CHAPTER ONE

Emanuel Revici: Genius, Quack or Medicine Man?

Medical malpractice is defined as a departure from the accepted medical standard of care. The medical community decides what constitutes accepted medical care. In cancer, the standard treatments are surgery, radiation, and chemotherapy, or "cut, burn, and poison" as they are affectionately referred to in the alternative medical community. Any treatment not within the accepted standard of care (or which is not given in an FDA-approved clinical trial) is technically a departure from the standard of care and is considered medical malpractice and negligence.

But suppose a patient doesn't want to take one of these accepted treatments. Can a doctor provide something else? Can he or she provide an experimental, unproven treatment outside of an FDA-approved clinical trial without the fear of facing a malpractice action from the patient if things don't go well? The answer to this question changed, at least in New York, as a result of two cases involving Dr. Emanuel Revici.

Introduction

Emanuel Revici was born in Bucharest, Romania, at the end of the nineteenth century. He was drafted out of medical school, commissioned a lieutenant, and placed in command of a medical brigade in the Romanian army during World War I. After the war, Revici completed his medical training at the University of Bucharest medical school. He then taught at the university and practiced medicine outside the university. (Revici was Jewish and Jews were not allowed to practice in Romanian universities.)

In the late 1930s, he moved to Paris where he did clinical research. In 1941, the French Underground arranged for his wartime stay in Mexico City, as the Nazis were after him in Vichy, France for his clandestine work with the Underground.

Revici opened up the original Institute of Applied Biology in Mexico. In 1947, he moved the institute to Brooklyn, New York, at the invitation of prominent local doctors, community leaders, and businessmen. In 1955, his fund-raising foundation purchased a small hospital on Manhattan's Upper East Side, renaming it Trafalgar Hospital. Trafalgar was a general community hospital. The oncology section, which Revici directed, was devoted to the clinical use of his method and therapies.

Revici died in 1998 at the age of 101. My joke to him was that he himself was his best advertisement since he took his own medicine.

During his entire medical career, Revici worked on his biological theory of disease and treated patients with medicines he produced. Revici's big picture idea was that life worked by the interaction of two opposite forces, the anabolic—or building phase, and the catabolic—the tearing down phase.

Revici thought cancer was caused by a biochemical imbalance of two classes of lipids: fatty acids and sterols. Lipids are fats stored in the body that are used for energy production. He believed that lipids like cholesterol, triglycerides, fatty acids and sterols were indispensable to the body's defense system. He was one of the first medical researchers to focus on these substances in the context of cancer.

In 1961, he published his *magnum opus*, *Research in Physiopathology as a Basis of Guided Chemotherapy with Special Application to Cancer*. It was not a

best seller,[5] and even medically trained readers thought it dense and difficult to read. He used common concepts in odd and new ways. Some who managed to trudge through a chunk of the book found that it had novel and ingenious insights and theories.

Revici had been the subject of criticism and adverse medical publicity almost since he first came to the United States. By 1961, he landed on the American Cancer Society's "Unproven Methods" list. Being on this list surely didn't help in the sale of his book, or acceptance of his theories.

In 1965, JAMA (the *Journal of the American Medical Association*) published a short summary of a "Clinical Appraisal Group" which consisted of nine doctors. They reported that supposedly none of the thirty-three patients followed showed any benefit from Revici's treatment. However, a few of the patients were kicked out of the study because they appeared to have benefited from the treatment. (Of course that was not the reason given by the appraisal group.)

Revici had a dedicated group of supporters, many of whom were his successfully treated cancer patients and their families. Revici never used the word "cure" because he didn't think it was possible to ever prove a cure for cancer. He also had a number of medical doctors and researchers who became strong advocates after seeing the results of his work.

Like many alternative doctors, Revici's supporters helped him immensely. They raised the money to buy him his hospital and funded his legal defense (and may the Lord bless and keep them for that noble act). They wrote letters and articles disputing the negative reports. They helped counter the negative press and TV media by putting faces to the idea that he was helping people. And I suppose on a psychological level, life can be good when you are surrounded by grateful people who think you can work miracles.

Since the late 1970s, Revici had worked out of a four story brownstone in Manhattan's Upper East Side. Revici and his staff made most of the medicine he used on the third floor of his brownstone. The medicine, mostly selenium and other trace mineral elements, would be given to patients in little dark bottles,

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5 Revici maintained that the American Cancer Society paid the publisher to burn the unsold copies of his book.

with a dropper on the top to measure the number of drops the patient was advised to take. Revici sometimes told people to put the drops of medicine on a piece of bread and then eat it, though some of his medications were given via injection.

Revici primarily treated advanced cancer patients, and like many old-time unconventional practitioners with novel treatments, his medical charting was terrible. You had to know his method and substances to understand his medical notes. To a conventional doctor, his notes were gibberish.

Given his age and thick Romanian accent, he was very hard to understand. Despite living in the United States for fifty years, he never learned the English word "and." For him it was always "uuund." Sometimes it was simply impossible to understand him. I suspect that people did a lot of nodding when he spoke to give him the impression they actually understood what he was talking about. I know I did.

By the time I first met him, he was close to ninety years old, and not surprisingly, he seemed well past his prime. He was frail and stooped over. His niece, Elena Avram, ministered to him and acted as his business manager. She took very good care of him. But past his prime or not, somehow, with those little dark dropper-topped bottles, he managed to cure some folks who were given death sentences by conventional doctors. And I mean cure, like being alive, disease-free five, ten or even thirty years later. (Of course, Revici would never call these folks cured.)

When It Rains, It Pours

One day, my law partner, Sam Abady, got a call from a private investigator acquaintance of his who was hooked into the Revici support group. Sam went to meet with Revici and some of his supporters.

Revici and his supporters were worried. Three malpractice cases had been filed against him, and he was in the middle of an administrative licensing (or de-licensing) proceeding before the New York Office of Professional Medical Conduct. All the proceedings were related.

The three lawsuits were filed by the same law firm, Pegalis & Wachsman. The main attorney was Harvey Wachsman. Harvey was a medical doctor who

liked being called "Doctor" by the judges. He had been a neurosurgeon, but sometime around age forty, he quit medicine and went to law school. Harvey became one of the most prominent and successful plaintiff malpractice attorneys in New York. He made a ton of money for his clients and himself, or so he said. Harvey was not tall, but he was a big guy, maybe three hundred pounds.

He also had a big ego and a bigger mouth, which he often used to regale me or anyone who would listen with tales about how important and successful he was. He was a member of the prestigious Cosmos Club in Washington, D.C. He had cases around the country, and he gave lectures around the world. His greatness was universally acknowledged and appreciated by all, at least according to him.

I guess that made us just like him. Founded in 1983 (two years before we met Revici), Abady & Jaffe had one associate and a part-time first-year law student helping us out. I was the most senior attorney, having graduated law school four years earlier. My partner, Sam Abady, had all of two years experience when we formed the firm. Between the two of us, we had left or been fired from four top New York law firms. The main thing we had going for us was that we were hungry, very hungry; plus Sam was a good talker. He had been the international college debating champion, and the title was well deserved.

Our firm spent the first six months working out of my two-bedroom apartment near Lincoln Center. But by the time we got the Revici case, we had moved to the top floor of an office building in midtown on Fifth Avenue. It was Flo Ziegfeld's (of *Ziegfeld's Follies* fame) old penthouse. (If the walls could talk...) To get there, we had to take two elevators and walk up a flight of stairs.

The plaintiffs in the three malpractice cases were also the subject patients in the licensing cases. Although the identity of a complainant in a licensing proceeding is confidential, it was clear that Wachsman was behind the complaints. He was playing hardball, but it was a good tactic. The hope was that the board would yank Revici's license; then Wachsman could use the

license revocation to prove malpractice in the civil cases.[6]

Unfortunately, Revici was in an even tougher position because a default had been entered against him in one of the federal civil malpractice actions. Revici had been represented by Henry Rothblatt, who was one of the country's premier litigators and health care attorneys. Rothblatt had a sort of partnership with F. Lee Bailey, and together they wrote many legal textbooks. So it was hard to understand how he had allowed Revici to get into this mess. Regrettably, there was no asking Henry, since he had recently died of melanoma (and no, he was not a patient of Revici's).

