UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0903

September Term, 2013

WINIFRED J. BOOKER

v.

JAMES LAWRENCE KERNAN HOSPITAL, INC., et al.

Zarnoch,
Berger,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 15, 2015

Dr. Winifred J. Booker, D.D.S., appellant, filed a complaint, in the Circuit Court for Baltimore County, in which she alleged breach of contract, breach of an implied covenant of good faith and fair dealing, negligence, and other misconduct, by James Lawrence Kernan Hospital, Inc., and others ("Kernan").[1] Kernan filed a motion for summary judgment, denying the existence of a genuine dispute of material fact relating to the counts in the complaint. Kernan also raised the defense of immunity. Following a hearing, the court granted summary judgment in favor of Kernan.

This appeal followed, in which Dr. Booker presents a single question, which we rephrase:

> Did the hearing court err by granting summary judgment in favor of all defendants on the ground of immunity under Federal and Maryland law?

For the reasons that follow, we shall affirm the judgment of the circuit court.

FACTS and PROCEEDINGS

Dr. Booker is a pediatric dentist and dental surgeon who began practicing at Kernan Hospital in 1999. In August 2009, a Focused Professional Practice Evaluation of Dr. Booker's practice was initiated by Kernan's Medical Staff Quality Oversight Committee ("MSQOC").

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[1] In her complaint, Dr. Booker named the following individual defendants: Dr. Michael Jablonover, M.D., Dr. John Harrison, M.D., Dr. John Straumanis, M.D., Dr. Patrice Wunsch, D.D.S., and Dr. George Brouillet, Jr., M.D.. For simplicity, we shall refer to the defendants, collectively, where possible, as "Kernan."

In March 2010, the MSQOC requested a review of Dr. Booker's practice, specifically with respect to her use of a pulpotomy procedure."[2] Kernan's Chief Medical Officer, Dr. Roy Smoot, informed Dr. Booker of the review on March 11, 2010. On July 6, 2010, Dr. Smoot, acting as the chairman of the MSQOC, sent a letter to Dr. John Harrison, Chairman of the Medical Executive Committee ("MEC"), in which he explained that internal review of Dr. Booker's use of pulpotomies indicated potential problems in 16 of the 26 cases in which radiographs were available for review. Moreover, Dr. Smoot noted, an independent outside reviewer found a question with all cases reviewed and that "specifically ... 55% of the pulpotomies performed [by Dr. Booker] were not indicated." Accordingly, Dr. Smoot requested that the MEC "initiate an investigation into the clinical practice of [Dr. Booker], specifically looking at the use of pulpotomy in her Pediatric Dental practice at Kernan [Hospital]."

Subsequently, on August 6, 2010, Dr. George Brouillet, Chief of Surgery at Kernan Hospital, sent a letter to Dr. Booker informing her that "[p]ursuant to the by-laws of Kernan Hospital, [Dr. Harrison] [had] appointed an ad hoc committee to continue the investigation of aspects of [her] dental practice, specifically the use of pulpotomy." Dr. Brouillet also requested that Dr. Booker respond to his letter with an answer to the following inquiry:

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[2] A pulpotomy is "root canal therapy consisting of partial excision of the dental pulp." Dorland's Illustrated Medical Dictionary 1553 (32nd ed. 2012).

> What are your indications for performing pulpotomy? Please advise us of intra-operative findings that would indicate the need for a pulpotomy, if such need is not anticipated pre-operatively.

Dr. Booker responded to Dr. Brouillet by explaining the circumstances she knew to necessitate a pulpotomy, and by asserting:

> I am confident that the expectations of the industry are to consider all of the variables that have been outlined in this communication when making the determination that the pulpotomy is the procedure of choice. I am equally as confident that I am in fact fulfilling these expectations by following the guidelines developed by the profession of dental medicine.

On November 8, 2010, Dr. Harrison informed her that review of her practice indicated:

> "[her] practice of performing pulpotomies [was] significantly in excess of acceptable rates and usages of pulpotomy in pediatric dentistry, and thus falls below the appropriate standards of dental care. In order to protect patient safety, and in the best possible interests of this patient population, the MEC desires to resolve this matter through institution of a remedial plan of action in which you agree to voluntary proctoring of all of your cases at [Kernan Hospital] for at least the next three (3) months and twenty (20) cases. The Hospital will arrange for a proctor to be present on each procedure day. The proctor will be Board Certified in Pediatric Dentistry and will review your cases with you in real-time in the operating room.

Dr. Booker responded by asking for the criteria used by the MEC in reaching its conclusion, as well as which of her specific cases had been reviewed. She requested that her inquiries be answered before she would agree to the proctoring sought by the MEC.

