

RAPHAEL J. OSHEROFF, M.D.

and

RAPHAEL J. OSHEROFF, M.D., INC.,

Plaintiffs,

vs.

ROBERT GREENSPAN, M.D.,

STEVEN TOLKAN, M.D.,

PRINCE WILLIAM DIALYSIS FACILITY, INC.,

and

MARGARET HESS,

Defendants.

IN CHANCERY NO. 11345

FILED
CLERK OF COURT
CITY OF ALEXANDRIA
FEB 9 12 30 PM '83
BY EDWARD G. ...
CREDIT CLERK

MEMORANDUM OPINION

In this chancery cause the complainants seek damages, equitable relief, counsel fees and costs. The complainant, Raphael J. Osheroff, M.D., hereinafter referred to as Dr. Osheroff, is a physician who practices nephrology primarily in the City of Alexandria. The complainant, Raphael J. Osheroff, Inc., hereinafter referred to as Osheroff, Inc., is a professional corporation. The defendants, Robert Greenspan, M.D., hereinafter referred to as Dr. Greenspan, and Steven Tolkan, M.D., hereinafter referred to as Dr. Tolkan, are physicians who practice nephrology in Northern Virginia. The defendant, Prince William Dialysis Facility, Inc., is a Virginia corporation operating a dialysis facility in Woodbridge, Virginia, of which Dr. Greenspan is president and sole stockholder. The defendant, Margaret Hess, hereinafter referred to as Nurse Hess, is a registered nurse and a former staff member of the Northern Virginia Dialysis Center in Alexandria. The complainants contend that the defendants have interfered with and damaged their professional and business

interests and that Dr. Greenspan and Dr. Tolkan have attempted to take over the practice of Dr. Osheroff.

THE FACTS

Dr. Osheroff, a board-certified nephrologist, opened his practice in Northern Virginia in 1972. At the outset, the practice consisted of an office and the provision of dialysis services in local community hospitals. By 1977, Dr. Osheroff was operating the Northern Virginia Dialysis Center in Alexandria, which had approximately eighty-five patients, and another center in Fredericksburg. He also held a license to open a third facility in Warrenton.

On October 1, 1977, Dr. Osheroff entered into a consulting and profit sharing agreement with National Medical Care, Inc., a national corporation which specializes in the management of renal dialysis centers. Pursuant to this agreement, National Medical Care purchased Dr. Osheroff's dialysis center in Alexandria, the center in Fredericksburg and his certificate of need for a facility in Warrenton. National Medical Care retained Dr. Osheroff as Medical Director for these facilities and as compensation therefor he was to be paid forty percent of the net income of the centers. As part of the agreement, Dr. Osheroff retained the exclusive right to payment for physician's services rendered to patients in the dialysis centers and the right to choose the physicians who practiced in the centers. In order to open his own separate facility in Prince William County, Dr. Osheroff was required to obtain the consent of National Medical Care and a waiver from another National Medical Care affiliate which had the right of first refusal to establish a new unit in this area. But for intervening events, Dr. Osheroff probably could have obtained both the consent and the waiver.

After the sale of the dialysis centers to National Medical Care, Inc., Dr. Osheroff established a professional corporation and practiced as Raphael J. Osheroff, M.D., Inc. Thereafter, he maintained his office practice, operated the Northern Virginia Dialysis Center and made renal consults in Northern Virginia hospitals.

In June of 1978, Dr. Osheroff engaged Dr. Greenspan, a board-certified nephrologist, as an employee of Osheroff, Inc. to assist Dr. Osheroff in his medical practice. Dr. Greenspan's initial salary was \$45,000.00 per annum, and it was agreed that he would become a partner in the practice in two years. Shortly thereafter, Dr. Tolkan, a board-certified nephrologist, was employed with the understanding that he would be a salaried employee of Osheroff, Inc. His beginning salary was \$40,000.00; however, he was not offered the prospect of a partnership.

Although Dr. Greenspan and Dr. Tolkan did not sign written employment contracts with Osheroff, Inc., a written employment contract containing, among other things, a covenant not to compete was submitted to Dr. Greenspan for his consideration and he was made aware that Dr. Osheroff and his attorney desired a non-competitive arrangement. Dr. Greenspan was dissatisfied with the proffered contract and declined to sign it.

During the summer and fall of 1978, Dr. Osheroff became severely depressed and was seen by several psychiatrists as an outpatient. As his condition grew worse, Dr. Osheroff was unable to perform his share of the work and gradually withdrew from the practice. Both Dr. Greenspan and Dr. Tolkan were aware that Dr. Osheroff was suffering from a severe depression. Dr. Greenspan encouraged Dr. Osheroff to enter a hospital for treatment. Dr. Osheroff and Dr. Greenspan enjoyed a close 1878 personal relationship, and Dr. Greenspan assured Dr. Osheroff

that he would maintain the medical practice until Dr. Osheroff recovered from his depression and could resume his practice. This representation was also made to Dr. Osheroff's attorneys and accountant. Dr. Greenspan discussed his commitment to Dr. Osheroff with Dr. Tolkan and Dr. Tolkan also agreed to stay on and maintain the practice until the return of Dr. Osheroff. When Dr. Osheroff's condition continued to deteriorate, Dr. Greenspan threatened to leave the practice unless Dr. Osheroff entered a hospital for treatment.

On January 2, 1979, Dr. Osheroff voluntarily admitted himself to Chestnut Lodge, a private psychiatric hospital in Rockville, Maryland, for treatment of his depression. Dr. Osheroff was accompanied on the drive to the hospital by his stepfather, Louis Bader, and Dr. Greenspan. During the trip, Dr. Greenspan assured Dr. Osheroff several times that he would maintain the practice while Dr. Osheroff was away.

At the time of Dr. Osheroff's admission to Chestnut Lodge, an informal understanding was reached between Dr. Osheroff and the Chestnut Lodge personnel that Dr. Greenspan would be kept informed of the progress being made in the treatment of Dr. Osheroff and that Dr. Greenspan was to be included in the treatment plan discussions just as if he were a member of Dr. Osheroff's family.

