justice, and

1 all that we request of this Court is that it take into  
2 consideration what the substantial equities are in this  
3 case, what substantial justice requires, what the purpose  
4 of the rule requiring a declaration is, the fact that the  
5 Plaintiff filed in substance if not in form a declaration  
6 and permit these parties to have their day in Court.

7 THE COURT: Well, let me ask you this. You made  
8 one statement, and I may be missing something here. If Mr.  
9 Ehrmantraut and Mr. Scanlan lose their Action to Nullify,  
10 Dr. Osheroff still has a \$250,000 judgment, does he not?

11 MR. KAHN: Well, the whole case has to go up to  
12 a Jury trial. In other words, all we are asking this Court  
13 to do --

14 THE COURT: No, wait a minute. You did not  
15 answer my question.

16 MR. KAHN: Then I misunderstood.

17 THE COURT: Mr. Scanlan and Mr. Ehrmantraut have  
18 filed an action here to nullify the award.

19 MR. KAHN: Correct.

20 THE COURT: Okay. If they lose that, he still  
21 has a \$250,000 award, does he not?

22 MR. KAHN: I do not think so. The only way --

23 THE COURT: What does he have?

24 MR. KAHN: Well, the only way that they can lose  
25 the Action to Nullify is upon a Jury verdict in this case.

1 THE COURT: All right. The Jury says the health  
2 claim arbitration is fine.

3 MR. KAHN: Well in that case, yes. That --

4 THE COURT: Well, then the statement you made a  
5 minute ago is not being very candid with the Court to  
6 indicate that he is left with nothing. If he is  
7 successful in defeating their Action to Nullify, he walks  
8 out of here with a quarter of a million dollars, and maybe  
9 you do not think that is nothing, but I think that is a lot  
10 of money.

11 MR. KAHN: Your Honor, first of all, that award  
12 occurred after a three week trial on its merits --

13 THE COURT: I am not concerned about that, Mr.  
14 Kahn. You made a statement right here a minute ago that  
15 clearly indicated that you got problems about substantial  
16 justice and equity and everything, and if I do not set  
17 aside this, then he is going to be left with nothing, and  
18 I suggest to you that that certainly is an inaccurate  
19 statement because if you people convince the Jury that  
20 what happened over there was correct, he has \$250,000.

21 MR. KAHN: I think we are agreeing rather than  
22 disagreeing. My point simply is that if the Court does not  
23 reconsider, then Dr. Osheroff is left with nothing because  
24 the cause is dismissed. The Action to -- I think that is  
25 the effect of the Court's order. The Court dismissed this

1 case. The Action to Nullify was filed. The award does not  
2 become final at this point unless this matter goes before  
3 a Jury and is concluded by a verdict.

4 THE COURT: Well, they cannot get it set aside  
5 without the Jury doing it.

6 MR. KAHN: As matters presently stand, if Your  
7 Honor does not reconsider his ruling, Dr. Osheroff, in my  
8 opinion and certainly in the opinion of I think everybody  
9 in this room, is left with nothing, Your Honor. That is the  
10 effect of this Court's ruling because you have dismissed  
11 this case with the Action to Nullify filed, the arbitration  
12 award does not become a final judgment. He is left with  
13 nothing.

14 THE COURT: I think that the Action to Nullify  
15 is something that they have started.

16 MR. KAHN: That is correct. They filed an Action  
17 to Nullify the award from the arbitration panel --

18 THE COURT: Okay.

19 MR. KAHN: Having done that, the award from the  
20 arbitration panel cannot become a final judgment until the  
21 case is tried on its merits.

22 THE COURT: Well, you may have to deal with that.  
23 The only thing I dismissed was what the Plaintiff filed  
24 in this case.

25 MR. KAHN: Okay, and what --

1 THE COURT: If the whole case gets thrown out, I  
2 suggest to you that what happened over in Baltimore is the  
3 ruling.

4 MR. KAHN: Well, I can tell Your Honor that that  
5 is certainly not in our opinion the case, and I am sure the  
6 Defendants, if they are going to be candid with the Court,  
7 will tell you that in their opinion, your action has had  
8 the effect of ending Dr. Osheroff's case with prejudice  
9 against him. He will get nothing.

