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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

FRANK J. KELLEY, Attorney General of
the State of Michigan,

Plaintiff,

-v-

File No. 96-93848-CZ

MICHIGAN AFFILIATED HEALTHCARE
SYSTEM, INC. a Michigan nonprofit
corporation, and COLUMBIA/HCA
HEALTHCARE CORPORATION, a
Delaware corporation,

Defendants.

COURT RULING

BEFORE THE HONORABLE JAMES R. GIDDINGS, Circuit Judge

LANSING, MICHIGAN - THURSDAY, SEPTEMBER 5, 1996

In behalf of the Plaintiff: FREDERICK H. HOFFECKER
DAVID W. SILVER
MICHIGAN DEPT. ATTORNEY GEN.
CONSUMER PROTECTION DIVISION
P. O. Box 30213
Lansing, Mi 48909

Reported by Dorothy M. Dungey, CSR/RPR
Official Court Reporter



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APPEARANCES CONTINUED:

In behalf of Defendant
MAHCSI:

ROBERT W. STOCKER, II
MARK A. BUSH
FRASER, TREBILCOCK, DAVIS & FOSTER
1000 Michigan National Tower
Lansing, Michigan 48933

In behalf of Defendant
Columbia:

WILLIAM M. NEWMAN
LAGUE, NEWMAN & IRISH
600 Terrace Plaza
P. O. Box 389
Muskegon, Michigan 49443

1 Evening Session

2 September 5, 1996

3 6:01 p.m.

4 R E C O R D

5 THE COURT: We can go back on the
6 record in the matter Kelley vs. Michigan Affiliated
7 Healthcare System, Inc. docket number 83848-CZ.

8 And, I want to deal initially with --
9 let me deal initially with the motion for summary
10 disposition as to Counts 4 and 5, I believe it is, the
11 alleged violation of fiduciary duty by the Board of
12 Directors in this matter. As to that Count I don't
13 believe there is any genuine issue of material fact, and
14 the Court will grant summary disposition in favor of the
15 Defendants.

16 There is a very substantial amount of
17 documentation that's been presented here indicating a due
18 diligence, if you will, affected by them on behalf of the
19 Board. They did not have to obtain the valuation by that
20 stock brokerage firm, the name of which now escapes me
21 this late in the day.

22 MR. BUSH: Dean, Witter.

23 THE COURT: Dean, Witter, Reynolds;
24 but, the fact that they did, simply underscores the
25 concerns that they had in their commitment to carry out

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1 their responsibility in an effective and appropriate way.
2 I don't see that in terms of those counts their failure
3 to obtain a Private Letter Ruling from the Internal
4 Revenue Service is significant. There is case law that
5 supports some requirement that they do that, and in this
6 context, again, I don't believe that that is sufficient
7 to raise a fact -- genuine fact question with regard to
8 whether or not they've violated their duties pursuant to
9 Michigan law.

10 There doesn't appear to be any
11 question about their good faith. It appears their
12 responsibilities were carried out by whatever standard
13 you want to apply; gross negligence, exercise judgment of
14 the ordinarily prudent person, in my view there is no
15 reason to believe and nothing has been presented here
16 that suggests any impropriety or basis for successful
17 prosecution. Therefore, the Court will grant the motion
18 to dismiss with prejudice, summary disposition motion.

19 With regard to Count 2, that really
20 is the heart of this case. We've spent a long time
21 talking about the amount of money, given the outcome, the
22 amount really doesn't make a great deal of difference.
23 The question is simply this, whether the MAHSI working in
24 conjunction with Columbia/HCA can structure an
25 arrangement in the fashion that they have and commit

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1 their assets to the joint venture and do that consistent
2 with the requirements of Michigan law for a nonprofit
3 corporation. And, in that regard everybody talked about
4 it and we can just go back to the corporate purpose, as
5 set forth in paragraph 29 of the Plaintiff's Complaint
6 and has been made a part of this record, and I quote:

7 "The corporation is organized specifi-
8 cally for charitable, scientific and
9 educational purposes as a nonprofit
10 corporation; and that that activity
11 shall be conducted for the aforesaid
12 purposes in such a manner that no part
13 of its net earnings shall inure to the
14 benefit any member, director, trustee or
15 individual."