When Dr. Osheroff was admitted to Chestnut Lodge, Dr. Greenspan was under the impression that Dr. Osheroff would be hospitalized for a period of six to twelve months. As time passed, he concluded that the period of hospitalization probably would be for longer than a year.

Within a day or two of Dr. Osheroff's admission to Chestnut Lodge, his attorney, Arnold Westerman, arranged a meeting at his office with Dr. Osheroff's former wife, Dr. Joy Osheroff,

Dr. Greenspan and Frank Notaris, Dr. Osheroff's accountant, to discuss the continued operation and management of Dr. Osheroff's practice. During the course of the meeting, Dr. Joy Osheroff and Dr. Greenspan assured Mr. Westerman that Dr. Osheroff would receive good medical treatment at Chestnut Lodge and that its nearby location would enable Dr. Osheroff to maintain contact with his practice and friends. It was agreed that Dr. Greenspan would make all of the medical decisions regarding the practice. Dr. Greenspan also agreed to take over the medical aspects of the business and told Arnold Westerman that he would act as a trustee and fiduciary for Dr. Osheroff while he was away. It was also agreed at this meeting that Frank Notaris and several trusted employees would be responsible for Dr. Osheroff's financial matters, and that Arnold Westerman would be available for consultation, if needed.

During the aforesaid meeting, mention was made of a possible sale of Dr. Osheroff's practice and Arnold Westerman and Frank Notaris stated to Dr. Greenspan that if a sale of the practice took place, Dr. Greenspan would be given the first opportunity to purchase it; however, both Arnold Westerman and Frank Notaris felt they should wait and see whether Dr. Osheroff improved before considering a sale.

After Dr. Osheroff had been a patient at Chestnut Lodge for approximately two months, the staff and Dr. Greenspan became concerned about the frequent telephone calls that Dr. Osheroff was making to his family, Dr. Greenspan and others connected with his business. The consensus was that the calls were too numerous and counter-productive. As a result, a decision was made by the staff to limit Dr. Osheroff's telephone privileges to a weekly call from Dr. Greenspan to discuss the status of the practice and a weekly call from Dr. Osheroff's parents. Dr. Osheroff was also permitted to talk from time to

time with his attorney and accountant.

During Dr. Osheroff's hospitalization, Frank Notaris frequently visited Dr. Osheroff's office to check on the status of the practice. He often spoke to Dr. Greenspan while on these visits. In early 1979, Dr. Greenspan began pressing Frank Notaris to provide him the numbers involved in a sale of the practice. Dr. Greenspan gave Frank Notaris the impression that he had concluded that Dr. Osheroff was not going to return to the Northern Virginia Dialysis Center as a well man, and that, therefore, he should begin discussing the terms of a sale.

During Dr. Osheroff's confinement at Chestnut Lodge, his physical and mental condition deteriorated drastically. Dr. Osheroff spoke to Dr. Greenspan on the telephone and complained about the poor treatment he was receiving, and asked Dr. Greenspan to arrange his release from Chestnut Lodge. Dr. Greenspan reassured Dr. Osheroff by telling him that Chestnut Lodge would make him happy and that he would take care of everything for him.

After Dr. Osheroff entered Chestnut Lodge, Dr. Greenspan saw all of the new patients and any renal consults who came into the office. Dr. Tolkan continued his earlier practice of visiting all of the patients in the outlying hospitals. Dr. Tolkan was given an annual raise of \$20,000.00 after his request therefor was forwarded by Dr. Greenspan to either Arnold Westerman or Frank Notaris. Dr. Greenspan's salary was increased from \$45,000.00 to \$100,000.00, although Dr. Greenspan never mentioned it to Dr. Osheroff.

After Dr. Osheroff was hospitalized, Dr. Greenspan and Pat Shine, Administrator of the Northern Virginia Dialysis Center, interviewed Peggy Hess for the position of Head Nurse at the Northern Virginia Dialysis Center. Nurse Hess accepted the position and began work on April 10, 1979.

In March 1979, Dr. Greenspan was appointed Acting Medical Director of the Northern Virginia Dialysis Center and the Fredericksburg Dialysis Center. This was accomplished as the result of a letter written to Constantine L. Hampers, M.D., President of National Medical Care, Inc., by Dr. Greenspan and signed by Dr. Osheroff at the request of Dr. Greenspan, which confirmed the fact that Dr. Greenspan was associated with Dr. Osheroff in the practice of medicine. The purpose of this arrangement was to protect Dr. Osheroff's rights under his contract with National Medical Care, Inc. and to give Dr. Greenspan the right of first refusal to negotiate with National Medical Care, Inc. in the event Dr. Osheroff was disabled and unable to return to his practice.

During the approximately seven months that Dr. Osheroff was a patient at Chestnut Lodge, Dr. Greenspan visited him on three occasions, the last of which was on or about March 23, 1979. Neither Dr. Tolkan nor any other member of the staff visited Dr. Osheroff.

On March 19, 1979, Dr. Greenspan, acting for the medical staff, promulgated bylaws for the medical staff of the Northern Virginia Dialysis Center. Unlike Dr. Osheroff's contract with National Medical Care, Inc., which gave Dr. Osheroff the right to admit physicians of his choice to practice in the Center, the bylaws restricted membership on the medical staff to staff members of the George Washington University Medical Center. Dr. Greenspan did not discuss these bylaws with anyone other than Pat Shine and their existence was unknown to Dr. Osheroff until the trial of the suit brought by Dr. Greenspan and Dr. Tolkan against Dr. Osheroff in the federal court

In early 1979, Dr. Greenspan began considering the possible need for a new dialysis center in the Woodbridge area of Prince William County. The severe winter weather made it

difficult for patients living in that area to obtain transportation to Alexandria, and Dr. Greenspan was aware of efforts by other doctors to establish a new unit in the Woodbridge area, which would have an adverse impact on the Alexandria practice. At the outset, Dr. Greenspan intended that the new center be a part of Dr. Osheroff's practice. Dr. Greenspan discussed the matter with Dr. Tolkan, who concurred in the desirability of a Prince William unit and decided to participate in its operation.

