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Equity - Private Hospitals - Court Will Order Private Hospital to Review Application of Qualified Osteopath

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certain expenses beyond the initial cost of production. An allowance for this is added into the purchase price. If a seller wishes to limit or to eliminate such liability entirely he has other avenues open to him.[25]

Additional safeguards are available to the seller in the form of disclaimers of warranty liability and the like. Sections such as 2-718, 2-719 and the comments thereto suggest solutions which most sellers are normally willing to make voluntarily.[26] These safeguards, then, from the seller's point of view, and the remedies available to the buyer in cases of the seller's breach, make the fears of the court unfounded. The result therein obtained would have been good law prior to the Code. As it is, it violates certainly the spirit of the Code and the goals which have been set for it. It is a step backward for the effectiveness of the Code and for the "uniformly correct construction" of it.

Robert Mickler

EQUITY—PRIVATE HOSPITALS—COURT WILL ORDER PRIVATE HOSPITAL TO REVIEW APPLICATION OF QUALIFIED OSTEOPATH.

Greisman v. Newcomb Hosp. (N.J. 1963)

The plaintiff, a graduate of the Philadelphia College of Osteopathy,[1] was fully licensed to practice medicine and surgery by the State Board of Examiners. However, in accordance with bylaws requiring membership in the county medical society and graduation from a medical school which is approved by the American Medical Society, the defendant, Newcomb

25. While the seller's alternatives are unimportant to the instant case it will perhaps be useful to touch briefly on the subject. A useful discussion of the pertinent sections, comparing them with prior law on the subject of liquidated damages appears in 31 FORDHAM L. REV. 749, 763 (1963). Its analysis of the Code's provisions are valid for Pennsylvania as well.

> The Code validates a liquidated damage clause if, among other things, it is "reasonable in the light of anticipated or actual harm. . . ." The comments to this section speak of what is "reasonable in the light of the circumstances" and thus a liquidated damage clause unreasonable by the "anticipated harm" test, may now be validated if reasonable in view of the actual loss. This is a logical result. If a contract contains a damage clause so large that it is unreasonable in light of the anticipated loss, it must be presumed that the risk of such a forfeiture was well considered and compensated for in the consideration sought in return. [Thus answering the *Globe* theory that one ought not be allowed to obtain an advantage for which he has not paid.] This argument clearly has far more validity than the similar one usually given in support of the "contemplation" test, for in the case of a liquidated damage clause an attempt has in fact been made to assess losses. Thus when the actual loss is found to be commensurate with the previously unreasonable estimate, the liquidation clause should not be disposed of as a "penalty."

26. 30 TEMP. L.Q. 47 (1956). This article deals specifically with the procedural aspects of such limitations and disclaimers, but is a useful source of information on the solutions in actual operation.

1. Philadelphia College of Osteopathy, like all other schools of osteopathy, was not approved by the American Medical Association (AMA).

Hospital, rejected without consideration plaintiff's application for membership to its courtesy medical staff. Newcomb was the only hospital in the metropolitan area of Vineland, which included Newfield, where plaintiff was the only licensed physician. Plaintiff brought an action alleging that the preliminary requirements specified in the hospital bylaws were arbitrary, capricious, unreasonable, and void as against public policy of the State and operated to cause plaintiff severe economic loss and professional embarrassment. The defendant, a private nonprofit corporation governed by a Board of Trustees, denied the allegations and further contended that because of the private nature of the hospital, exclusion of a physician was within its discretion and as such afforded no legal basis for judicial interference.

After finding that the injury suffered by the plaintiff as a result of his exclusion from the only hospital in the area justified judicial scrutiny, the court *held:* (1) the bylaw requiring membership in the county medical society, as a preliminary qualification, was void per se as contrary to public policy, (2) the bylaw requiring graduation from a medical school approved by the AMA, in so far as it applied to the plaintiff, against public policy[2] and directed the defendant to reconsider plaintiff's application. *Greisman v. Newcomb Hosp.,* 40 N.J. 389, 192 A.2d 817 (1963).

The American traditions of liberty and independence helped to develop an early policy of maximum autonomy toward private organizations. Not until the growth of private associations increasingly affected the lives of individuals was this policy questioned. The great control which labor unions, trade and professional associations acquired over access to jobs and economic opportunities caused the courts to review this autonomy.

Faced with initial problems of jurisdiction and what body of law to apply, the courts turned to common law principles of property, contracts, torts and, more recently, to fiduciary theories. Under the property doctrine the courts took jurisdiction of a controversy to protect a member's property interest in the association. Any pecuniary interest a member has in association property such as the physical property or an organization's assets suffices. This doctrine has developed into a mechanical test, but its usefulness is questionable in light of the fictional nature of the property interest on which courts have relied.[3] The contract theory emphasizes the enforcement of an association's rules as contractual obligations between an association and its members. The major fault of this doctrine is that it provides no relief to a nonmember[4] or a member unjustly excluded but in compliance with the rules.