10 THE COURT: Is that right, Mr. Scanlan?

11 MR. SCANLAN: That is exactly correct, Your  
12 Honor, although there are some facts that I would like to  
13 address in my portion of the argument that may put a  
14 different light on that, but the ultimate bottom line  
15 answer is correct -- that if your ruling stands, as I  
16 believe it should, that Plaintiff has failed to comply with  
17 the Maryland rules to perfect his award, and he will be  
18 awardless as he should be.

19 THE COURT: All right. Let me hear from you, Mr.  
20 Scanlan, because I am running out of time here.

21 MR. SCANLAN: Yes sir, and I am going to be real  
22 brief because I do not want to cut into my colleague's  
23 time. I am sure Mr. Ehrmantraut is going to have something  
24 to say, and I think he will be more helpful to the Court  
25 than I could ever hope to be, but I would like to point

1 just a couple of things out.

2 One, Mr. Kahn suggests that the Defendants in  
3 this case appealed this verdict or judgment by the health  
4 claims panel. That is only partially true. We filed an  
5 Action to Nullify, but the pleadings, as I read them and  
6 as I am sure the Court's file indicates that Dr. Osheroff  
7 also rejected the award. At that point with two  
8 nullification actions having been filed, it was incumbent  
9 upon Dr. Osheroff under the Maryland rules to follow the  
10 Maryland rules, specifically, B-Y-4 that says in black and  
11 white and in no uncertain terms, "Once an Action to  
12 Nullify is brought, the Plaintiff must file a declaration  
13 within 30 days from the filing of that Action to Nullify".

14 He did not do so. We have filed a Motion Raising  
15 Preliminary Objection on that grounds and others. Because  
16 he did not do so, Your Honor has ruled favorably to us  
17 granting that Motion Raising Preliminary Objection, and that  
18 probably should have been the end of it.

19 The reason we are here today, as Your Honor is  
20 aware, is because the Plaintiff has filed a Motion to  
21 Reconsider, which I suggest is unfounded. You have ruled  
22 that the law of the case is that the Motion Raising  
23 Preliminary Objection was a good one, was granted, that he  
24 had filed to comply with the rules, i.e. Dr. Osheroff, and  
25 that the action is dismissed.

1           That action has been dismissed not through the  
2 veiled suggestions by Mr. Kahn of some kind of deviousness  
3 by the Defendants to coyness. It was through the  
4 inattention and the inaction of Dr. Osheroff and no one else.  
5 The rules required him to file a declaration, not to  
6 incorporate in some vague manner a statement of claim from  
7 Health Claims because that is not a pleading in this Court.  
8 That intention of Health Claims and the whole process, one  
9 that I am very familiar with and Mr. Ehrmantraut is  
10 intimately familiar with -- we do it every day, all the  
11 time -- the whole intent of the process, much to my chagrin  
12 sometimes, is to effect binding arbitration, not some  
13 intermediate step that sends things up to Circuit Court  
14 willy nilly. It is supposed to be binding, and the way that  
15 Dr. Osheroff was required to make it non-binding was not  
16 only to answer our Action to Nullify or to file his own, but  
17 to file a declaration 30 days within the time of the first  
18 filing of an Action to Nullify. He did not do so.

19           He was under a duty as, in essence, an appellant  
20 in that situation to perfect his award and to make the  
21 arbitration non-binding in that sense. To perfect the  
22 award and send it up to Circuit Court and try to get more  
23 money is what he really wanted. He did not do it. We did  
24 not do that to him. We were not under a duty to tell him  
25 or his lawyers what the Maryland rules were, but I believe

1 that this Court, according to Judge Gilbert in the cases  
2 we have cited in our memorandum, is under a duty to  
3 construe the rules for just what they are. The Constitution  
4 says they are the law of this state until the Court of  
5 Appeals say otherwise, and they have not. The Court of  
6 Special Appeals, through Judge Gilbert, and the Court of  
7 Appeals have repeatedly, time and time and time again,  
8 said they are precise rubrics, particularly when  
9 perfecting an appeal, and it is no excuse -- they are not  
10 an apographia, I think are Judge Gilbert's words, and they  
11 are not appendices. They are the law, and they must be  
12 followed precisely.