In July 1979, Dr. Greenspan inquired of Dr. Constantine L. Hampers to learn the reaction of National Medical Care, Inc. to Dr. Greenspan's proposal to open a new facility in Woodbridge. Initially, Dr. Hampers told him that National Medical Care, Inc. could interpose no objection; however, later in the summer Dr. Hampers changed his mind and decided that Dr. Greenspan should be bound by the non-competition clause in Dr. Osheroff's contract with National Medical Care, Inc. In September 1979, Dr. Hampers informed Dr. Greenspan that he thought Dr. Greenspan was in violation of Dr. Osheroff's contract with National Medical Care, Inc.

In July of 1979, Dr. Greenspan discussed the Prince William application with Dr. Osheroff's attorney, Arnold Westerman, and told him that the application was being made in Dr. Greenspan's name instead of Dr. Osheroff's because Dr. Osheroff was not available to handle the details. Dr. Greenspan assured Westerman that the application was Dr. Osheroff's and that it would be held for him. Dr. Greenspan also told Arnold Westerman that National Medical Care, Inc. had waived its right to object to the proposed unit under the non-competition clause of its contract with Dr. Osheroff, when in fact such was not the case.

Dr. Greenspan also discussed the application for a Prince William facility with Frank Notaris. Dr. Greenspan told Notaris that he was precluded from filing the application in the

name of Osheroff, Inc. by the terms of Dr. Osheroff's contract with National Medical Care, Inc. and that he was filing the application to forestall competition from another nephrology group. Dr. Greenspan gave Frank Notaris the impression, however, that the new unit would be jointly operated with Dr. Osheroff.

On September 7, 1979, Dr. Greenspan filed the application for a certificate of need for a dialysis center in Woodbridge, using information gleaned in large measure by virtue of his position as Acting Medical Director of the Northern Virginia Dialysis Center and as an employee of Dr. Osheroff. The letters written in connection with the application were all written on Northern Virginia Dialysis Center stationery and were signed by Dr. Greenspan in his capacity as Acting Medical Director. The course of action followed by Dr. Greenspan in pursuing the application led those acting on behalf of Dr. Osheroff to believe that the application was being made for the benefit of Dr. Osheroff.

On November 12, 1979, the Board of Directors of the Health Systems Agency, the regional planning agency responsible for reviewing applications for new health care facilities, met and approved the application. On January 8, 1980, the State Health Commissioner granted a certificate of need to Prince William Dialysis Facility, Inc., a Virginia proprietary corporation, the stock of which is wholly owned by Dr. Greenspan. Unlike the Northern Virginia Dialysis Center, the Prince William Dialysis Facility is an open unit which permits all physicians to treat their patients there.

During the time that Dr. Osheroff was a patient at Chestnut Lodge, negotiations were initiated for the sale of Dr. Osheroff's practice to Dr. Greenspan. Although his attorney did not believe him to be mentally incompetent, guardians were

1884

appointed to protect Dr. Osheroff's interests. A meeting was held on August 21, 1979, between Dr. Osheroff's guardians, H. Bradley Evans and Louis Bader, Dr. Osheroff's attorney, Arnold Westerman, Dr. Osheroff's accountant, Frank Notaris, and Dr. Greenspan and his attorney, Lawrence Rubin, for the purpose of discussing a possible sale of the practice. The guardians favored a partnership arrangement that would permit Dr. Osheroff to return to the practice; however, Dr. Greenspan refused to enter into any partnership arrangement with Dr. Osheroff. A firm proposal for the sale of the practice was not made on behalf of Dr. Osheroff to Dr. Greenspan or his attorney and the meeting concluded with the understanding that Dr. Greenspan and his attorney would be provided additional financial information about the practice.

By the summer of 1979, Dr. Osheroff's physical and mental condition had deteriorated drastically. Concerned about the situation, Louis Bader conferred with a psychiatrist in Washington, D.C. and the decision was made to transfer Dr. Osheroff to Silver Hill, a psychiatric facility in New Canaan, Connecticut. Dr. Osheroff was admitted on August 1, 1979, and within a short time thereafter, he began to show marked signs of improvement. After several weeks at Silver Hill, Dr. Osheroff made a weekend visit to Washington, D.C. during which he consulted a psychoanalyst who agreed to see him upon his release from Silver Hill and met with his attorney to discuss termination of the guardianship. On November 1, 1979, the guardianship was terminated and Dr. Osheroff was discharged from Silver Hill.

Following his discharge from Silver Hill, Dr. Osheroff returned to the Washington area and prepared to resume the active practice of medicine by visiting the Northern Virginia Dialysis Center, reviewing patients' charts and reading current literature

on medications. He did not, however, actually make rounds or give orders for medication prior to December 12, 1979.

In November 1979, Dr. Osheroff met Dr. Greenspan for lunch to discuss Dr. Osheroff's return to practice. When Dr. Osheroff said he was feeling well and wished to come back to the practice, Dr. Greenspan responded by saying that Dr. Hampers wished for him to sell the practice to Dr. Greenspan. The conversation was then terminated by the departure of Dr. Greenspan, who had been paged to see a patient.

Following a visit to the Northern Virginia Dialysis Center by Dr. Osheroff in November 1979, a meeting of the staff was held at which Dr. Osheroff's return was discussed. During this meeting, Nurse Hess stated that Dr. Osheroff was incompetent. She further stated that she did not want to work for Dr. Osheroff and that if he did return, she would stay long enough to see all the nurses transferred and then she would leave. In response to a question about whether the staff could do anything to prevent Dr. Osheroff's return, Nurse Hess stated that they could write a petition refusing to work for Dr. Osheroff, but that she could not initiate it because she was the head nurse. This resulted in the petition alleging Dr. Osheroff's incompetence which was circulated on December 12, 1979.