16 In short, no one is entitled to
17 profit from this operation. I have no doubt that this
18 corporation could sell all of its assets for fair
19 consideration to a profit making entity; and if they did,
20 such as occurred in Nashville Memorial Hospital --
21 actually, State of Tennessee vs. Nashville Memorial
22 Hospital, case opinion cited in -- attached as Exhibit 2
23 to a brief filed behalf of the Attorney General, they
24 could do that. For whatever reason MAHSI has elected not
25 to do that, but intends to sort of bifurcate this

1 transaction.

2 I'll assume for the purpose of this
3 argument, no one -- it's not my purpose here to question
4 the wisdom of this transaction; whether or not it makes
5 economic good sense; whether or not it's good for the
6 community; whether or not it enhances the quality of
7 medical care, those are not the questions that I'm called
8 upon to address here. That's not really the purpose.
9 The purpose is whether or not we can take assets, that
10 are unquestionably nonprofit assets, and commit them in
11 this way. And I find no authority to suggest that one
12 can do that.

13 I do not believe it is appropriate to
14 take these assets and commit them to a profit making
15 joint venture. If all the profits from that joint
16 venture were to inure to MAHSI, it might pass muster.
17 That's another situation. all the profit.

18 There are other cases that talk about
19 it, the Georgia case that was cited in this matter, I
20 believe. Actually, cited by both parties, but
21 essentially, hits the nail on the head, when it describes
22 this kind of activity and what I believe the requirements
23 are. And, Georgia Osteopathic Hospital, Inc. vs.
24 Alford, 217 Ga 663, a 1962 decision, which involved a
25 profit making operation, but this is more the definition,

1 if you will, being when they talked about what a
2 charitable institution -- that's what we're talking
3 about, MAHSI here is a charitable institution, quote:

4 "A purely charitable institution, a
5 hospital, was not removed from that
6 category simply because it derived a
7 profit from the patronage of patients
8 who were able to pay, so long as the
9 money earned was reserved for the
10 purpose of carrying out its purely
11 charitable purposes."

12 And, the Michigan statute itself
13 makes clear, Section 305.301(5) of the NonProfit
14 Corporation Act quoted by the Attorney General states
15 that the Act, quote:

16 "Shall not be deemed to permit assets
17 held by the corporation for charitable
18 purposes to be used, conveyed or distributed
19 for non charitable purposes, MCL
20 45.2301(5)."

21 Shall not be deemed to permit assets
22 held by the corporation for charitable purposes to be
23 used, conveyed or distributed for non charitable
24 purposes. We are taking all the physical plant, as a
25 practical matter, and giving it to a joint venture and

1 allowing a profit making entity, Columbia/HCA, and as
2 well advised as this may be, to make a profit off of it.
3 Whether or not MAHSI could hire someone to manage their
4 hospital consistent with their corporate charter, perhaps
5 they could. I believe they could sell it. all their
6 assets. They could sell part of their assets, if, in
7 fact, that is what they do.

8 .. If they sold the Greenlawn campus for
9 \$30 million, we sell that and we take our \$30 million and
10 we commit our 30 million to purposes consistent with the
11 corporate charter, consistent with the statute. Here we
12 have taken very substantial, very substantial assets
13 belonging to a nonprofit, established under Michigan law
14 and allowed those -- and will allow, as I understand it,
15 those assets to be used, quote, to generate benefits for
16 the hospital, but also to generate profits for
17 Columbia/HCA. I do not believe that is permissible under
18 Michigan law under these circumstances.