13 They have not been followed in this case by the  
14 Plaintiff, and his cause should be rejected. You did it  
15 once before, and I suggest you do it again. I finally,  
16 Your Honor, so that I hope I will preserve some time for  
17 my colleague, I would point once again to the case we have  
18 cited in our most recent submission, not the Trenan case,  
19 but the supplemental memorandum we supplied you with.

20 The Ohio Casualty case -- I happen to be  
21 unfortunately intimately familiar with that case for two  
22 reasons. One, my partner, Bill Nickerson, was the victim  
23 of an unkindly failure to perfect an appeal to which the  
24 other side suffered no more prejudice than we do in this  
25 case, and the Court of Special Appeals, affirmed later by

1 the Court of Appeals per Chief Judge Gilbert, said, "The  
2 rules are precise rubrics and even when Nickerson has to  
3 follow them".

4 Now, it is doubly unfortunate because in that  
5 case Judge Gilbert used my father's article on appellate  
6 advocacy to point out that my partner had to lose that  
7 appeal. Well, it is nice when the sword is double-edged,  
8 and I suggest the sword is double-edged and has finally  
9 come back to do me some good. I rely on the Ohio Casualty  
10 case, much as it pained me when it came out seven or eight  
11 years ago, and I suggest Your Honor follow it because it is  
12 no different than this case.

13 It is unfortunate perhaps that Dr. Osheroff did  
14 not take steps to perfect his award, but he rejected the  
15 award and had a duty to follow the appellate steps that  
16 allowed him to take that rejection up to the Circuit Court.  
17 I ask Your Honor to affirm your decision of several months  
18 ago or months ago, and sustain your former decision granting  
19 our Motion Raising Preliminary Objection.

20 We, Defendants, have a motion pending to strike  
21 their second amended declaration which, if Your Honor grants  
22 the Motion Raising Preliminary Objection, I think would  
23 become moot, although if you would like to hear from that  
24 later, I would be glad to address it.

25 THE COURT: Mr. Ehrmantraut?

1 MR. SCANLAN: Thank you, Your Honor.

2 MR. EHRMANTRAUT: Your Honor, I cannot improve on  
3 the presentation by Mr. Scanlan other than point out that  
4 you went over all these issues, and you granted the relief.  
5 Now, this a Motion to Reconsider. I see nothing new. The  
6 only thing different it appears to me is that the Trenan  
7 decision has come down, which certainly supports the ruling  
8 that you made previously.

9 Let me read just one brief sentence from Trenan.  
10 "If the award is in favor of the Claimant and the health  
11 care provider rejects the award and files a notice of Action  
12 to Nullify and thereafter the Claimant fails to file a  
13 complaint within the allotted the time, the arbitration  
14 award is nullified and the case is concluded," and that is  
15 exactly what we have here. They have failed to comply with  
16 the rules. Thank you, Your Honor.

17 MR. KAHN: Very briefly, Your Honor, if I may?

18 THE COURT: Go ahead.

19 MR. KAHN: Let me start with the last point that  
20 Mr. Ehrmantraut just made. I wholeheartedly agree with  
21 him that that is what Trenan says which brings me back to  
22 my point that if Your Honor does not reconsider, Dr.  
23 Osheroff has lost the quarter of a million dollar award  
24 that he initially got.

25 Secondly, Mr. Ehrmantraut still seems to be

1 missing the point because what we are saying here is if,  
2 indeed, Dr. Osheroff failed to file a timely pleading within  
3 30 days, indeed the award would be nullified, and that would  
4 be the end of the case. Our thrust here is that Dr.  
5 Osheroff substantially complied with the Maryland rule.  
6 What he filed, although technically misstyled, did in  
7 substance conform to the Maryland rules regarding a form of  
8 action and regarding a declaration.

9 What is not a declaration about what he filed?  
10 It simply does not contain the full names and addresses of  
11 the parties, and it simply does not call itself a  
12 declaration. If you look to the substance of what was  
13 filed, it is clearly a declaration. If you look to the  
14 intent of what it was, it was clearly a declaration.

15 Mr. Scanlan says that since Dr. Osheroff intended  
16 also to nullify the award, the duty became his to file a  
17 complaint. ~~I suggest it does not matter whether he filed~~  
18 ~~the Action to Nullify or not.~~ The duty would have been  
19 his to file a complaint in light of the fact that the  
20 Defendants filed an Action to Nullify.