Sam returned from the meeting with the file. His then live-in girlfriend (and later wife) was a medical doctor. Sam loved talking about medicine, and he knew a great deal about the subject for a layman.

Me, I was the administrative partner. I was just interested in paying the rent and staff, with the hope that there would be enough left over at the end of the month for Sam and me to take a small salary.

Up until then, I had been doing commercial litigation, mostly representing businessmen being sued by banks—deadbeats, if you will. But I wasn't particular: I drafted contracts, represented real estate developers—whatever paid the bills.

I had no inclination for medicine, other than the inclination to pass out at the sight of blood. However, I did have some exposure to alternative health treatments—at least if you consider having a father who blindly used alternative remedies like trying to heal his hernia by putting cabbage leaves on it as exposure to the field. My father also used to drag me to macrobiotic restaurants, mostly Father Divine's in downtown Philadelphia. All the brown rice and cooked-to-hell cabbage and collard greens you could eat for $2.50. I didn't eat much.

Getting Un-defaulted

But before we could get into the whole alternative medicine thing, we had a more immediate problem. Because of the default, there would be no jury trial,

6 There may have been one flaw in Wachsman's plan. Revici did not carry malpractice insurance, which normally would be enough to make a grown malpractice attorney cry.

no defense, no nothing. The only thing scheduled was an inquest in which the judge herself would determine how much money the plaintiff would be awarded. Not a great way to enter a case.

How did Revici get into this pickle? All three cases were proceeding normally through the discovery process. Revici had been deposed in one of the federal cases. The attorneys had argued continuously, and the deposition was adjourned.

The federal district judge, Chief Judge Constance Baker Motley of the United States District Court for the Southern District of New York got involved and ordered the deposition to continue. Rothblatt refused to produce Revici.

Unfortunately, Rothblatt never informed Revici about his clever strategy. The federal judge retaliated (as they are wont to do when lawyers ignore their orders) and entered a default against Revici. And then, inconsiderately, Henry Rothblatt died of cancer, and Abady & Jaffe entered the picture.

Sam handled the inquest. There was not much he could do. The patient told about her hardships—and she had plenty, resulting from her bi-lateral mastectomy—and her shortened life expectancy due to Revici's mistreatment. Sam did his best, but Judge Motley was not listening.

The judge took it under advisement and said she would issue a written decision at some future time. We figured we had a month or two to come up with a plan and implement it. Sam moved on to other cases; it was left to me to figure out what to do.

It was obvious that we had to get rid of the default. The Federal Rules of Civil Procedure provide a mechanism for doing just that—Federal Rule 60 (b). A court can vacate a default for the "excusable neglect" of an attorney. However, Henry's actions were not neglectful. They were intentional.

There is a catch-all rule to vacate a default for "exceptional circumstances." Getting angry at a judge and being stupid may not be all that uncommon, but it was not what the drafters of the rule had in mind.

I started thinking about Rothblatt's cancer. He had melanoma, and that form of cancer commonly spreads to the brain. I got some information about his medical history, and sure enough, his melanoma had spread to his brain.

Medical research revealed that brain metastases could cause impaired judgment. So that was it. Rothblatt's judgment might have been impaired by his cancer.

Was it? Who knows? What we did know was that Henry had screwed up and exhibited bad judgment. That was enough for me. I put together a good set of motion papers. We even had an affidavit from a neurologist attesting to the judgment impairment theory. Revici said that he was never informed by Rothblatt about the rescheduled deposition.

It looked like a pretty good argument. Pegalis & Wachsman objected, of course, but the motion was a winner. Maybe the judge thought it would be easier trying the case than writing up a decision and determining a damage award. Whatever the reason, the judge vacated the default, and we were back in business.

We finished up the discovery on the case, and before we knew it, the case was set for trial.

Bad Decisions All Around

The more we looked at the case, the more difficult it looked under New York law. The plaintiff, Edith Schneider, had been diagnosed with stage I breast cancer. She had a very small cancerous lump in one breast with no other involvement. Her family doctor recommended a mastectomy. But Mrs. Schneider wanted to go "the natural way." She did not want to have surgery. So she went to three additional doctors, two surgeons and an oncologist, and they all recommend a mastectomy. But she still refused.

She then found her way to Revici, and he foolishly agreed to treat her with his own medications even though she would not do the lumpectomy he says he recommended to her. (Schneider denied Revici said anything about surgery.)

Schneider signed Revici's standard consent form that informs patients his treatment is experimental and not FDA-approved but that the medications have been "thoroughly tested" (by whom, the form didn't say).

Revici's treatment did not help her. Eventually she developed large masses in both her breasts and had lymph node involvement. She had a bilateral

mastectomy, and of course, her prognosis became much worse than it was when she first saw Revici.

She then sued Revici for medical malpractice, lack of informed consent, and fraud. We thought we could win on the fraud and lack of informed consent claims. The patient had known Revici's treatment was experimental and unproven, and four doctors had told her she needed surgery. These two facts seemed to negate any claim that Revici defrauded her or that she did not have informed consent before she undertook Revici's treatment.

But the medical malpractice claim had us worried. Clearly Revici's treatment was a departure from the accepted standard of care for stage I breast cancer, which was surgery. By some estimates, surgery has a 96 percent cure rate for a small breast tumor characterized as stage I.

Revici's treatment was completely unproven, and it had never been tested in an FDA-approved clinical trial. Although he had patients who said they were cured by his treatment, the medical and scientific community considers this "anecdotal" evidence worthless.

No doctor in his right mind would recommend or even sanction a patient taking Revici's treatment instead of curative surgery. Therefore, Revici's treatment was clearly a departure from the accepted standard of care. As a result, the law considered his treatment to be negligent or malpractice, pure and simple.

Schneider's cancer progressed despite Revici's treatment, and she was obviously injured. Thus, Revici's technically negligent care "proximately caused" (as lawyers say) Mrs. Schneider harm or injury. And that's all it takes to obtain a damage award for medical malpractice. All a jury has to do is figure out how much to award the plaintiff.

Of course, it was Mrs. Schneider's decision not to have surgery. But Revici still agreed to treat her stage I breast cancer, which in retrospect was a mistake. In part because of the imbalance of information between a doctor and a patient, New York law did not recognize "assumption of risk" as a complete bar to recovery. Patients cannot legally assume the risk of treatment that is negligent or does not meet the standard of care.

But the physician's liability for negligence can be reduced if the patient had contributed to her own injuries, and that is called contributory or comparative negligence. In New York, a plaintiff's negligent conduct did not stop a recovery of money from the negligent defendant; it just reduced the damage award by the percentage of the plaintiff's contributory or comparative negligence. Usually, the most you could get from the jury was a 50 percent reduction of the award, and usually the reduction was much less. Juries tend to blame the doctors if they are negligent. We were looking for something better than a reduction of the damage award.

We Come Up with a Bright Idea, Maybe

Cathy Helwig was a first-year law student who worked for us part time. One day she mentioned that they had discussed in her torts class a recent New York case. (Torts deal with injuries to people and suing to recover damages.) A teacher had sued the school board for negligence. The school had sponsored a race. But the teachers would not be running; they would be riding donkeys. As can be expected, some jackass fell off the donkey, got hurt, and sued the school board for creating a dangerous activity.

The New York Court of Appeals (the highest court in New York State) made a distinction between implied and express assumption of risk. If the plaintiffs knew about the risk and implicitly assumed the risk of the activity, the award could be reduced by the percentage of the plaintiff's negligence, just like in any comparative negligence case. The court called that implied assumption of risk.

If, on the other hand, two parties explicitly agree in advance that the defendant need not exercise reasonable care, then the agreement is an enforceable contract and there could be no recovery against the negligent defendant. That was called express assumption of risk, which would be a complete bar to recovery.

