Circuit Court of Alexandria
Virginia

FRANKLIN P. BACKUS
Judge Retired

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July 1, 1983

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Re: Osheroff, et al v. Greenspan, et al
Chancery No. 11345

Dear Counsel:

A hearing was held in this cause on March 23, 1983, during the course of which the Court clarified its memorandum opinion of February 8, 1983, by stating that the constructive trust to be imposed on one-half of the profits of the Prince William Dialysis Facility will terminate when the damages awarded the complainants have been fully paid. During a subsequent hearing on April 13, 1983, the Court denied the motion of the defendants to take testimony from patients of the Prince William Dialysis Facility. A third post-trial hearing was held on May 27, 1983, and the Court heard argument on several motions, the pendency of which has prevented the entry of the final decree in this cause. The motions will be ruled on in the order in which they were argued. The Court will also prescribe the terms of the final decree.

Application for Attorney's Fees and Costs

In its memorandum opinion of February 8, 1983, the Court awarded the complainants a reasonable attorney's fee and costs as a part of the recovery under Counts I and II against the defendant, Robert Greenspan, M.D. This award was made pursuant to § 18.2-500(a), Code of Virginia, 1950, as amended.

Counsel for the complainants have supported the claim for legal fees and costs with an itemized billing statement and affidavits from lead counsel and two other respected members of the Northern Virginia Bar. As supplemented, the complainants claim a base fee in the amount of $187,976.25 and costs of $27,716.76 for all of the legal work done and costs incurred in connection with this cause. The complainants request that the base fee be multiplied by a factor of 2.0 in order to fairly reflect the highly contingent nature of success in this complex suit and the exceptional results obtained by counsel.

Dr. Greenspan contends that the number of hours claimed and the hourly rates sought by counsel for the complainants are grossly excessive, and that the circumstances of this case do not justify an adjustment of the base fee. He further points out that the fees to be awarded are limited to Counts I and II and that he was but one of several defendants against whom recovery was sought in Counts I and II.

The authorities cited by counsel which set forth the criteria to be applied in determining a reasonable attorney's fee all seem to support the proposition that the Court should first determine the base or "lodestar" fee by multiplying the number of hours reasonably expended by a reasonable hourly rate. The base or "lodestar" fee may then be adjusted to compensate for other factors which primarily reflect the risk inherent in the case and the quality of the work performed.

Disciplinary Rule 2-106 of the Virginia Code of Professional Responsibility lists the following factors to be considered as guides in determining the reasonableness of a fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or by the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation and ability of the lawyer or lawyers performing the services.

(8) Whether the fee is fixed or contingent.

I have carefully reviewed the itemized billing statements submitted by counsel for the complainants; and, subject to minor adjustments, they fully document the base fee claimed in connection with the entire case. They do not, however, distinguish between the work devoted to the different counts of the bill of complaint or divide the work between the different defendants. Understanding that the entries in the billing statements were made as the work progressed, it would be unrealistic to expect the billing statements to be divided into separate categories as to counts and defendants. Nonetheless, the Court is in the position of either having to reject the claim out of hand or attempting to strike a reasonable balance between the legal work for which Dr. Greenspan is chargeable and that for which there is no permissible recovery. In following the latter course, I have taken cognizance of the fact that there was a considerable overlap between the work necessary for the preparation and trial of Counts I and II and Count VI. Furthermore, although the case began with six different defendants, it has been apparent from early on that Dr. Osheroff's desire for recompense focused primarily on Dr. Greenspan.

I have reached the conclusion that the base fee attributable to Counts I and II should be $90,000.00. When taken together, the number of hours billed and the hourly rates charged are sufficiently high to fairly compensate counsel for all of the other factors that should be taken into consideration when arriving at a reasonable fee; and, therefore, the Court will not adjust the base fee. Accordingly, Dr. Osheroff will be awarded a reasonable attorney's fee in the amount of $90,000.00 plus the costs of suit. The costs will be restricted to those items which are traditionally recoverable in Virginia, such as filing fees, witness fees and the like. Expert witness fees and the costs of discovery depositions will not be included. If counsel for the complainants will identify the allowable costs, they will be included in the final decree.

Motion to Reconsider Ruling Concerning Margaret Hess

Dr. Osheroff has moved the Court to reconsider its ruling that the defendant, Margaret Hess, did not defame him as a result of the article published in the Alexandria Journal on March 12, 1980 (complainant's exhibit 120[j]). Counsel for the complainant have

called the Court's attention to the fact that, notwithstanding the statement to the contrary at pages 18 and 24 of the memorandum opinion, the article was admitted into evidence for the purpose of proving that Nurse Hess was the source of two of the statements contained in the article; and counsel for Nurse Hess have conceded that such was the case.

Having reconsidered the evidence, I now find as a fact that Nurse Hess made the statement in the paragraph that includes the quote "might well have died." The truthfulness of this statement has not been proven to the satisfaction of the Court. Although the Court gave Nurse Hess the benefit of the doubt and found in her favor as to Counts I and II, she crossed the line of permissible behavior when she impugned Dr. Osheroff's competency to practice medicine; and I have concluded that she must respond in damages for the unprivileged statement she made to the Alexandria Journal. Accordingly, Dr. Osheroff will be awarded compensatory damages against Nurse Hess in the amount of $5,000.00.

Motion of Defendants for Reconsideration

Dr. Greenspan has moved the Court to reconsider the findings and conclusions that form the basis for the damages awarded pursuant to Counts I, II, III and VI. The defendants also question whether the evidence is sufficient to support the imposition of a constructive trust pursuant to Count V.