On December 7, 2010, Dr. Booker appeared at a hearing before the MEC and made a presentation in defense of her practice. At the conclusion of the hearing, Dr. Booker rejected the proposed plan of voluntary proctoring. Subsequently, "the MEC voted

unanimously for a remedial plan of mandatory proctoring pursuant to [Kernan Hospital's by-laws]." By letter dated December 20, 2010, Dr. Booker was advised that she could request a formal hearing by a panel appointed by Kernan's Board of Directors.

At the formal hearing, held on June 29 and July 27, 2011, Dr. Booker was represented by counsel who was permitted to argue her position and examine those who conducted the review of Dr. Booker's practice. Additionally, Dr. Booker testified on her own behalf and called Dr. Robert Camps as an expert witness. Thereafter, the panel's decision was explained as follows:

> It is the unanimous opinion of the panel that Dr. Booker be required to undergo mandatory proctoring of her surgical practice. In this regard the panel fully agrees with the recommendation of the MEC for mandatory proctoring which was made subsequent to Dr. Booker's decision to decline a recommendation of voluntary proctoring.
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> It is the unanimous opinion of the panel that such proctoring be implemented as soon as possible and that the issue regarding her continued practice at Kernan Hospital be brought to a swift resolution. In this regard it was the opinion of the panel that Dr. Booker's continued privileges to practice at Kernan [Hospital] be contingent upon her agreement to undergo proctoring.
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> The panel recommends that an outside pediatric dentist be engaged to provide the mandatory proctoring and that said proctoring should occur in an unannounced fashion after 5 initial, consecutive proctoring sessions in the OR. The proctored sessions should include a discussion of the treatment plan with the proctor prior to the procedure and direct observation of Dr. Booker by the proctor for the duration of the procedure. The proctor's report should be reviewed by the MEC at intervals throughout the period of mandatory proctoring and at its termination. A summary statement by the proctor should be provided to the MEC at the time of termination of mandatory proctoring. The panel also recommends that 2 different outside pediatric dentists be used

> for the mandatory proctoring. The panel also recommends ongoing monitoring of Dr. Booker's cases and rates of pulpotomies to continue beyond the specified proctoring sessions for a time as determined by the MEC. The panel defers to the MEC as to the appropriate number of cases needed for mandatory proctoring and over what time period.
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> The conclusions and recommendations made by this panel were based upon our unanimous opinion that Dr. Booker's use of pulpotomies on many patients was inappropriate given the evidence presented and thus not in line with current pediatric dental practice.

On August 26, 2011, Dr. Booker requested appellate review of the hearing panel's decision. The parties submitted briefs and participated in oral argument on November 7, 2011. The appellate panel[3] issued its decision on November 23, 2011, detailing its findings as follows:

> The Appellate Panel further finds that the Hearing Report was supported by reasonable evidence, which included testimony of Dr. Booker and her expert witness, testimony from the Hospital's experts in pediatric dentistry, including a pediatric dentist from New Jersey selected to provide an independent opinion, and substantial written material from Dr. Booker and the Hospital. Specifically, the hearing record reflects that there were multiple instances in which neither radiographic evidence nor operative notes documenting intra-operative findings support the procedures at issue. Moreover, Dr. Booker's expert testified before the Hearing Panel that he "agreed with some and disagreed with some" cases performed by Dr. Booker, however, he was unable to state the specific number and testified that he agreed with "not all" cases.... [T]he Appellate Panel finds that observation was not required for the Hearing Report to be found to be supported by reasonable evidence based on the

[3]Pursuant to Kernan's medical staff by-laws, the appellate panel consisted of Davis Sherman, Esq., Chairman of the Board of Directors of Kernan Hospital, Inc., and Board members Alan Levitt, M.D., and William Peck.

> hearing record. No one contends that prospective observation of other cases would shed much light on the cases at issue in the Hearing Report.
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> Finally, the Appellate Panel finds that there is no evidence to suggest that the Hearing Report was rendered due to demonstrable prejudice or bias. Dr. Booker did not make this claim in her October 17, 2011 memorandum to the Appellate Panel. When asked at the oral argument about this ground for appeal, Dr. Booker cited indicia of hostility and mistrust from one of the pediatric dentists who reviewed some of her cases and from a member of the MEC that conveyed a negative impression to the Hearing Panel. Dr. Booker notes that the Hearing Report contains extraneous points of discussion inadequately supported by evidence or testimony. Since some of the points of discussion are favorable to Dr. Booker, and since the physicians said to be hostile did not serve on the Hearing Panel itself, these aspects of the process do not persuade us that the Hearing Panel's recommendation was biased or prejudiced....
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> For the reasons set forth above, the Appellate Panel unanimously affirms the Hearing Report upholding the MEC's recommendation that Dr. Booker undergo mandatory proctoring subject to the modifications set forth herein.