The courts, attempting to make these doctrines more flexible, have found implied trusts to exist where group action diverts property or power

2. Greisman v. Newcomb Hosp., 40 N.J. 389, 192 A.2d 817 (1963).

3. State *ex rel.* Waring v. Georgia Medical Soc'y, 38 Ga. 608, 626 (1869) (interest in corporate franchise); Halcombe v. Leavitt, 124 N.Y. Supp. 980 (Sup. Ct. 1910) (opportunity to become trustee of church); Williams v. District Exec. Bd., UMW, 1 Pa. D.&C. 31 (Lackawanna C.P. 1921) (chance of election to salaried position in an association).

4. Elizabeth Hosp., Inc. v. Richardson, 167 F. Supp. 155 (W.D. Ark. 1958).

from the purpose for which it was intended. The officers of the association are regarded as trustees[5] acting on behalf of the members or the general public. The fiduciary doctrine has most often been applied to organizations involved in areas that are regulated by statutes.[6] Labor unions were first held to have a fiduciary obligation not only to their members but also to nonmembers.[7] Industry-wide closed shop rules necessitated such judicial intervention.

Prior to this decision, judicial interference in a private hospital's affairs was virtually nil. There have been cases in which courts interpreted hospital bylaws[8] or ordered enforcement of a bylaw requiring particular procedure before expulsion of a practitioner.[9] But as a general rule, unless government had a direct voice in the management and control of a hospital,[10] and even in cases in which a hospital received funds from the government, a private corporation engaged in charitable work is considered a private institution[11] and courts ". . . will not interfere with internal management of a private corporation. Questions of policy and management are left solely to the honest decisions of the officers and directors, and the court is without authority to substitute its judgment for theirs."[12]

The rule prior to the instant case was that a private hospital could "exclude any physician from practicing therein, and such exclusion rests within sound discretion of managing authorities."[13] The court was careful to differentiate numerous decisions pertaining to *public* hospitals[14] where

5. Local 1140, United Elec. Workers v. United Elec. Workers, 232 Minn. 217, 45 N.W.2d 408 (1950).

6. Labor-Management Reporting and Disclosure Act of 1959, § 501(a), 73 Stat. 535 (1959), 29 U.S.C. § 501(a) (Supp. III, 1962).

7. See, *e.g.*, Crowell v. Palmer, 134 Conn. 502, 58 A.2d 729 (1948).

8. Joseph v. Passaic Hosp. Ass'n, 26 N.J. 557, 141 A.2d 18 (1958).

9. Berberian v. Lancaster Osteopathic Hosp. Ass'n, Inc., 395 Pa. 257, 149 A.2d 456 (1959).

10. Eaton v. Bd. of Managers of James Walker Memorial Hosp., 164 F. Supp. 191 (E.D.N.C. 1958), *aff'd*, 261 F.2d 521 (4th Cir. 1958), *cert. denied*, 359 U.S. 984, 79 S.Ct. 941 (1959).

11. Van Campen v. Olean Gen. Hosp., 210 App. Div. 204, 205 N.Y. Supp. 554 (1924), *aff'd per curiam*, 239 N.Y. 615, 147 N.E. 219 (1925).

12. Edson v. Griffin Hosp., 21 Conn. Supp. 55, 59, 144 A.2d 341, 344 (1958). Note that in this case, the hospital would have lost its accreditation which makes it impossible to obtain interns and nursing students.

13. Levin v. Sinai Hosp., 186 Md. 174, 179-80, 46 A.2d 298, 301 (Ct. App. 1946); Natale v. Sisters of Mercy, 243 Iowa 582, 52 N.W.2d 701 (1952). In these cases, the courts speak of rights and interests which would indicate consideration of property and contract theories, and this explains why the court would not interfere with an *exclusion*. The theories were too limited and did not allow judicial intervention in cases brought by nonmembers.