The donkey case got us thinking. Maybe it was time for the New York courts to acknowledge that a patient could expressly assume the risk of technically negligent medical treatment. Revici's case seemed like an excellent vehicle to establish the doctrine. The patient had repeatedly been told

by her doctors that she needed surgery even before she met Revici, but she rejected that advice. Although Revici's treatment was certainly a departure from the "accepted standard of care," and hence technically malpractice, it was unconventional therapy, not really negligent treatment as most people would understand the term. It was the patient's choice to seek out and obtain this "negligent" therapy.

We also thought the case could be framed as a freedom of choice and personal responsibility issue. Patients should have the right to seek unconventional treatment. But if they do, maybe they should not be able to complain about the result, so long as they were properly warned. Seemed reasonable to us, but there was no authority for it, and we knew it would be difficult to sell it to a federal district court, since federal district judges are never excited about making new state law.

So we wrote a jury charge on an "express assumption of risk" affirmative defense that would be a complete defense to the case. (A jury charge is an instruction on a point of law to the jury. The judge decides what jury charges to give to the jury based on input from the attorneys). We also put one in for comparative negligence (implied assumption of risk) in case the judge would not give the express assumption of risk charge.

A New and Magical World

As we were in the final preparation for the trial, a new and magical world appeared before me—a world that would become one of the most valuable weapons in all of my future battles. It was a world with its own rules and governed by its own logic. This new world had some similarities to the world I inhabited, but only on the surface. I am speaking of the media.

Early on in the case, Revici had been hammered by the media. Wachsman was a virtuoso at manipulating the media. Somehow, he and his PR firm, Howard Rubenstein, had gotten a national ABC TV show to cover the funeral of one of Revici's patients, and the piece just also happened to cover Revici getting sued by the executor of the patient's estate. "Quack, charlatan, murderer" were all terms used to describe Revici and also some really bad stuff.

We were getting indications that there would be a repeat of the media attacks for the trial. But we were starting to feel our way in this strange new world. Turns out, Gabe Pressman, one of the most venerable New York TV newsmen, was interested in Revici and the controversy surrounding him.

Gabe Pressman was an old-time newspaper reporter who made the move to TV journalism in the 1960s. He is a terrific guy and much deeper and insightful than most of the modern crop of TV "gotcha journalists."

Over the years, I got to know Gabe pretty well. Alternative health fascinated him. A decade later, he would become interested in the whole Burzynski saga,[7] and I often spoke to him and appeared on several of his shows on cancer.

Gabe and his NBC affiliate were working on a multi-part series on *The Politics of Cancer*. They ended up featuring Revici in one of the segments right before the Schneider trial. Though the piece presented both sides, the mere acknowledgment that there were politics surrounding Revici's treatment was a good thing.

NBC's *The Politics of Cancer* series received so much local attention that on *voir dire*, or jury selection, Wachsman requested the judge to ask prospective jurors if they had seen the piece and if so, what they thought of it. Wachsman was getting a taste of his own medicine, and that suited us just fine.

However, throughout the Revici saga, the media was a mixed bag. Because of the malpractice and licensing cases, and in general because for so long he was considered a quack by conventional medicine, Revici received more negative press than positive.

I defended Revici on two prominent TV talk shows: the *Morton Downey Jr. Show* and *Geraldo*. The Downey show was a zoo. The format was like the Coliseum in Rome: the guests were the Christians, and Mort was the lion. The show tended to take on simple issues with a clear villain, which caused a lot of yelling and booing.

But the Revici issue was complicated and nuanced. To my great surprise and relief, Mort was a perfect gentleman to me, and he didn't go on the attack

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7 The next chapter in this book entitled "The Burzynski Wars" relates the story of this medical pioneer.

the way he did with most of his guests. I only recently learned that Downey's producer was in our corner and that's the reason the show went well.

I had no such luck on *Geraldo*. Producers of these types of shows have a standard trick (which I didn't know at the time). They lie to you about the name of the segment. You think I would have agreed to appear if they had told me the name of the segment was "Doctors Who Maim Their Patients"?

They really sucker-punched me on that one. There were six guests. I sat next to a woman whose face had been butchered by a cosmetic surgeon who had let his chauffeur do the surgery. Her lawyer sat on the other side of her. There was a father whose son was killed by a surgeon who let an unlicensed person perform the surgery. His lawyer sat next to him. Harvey was there representing his three clients who supposedly were killed or maimed by Revici. And I was there representing Revici. When discussing Revici in the opening, Geraldo reluctantly admitted that Revici wasn't as bad as the other doctors mentioned in the show. (Yeah, and he was a whole lot better than the Nazi doctor Josef Mengele and Genghis Kahn too!)

Despite the ups and downs with the media, Sam and I were excited about this malpractice case. It was interesting. It was important. For better or worse, it was in the media, and we were going against one of the top lawyers in the field (according to him, anyway). So far, we were going toe-to-toe with Harvey. Well, at least we had vacated the default. But good things often end suddenly.

Things Go Bad Right at the Beginning

We had ended the first trial day by picking the jury. Around ten o'clock that night, I got a call from Sam. He said that I was not going to believe what had just happened to him. I told him, "Sure I'll believe it." He insisted I wouldn't believe it. We went back and forth about whether I would believe him.

Finally, after he was convinced I would really believe him, he told me that he was working on the opening argument in his apartment when he got a call from a woman. She had gone to summer camp with Sam's sister and supposedly, she was trying to track her down. She had seen Sam several times when he went to see his sister at camp. Sam had no idea who she was, but he chatted

amiably with the woman about his sister, the camp, and the good old days in general.

They talked about what she was currently doing, and she mentioned that she was living in New York City. He told her he was a lawyer, and that he was working on a big case.

Then she dropped the bombshell. "I know. I am juror number six." For the first time in his life, Sam Abady, the former world debating champion, was speechless.

In the old days of English common law, a jury consisted literally of people who knew the parties to the suit. Hence when they said "jury of your peers," they really meant it. But in the American legal system, jurors cannot know nor have any contact with the parties or their attorneys. The process of jury selection, or *voir dire,* includes making sure there is no connection whatsoever between a juror and the parties or their attorneys.

One of the main things a judge will explain after the jury is sworn in is that the jurors can have no contact with any of the parties or their counsel. Judges routinely explain that attorneys will look away when a juror passes by so as not to even make eye contact.

So after hearing this from the judge a few hours before, this moron decides to call up Sam just to talk about the good old days. Sam explained to her that what she had done was totally improper and that he would have to tell the judge in the morning and hung up. Then he called me.

This was bad. Judge Motley already didn't like Revici or either of his lawyers. Whenever we would appear, she would call Harvey "Dr. Wachsman." She seemed to think Revici was the scum of the earth, and we were just a half step up in the food chain. Now, we were looking at improper jury contact.

We talked it through, though more for the psychological reasons than for the planning. We had no choice. So the next morning, we went to see the judge. She was justifiably incensed.

She did not believe Sam just happened to get the call out of the blue. Unfortunately, she had chided Sam during his questioning during jury selection that he was being overfriendly with the prospective jurors, especially the female ones. So she blamed him.

She started talking about throwing him off the case and making me try the whole thing myself. I told her I was not prepared to try the whole case. "I'm just the motion man," I said. I was plenty worried, since I had not planned to do the opening.

Judge Motley then excused us and said she was going to interview the moron juror. Sam and I even had this crazy idea that she had been planted by Wachsman to shake us up. Well if he did, it had worked. We were plenty shaken up. My mind started racing as I began feverishly preparing some sort of opening. Also, for all we knew, the moron would lie and say Sam had called her.

We were called back to chambers after the judge finished with the juror. The soon to be ex-juror had told the truth and admitted she had called Sam. But the judge was feeling smugly prescient since she had warned Sam the day before about his conduct toward the female jurors.

She told us she was referring the matter to the U. S. Marshals Service and possibly the U. S. Attorneys office and that there would be a full investigation. She allowed Sam to continue. Of course, the juror was thrown off the case, and one of the alternates took her place. Not the best way to start a big federal trial.

Showtime

Judge Motley brought the jury in, and we were ready to try the case. Sam and I must have looked like the guys on the Smith Brothers' cough drops box. We both had full beards. Sam was around five feet nine inches tall, dark complexion, and carried an extra forty pounds in his midsection.