Dr. Greenspan contends that the evidence fails to establish that Dr. Osheroff sustained damage as a result of Dr. Greenspan's violation of subsection (b) of Code Section 18.2-499. He says that damages are not recoverable for an attempt to violate subsection (a) of Code Section 18.2-499. This argument runs counter to the language of Code Section 18.2-500(a), which provides that treble damages may be recovered by any person who is injured in his reputation, trade, business or profession by reason of a violation of Code Section 18.2-499. If the General Assembly intended to limit recovery of civil damages to violations of subsection (a), it would have done so. Furthermore, the Court did not find, as suggested in the defendants' memorandum, that Dr. Greenspan unsuccessfully attempted to cause damage. The Court found that Dr. Greenspan's prohibited conduct resulted in great damage to Dr. Osheroff and his professional corporation; and the Court concluded that Dr. Greenspan was guilty of an attempted rather than a completed conspiracy only because the other persons that Dr. Greenspan involved in his nefarious scheme did not share the malevolent motive or purpose the Court deems the statute to require.

I find no merit to Dr. Greenspan's contention that the punitive damages are excessive and unreasonable in light of the public policy to punish and deter. The case of Weatherford v. Birchett, 158 Va. 741, 164 S.E. 535 (1932) stands for the proposition that evidence of the financial standing of the defendant may be considered in assessing punitive damages; however, I am unaware of any authority requiring the plaintiff to prove the financial standing of the defendant as a prerequisite to an award of punitive damages. Nevertheless, there was evidence relating to the issue of punitive damages which the Court carefully considered; and it is too late for Dr. Greenspan to complain that the Court should have been given more information upon which to base its award.

Dr. Greenspan further contends that he cannot be found to have violated Section V of the Principles of Medical Ethics of the American Medical Association because a 1979 order of the Federal Trade Commission, which became final in 1982, made illegal the prohibition against solicitation contained in Section V. He argues that, since this finding is the linchpin of Dr. Osheroff's case against him, the case must fail. This argument has two flaws. First, although significant, the finding is not critical to the conclusions reached by the Court. Second, the order of the Federal Trade Commission provides that nothing contained therein prohibits the American Medical Association from adopting and enforcing reasonable ethical guidelines with respect to "uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence." Thus, even if it can be said that the order applies retroactively to the Principles of Medical Ethics in effect in 1979, it is clear that the order does not make illegal a ban on the kind of solicitation that occurred in this case. Parenthetically, I might add that even if the Court had admitted complainant's exhibit 135 into evidence, which demonstrates that in 1980 the American Medical Association deleted the ban against solicitation found in Section V, it would not change my view of the case. Whether banned by the Principles of Medical Ethics or not, Dr. Greenspan's tactics in encouraging the patients receiving treatment in the Northern Virginia Dialysis Center to refuse further treatment from Dr. Osheroff and acknowledge Dr. Greenspan as their physician were improper. If Dr. Greenspan was faced with a dilemma as suggested by his counsel, it was the result of his own misconduct.

The defendants assert that there is insufficient evidence to support the finding that Dr. Osheroff probably could have obtained both the consent and the waiver requisite to opening a separate dialysis facility in Prince William County. They argue that absent this finding the Court could not award compensatory damages or impose a constructive trust. After reviewing the evidence, I am

satisfied that the finding is not without support. Furthermore, this contention does not square with Dr. Greenspan's claim that he intended for the new dialysis center to be a part of Dr. Osheroff's practice because, if such were the case, he either intended to proceed without the consent and the waiver in violation of Dr. Osheroff's contract with National Medical Care, Inc. or thought that the consent and the waiver would be forthcoming.

Dr. Greenspan also asks the Court to reconsider its ruling that he defamed Dr. Osheroff during the hearing before the Executive Committee of the Alexandria Hospital. In support of this request he correctly points out that the Court did not specify which of his statements were false and defamatory. This omission is not fatal to the Court's ruling. When considered in their entirety, the statements were defamatory per se and it was Dr. Greenspan's burden to prove that they were substantially true. This he failed to do. Insofar as the qualified privilege is concerned, I am satisfied that Dr. Greenspan's statements were actuated by a motive to injure Dr. Osheroff by depriving him of his privileges to practice medicine in the Alexandria Hospital, which was in furtherance of his goal to take over Dr. Osheroff's practice. Consequently, Dr. Greenspan may not avail himself of the qualified privilege afforded by Code Section 8.01-581.16.

The Remaining arguments advanced by the defendants in support of their motion for reconsideration are without sufficient merit to warrant further comment.

The Final Decree

In addition to being consistent with the memorandum opinion dated February 8, 1983, as modified and supplemented by this letter opinion, the final decree shall make provision for the following:

1. The judgment will bear interest at the legal rate from the date of the decree.

2. Assuming the complainants still desire a constructive trust, they will not be permitted to enforce the judgment by the attachment or sale of the stock of the Prince William Dialysis Facility, Inc.

3. The constructive trust will be structured in the manner set forth in the defendants' proposed decree except that the profits will include unit professional fees attributable to Dr. Greenspan as well as dialysis fees charged by the Center.

4. The annual accounting will take place within thirty days following the end of the fiscal year of the Prince William Dialysis Facility, Inc. and the profits will be payable within thirty days following the completion of the annual accounting.

If counsel are unable to agree on the selection of a trustee, the Court will make the selection.

Counsel for the complainants should submit a sketch of a final decree consistent herewith endorsed by counsel for the defendants. Counsel for both sides are urged to meet for the purpose of drafting the final decree in order to avoid further delays in the conclusion of this case. If need be, I will meet with counsel in chambers or confer with counsel by conference call in order to facilitate the entry of the decree.

Very truly yours,

Wiley R. Wright, Jr.

WRW:jk