14. Public hospitals have been described as "instrumentalities of the state, founded and owned by it in the public interest, supported by public funds, and governed by managers deriving their authority from the state." Van Campen v. Olean General Hosp., 210 App. Div. 204, 205, 205 N.Y. Supp. 554, 555 (1924), *aff'd per curiam*, 239 N.Y. 615, 147 N.E. 219 (Ct. App. 1925). This is in contrast with a private hospital which is "one founded and maintained by private persons or a corporation, the state or municipality having no voice in the management or control of its property or the formation of rules for its government." Edson v. Griffin Hosp., 21 Conn. Supp. 55, 58, 144 A.2d 341, 343 (1958). The criterion for the distinction is not whether the hospital receives public aid, Eaton v. Bd. of Managers of James Walker

judicial interference has been substantial.[15] The Supreme Court of the United States in *Hayman v. Galveston*[16] held that there was no constitutional right to the use of facilities of a public hospital, but only a privilege granted or refused in accordance with rules formulated by hospital authorities. The rules have to be reasonable and not arbitrary, and these standards have been applied to the rules of private hospitals as well as public. In *Hamilton County Hosp. v. Andrews,*[17] plaintiff sought relief from a hospital rule which required, as a preliminary qualification, membership in the county medical society. The court held that the plaintiff failed to show that the rule was "unreasonable and arbitrary." However, in a similar case,[18] where membership in the county medical society was a condition precedent to admission to the hospital staff, the court held that the requirement was an invalid delegation of hospital authority since, in effect, the county medical society was determining who was qualified to be on the staff. The court felt that there was an insufficient relationship between membership in the medical society and the public interest in maintaining high standards of practice in the hospitals to justify such delegation.

There are few cases dealing with admission to medical societies; the general rule seems to be that membership is determined solely by the society, and the courts will not interfere, even if exclusion is arbitrary.[19] However, the Superior Court of New Jersey in *Falcone v. Middlesex County Medical Society*[20] took the necessary step forward stating the following position: "the court will grant relief, providing that such exclusion was contrary to the organization's own laws, was without procedural safeguards, *or* the application of a particular law or laws of an organization was *contrary to public policy.*"[21] In affirming the lower court's decision, the Supreme Court of New Jersey broadened the holding by pointing out that an "individual's opportunity of earning a livelihood and serving society in his chosen trade or profession appeared as the controlling policy con-

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Memorial Hosp., 164 F. Supp. 191 (E.D.N.C. 1958), *aff'd,* 261 F.2d 521 (4th Cir. 1958), *cert. denied,* 359 U.S. 984, 79 S.Ct. 941 (1959), but whether government has direct control in its management and control.

15. See, *e.g.,* Jacobs v. Martin, 20 N.J. Super. 531, 90 A.2d 151 (Ch. 1952); Alpert v. Bd. of Governors of City Hosp., 286 App. Div. 542, 145 N.Y.S.2d 534 (App. Div. 1955); Group Health Cooperative v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951); Ware v. Benedikt, 225 Ark. 185, 280 S.W.2d 234 (1955); Hamilton County Hosp. v. Andrews, 227 Ind. 217, 84 N.E.2d 469 (1949), *aff'd,* 85 N.E.2d 365 (1949), *cert. denied,* 338 U.S. 831, 70 S.Ct. 73 (1949); Stribling v. Jolley, 241 Mo. App. 1123, 253 S.W.2d 519 (1952).

16. 273 U.S. 414, 47 S.Ct. 363 (1927). This case is a good example of past legal thinking on this point. However, in the light of the Supreme Court's attitude today, its strength as a precedent is questionable.

17. 81 N.E.2d 699 (Ind. App. 1948).

18. Ware v. Benedikt, 255 Ark. 185, 280 S.W.2d 234 (1955).

19. See Medical Soc'y v. Walker, 245 Ala. 135, 16 So. 2d 321 (1944); Ware v. Benedikt, *supra* note 18; Hamilton County Hosp. v. Andrews, 227 Ind. 217, 84 N.E.2d 469, *aff'd,* 85 N.E.2d 365 (1949), *cert. denied,* 338 U.S. 831, 70 S.Ct. 73 (1949).

20. 62 N.J. Super. 184, 162 A.2d 324 (1960). For a comprehensive article on this area see Note, *Expulsion and Exclusion From Hospital Practice and Organized Medical Societies,* 15 RUTGERS L. REV. 327 (1961).

21. Falcone v. Middlesex County Medical Soc'y, *supra* note 20, at 197, 162 A.2d at 331.

sideration."[22] The court went on to say, "In a case presenting sufficient compelling factual and policy considerations, judicial relief will be available to compel admission to membership."[23]

In *Falcone,* the county medical society possessed a virtual monopoly over the use of hospital facilities. Therefore, when the society excluded the plaintiff, an osteopath, because of an unwritten rule requiring four years attendance at an AMA approved school, it seriously restricted his professional endeavors and caused him economic loss.[24] The court said public policy would not permit such power to prevail unsupervised. Instead, courts should scrutinize this "fiduciary power" and determine if it is exercised in a reasonable and lawful manner to advance the interests of the medical profession and the public.

Along with the *Falcone* case, several significant events distinctly affected the setting in which the *Greisman* case was to appear. First, the American Hospital Association announced hospitals having Doctors of Osteopathy would be listed; second, the Joint Commission on Accreditation of Hospitals announced such hospitals were also qualified for accreditation;[25] and third, the Judicial Council of the American Medical Association adopted a policy which permitted members of medical societies to practice with Doctors of Osteopathy. Also, the Judicial Council of New Jersey adopted a resolution making it ethical for its members to associate with any fully licensed physician who adheres to sound scientific principles.