Me, I was six feet and in decent shape, since I was a regular at the New York Health and Racquet Club. Because of my red hair and red beard, people said I looked like the Viking "Eric the Red." But with a suit and my black fedora hat, I could also have passed for an orthodox rabbi from Brooklyn.

On the other side was Dr. Harvey Wachsman; he was heavy, had thinning grey hair, had a shrill voice with a heavy Brooklyn accent, and was arrogant in the way that many medical doctors or lawyers can be (and he was both). Assisting him was one of his associates, Alice Collopy, who was in her mid-thirties,

short, attractive, and very stiff and formal. She was smart enough to be a good lawyer, competent, and much more detail-oriented than Harvey. She was a decent person. Harvey treated her like a lackey.

Wachsman as the plaintiff's counsel spoke first. To me, it was over the top and too aggressive. Since he was so good on his feet and because he had more trial experience than I did, Sam did the opening. He was terrific.

The plaintiff presents first in a civil trial and Harvey and Alice presented a well-organized case. Of course, they had Mr. and Mrs. Schneider testify. They also called two experts and one of the treating doctors. It was very solid, at least on the direct examination. They also called Revici as a hostile witness. Regrettably, he was probably their best witness.

We decided I would do the cross-examination of all of the plaintiff's witnesses, and Sam would handle Revici, our expert, and the closing. That played to Sam's strengths. Sam was excellent on his feet. But how do you cross-examine a woman who lost both her breasts and had a short life expectancy? What do you say to her husband?

A Light Touch

I gave this much thought. Attacking them was out of the question. They obviously had gone through a difficult time. To avoid creating more sympathy for her, a light touch was needed.

So I did not ask her any questions about her dealings with Revici. Instead, I just had her go over her conversations with the four doctors who recommended surgery. We had all the medical records, and I had her explain each reference in every doctor's note that advised her to have surgery. She could not get too emotional about all this stuff. By the end of this back and forth, the jury understood that she had known the risks of not undergoing surgery before she ever stepped foot in Revici's office. That was about all I could do with her, and I was happy with that.

For the husband, I had something else in mind. After establishing that he had gone with his wife to most of the appointments with the other doctors, I only asked him one question. "Mr. Schneider, having heard these doctors tell your wife that she needed surgery and the risks she faced if she didn't have

it, as her husband, I ask you, why didn't you drag her to the operating room and make her get this life-saving surgery?" With noticeable resignation in his voice, he quietly said it was her choice, and she chose not to do it. I thanked him and sat down.

The treating doctor confirmed that Mrs. Schneider was advised to have surgery, and she knew what the risks were in not having it. This physician had excellent notes about her interactions with Mrs. Schneider. I just had her go over word-for-word what she told Mrs. Schneider and what Mrs. Schneider told her. By the end of the doctor's testimony, it was crystal clear that Mrs. Schneider knew that without the surgery she might die.

We Have Some Fun

Wachsman called two experts. The first was from Harvard's physics department. His job was to establish that selenium was a dangerous chemical. I think they called him because he worked at Harvard. He was not a medical doctor, let alone an oncologist, and he didn't seem to know much about selenium. I thought about trying to strike him as a witness or challenge his credentials, but instead, I decided to have some fun with him.

We did some medical research and pulled up every article about selenium published in the past twenty years, and every article about a couple of other medications. Those were the days of dot-matrix, continuous-feed printer paper. When we printed up the lists of articles, it was a lot of pages, maybe fifty or a hundred pages of just the names and citations of the scientific articles (and some other lists).

So on cross, I just started reading the names of the articles and where they were published (and most were published in reputable journals, at least as far as I and the jury knew). One by one I read them.

In order to discuss an article with an expert, you have to first ask the expert if he is familiar with the article. If he says he is, you can ask him questions about the article. But if he isn't, you can't ask him about the article. This Harvard professor was not familiar with the first article on selenium, so I moved to the second. Nope, he didn't know that one either. I went down

my list, quoting the title of each article about selenium and where it was published. He was not familiar with a single one of them.

All of these articles had titles like "The Use of Selenium to Prevent and Treat Tumors." So he didn't look so much like an expert on selenium since he had not heard of any of these articles. And the jury was hearing about all these wonderful articles about the magical anti-cancer properties of selenium.

After going through about a dozen such articles, the jury was seeing me appear to get frustrated, since I was not able to discuss any of these articles with him. Actually, I was hoping he had not read any of the articles, because that made two of us. I hadn't read a single one of them either. All I had were the names of the articles.

I then asked the judge for a moment to look through all the pages of the articles. At that point the fifty attached pages somehow started to unfold and fall to the floor like an expanding accordion, page after attached page. I clumsily tried to stop the pages from unraveling. (The clumsy part was no act.) I eventually retrieved all the attached papers from the floor, but it took some time, as I was having some trouble putting them back together. All this time, everyone was waiting for me to continue. As I finished putting the pages back together, I told the judge I had no further questions. I think the point was made.

It's Hard to Argue with a Guy Who Is Right

I had a much tougher time with the second expert. Dr. Robert Taub was a highly trained and very articulate oncologist who worked at Columbia Presbyterian Hospital. His job in the case was to establish that the standard of care for stage I breast cancer was surgery and that it was a completely curable disease. He also opined that faced with a patient with this diagnosis, it was the physician's job to convince the patient to undergo surgery and that there was no other rational choice. If a patient would not follow the advice, then the doctor should turn the patient away rather than give experimental treatment. I worked hard crossing him but got nowhere. The problem was that he just made too much sense. I thought Revici was incredibly arrogant to treat the patient with his brown dropper-topped bottles given how curable the disease

was and given the fact that the chances of cure dramatically diminishes the more the tumor is allowed to grow. But what if the patient simply refuses and insists on unconventional treatment, I asked Taub over and over again. Suppose the patient goes to four doctors or ten and she still refuses? And Taub kept coming back to his statement, "The doctor's job is to ensure that the patient gets the best treatment possible." But what if the doctor also recommends surgery, but agrees to treat the patient with medications and maybe tries to talk her into to surgery later on? "No, that's not enough. She needs surgery. Giving her anything else is malpractice." I'm not sure what the jury thought about all this, but I felt that I did not neutralize his testimony.

Revici Takes the Stand

The only other witness Wachsman called was Revici, and that didn't go well. We had tried to prepare Revici, but that proved to be impossible.

By that time, Revici was close to ninety. Despite fifty years in the United States, his English was very poor. Also, maybe because he was so old or so fixed in his ideas, it did not matter what question he was asked, he would answer the question he wanted to answer. (Politicians do that also, so maybe it was not his age that caused him to behave this way.)

During most of his answers, the judge had to instruct Revici to answer the question and not give soliloquies irrelevant to the question or to the lawsuit. He would turn and look at her and say, "Of course, of course." Then he would do the exact same thing on the very next question. But it did not matter, since most of what he said was unintelligible to the jury and everyone else in the courtroom.

Sam's future mother-in-law was watching the trial. She was married to one of England's most prominent physicians. After listening to Revici on the stand for a few hours, she commented to us, "I wouldn't let that guy treat my dog." I guess the disaster that was Revici's examination had a silver lining. What kind of idiot would allow this guy to treat a patient for stage I breast cancer, and how can anybody think that this doddering old fool could have a cure for cancer? That was not the impression we were trying to make on the jury, but those were the cards we were dealt. Sam tried to revive Revici by calling him

as our witness in the defense case. But it did not help. Revici gave Sam as hard a time in answering questions as he had given Wachsman. I think everyone in the courtroom was relieved when Revici left the stand the second and final time.

Sam did the direct examination of our expert, Gerhard Schrauzer. Dr. Schrauzer was very professional, and you could see he was one of the world's experts on selenium. Schrauzer testified extensively about all of the research showing the benefits of selenium on cancer. The contrast between him and the Harvard physicist was not lost on the jury. After Dr. Schrauzer testified, we rested.