On November 15, 1979, Dr. Greenspan met with Dr. Constantine L. Hampers at National Airport. Dr. Hampers told Dr. Greenspan that he wanted him to turn over the Woodbridge facility to National Medical Care and operate it as partners. Dr. Hampers also expressed his concern over the fact that Dr. Greenspan had made application for a new facility in northeast Washington, which would be a competing unit. Dr. Greenspan told Dr. Hampers that, if he were made the permanent medical director of the Virginia facilities, he would consider

turning over the northeast Washington and the Woodbridge facilities to National Medical Care, Inc. Dr. Hampers informed Dr. Greenspan that he would have to talk to Dr. Osheroff to determine how well he was before deciding whether to consider Dr. Greenspan for the permanent medical directorship. Dr. Greenspan then asked Dr. Hampers to use whatever influence he had to convince Dr. Osheroff to sell his practice to Dr. Greenspan. When Dr. Hampers responded that Dr. Osheroff would have to decide that for himself, Dr. Greenspan stated that Dr. Hampers' decision not to reappoint Dr. Osheroff as Medical Director would weigh heavily on Dr. Osheroff's decision to sell. Dr. Hampers then said he would not enter into collusion to force Dr. Osheroff to sell. Whereupon, Dr. Greenspan told Dr. Hampers that if Dr. Osheroff didn't sell, he would take the patients from Dr. Osheroff anyway.

On November 19, 1979, Dr. Greenspan filed an application for a new dialysis center in Montgomery County, Maryland, on which he listed himself as Co-Medical Director and Chief Executive and listed Dr. Tolkan as a staff member. Neither Dr. Greenspan nor Dr. Tolkan told Dr. Osheroff about this application.

On or about November 20, 1979, Dr. Osheroff offered to make rounds at the Northern Virginia Dialysis Center because Dr. Greenspan was scheduled to be away and Dr. Tolkan was occupied at the hospital. Dr. Osheroff called Dr. Tolkan at the hospital to tell him he would make rounds, and Dr. Tolkan responded that he was not to do so. Dr. Tolkan then called Dr. Greenspan who in turn called Dr. Hampers in Boston to apprise him of the situation. Dr. Greenspan then went to the Northern Virginia Dialysis Center and informed Dr. Osheroff that he could not make rounds, whereupon Dr. Osheroff left the Center.

After being told that he could not make rounds, Dr. Osheroff called Dr. Hampers and arranged a meeting. They met on November 30, 1979, and discussed Dr. Osheroff's reinstatement as Medical Director. During this meeting, Dr. Osheroff learned about Dr. Greenspan's activities in setting up competing facilities and of his request that Dr. Osheroff not be reappointed as Medical Director. It was decided during this meeting that Dr. Greenspan should be terminated as Acting Medical Director. After satisfying himself that Dr. Osheroff was competent to resume the practice of medicine, Dr. Hampers wrote to Dr. Osheroff on December 6, 1979, and formally reinstated him as Medical Director of the Northern Virginia Dialysis Center.

On December 3, 1979, Dr. Greenspan filed an application for the Northeast Washington Dialysis Facility on which he listed himself and Dr. Tolkan as doctors for the facility. Neither Dr. Greenspan nor Dr. Tolkan informed Dr. Osheroff of this application. Unlike the application for the Prince William facility, the northeast Washington and Montgomery County applications did not refer to Dr. Greenspan's position as Acting Medical Director of the Northern Virginia Dialysis Center and did not contain letters of support written on Northern Virginia Dialysis Center stationery. This procedure was followed at the suggestion of Dr. Greenspan's attorney to make it clear that these two facilities were not to be affiliated with Dr. Osheroff.

On December 12, 1979, Arnold Westerman and Dr. Osheroff met at length with Dr. Greenspan for the purpose of negotiating a mutually satisfactory arrangement. After protracted discussions, Dr. Greenspan refused to enter into a partnership agreement with Dr. Osheroff and he was then told that his services were being terminated. During the course of these conversations, 1888
Dr. Greenspan told Dr. Osheroff that he had already made a call

to make sure that Dr. Osheroff would not be able to practice medicine in the area again and that he was going to lose everything he had unless he sold his practice to Dr. Greenspan.

Prior to December 12, 1979, Dr. Donald D. Haut, Chief of the Department of Medicine at the Alexandria Hospital, inquired of Dr. Greenspan about Dr. Osheroff's status and requested that Dr. Greenspan notify him if Dr. Osheroff intended to resume his practice and admit patients to the Alexandria Hospital.

On December 12, 1979, Dr. Greenspan telephoned Dr. Haut and informed him that Dr. Osheroff intended to resume his practice. Thereupon, Dr. Haut called Dr. Osheroff and summarily suspended his privileges at the Alexandria Hospital. Dr. Haut confirmed the telephonic suspension by letter on December 13, 1979.

On December 12, 1979, Dr. Greenspan called Dr. Tolkan at the hospital while he was making rounds and told him of his firing. Thereafter, Dr. Tolkan met with Dr. Osheroff and Arnold Westerman who asked him to continue working for Dr. Osheroff. Dr. Tolkan also met with Dr. Greenspan in an office Dr. Greenspan had rented on the first floor of the same building in which the Northern Virginia Dialysis Center was located. After expressing concern about Dr. Osheroff's medical competence, Dr. Tolkan declined the offer to remain with Dr. Osheroff and elected to join Dr. Greenspan.

After the negotiations of December 12 culminated in the firing of Dr. Greenspan and the resignation of Dr. Tolkan, they were both told by Arnold Westerman that they could no longer use the facilities or enter the dialysis unit. They then opened their own practice in the office Dr. Greenspan had rented. Martha Hall, a long-time employee of Dr. Osheroff, resigned and was employed by Dr. Greenspan. With the knowledge of Dr. Greenspan and Dr. Tolkan, she began telephoning patients to notify them

that Drs. Greenspan and Tolkan were in a new location and to inquire whether they wished to continue being treated by Drs. Greenspan and Tolkan. Several of Dr. Osheroff's other employees, including all of his acute technicians, resigned and were employed by Drs. Greenspan and Tolkan.

Notwithstanding the admonition of Arnold Westerman, Dr. Greenspan and Dr. Tolkan continued to see patients and make rounds in the unit for about two weeks after December 12, 1979. They ceased making rounds only after they were threatened with arrest.