19 The Court denies the motion for
20 summary disposition as to Count 2 for the Defendant;
21 grants motion for summary disposition as to Count 2 in
22 favor of the Plaintiff, Attorney General.

23 With regard to the Cy Pres Count,
24 it's kind of academic under the circumstances, but I
25 believe this is implied trust and could be established as

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1 an implied trust under the circumstances, beneficiary
2 being, at least, the people of the State of Michigan,
3 more direct beneficiary, the people of this community.
4 And that these assets must be -- albeit, not considered
5 as a principle, the Attorney General has a role. I'm not
6 sure that the Court needs to make some further comment.
7 again, the same standard comes into play there.

8 The problem is that I do not believe
9 that these assets can be disposed of under the mechanism
10 that has been proposed. And again, I'm not unmindful of
11 the tremendous amount of the work and the dedication of
12 the People involved, the good faith to try to deal with
13 the changing situation heard in terms of the medical
14 economics situation of the late 20th century. I
15 understand that, and I have sympathy for that, but my
16 role here, again, is very limited, not to pass on the
17 wisdom of it; the economic commonsense of it; whether
18 it's workable; whether it shares, profit, first rate
19 medical care for the people of this community over the
20 next ten or twenty years, that's not the standard.

21 The standard is whether we meet the
22 requirements of state law, and that's why I asked Mr.
23 Bush if I could find a single case where you had a
24 venture that in affect took assets from a nonprofit and
25 committed them to a profit making enterprise as is

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1 proposed here. And really, respectfully, there wasn't
2 any such case. I have not been made apprised of any such
3 case, other than to say what that says, and even those,
4 the public authority have looked very closely at to
5 assure that the sale occurs in a manner consistent with
6 the public interest as well as the public requirements of
7 state sanctions. But, this in my view simply cannot meet
8 those requirements. So, as I said, motion will be
9 granted in favor of the -- pursuant to the Court Rule.
10 favorable to the Attorney General as to Count 2.

11 Any questions about that, Mr.
12 Hoffecker?

13 MR. HOFFECKER: None, your Honor.
14 Thank you very much for your hard
15 work on this case?

16 MR. BUSH: Your Honor, could you
17 articulate a ruling for Count 7 for the record, please.

18 THE COURT: That's the Cy Pres?

19 MR. BUSH: Yes.

20 THE COURT: Well, in my view, it's
21 kind of academic. I will say this, that it's my view
22 that there is a trust within the meaning of that, under
23 these circumstances, and again, that the Attorney General
24 would have a role. The Attorney General is here already,
25 so, I guess, I grant motion for summary disposition.

1 denying -- I'll deny it clearly on behalf of the
2 Defendants, but I'm not -- I guess, really what I'm
3 asking, I'm not sure it's necessary to grant judgment
4 favorably to the Attorney General in that context, given
5 that they are here and I've made a determination as to
6 the legal propriety of the entire transaction under these
7 circumstances. I guess I'm willing to say they have a
8 role and that it is a trust, if that's necessary.

9 Anything else?

10 You'll draft an order, Mr. Hoffecker?

11 MR. HOFFECKER: Yes, we will, your
12 Honor. I want to thank the Court for its hard work in
13 expediting the way we handled this matter.

14 THE COURT: That's all on the record.

15 MR. BUSH: Thank you, your Honor.

16 MR. NEWMAN: Thank you, your Honor.

17 (End of Court's Ruling)

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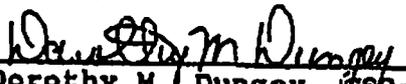
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CERTIFICATE OF REPORTER

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

I, Dorothy M. Dungey, Official Court Reporter in and for the County of Eaton, Acting in Ingham County, State of Michigan, do hereby certify that the foregoing 11 pages is a full, true and correct transcript of the Court's Ruling had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.


Dorothy M. Dungey, CSR-RPR
Official Court Reporter

Dated: September 8, 1996