And that was it, or so we thought. All in all, it had not gone too badly for Revici. Only Taub (and Revici himself) had done us any real harm. Up close, Wachsman was surely a very competent attorney, but he was no Clarence Darrow. He was loud and abrasive. I thought it would be hard for a jury to like him. His assistant, Alice, handled some of the witnesses, and to us, she seemed more effective and certainly more likeable.

More importantly, they didn't present an overpowering case. All of their witnesses agreed that Mrs. Schneider was repeatedly told she needed surgery, but she refused, despite the pleas from all her doctors and her husband. So we were feeling good and maybe even confident.

But Wachsman still had something up his sleeve. He announced that he had a rebuttal witness. Rebuttal witnesses are witnesses presented by the plaintiff after the close of the defendant's case. The advantage of this tactic is that there is no pre-trial discovery of rebuttal witnesses. That is because they are supposed to be used only to rebut matters brought out in the defense case that could not have been reasonably anticipated.

Harvey was not going to rebut anything. He just made a tactical decision to put part of his case-in-chief as rebuttal evidence. This quickly became clear once we figured out who the rebuttal witness was and what he was going to say.

Enter the Quack-Busters

The world of alternative health has always been polarizing. Proponents are adamant supporters. Now, the big players in the alternative health field are

people like Andrew Weil, Deepak Chopra, Gary Null, and Kevin Trudeau. Some of these folks have been around for twenty or thirty years, but they did not have the following they do now. The alternative health community back then was small, unsophisticated, unorganized, and not well funded. That was not the case with the opposition.

Then and now, there are many opponents to anything alternative, simply because these remedies have not been proven by controlled clinical trials to be safe and effective. Well, duh, that's why they're called "alternative." If a remedy is proven, then it is not alternative or unconventional.

The opponents seemed to be organized and very well-funded. They called themselves the "quack-busters." Their stated goal was to debunk alternative remedies and attack alternative health practitioners.

The quack-busters developed a not-so-secret list of the country's hundred biggest medical "quacks." They rated the practitioners by using a "ding dong" index. "Ding dongs" were like star ratings for restaurants or hotels. The more "ding dongs," the bigger the quack.

The core group of quack-busters included (the late) John Renner, Stephen Barrett, William Jarvis, and Grace Powers Monaco.

But by far the most rabid quack-buster of them all was Victor Herbert. The first time I heard his name was when Harvey Wachsman announced that Dr. Victor Herbert would be his sole rebuttal witness. We protested to the judge and argued that he was not a true rebuttal witness.

By this time, the judge was even more hostile toward Revici and his lawyers. She would do anything she could to see that Revici would be found liable, and allowing Wachsman to call the premier quack-buster would greatly help the cause. However, with imperial-like magnanimity, she did allow us a short break after his direct examination to prepare his cross.

Wachsman had given us a copy of Herbert's *curriculum vitae* (C. V.) right after he announced he would be calling him. It was an amazing document. It was hard to believe that one person could have done all he claimed to have done in only one lifetime. He was a medical doctor, of course, and had taught at many top universities. He worked for the government, published dozens and hundreds of papers and books, lectured around the world, and was an

adviser to numerous companies and industries. He was a lieutenant colonel in the Green Berets. And he was an attorney licensed in several jurisdictions.

But he came to court because he was a self-proclaimed quack-buster extraordinaire. According to Herbert, he went around the country doing what he could to protect the public from quacks like Revici. He felt bad for all the people who Revici and his ilk duped, defrauded, and maimed.

According to Herbert, Revici was one of the cruelest killers in the world, and those were the words he used. Herbert said that Revici's treatments had been thoroughly refuted, debunked, and rejected twenty or thirty years ago. He claimed that Revici knew they did not work and still continued to dupe people into taking his worthless treatments.

This guy was killing us. He was smug, arrogant, but very straightforward. His legal training was evident. Sam raised numerous objections, most of which were overruled by Motley. It was brutal.

I spent the break calling a couple of the alternative health advocates to see what I could find out about Herbert. Apparently, he was a consultant to the sugar lobby and received money from "big pharma" (i.e., the pharmaceutical industry) and other conventional health institutions. He was also vehemently opposed to vitamins and nutritional supplements that were being sold to consumers. I did not come up with much.

Sam did what he could in cross-examining Herbert. They argued a lot, and the best thing Sam did was to show that Herbert was an arrogant, argumentative, self-assured jerk. Between the direct and cross-examination, we hoped that the jury would understand that Herbert was just a biased medical hit man.

As Herbert was leaving the stand, he and Wachsman exchanged self-satisfied, congratulatory grins. They had sunk Revici, or so they thought. That little exchange really ticked me off. Looking at them look at each other, I decided I was going to get both of them (and eventually, I did).

Finally It's Over, but We're Not Finished

After Herbert testified, the case was ready for summations. We were given a little time to prepare. Sam didn't do any overt preparation. We just sat around

and talked about the case, and I guess Sam cogitated unconsciously. He had been working on the case for several weeks and like some talented lawyers, he worked best unconsciously.

By this time, we had what is called a charging conference, which is when the lawyers get together with the judge to discuss the jury charges. Judge Motley had rejected our request to give an express assumption of risk charge. As much as I disliked her and felt that she was prejudiced against Revici and us, I couldn't fault her for not issuing the jury charge. New York law did not recognize the affirmative defense of express assumption of risk to a malpractice action. As a federal district judge, she did not want to create this defense and certainly not for a doctor like Revici.

We did get the comparative negligence or implied assumption of risk charge. We thought the jury understood that Mrs. Schneider knew and appreciated the risk of forgoing surgery, so we thought we had a good chance of having the damage award reduced. We also thought we had thoroughly discredited Wachsman's fraud and lack of informed consent claims.

Wachsman did a good job closing. He was still annoying (at least to me), but he had good points and made them very effectively. Sam was excellent. He spoke without any notes. He talked about freedom of choice, the right of patients to make even bad decisions, and how important it was that people be allowed to choose unconventional therapies. After he finished his closing, Motley appeared annoyed. I think she was concerned that Sam might have convinced the jury to find in Revici's favor.

After the summations and the reading of the jury charges, the jury retired to deliberate. They were out some time, but eventually they came back with a verdict.

The jury was given a special interrogatory form that asked them specific questions. We won outright on fraud and lack of informed consent. The first question on the malpractice claim was whether Revici's treatment was a departure from the accepted standard of medical care. We basically conceded that his experimental treatment for a curable cancer was a departure from the accepted standard care. The jury saw it that way.

The jury also found that Revici's departure was the proximate cause of injuries sustained by Mrs. Schneider. As to damages, the jury awarded her $1,050,000.

The next interrogatory was on our comparative negligence or implied assumption of risk charge. Was Mrs. Schneider's conduct partially responsible for her injuries, and if so, what percentage was she responsible? The jury found that she was fifty percent responsible, which was basically as much fault as they could assess against her.

So the bottom line was that Wachsman had obtained a verdict for $525,000. It could have been worse, and Wachsman was probably expecting more. So ended the first Revici trial, but we were far from finished.

The Schneider Appeal

We felt strongly that, in light of the donkey case, New York was ready to adopt an express assumption of risk defense to medical malpractice, regardless of whether a federal district court judge would give the instruction. So everyone was clear that we would take the case up on appeal to the Second Circuit Court of Appeals.

We agreed on a reasonable fee with Revici's supporters and we started preparing the necessary paperwork. Revici did not have a lot of cash back then, and he also did not have any free assets, as we had taken a lien on his brownstone to secure our attorney's fees and also for some protection against the possible judgment.

The filing of an appeal does not automatically stop collection efforts on the judgment. Therefore, the losing defendant usually posts an appeals bond that acts to stop the victorious plaintiff from attempting to collect on the judgment. Revici did not have the cash or securities to post a bond to secure a half-million-dollar judgment. But interestingly, throughout the duration of appeal, Wachsman never seriously attempted to collect on the judgment.

Appeals usually take at least a year. The trial transcript has to be prepared, corrected, and sent to the parties. Then the record or paperwork of the case has to be prepared and transmitted to the appellate court. In this case, it did not have to travel far since the Second Circuit Court of Appeals was

in the same building as the district court, in downtown New York at Foley Square.