On January 24, 2012, Dr. Booker filed a six-count complaint in the circuit court in which she made claims for: (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) negligence; (4) declaratory and injunctive relief; (5) tortious interference with contract; and (6) tortious interference with prospective advantage. In her complaint, Dr. Booker asserted that Kernan had, apparently, been reviewing her practice as early as July 2007, and that the subsequent MEC investigation did not include independent review of her patient records or direct observation of her performance. She claimed that the MEC based

its conclusions on her practice using "undefined and unexplainable terms" and did not provide a definition of the "mandatory proctoring" to which Dr. Booker was to submit.

Moreover, Dr. Booker insisted that Kernan did not follow its own by-laws when it reviewed her practice. She also pointed out that, after it was decided she should be subjected to mandatory proctoring, Kernan filed an adverse action report against her with the National Practitioner Data Bank. Dr. Booker alleged that as a result of Kernan's actions, she "continue[d] to suffer substantial economic and reputational harm."

Kernan responded to Dr. Booker's complaint with a motion for summary judgment in which it asserted:

> There is no evidence to support the claims against these defendants for negligence ... or tortious interference with prospective advantage.... There is no basis for ... [declaratory and injunctive relief] as to any of the individual Defendants. Further, even if there were any genuine dispute as to any material fact on which those claims are based, all of the Defendants are immune from civil suit under federal and state law.

Subsequently, Dr. Booker filed an opposition to Kernan's motion for summary judgment in which she contended that none of the parties named in her complaint met the standard through which they might be entitled to immunity. Further, she asserted that the parties named in her complaint were not entitled to summary judgment on the count of negligence because the peer review of her practice, the MSQOC and MEC investigations, and the proposed proctoring process, were carried out in a negligent manner.

At the hearing on Dr. Booker's motion, Kernan argued its position that the parties named in Dr. Booker's complaint were entitled to immunity under Federal and State law.

It asserted that under Federal law, "professional review actions are presumed to have met the standards for immunity protection" and so the burden would be on Dr. Booker to "produce facts to rebut the presumption of reasonableness."

Kernan contended that Dr. Booker did not satisfy her burden as she failed to refute any of the following: (1) that the actions of Kernan were taken according to a belief that they would be in furtherance of quality medical care; (2) that Kernan made a reasonable effort to obtain facts related to the matter; (3) that Dr. Booker was given adequate notice of the action and was afforded a hearing; and (4) that, after the hearing, Kernan's action was taken according to a reasonable belief that it was warranted by the facts. Moreover, Kernan Hospital insisted that the parties named in Dr. Booker's complaint were entitled to immunity under Maryland law because the actions in question were taken in good faith.

Dr. Booker responded that Kernan was not entitled to immunity because its actions did not satisfy three of the four criteria required for immunity under Federal law. She asserted that "the [d]efendants did not act in a reasonable belief that the action was in furtherance of quality healthcare, that the [d]efendants did not make a reasonable effort to obtain the facts, [and] that the [d]efendants did not have a reasonable belief that the action was warranted by the facts after they made such reasonable effort to obtain them[.]"

Specifically, counsel argued that the way Kernan conducted its investigation was unreasonable:

> [APPELLANT'S COUNSEL]: For instance, they claim that they offered [Dr. Booker] voluntary proctoring, which they did on November 8th. Prior to that,

the only contact they had with her was a brief meeting where they said she was under review in March and this letter with this general question in August. And then they concluded in a letter dated November 8th, 2010 that her practice of performing pulpotomies was significantly in excess of acceptable rates and usages in pulpotomy in pediatric ... dentistry, and thus falls below the standard of care, and that they were taking action under the bylaws and wanted her to undergo voluntary proctoring....

The issue is that she was never given an opportunity to give any information throughout the investigation of her activities. And why that's unreasonable is that Kernan [Hospital] has a peer review policy that requires that Dr. Booker be allowed to give input on the peer review and that was never done here....

* * *

She was never given that opportunity from the MSQOC or the MEC before they took that professional review action against her. She was never told which cases were under review. She was only told that after she asked for a hearing which is her right.

* * *

... they violated their own policy ... it's the policy of [Kernan Hospital] that says when you're under peer review, even if they don't want information from you, you have the right to give it up, the right to be present at meetings. It's unreasonable that they did not allow that to happen before they made this decision that the MEC made.

[THE COURT]: ... Did anybody stop her from providing this information?

[APPELLANT'S COUNSEL]: Well, Your Honor, she didn't know what was being reviewed to ask....

* * *

[APPELLANT'S COUNSEL]: – she sent a letter ... asking ... she [asked] which cases were under review, can you give me the cases, can you tell me what this review was about? And [Kernan Hospital] refused to give her the cases and went right ahead and made decisions about her review without ever having told her what was under review....

> When the MEC made the decision ... [Dr. Booker] still didn't know which cases were under review, so she had to give a general presentation. She was not allowed to ask questions, she was not given what cases were under review.
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> And so I submit to you that she did ask, she was refused, and then at the meeting she still couldn't give adequate feedback because she didn't know which cases were under review.