After he was fired and opened his own office, Dr. Greenspan drafted the following form and had it typed by one of his employees on Northern Virginia Dialysis Center stationery:

TO WHOM IT MAY CONCERN:

I, _____, currently a patient
Name of Patient
undergoing chronic hemodialysis at the Northern Virginia
Dialysis Center, do hereby declare that I will not
accept any medical services from Raphael J. Osheroff, M.D.
and am under the care of Robert E. Greenspan, M.D. for
any and all medical services associated with my therapy
at the Northern Virginia Dialysis Center in Alexandria,
Virginia.

Signature of Patient

Date Signed

Signature of Witness

Dr. Greenspan distributed the form to patients in the dialysis center, discussed it with them and suggested they should sign it if they preferred to have Dr. Greenspan continue treating

them. This was done while many of the patients were undergoing dialysis and many of the patients became upset over the situation.

Although it is unclear whether Dr. Tolkan participated in the drafting or circulation of the form, he nevertheless discussed it with several of the patients and told some of them that he and Dr. Greenspan were going to bring suit in the federal court in order to obtain privileges in the unit.

Nurse Hess acted as a witness to the execution of the forms, and in one instance provided a form to a patient who didn't have one. Although she was still acting as Head Nurse, Nurse Hess did not discuss the patient forms with Dr. Osheroff.

Section V of the Principles of Medical Ethics of the American Medical Association, which was excerpted from the American Medical Association Code of Ethics, prohibits the solicitation of patients by physicians. Solicitation is defined elsewhere as the use of "undue influence or pressure to obtain patients." Dr. Greenspan violated this prohibition by drafting the form in the language he chose, having it printed on Northern Virginia Dialysis Center stationery and presenting it to patients for execution while they were undergoing treatment.

A hearing was held by the Executive Committee of the Alexandria Hospital on December 27, 1979, to determine if Dr. Osheroff's privileges should be restored. Dr. Greenspan testified and expressed the opinion that Dr. Osheroff was not competent to practice medicine, buttressing his opinion with references to incidents he considered to be irregular and letters from the staff of the Northern Virginia Dialysis Center which had been written in connection with Dr. Osheroff's return as Medical Director of the Northern Virginia Dialysis Center. Dr. Tolkan also testified and concurred in the opinion that Dr. Osheroff was not competent to practice. At the conclusion of the hearing,

the Executive Committee required that Dr. Osheroff be evaluated by an independent psychiatrist. After considering the evaluation on January 15, 1980, the Executive Committee terminated the suspension of Dr. Osheroff's clinical privileges.

On December 18, 1979, Dr. Greenspan and Dr. Tolkan filed suit against Dr. Osheroff and Osheroff, Inc. in the United States District Court for the Eastern District of Virginia seeking a temporary and permanent injunction to permit them staff privileges at Northern Virginia Dialysis Center, Incorporated, to treat patients on dialysis machines, injunctive relief against alleged antitrust violations and treble damages for violation of the antitrust laws. The Federal Court bifurcated the antitrust claims and held an expedited evidentiary hearing on the prayer for a permanent injunction, at the conclusion of which the prayer was denied. In the memorandum opinion and order that followed the hearing the Court concluded that there had been no deprivation of the plaintiffs' constitutional rights, that the patients being treated at the Northern Virginia Dialysis Center were Dr. Osheroff's and not Dr. Greenspan's or Dr. Tolkan's, and that Dr. Greenspan's reliance on the bylaws he had promulgated was misplaced. The Court also concluded that Dr. Osheroff had ample cause to summarily discharge Dr. Greenspan. The antitrust charges were voluntarily dismissed by the plaintiffs.

The controversy between Dr. Osheroff and Drs. Greenspan and Tolkan became the subject of extensive newspaper publicity at about the time of the trial of the lawsuit brought against Dr. Osheroff by Drs. Greenspan and Tolkan in the Federal Court. The newspaper articles were about the trial in the Federal Court and the situation at the Northern Virginia Dialysis Center. Some of these articles seriously disturbed Dr. Osheroff because they contained statements about his professional competence and mental health which he considered to be derogatory.

It should be noted that the article published in the Alexandria Journal on March 12, 1980, entitled "Half of Dialysis Center Nurses Quit" was admitted into evidence for the limited purpose of showing that publicity was generated by the controversy and was not re-offered during or following the testimony of Nurse Hess. Thus, the Court was not called upon to rule whether a sufficient showing had been made that Nurse Hess was the source of the comments in the article.

After Dr. Greenspan and Dr. Tolkan opened their own office, Nurse Hess and two other nurses in the Northern Virginia Dialysis Center communicated on a daily basis with Dr. Greenspan and Dr. Tolkan about the patients at the Center. This communication continued until all three nurses left employment at the Center on March 5, 1980, and went to work for Dr. Greenspan and Dr. Tolkan.

Approximately thirty of the chronic hemodialysis patients of the Northern Virginia Dialysis Center transferred to the Prince William Dialysis Facility when it opened in June 1980.

CONCLUSIONS OF LAW

COUNTS I AND II

In Counts I and II the complainants allege that the defendants concerted together for the purpose of willfully and maliciously injuring the complainants in their reputation, trade, business and profession in violation of Virginia Code Sections 18.2-499 and 18.2-500. These statutes provide in pertinent part as follows:

§ 18.2-499. - (a) any two or more persons who shall combine, associate, agree, mutually undertake or concert together for the purpose of willfully and maliciously injuring another in his reputation, trade, business or profession by any means whatever, . . . shall be jointly and severally guilty of a Class 3 misdemeanor. Such punishment shall be in addition to any civil relief recoverable under § 18.2-500.

(b) any person who attempts to procure the participation, cooperation, agreement or other assistance of any one or more persons to enter into any combination, association, agreement, mutual understanding or concert prohibited in subsection (a) of this section shall be guilty of a violation of this section and subject to the same penalties set out in subsection (a) hereof.

§ 18.2-500. - (a) any person who shall be injured in his reputation, trade, business or profession by reason of a violation of § 18.2-499, may sue therefor and recover three-fold the damages by him sustained, and the costs of suit, including a reasonable fee to plaintiff's counsel; and without limiting the generality of the term "damages" shall include loss of profits.