Then the parties write briefs in support of the appeal. The appellant, the party filing the appeal, writes the first brief. The appellee then responds. And finally, the appellant is given an opportunity to submit a reply brief. In most appeals of civil trials, the judges call for oral argument, and the judges requested it in our case.

Sam was busy with other things and could not spend any significant time on the appeal. By that time, one of Sam's good friends, an extremely able attorney named Matt Dineen, was working with us, and Cathy Helwig was still helping out. Matt, Cathy, and I did the briefs. We argued all kinds of issues like evidentiary errors and the Victor Herbert trick. However, the main thrust was the jury charge and, in particular, the judge's failure to give the express assumption of risk defense.

Sam did the oral argument and it went smoothly, for us anyway. The judges seemed swayed by the fact that Mrs. Schneider voluntarily chose to forgo surgery and instead chose to undergo Revici's questionable treatment. They gave Alice Collopy, who argued the appeal for Mrs. Schneider, a hard time.

In a few months, we received the decision. The Second Circuit overturned the jury verdict, holding that the trial judge committed reversible error by not giving the express assumption of risk defense as a complete bar to recovery. As the Second Circuit stated, "While a patient should be encouraged to exercise care for his own safety, we believe that an informed decision to avoid surgery and conventional chemotherapy is within the patient's right 'to determine what shall be done with his own body.'"[8]

It was a complete victory. Back then, there were not many legal victories in the alternative health community, so news of the Second Circuit's decision spread throughout the country. Sam, and to some extent our firm, was heralded as the great white hope amongst alternative health practitioners. Sam was invited to speak at conferences, and we ended up landing a number of other clients in the field, including the ever-increasingly popular diet doctor, Robert Atkins.

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8 For the legally interested, *Schneider v. Revici* is reported at 817 F.2d 987 (2nd Cir. 1987).

The Second Circuit had an unwritten rule that if a case was overturned on appeal, it would be reassigned to another district court judge. That was excellent news from our perspective, since Judge Motley was horribly biased against us. It was not just her rulings. She engaged in the most outrageous behavior I have ever seen from a judge—very clever but thoroughly despicable.

Throughout the trial, when one of Wachsman's witnesses was on the stand, she would hold an exaggerated pose of rapt attention. She would stare at the witness with hands folded underneath her chin, with a furrowed brow, like she was mesmerized. When Revici and Schrauzer testified, or during my cross of their witnesses, she wore an exaggerated expression of boredom. She would literally stick out her hand, turn it palm up, make a half-fist, and look at her fingernails. She actually started filing or brushing her nails with an emery board—but up high so the jury could see that she was not paying attention to our witnesses.

It was a clever way to send a message to the jury. I thought about standing up and making a comment about her conduct on the record. But it was her court, and I figured it would just make her more rabid against us. That was the only time I ever saw a judge use this tactic. We were mighty happy to be rid of her, and I am certain the feeling was mutual.

Round Two: It's Payback Time

The case was reassigned to District Judge John Sprizzo. He called us down to his courtroom for a conference to discuss the retrial. (Sam was busy on other cases, so I took the case over.) At this point, Mike Carlucci, another of Harvey's associates, was handling the case. Mike was tall, good looking, and affable; a very good guy and easier to deal with than Alice Collopy.[9]

The only thing I wanted from Sprizzo was the chance to depose Victor Herbert, since we had not had the opportunity pretrial. It seemed reasonable, so he granted the request.

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9 I would later learn that they were seeing each other and would eventually marry. They are still married and practicing law together. Good for them!

Herbert's office was at the Bronx VA (Veteran's Administration) Medical Center, and we arranged for me to depose him there for his convenience. By this time, I knew quite a bit about Dr. Herbert. He really was the nastiest, most rabid quack-busting anti-alternative health person out there. Because of his personality and legal training, he was constantly mixing it up with alternative health practitioners and their lawyers. He had been involved in numerous lawsuits, as a testifying witness and as a party.

I discovered one extremely interesting fact about Herbert. He was actually written up in some book about medical pioneers who advanced medical knowledge by engaging in self-experimentation. Herbert's early claim to fame rested on his research on the body's need for folic acid.

He proved this need in part by devising an experiment whereby he would deprive himself of all folic acid. He did this by double boiling meat and vegetables, thereby removing the folic acid. Apparently, he became weak and disoriented as a result of his self-deprivation. And the book heralded him for his noble sacrifice. Hmm, disorientation.... And then I knew what I was going to do to him.

Herbert's office was suitably crowded and overflowing with medical textbooks and books about alternative health. He had a picture of himself with Louis J. Sullivan, who at the time was the U. S. Secretary of Health and Human Services. Apparently, Sullivan was a student of his, and Herbert had been Sullivan's best man or something like that.

I spent about an hour and a half deposing him, just eliciting his background and accomplishments. He was only too happy to relate the many, varied, and important things he had done in his life, sprinkled with references to all the very important people he had helped or who thought highly of him. Carlucci was just letting him ramble on, and both of them were having a good old time while Herbert established his expertise on a wide variety of health topics.

Who's a Nut Job?

Just before I was ready to puke, I asked him quietly, "Dr. Herbert, have you ever been treated for a mental disease or disorder?" Carlucci woke up from his blissful stupor. Herbert just sat there with his mouth open.

"Objection! Objection!" Carlucci bellowed. "I request that you state for the record the good-faith basis of this question."

I was ready for that. I mentioned Herbert's self-experimentation with folic acid, which he referred to during the deposition. I explained that there had been studies that showed that people who were folic-acid deprived could experience long-term cognitive problems and mental disorders.

I mentioned one other basis. I had heard about some psychiatric or health clinic in Princeton, New Jersey, called the Brain-Bio Institute or something of the sort. I didn't know much about it, but what I did know was that the doctor in charge was an MD/PhD by the name of Russell Jaffe. I had never met or heard of Dr. Jaffe, and he was not a relative.

I had heard some rumor that Herbert was treated there or had some connection to the place. So I told Carlucci and Herbert that we had reason to believe that Herbert had been treated at the Brain-Bio Institute at Princeton for a mental disorder and otherwise implied that I had seen Herbert's psychiatric records. I then mentioned that the medical director was Dr. Russell Jaffe.

Carlucci went ballistic, and Herbert became apoplectic. Carlucci instructed Herbert not to answer the question. Carlucci then said that if I had illegally obtained Dr. Herbert's medical records from a relative of mine, both Dr. Jaffe and I would face charges. Carlucci wouldn't let me ask any more questions, terminated the deposition, and threw me out of Herbert's office. But I wasn't finished with Herbert yet, not by a long shot.

I had a smile on my face all the way back to my office. It got me thinking. They both had such an intense reaction, maybe there was something to this mental disorder idea. Herbert seemed like a nut job to me. Maybe he really was certifiable.

We Get Some Help from the Judge

When a witness is instructed by his attorney not to answer a question during a deposition, the remedy is to go to court and seek an order from the judge compelling the answer. And that is exactly what I did. I got a copy of the transcript of the deposition, and I put together a set of papers. Nothing fancy.

I simply explained that in light of Dr. Herbert's self-experimentation and the documented scientific fact of possible long-term cognitive impairment, we were entitled to inquire whether Dr. Herbert was mentally competent to give testimony in this *or any other trial* as an expert witness. Carlucci submitted papers in opposition to the motion. The judge called us down for oral argument.

It was late November or early December, and the judge had a number of cases before he was to hear our matter. One of those was a criminal case involving an older black man who was being sentenced by Judge Sprizzo.

The defendant had pled guilty to some crime, and it was his third conviction. None of the crimes were that horrible, but the defendant looked worried. He also looked like he had been beaten down by the system.

Sprizzo looked at him and shuffled through his papers. He explained that normally a crime such as the defendant had committed would warrant several years in prison, but Sprizzo said that he had looked at the defendant's past criminal history and felt the prison time he had received on these prior offenses had been excessive (and in both cases, he had been sentenced someplace in the deep South).

So Sprizzo said to balance things out, he was going to give the defendant an early Christmas present and not give him any jail time. The old black guy was stunned, quietly thanked Sprizzo, and left the courtroom. I liked that judge! He knew how to dispense justice.