In view of *Falcone,* the decision in this case was inevitable once the court decided it had the right to interfere. Newcomb Hospital had a virtual monopoly in the Vineland area and vitally affected the public interest. The court justified interference in a private organization by showing that from early common law days, courts have been willing to regulate private business and professions for the public good.[26] It noted that this policy has continued in areas where private property or business is devoted "to a public use,"[27] or is "affected with a public interest."[28]

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22. Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 596, 170 A.2d 791, 799 (1961); 7 VILL. L. REV. 150 (1961).

23. *Ibid.*

24. A physician deprived of membership in a medical society is injured not only because he is unable to use the facilities of many hospitals which require such admission, but also because exclusion limits his professional contacts which are necessary for patient referrals and consultations, a major means of expanding his practice. As a member of a medical society, a doctor receives the latest scientific information through medical journals, group malpractice insurance or legal advice, and, in the larger societies, bill collection agencies. All of these services are available to members at substantial savings. A doctor excluded from a society also misses the opportunity to discuss and exchange ideas with other men in his profession. For a detailed study of the AMA and its local subsidiaries, see Note, *The American Medical Association: Power, Purpose, and Politics in Organized Medicine,* 63 YALE L.J. 938 (1954).

25. Joint Commission on Accreditation of Hospitals, Bulletin No. 25, p. 2 (1960).

26. Reference here is made to traditional common law provisions on innkeepers, carriers, farriers, and the like.

27. Munn v. Illinois, 94 U.S. 113, 130 (1877).

28. German Alliance Ins. Co. v. Lewis, 233 U.S. 389, 406, 34 S.Ct. 612, 617 (1914); *see,* Nebbia v. New York, 291 U.S. 502, 536-37, 54 S.Ct. 504, 516 (1934); Amodio v. Bd. of Comm'rs, 133 N.J.L. 220, 224, 43 A.2d 889, 892 (Super. Ct. 1945).

Taking this thread of policy, the court applied the test given in *Falcone*. It determined that the monopolistic power which Newcomb Hospital used to exclude Dr. Greisman and which jeopardized him in his chosen profession was contrary to public policy. This power, denominated as "fiduciary in nature," required that it be exercised reasonably and for the public good. The court limited its decision strictly to the validity of the bylaws, and because of this, it is questionable how useful it was or will be in "bridling" the fiduciary power. The decision does help to eliminate unwarranted discrimination on a class basis. Judicially, it has created a means of spanning the gap between the AMA and osteopathy which from all indications is perpetuated by a tradition of prejudice and by groups with vested interests, rather than a conflict of ideology or scientific method.[29]

Hasn't the legislature, by licensing osteopaths to practice medicine, given the courts the answer to the issue presented in this case? Or have they simply set minimum standards required to practice in the state? Has the legislature, by licensing the osteopaths, made it unlawful for a hospital to refuse a licensed doctor? Surely the answer to these questions is that the legislature has only established a minimum standard and has indicated no policy which would require a hospital to accept this minimum. The *Greisman* court realizes this and makes it clear that the solution of each case will depend upon its fact situation. It states that its ruling is not a policy decision, but a judicial determination insofar as it applies to the plaintiff. While the court verbally limits its holding to the denunciation of an arbitrary bylaw requiring exclusion without consideration, it is apparent that the case states a broader proposition. Private organizations can no longer be considered strictly private if they have a substantial influence upon public welfare. When an organization's activities have this effect, judicial intervention will not depend upon property, contract or tort theories, but upon the courts power to enforce fiduciary obligations. The major determinations thus become: does a fiduciary obligation exist, if so, is it breached.

The court has apparently recognized what Chafee called the "strangle hold policy."[30] When an association is in such a position that membership in it is necessary to earning a livelihood in a trade or profession, it is said to have a strangle hold. Courts have in the past not been unwilling to break this power when unjustly practiced by labor unions, and now other associations are beginning to be similarly restricted. There is little doubt that the defendant had a stranglehold here, but whether the court would have reached the same decision had there been a hospital willing to accept the plaintiff, is another question.

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29. See generally Note, *The American Medical Association: Power, Purpose and Politics in Organized Medicine*, 63 YALE L.J. 938, 966-67; Note, *State Recognition of Doctors of Osteopathy Compared with State Recognition of Doctors of Medicine*, 31 NOTRE DAME LAW. 286 (1956).

30. Chafee, *Internal Affairs of Association Not for Profit*, 43 HARV. L. REV. 993, 1021 (1930).