There are no reported decisions of the Virginia Supreme Court construing Code Sections 18.2-499 and 18.2-500. The lack of State case law, coupled with the nonexistence of any recorded legislative history, poses a dilemma for the Court when trying to fathom the purpose and scope of this statute. There are, however, several federal decisions interpreting the statute. In Federated Graphics v. Napotnik, 424 F.Supp. 291 (E.D.Va. 1976) the Court stated that the statute provides a remedy for wrongful conduct directed at one's business, not one's person, and that the statute does not codify common law actions. See also Moore v. Allied Chemical Corp., 480 F.Supp. 364 (E.D.Va. 1979). In Falwell v. Penthouse International, Ltd., 521 F.Supp. 1204 (W.D.Va. 1981) the Court concluded that the allegations of the complaint did not state a viable claim under Code Sections 18.2-499 and 18.2-500 because there was no basis for the general allegation that any of the defendants conspired for the specific purpose of injuring the plaintiff. The Court noted that the plaintiff had alleged no facts or circumstances which even remotely suggested that the defendants acted for any more sinister purpose than to sell magazines.

In order to recover for a violation of Code Section 18.2-499(a) the complainants must prove that (1) two or more of the defendants acted in concert (2) for the purpose of willfully and maliciously damaging the complainants in their reputation, trade, business or profession and (3) that the reputation, trade, business or profession of the complainants was in fact injured.

In my view of this case, the liability of the defendants under Counts I and II depends on whether they acted with the specific intent to injure the complainants in their business or profession, and if so, whether they acted willfully and maliciously. Keeping in mind that the gist of Counts I and II is a violation of a criminal statute to which severe civil penalties are attached, I would construe the statute to require proof of actual malice or malice in fact as contrasted to legal malice. Actual malice, or malice in fact, may be established by showing that a person acted out of a sinister or corrupt motive such as hatred, personal spite, ill will, or a desire to injure the plaintiff. On the other hand, legal malice may be established by showing that the actor lacked legal excuse or justification for his actions. This construction of the statute equates the test for treble damages with the common law definition of actual malice.

My assessment of the evidence has led me to the conclusion that Nurse Hess did not act out of a malevolent desire to injure Dr. Osheroff or his professional corporation in their business or profession. Notwithstanding the fact that some of her actions demonstrated questionable judgment, I am persuaded that Nurse Hess was motivated by a desire to fulfill what she deemed to be her professional responsibilities as a nurse. Thus, Nurse Hess was not party to a conspiracy proscribed by the statute.

Dr. Tolkan's motive or purpose is not as easily discernable as that of Nurse Hess. Not only did he have a substantial stake in the outcome of the maneuverings between Dr. Greenspan and Dr. Osheroff, but he also elected to join Dr. Greenspan when confronted with the choice of practicing with either Dr. Osheroff or Dr. Greenspan. Nevertheless, I have concluded that Dr. Tolkan acted not out of a malicious desire to damage Dr. Osheroff's practice, but rather for the purpose of fostering his own practice and rendering proper medical care to his patients. Inasmuch as these were legitimate ends, Dr. Tolkan was not party to an illegal conspiracy.

Although Dr. Tolkan and Nurse Hess may have been the unwitting accomplices of Dr. Greenspan and engaged in conduct which adversely affected the business or profession of Dr. Osheroff, the Court has found that neither of them maliciously conspired with another for the specific purpose made illegal by the statute. It follows, then, that since the complainants have failed to prove that two or more of the defendants engaged in an illegal conspiracy, there has been no violation of Code Section 18.2-499 (a).

The complainants contend that, even if Dr. Tolkan and Nurse Hess are innocent of violating the statute, Dr. Greenspan still must respond in treble damages because he violated subparagraph (b) of Code Section 18.2-499, which penalizes anyone who attempts to procure any other person to participate in a conspiracy prohibited by subparagraph (a). My research has failed to disclose any cases, state or federal, concerning subparagraph (b), and its meaning is even more enigmatic than that of subparagraph (a).

I read the statute to mean that Dr. Greenspan must have been motivated by a malicious desire to harm Dr. Osheroff and his professional corporation in their business or profession in order

to have violated either subparagraph (a) or (b) of Code Section 18.2-499. As in the case of Dr. Tolkan, I am satisfied that Dr. Greenspan intended to foster his own practice and render proper medical care to his patients, both of which are legitimate purposes; however, his conduct was so unprincipled and over-reaching as to convince me that he did in fact act willfully and maliciously for the specific purpose of harming Dr. Osheroff and his professional corporation in their business or profession. Having considered Dr. Greenspan's entire course of conduct, including his involvement of Dr. Tolkan and Nurse Hess and his attempted involvement of Dr. Hampers in his scheme to take over Dr. Osheroff's practice, I have reached the conclusion that Dr. Greenspan violated Code Section 18.2-499 (b).

COUNT III

Count III alleges that the defendants defamed Dr. Osheroff and injured his reputation.

The common law action of defamation includes two classes of defamatory statements which encompass the allegations allegedly made by the defendants about Dr. Osheroff in this case. Under Virginia law, the following words are actionable per se: (1) Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; and (2) defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. M. Rosenberg and Sons v. Kraft, 182 Va. 512, 518, 29 S.E.2d 375 (1944).

The defendants assert that any statements they may have made about Dr. Osheroff were qualifiedly privileged. Dr. Greenspan and Dr. Tolkan rely on Code Section 8.01-581.16 to shield them from liability for any statements they made before the Executive

Committee of the Alexandria Hospital, and the Court has heretofore ruled that the privilege afforded by this statute is a qualified privilege. The defendants rely on the common law privilege as to any other statements they may have made. In Taylor v. Grace, 166 Va. 138, 184 S.E. 211 (1936) the Supreme Court of Appeals stated:

A communication, made in good faith, on a subject matter in which the person communicating has an interest, or owes a duty, legal, moral or social, is qualifiedly privileged if made to a person having a corresponding interest or duty.
166 Va. at 144.