Eventually our turn came. I explained what I wanted and why. No embellishments. But I did quote a couple of Herbert's most outrageous statements from his trial testimony, just to set the proper mood for the judge. I think that did the trick. Carlucci talked about what an esteemed scientist Dr. Herbert was, but the wind was blowing against him.

The judge went my way and then some. I had not asked for anything special in terms of the continued deposition, but Sprizzo took it upon himself to order that the continuation of Herbert's deposition take place before a federal magistrate. At the end of the deposition, the magistrate would determine whether Herbert was mentally competent to testify at this or any other trial. This time, I was laughing all the way back to the office. People on the subway must have thought that I was just another crazy New Yorker.

The Green Beret Is Called Up (Yeah, Right), and It's Over

I sent Carlucci a note suggesting a couple of possible deposition dates. It took him some time to respond, which he did by letter. I knew that Herbert was a reserve officer in the Green Berets, but I didn't know how important he was. Carlucci informed me that Herbert was being called up for some reason, for some exercise or war preparation or something. Even though he would not be deployed for months, unfortunately, Herbert did not have the time to finish the deposition. As a result, they were withdrawing Herbert's name as a witness for the retrial. I had put Herbert in his place and it felt good.

It felt even better when a few weeks later, and shortly before the scheduled retrial, Wachsman's firm notified us that they were not going forward with the retrial; they were walking away from their $525,000 judgment against Revici. And so ended *Schneider v. Revici*.

Next Up: Boyle v. Revici

It was good news for Revici and his supporters, but Revici was still in the thick of it with Wachsman's firm. After the end of the Schneider trial, but before Wachsman had given up his verdict, we had to start dealing with the second federal malpractice trial Wachsman had filed against Revici.

Revici had seen Cecelia Zyjewski around the same time he had treated Mrs. Schneider. Cecelia was an older woman who lived in New Britain, Connecticut. She had never married and lived with her brother, Skip. She had been diagnosed with stage I colorectal cancer. Her tumor was at the edge of her anal canal. The tumor was not big, and she had no other evidence of cancer. Her cancer was treatable by surgery and by all accounts was completely curable. There was some risk, however, that she would need a colostomy, which, of course, no one would look forward to.

Like Mrs. Schneider, Cecelia Zyjewski went to several physicians, all of whom strongly advised her that she needed to have the tumor removed. And like Mrs. Schneider, she refused.

Cecelia found her way to Dr. Revici, and he agreed to treat her with his medications. Nothing he did helped her. Her condition deteriorated and her cancer spread. She continued to refuse to have any kind of surgery until the

end when the doctors had to perform an emergency colostomy to save her life. By that time, the cancer had ravaged her body. In fact, the cancer ate through the wall between her vaginal cavity and her anal canal, a gruesome fact Harvey would repeat over and over again during the trial.

Cecelia eventually died. But even before she died, her nephew, Arthur Boyle, was appointed as her guardian. Boyle was angry that Revici agreed to treat her and contacted Harvey Wachsman. It was Cecelia's funeral that the ABC news crew had filmed. After Cecelia died, Wachsman filed a malpractice suit with Arthur Boyle, the executor of the estate, as the plaintiff.

This case proceeded more slowly. It had been kicked around between several federal judges. Judge Whitman Knapp (of the Knapp commission) out of White Plains, New York, had the case on his docket for awhile. There were a variety of legal issues that came up, and we went back and forth with Harvey and his firm for some time. But we were both mainly focused on the Schneider case. After Schneider's trial, both law firms started focusing on this case: *Boyle v. Revici*.

By the time the Boyle case was ready for trial, the Second Circuit had issued its landmark decision in the Schneider case. So we knew we could argue assumption of risk as a complete defense to the medical malpractice case. Or at least we thought we could. The only problem we had was that Revici could not find the signed informed consent form.

The good news was that three of Cecelia's relatives had been involved in her treatment with Revici, and they were supportive of him. The bad news was that one of them, Cecelia's brother Skip, had died before the trial and before he could be deposed. That left only Carol Palumbo, Cecelia's niece (and the sister of the plaintiff Arthur Boyle), and Carol's husband, Dominic. Fortunately, Carol and Dominic had taken Cecelia to Dr. Revici's office and sometimes even sat with her during the visit.

Perhaps because of Knapp's busy docket, the case was transferred back to Manhattan to the court of District Judge Mary Johnson Lowe. From the very beginning, Sam rubbed Judge Lowe the wrong way. It was not hard to do. Judge Lowe had a well-deserved inferiority complex. The publication *American Lawyer* consistently found her to be one of the most reversed judges in the Southern District of New York.

Of course, the facts of the case did not help us. Despite some positive press, Revici was still viewed by most mainstream people as a quack. Lowe knew that Motley had been reversed on appeal. We had a hard time with Lowe throughout her tenure on the case.

Based on his early dealings with Judge Lowe, we decided that Sam should not be involved in the case. I had plenty of other things to do. So Matt Dineen and Cathy Helwig did most of the work. I was to lend a hand when needed.

This Looks Like an Easy Case

Despite having an irascible judge, it didn't seem like a hard case after the Schneider appellate victory. We could prove through the testimony of Dominic and Carol Palumbo that Cecelia knew the treatment was experimental and not FDA-approved. We could also prove from the medical records that she was advised she should have surgery. That made it basically the same as the Schneider case. So we were not expecting any problems.

But as is often the case, stuff happens. Matt was a super-smart and exceptionally competent attorney, but he was very shy and did not have much trial experience. And of course, Judge Lowe did not like anybody associated with Revici. She made no pretense of being fair and took every opportunity to rule against us.

So the case proceeded to trial: Harvey and Alice for the plaintiffs, Matt and Cathy for Revici. Things did not go well. After the first day, I got several calls from Revici's supporters complaining that Matt was getting hammered by Wachsman. Matt was not happy either. He had had enough of Judge Lowe and Revici. Sam was tied up and otherwise did not want any part of the trial. So that left it up to me, by default.

Ready or not, Here I Come

I went down the next day and took over as lead counsel. I had not prepared the case, but I had read all the motions and was generally familiar with the facts. And of course, I had been deeply involved in the Schneider case. Most importantly, I had no choice.

Judge Lowe didn't like me any better than Sam or Matt. She continued to rule against us any time she could. She limited what we could ask on cross-examination and would not let me pursue Boyle's evasive answers. Robert Taub testified again, and once again, he was adamant that Revici should never have treated the patient. I did what I could with him, but it wasn't much.

I ate with Revici at one of the lunch breaks. It was just the two of us. We were discussing the case and the causation issue. He was pretty lucid—for him, anyway. He admitted that if Cecelia had had the surgery, she would be alive today. So I asked him, if that was the case, why he had agreed to treat her. He said it was her choice. I appreciated Revici's candor, but frankly, I agreed with Taub. Revici should never have treated her. I held my tongue. I had a job to do.

We did not have much of a defense, other than calling both Carol and Dominic Palumbo to testify that Cecelia knew Revici's treatment was experimental, and she also was fully aware that her doctors strongly recommended that she have surgery. Basically, it looked like a repeat of the Schneider trial. But as usual, when you least expect it....

We had our charging conference with Judge Lowe. We submitted both the express assumption of risk and a comparative negligence/implied assumption of risk charge to the judge and cited *Schneider v. Revici*. To us it was a slam dunk. True, there was no signed informed consent form, but we had the testimony of Dominic and Carol Palumbo that Revici explained to Cecelia that the treatment was experimental and not FDA approved. They even said she had signed the consent form. The form just could not be produced from Revici's records. There was no logical reason why a signed document was a prerequisite for asserting the express assumption of risk defense, and the Second Circuit never said it was.

Wachsman and Alice argued the opposite. Then Judge Lowe said something amazing. She said if she gave the assumption of risk charge, she would have to enter a directed verdict (i.e., judgment) in favor of Revici, since the Palumbos had established that Cecelia had assumed the risk and there was no evidence to the contrary.