21 Finally, I agree wholeheartedly with Mr. Scanlan.  
22 The rules are the law of the State of Maryland, and I would  
23 quote this rule to the Court, and it is Rule 320-A-4, which  
24 Mr. Scanlan I believe and Mr. Ehrmantraut wishes this Court  
25 would forget about, and that is as follows: "Defects

1 disregarding, the Court at every stage of the proceeding  
2 shall disregard any error or defect in process, pleadings  
3 or record which does not effect the substantial rights of  
4 the parties." Your Honor, what they filed was technically  
5 misstyled, but in substance it was a complaint. It was  
6 timely filed. This Court has the ability to disregard the  
7 errors or defects which it contained. The Court of Appeals  
8 has taught us in the Institutional Management Corporation  
9 decision and its predecessors that the Court shall freely  
10 ignore the text of a pleading if it was timely filed and the  
11 intent is clear.

12 What we are asking this Court to do is to give the  
13 Plaintiffs in this case the ability to amend the technical  
14 irregularities contained in their Action to Nullify, to call  
15 it a declaration, to put the full names and addresses of  
16 the parties on there if that is what the Defendants insist  
17 on and to have this case heard by a Jury, which after all  
18 is what the Defendants wanted when they filed their Action  
19 to Nullify.

20 THE COURT: Well Mr. Kahn, we have gone over here  
21 today essentially what I spent some time with back in May.  
22 Not only was this misnamed, what it contains in no way  
23 comports or complies with what is required by our rules in  
24 a declaration. If the Court of Appeals wants to decide  
25 that an Action to Nullify an HCA award is really a

1 declaration, well we certainly will accept that and go  
2 ahead and try this case, but they tell us that we are  
3 supposed to follow the rules, that lawyers are supposed to  
4 follow the rules, and one of our obligations in ruling on a  
5 matter such as this is that the rules are precise and must  
6 be followed, and the rule, in my opinion as I indicated  
7 back in May and I reiterate, which is very clear and precise  
8 was not followed in this case, so that your Motion to  
9 Reconsider in this matter is denied.

10 MR. KAHN: Your Honor, may I just have a point of  
11 clarification in order for the record to be correct? Has  
12 the Court, in its ruling today and on May 2nd, also set  
13 aside the arbitration award or is it simply acting on the  
14 Defendants' in this case Motion to Dismiss? In other words,  
15 has the arbitration award also been vacated? Because if so,  
16 we have an affidavit from Mr. Tabler that we would like to  
17 enter into the record, so that --

18 THE COURT: Well, all I am doing is reaffirming  
19 what I did back on May 2nd, and what the extend and effect  
20 of that, Mr. Kahn, is I think it is pretty clear that, as  
21 a result of the preliminary objection being sustained, the  
22 matter was dismissed, and I ordered the Clerk to enter  
23 judgment for Court, and that will be what will happen as a  
24 result of what I have done here today.

25 MR. KAHN: Your Honor, one other point, the

1 Plaintiffs in their request for reconsideration asked that  
2 if the ruling were to be adverse, in accordance with Lowe  
3 v. Bachman, whether the Court would explain how the  
4 conclusion was reached in a memorandum of opinion so the --

5 THE COURT: Well, there is a specific, Mr. Kahn,  
6 that requires us to do that. As far as I am concerned, I  
7 have complied with that rule by the statements that I made  
8 on May 2nd in open Court and that I have made just here.

9 It is very simply and very basic. If somebody  
10 wants to appeal this, I will have it transcribed, I will  
11 sign it, and that will be my memorandum of opinion.

12 MR. KAHN: Very well. Thank you, Your Honor.

13 (Whereupon, the hearing was concluded.)  
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C E R T I F I C A T E

DEPOSITION SERVICES, INC. hereby certifies that the attached pages represent an accurate transcript of the electronic sound recording of the proceedings in the Circuit Court for Montgomery County in the matter of:

LAW NO. 66024

RAPHAEL J. OSHEROFF

v.

CHESTNUT LODGE, INC.,  
MANUEL ROSS, M.D.  
C. WESLEY DINGMAN, M.D.

BY:

*E. Aleva Schneider*  

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E. Aleva Schneider  
Transcriber