In order to successfully invoke the defense of privilege when the occasion on which the communications were made was qualifiedly privileged, three elements must concur: (1) The occasion on which the words were used must be privileged; (2) the words used must not transcend the scope of the privilege of the occasion; and (3) the words must be used in good faith, without actual malice. Rosenberg v. Mason, 157 Va. 215, 234, 160 S.E. 190 (1931). If a communication is one of qualified privilege, the person claiming to have been defamed bears the burden of proving the existence of actual malice. Story v. Newspapers, Inc., 202 Va. 588, 590, 118 S.E.2d 668 (1961).

In Preston v. Land, 220 Va. 118, 255 S.E.2d, 509 (1979) the Supreme Court stated the burden of the plaintiff to be as follows:

Where defamatory words are uttered under a qualified privilege, they are actionable only when the plaintiff proves they were spoken with actual malice.

"[I]n order to avoid the privilege it is necessary for the plaintiff to show that the words were spoken with malice in fact, actual malice, existing at the time the words were spoken; that is, that the communication was actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff; or what, as a matter of law, is equivalent to

malice, that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff."

(Citations omitted) 220 Va. at 120, 121.

As previously noted in the Findings of Fact, the newspaper article attributed to Nurse Hess was never admitted into evidence for the purpose of proving that she made the allegedly libelous statement contained therein. Thus, Nurse Hess may not be found to have libeled Dr. Osheroff as a result of the publication of this article. This leaves for consideration the oral statements made by the defendants on other occasions.

Applying the foregoing principles to the facts and circumstances of this case, I have concluded that any statements made by Dr. Tolkan and Nurse Hess meet the criteria for qualified privilege and that Dr. Osheroff has failed to prove that either Dr. Tolkan or Nurse Hess was actuated by actual malice or the legal equivalent thereof.

I have reached a contrary conclusion in the case of Dr. Greenspan. I am satisfied from the evidence that he uttered false and defamatory statements about Dr. Osheroff which were actuated by sinister and corrupt motives and that, as a result thereof, he may not avail himself of the defense of privilege.

COUNT IV

Count IV alleges that the defendants intentionally, maliciously and wantonly sought to interfere with the contractual relationship between the complainants and National Medical Care attempting to cause a breach or disruption thereof. At the conclusion of the complainants' evidence, the Court granted a motion to strike the evidence as to this Count. Accordingly, the defendants will be granted summary judgment as to Count IV.

COUNT V

Count V alleges that Dr. Greenspan and Dr. Tolkan breached a fiduciary obligation owed to the complainants, and that as a result thereof, Dr. Greenspan, Dr. Tolkan and the Prince William Dialysis Facility, Inc. stand to profit at the expense of the complainants. The complainants ask that a constructive trust be imposed in their favor on the profits of the Prince William Dialysis Facility, Inc.

A constructive trust is one which the law creates, independently of the intention of the parties, to prevent fraud or injustice. A constructive trust may arise from actual fraud, violation of a fiduciary duty or unconscionable conduct amounting to constructive fraud. Leonard v. Counts, 221 Va. 582, 272 S.E.2d 190 (1980); Porter v. Shaffer, 147 Va. 921, 133 S.E. 614 (1926).

In Horne v. Holley, 167 Va. 234, 188 S.E. 169 (1936) the Virginia Supreme Court stated:

It is well settled that where one person sustains a fiduciary relation to another he can not acquire an interest in the subject matter of the relationship adverse to such other party. If he does so equity will regard him as a constructive trustee and compel him to convey to his associate a proper interest in the property or to account to him for the profits derived therefrom. (Citations omitted) 167 Va. at 240.

A mere preponderance of the evidence will not suffice to prove the basis of a constructive trust. The complainants must establish their entitlement to this equitable remedy by evidence which is clear, definite and convincing. Sutton v. Sutton, 194 Va. 179, 185, 72 S.E.2d 275 (1952).

Having considered the nature of the relationship between Dr. Osheroff and Drs. Greenspan and Tolkan, I have no hesitation in concluding that Dr. Greenspan and Dr. Tolkan owed Dr. Osheroff and his professional corporation the high degree of

1900

fideliity required of a fiduciary. Consequently, they were bound to exercise the utmost faith and loyalty to their principal or employer. I am equally satisfied that their conduct under the circumstances of this case was such as to amply justify the imposition of a constructive trust on the profits of the Prince William Dialysis Facility. I find no merit in the contention of Dr. Greenspan and Dr. Tolkan that Dr. Osheroff is barred from this relief because of laches or his failure to mitigate his damages.

COUNT VI

Count VI alleges that Dr. Greenspan, individually, deliberately and intentionally interfered with the business, reputation and profession of the complainants. This Count is predicated on the common law tort of interference with contractual relationships.

The common law has recognized an action in tort for the intentional interference by a third party with the contractual relations of another at least since the early English case of Lumley v. Gye, 2 El. & Bl. 216, 118 Eng. Reprint 749 (1853). The essential elements of this tort are: (1) existence of a contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) damages resulting therefrom. 45 Am.Jur.2d, Interference, § 39.

Although I am unaware of any Virginia cases which explicitly recognize the tort of interference with contractual relations, the case of Worrie v. Boze, 198 Va. 533, 95 S.E.2d 192 (1956) strongly suggests that the tort is cognizable in Virginia. In Worrie, supra, the Supreme Court of Appeals declared that the right to performance of a contract and to reap the profits therefrom are property rights which are entitled to protection.

in the courts, and recognized the rule that an action in tort will lie against those who conspire to induce the breach of a contract. Consequently, I have no hesitation in concluding that Virginia recognizes the common law tort of interference with contractual relations.

The case of Adler, Barish, Daniels, Levin and Creskoff v. Epstein, 393 A.2d 1175 (Pa. 1978) is similar in many respects to the case at bar and the legal principles explicated therein are applicable to the issues posed by Count VI in this case. In Adler, Barish, supra, a Philadelphia law firm sought to enjoin former associates of the firm from interfering with existing contractual relationships between the firm and its clients. Reversing the Superior Court, the Pennsylvania Supreme Court directed the Court of Common Pleas to reinstate its final decree granting an injunction. Noting that the defendants had clearly violated the proscription against self-recommendation (solicitation) contained in the Code of Professional Responsibility, the Pennsylvania Supreme Court concluded that the defendants were guilty of "improper" conduct justifying injunctive relief.