Here We Go Again

If I had not been trying the case before her for the last several days, I would have been shocked. First of all, it was the smartest thing I ever heard come out of her mouth. She knew and acknowledged that we won the case without even going to the jury.

But then she did something even more amazing. She ruled that she would not give the express assumption of risk defense, because there was no written informed consent form. Matt and I were flabbergasted but not surprised. Lowe was biased, and that's what a biased judge does. Matt and I looked at each other. Here we go again. Like Motley, Lowe agreed to give the comparative negligence charge.

We finished up the case. Wachsman and I did the closings and the case went to the jury. The jury's verdict was no surprise.

This time we had stipulated that the treatment was technically a departure from the accepted standard of care. We thought it might limit Wachsman's efforts to put on the gory details of Cecelia's medical problems. It didn't.

My First Million-Dollar Verdict!

The jury found that the treatment caused injuries, and awarded damages of $1.5 million. The jury found that Cecelia was 5–10 percent negligent and the verdict was reduced to $1.35 million.

As I would often later joke, this was my first million-dollar verdict. Too bad I represented the defendant. But we had an excellent case on appeal, and we were certain that the court of appeals would reverse the judgment because the judge failed to give the express assumption of risk defense.

Sam and Cathy handled the appeal because by that point, I had dissolved the law firm and moved my practice to Houston. As everyone expected, the Second Circuit reversed Judge Lowe and specifically stated that the express assumption of risk defense does not require a written informed consent form or any particular form of evidence. Testimonial evidence was just as good as a written consent form. So once again, Wachsman's judgment was reversed, and once again the case was sent back for retrial. This time, there would only be one issue at the retrial: whether the patient had expressly assumed the risk of the so-called "negligent" treatment.

I ended up handling the Boyle case on remand. Because of the Second Circuit's rule on reassignments after reversals, we got rid of Judge Lowe (and she got rid of us).

Dr. Harvey Exits the Case and the Ho Hum Retrial

The case was reassigned to District Judge John Martin. Martin had been the United States Attorney for the Southern District of New York. He was a very smart, no-nonsense judge. As fate would have it, Harvey immediately didn't hit it off with Martin. He would not call Harvey "Doctor," which appeared to annoy Harvey. Martin was not nearly as deferential to Wachsman as Judges Motley and Lowe had been. And worst of all, Martin acted just like a judge should act: fair and impartial to both sides. This was a completely new experience for Harvey in these Revici cases, and I am sure he did not like it.

The main problem for us on the retrial was that the case had created animosity between our star witness, Carol Palumbo, and her brother, Arthur Boyle, the plaintiff. Between the end of the trial and its reassignment to Judge Martin, the family had reconciled. Part of the reconciliation was that neither Carol nor Dominic Palumbo would testify at any retrial. Because they lived out of state and more than one hundred miles away from the courthouse, we could not subpoena them and force them to testify.

I told the judge that I intended to prove our case by reading the trial and/ or deposition testimony of the Palumbos. Harvey went crazy. He ranted and raved. But John Martin was the wrong judge to pull that stuff on, and he gave Harvey an earful. After Martin ruled that he would allow us to read the prior testimony at the trial, Harvey stormed out of the courtroom in a huff, and that was the last I saw of the great Dr. Harvey Wachsman.

Alice Collopy and Mike Carlucci, who were by that time married, took over the case. We did some minor preliminary work. They tried to have some other medical doctor testify at the retrial. I deposed him, but he didn't know anything about the only issue in the case, which was whether the patient assumed the risk of Revici's treatment, so I moved to preclude their witness from testifying. Martin saw it my way and struck their witness from the case.

The day of the trial came and it was anti-climactic. We picked the jury. We did openings. Arthur Boyle testified, but he did not have much to say; he couldn't say whether Cecelia did or did not assume the risk.

As to our defense, Marcus Cohen, the unofficial spokesman for Revici's patients, read the part of Dominic Palumbo. A very beautiful blond cancer patient cured by Revici read Carol Palumbo's testimony. And that was all she wrote. We did summations, and the case was sent to the jury.

Of course, Judge Martin gave the express assumption of risk defense. The jury came back in maybe three quarters of an hour and found in Revici's favor. And so went Harvey Wachsman's second judgment against Revici.

The Operation Is a Success but the Patient Dies

After the verdict, I went to Revici's offices to tell him and Elena the good news. They were pleased. This was the third and last of the civil malpractice cases filed by Wachsman, and Revici had prevailed in all of them.[10]

However, it was bittersweet for them. By then, Revici's medical license had been revoked by the New York medical licensing board, the Office of Professional Medical Conduct (OPMC). Abady & Jaffe had worked on the licensing case briefly when we first took over the malpractice cases, but we had long since been replaced by an attorney who supposedly had political connections. The licensing case went back and forth and up and down the administrative system. At first Revici's license was suspended, but eventually, OPMC revoked it.

Elena brought in several doctors to try to run the clinic. Revici still had an office at the clinic and acted as a "consultant." The problem with Revici's treatment was that it was more of an art than a science. He was more medicine man than disciplined clinician. He had no standard reproducible protocols, and it was exceedingly difficult for other physicians to understand why he would give some medications at one time and others at other times. Eventually, the practice just faded away of natural causes.

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10 Wachsman had previously voluntarily dismissed his third case against Revici.

When Revici turned one hundred, his supporters threw him a big birthday party. Several hundred of his supporters and former patients attended. Later that year, because of the work of his politically connected patients and supporters, Revici's medical license was returned to him. He was very gratified by that.

Revici passed away shortly after his 101st birthday. Although a few doctors still use some of his formulations, his art of treating cancer patients has largely passed with him. However, I believe that his work on lipids will eventually be rediscovered and validated.[11]

Lessons Learned

And so ended my introduction into the world of alternative health. I had become an advocate but not a blind supporter. Revici surely helped many people, but I don't think he should have treated Schneider, Zyjewski, or any other such patient with early-stage cancer that is curable by conventional means.

Admittedly, it is a complex issue. Almost all curative treatments for early-stage solid tumor cancers involve disfiguring surgery. It is easy to say that someone else should have her breast cut off or have her anal canal resected and face a possible permanent colostomy. It is much harder for some patients to accept that fate without question and without first trying an unproven, unconventional treatment.

I confess to some personal experience with these issues. During the 1970s, my grandfather was diagnosed with mid-stage colon cancer. He had numerous unsuccessful and very painful operations to try to arrest the spread of the cancer. He died a horrible death. That experience made me skeptical of conventional cancer treatment.

11That process has already started. For example, one medical author has recently stated: "Another critical component of lipid metabolism warranting discussion is that of eicosanoids popularized by Barry Sears, PhD in his book, ***The Zone***. Emmanuel Revici, MD provided the early conceptual model for this entire field of fat metabolism." See http://www.drkaslow.com/html/cholesterol.htm, which is an excerpt from ***Cardiovascular Efficiency vs. Nutritional Deficiency***, by Dr. Jeremy E. Kaslow.

But as fate would have it, while we were litigating the Boyle case, my father was diagnosed with stage I colon cancer, the same disease as Cecelia Zyjewski. Although he was an alternative health nut and thought about exploring some alternatives for his cancer, he decided (with my strong recommendation) to have the surgery and seek unconventional care afterwards. The surgery cured him, and he lived the last twenty years of his life cancer free. Based on these two experiences, I can understand the desire of Mrs. Schneider and Cecelia Zyjewski to avoid surgery, as well as the anger their families had when Revici's treatment didn't work.

But more important than personal experiences is the danger of medical board action. Medical boards believe it is unreasonable to give an unproven therapy to a patient with a curable early-stage cancer. A licensing action would surely result if the patient's cancer progressed and the medical board found out about it.

The Revici cases created some protection against malpractice actions for doctors who provide unconventional treatments to patients. But despite this legal precedent, I have advised unconventional cancer doctors to limit their treatment of early-stage cancers when there is a relatively safe and proven conventional alternative, because of potential medical board action. Most of my clients have followed this advice and have avoided the problems Revici faced. In the alternative health field, it is said that the pioneers are the ones with the arrows in their backs. Emanuel Revici was surely proof of that.