If the "improper" conduct found to exist in Adler, Barish, supra, was sufficient to justify injunctive relief, then the facts of this case are far more compelling. Not only did Dr. Greenspan solicit Dr. Osheroff's patients, but he also engaged in a whole series of improper acts calculated to deprive Dr. Osheroff of his practice. His conduct was particularly reprehensible when considered in light of the fact that Dr. Osheroff was either suffering or recovering from a severe mental depression during much of the time that Dr. Greenspan was trying to take unfair advantage of him.

Dr. Greenspan attempts to justify his actions by arguing that he was merely fulfilling a duty to provide continuing treatment for his patients; and that, inasmuch as his

employment contract did not contain a covenant not to compete, he was free to engage in unrestricted competition with Dr. Osheroff after leaving his employment. When analyzed in light of the facts, neither of these arguments is persuasive.

DAMAGES

Dr. Osheroff receives income related to the practice of medicine from three separate sources. Unit professional fees of \$260.00 per month are paid for each patient receiving chronic dialysis treatment within a dialysis facility. Medical practice fees are paid for the treatment of patients in the office and in the hospital. Lastly, Dr. Osheroff receives a participation fee as a result of his contract with National Medical Care, Inc. which is equal to 40% of the net income of the dialysis centers.

The complainants rely in large measure on the testimony of Dr. Carl Schramm, an expert economist, to prove their claim for damages. Using data provided to him, Dr. Schramm calculated the income loss sustained by Dr. Osheroff and his professional corporation as a result of the departure of Drs. Greenspan and Tolkman and the opening of the Prince William Dialysis Center. In doing so, he eliminated the participation fees from his projections because they are too speculative and based his calculations solely on an aggregation of the medical practice fees and the unit professional fees for the chronic patients. Using the assumption that the practice would continue to grow at the same rate as the rest of the greater Washington area, Dr. Schramm concluded that the loss to Dr. Osheroff's practice would be \$824,662.00 for the years 1980 through 1985, which he discounted to a present value of \$535,270.00. Using the assumption that the practice would continue to grow at the faster rate previously experienced by the Northern Virginia Dialysis

Center, Dr. Schramm calculated the loss to be \$1,237,211.00 for the years 1980 through 1985, which he discounted to a present value of \$802,948.00.

I recognize that it is not required that the complainants prove their damages with absolute certainty in a cause of this nature; nevertheless, I perceive several flaws in the complainants' assessment of their damages. First, Dr. Schramm calculated the loss sustained over a period of six years. The determination that six years should be used as the basis seems arbitrary to me, and I think it more reasonable to conclude that Dr. Osheroff could be expected to rebuild his practice to its former state within three years after the departure of Drs. Greenspan and Tolkan. Furthermore, the longer the period for which lost income is projected, the more speculative the loss becomes. Second, Dr. Schramm's calculations fail to take note of other factors revealed by the evidence which could have an adverse impact on Dr. Osheroff's practice for which Drs. Greenspan and Tolkan are not answerable. Last, Dr. Schramm's projections do not take into account the obvious fact that Dr. Osheroff would not have received all of the projected increase in income if Dr. Greenspan and Dr. Tolkan had remained in practice with him.

After carefully reviewing the evidence, I have concluded that the damages sustained should be limited to the years 1980, 1981 and 1982, and that the projected loss calculated by Dr. Schramm should be reduced by 50% in order to more accurately reflect the actual out-of-pocket loss sustained by Dr. Osheroff and his professional corporation. Accordingly, the compensatory damages awarded against Dr. Greenspan for Counts I, II and VI will be in the amount of \$184,804.00. To approach the question from a slightly different angle, this 1904 amount is roughly equivalent to the loss of unit professional

fees for thirty patients during the first of the three years for which damages will be allowed, twenty such patients during the second year and ten such patients during the third year.

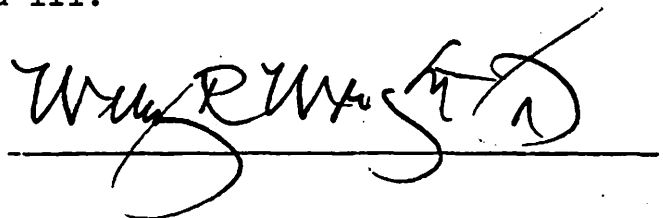
As to Counts I and II, the complainants will be awarded treble damages against Dr. Greenspan in the total amount of \$554,412.00, plus a reasonable attorney's fee and costs. If counsel are unable to agree on the amount of the attorney's fee, the Court will hold a further hearing for the limited purpose of determining the amount of the fee.

As to Count III, Dr. Osheroff will be awarded compensatory damages in the amount of \$10,000.00 plus punitive damages in the amount of \$20,000.00 against Dr. Greenspan; however, these damages will not be in addition to the damages awarded as to Counts I, II and VI.

As to Count V, the Court will impose a constructive trust upon one-half of the profits of the Prince William Dialysis Facility, Inc. in favor of the complainants. Relief is being limited to one-half of the profits because Dr. Greenspan's employment agreement with Dr. Osheroff contemplated that Dr. Greenspan would be made a partner in two years, and it will more nearly put the parties in their original position if the trust is so limited.

As to Count VI, the complainants will be awarded compensatory damages in the amount of \$184,804.00 and punitive damages in the amount of \$369,608.00 against Dr. Greenspan; however, these damages will not be in addition to the damages awarded as to Counts I, II and III.

February 8, 1983



**CURRENT OPINIONS
OF THE
JUDICIAL COUNCIL
OF THE
AMERICAN MEDICAL ASSOCIATION — 1982**

Including the **PRINCIPLES OF MEDICAL ETHICS**
and **RULES** of the **JUDICIAL COUNCIL**

Prepared by the **JUDICIAL COUNCIL**

John H. Burkhart, M.D., Chairman
Samuel R. Sherman, M.D., Vice-Chairman
Burns A. Dobbins, Jr., M.D.
Nancy Dickey, M.D.
W. Scott Chisholm, M.D.

AMERICAN MEDICAL ASSOCIATION
535 North Dearborn Street
Chicago, Illinois 60610 -