As to why Kernan's actions were not in furtherance of quality healthcare, Dr. Booker's counsel pointed out that although there was a record of an MSQOC meeting at which Dr. Patrice Wunsch stated she had been getting negative feedback from dental assistants about Dr. Booker since 2003, it was not until years later that a review of her practice occurred. Counsel contended that if Dr. Booker's practice had raised questions regarding patient safety or quality of care, Kernan would have conducted a review earlier. Further, counsel argued that review of her client's practice came about because "Dr. Wunsch thought [Dr. Booker] should be doing indirect pulp therapy and not pulpotomy[.]"

Dr. Booker's counsel contended further that there was evidence of animus toward her client in the form of previous statements by Dr. Wunsch indicating her belief that Dr. Booker practiced unethically. To that same point, counsel cited statements by Dr. Brouillet in which he expressed concern that Dr. Booker would not be "collaborative" or "collegial" if presented with the possibility of voluntary proctoring. Counsel asserted that such evidence showed a prejudgment of Dr. Booker which prevented Kernan from following its own by-laws with respect to peer review. Similarly, counsel argued that these indications of bias against Dr.

Booker showed that Kernan's actions were not in good faith and so did not allow for protection by immunity under Maryland law.

In rebuttal, Kernan argued:

> [APPELLEE'S COUNSEL]: First of all with regard to MSQOC and the MEC investigations and recommendations, neither of those were an action adverse to Dr. Booker's privileges. The MSQOC did conduct an investigation, did it in good faith ... not with the – the so-called malice of Dr. Wunsch, because [what] did the MSQOC do? It got both internal [reviews], from somebody other than Dr. Wunsch, to review, Dr. Schulz, and it got an external review. So even if one were to believe that Dr. Wunsch had already individually made up her mind about Dr. Booker, she, through the MSQOC, made sure that they undertook a reasonable investigation. Because as you heard from [Dr. Booker's] counsel this morning, that included both internal and external review.
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> And what happened as a result of the MSQOC investigation? Nothing happened to Dr. Booker's privileges, except that a recommendation was made to the MEC that it should conduct an investigation. That's not an action under – [the applicable federal statute] because it doesn't result in anything adverse being done to the Doctor's privileges.
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> So after that, the MEC made a recommendation to the hospital. Again that recommendation is not an action adverse to [Dr. Booker's] privileges. It is a recommendation which if adopted by the hospital would be adverse. And that's where the fair hearing stuff comes into play. That's why [Dr. Booker] is given that opportunity to be heard, that is why on February the 1st she was provided with the list of cases that had been reviewed, that's why on February 1st she was given all of the peer reviews done both internally and externally, that's why she was given all that information so that when she had that fair hearing on the recommendation of the MEC, she could address all of the specifications and she had that opportunity. She didn't do it. She never once rebutted any one of those individual cases and showed why it was justified.
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> So that's the failure to follow policy is a policy that had nothing to do with the actual action taken by the hospital.... Because by the time [Dr. Booker] had her

> privileges restricted by the hospital, she had not only the opportunity to see everything that had been reviewed and have input into it, she had opportunity to cross-examine, present evidence and present her own expert.
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> Now, the second thing that you heard showed that the actions were unreasonable was this so-called [“]what other hospitals do.[”] Dr. Camps did testify [as an expert, on Dr. Booker’s behalf] at the hearing at this matter ... that at his hospital he would have ... done a direct observation. That’s all.... He didn’t say that’s what everybody does, he doesn’t say what’s required, he said, that’s what we do at my hospital ... So it’s not what every other hospital does, it’s what one other hospital did.
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> ... immunity ... does not require perfection, does not require even complete accuracy, it requires objective reasonableness....
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> Animus has nothing to do with a determination of objective reasonableness....
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> There is absolutely no evidence in this record to show any malice or ill will ... toward Dr. Booker as having led to the action that was taken. Even if one could infer that Dr. Wunsch had already made up her mind – and that’s all that has been said, not that she disliked or felt some ill will ... but had already made up her mind that Dr. Booker was doing more procedures than she ... should have, still ... there’s got to be some showing that that had something to do with the – the action finally taken by the hospital.
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> Dr. Wunsch wasn’t on the hearing panel. Dr. Wunsch hadn’t even been involved in the investigation since the very early and middle stages of it. So that Dr. Wunsch’s own personal belief ... doesn’t rise to the level of animus; and ... if it did, had nothing to do with the ultimate decision that was taken by the hospital.

Dr. Booker’s counsel responded that an action does not have to result in an adverse finding to be considered a professional review activity under the Federal statute. Further, counsel contended that Dr. Wunsch had been involved in the action against Dr. Booker since

the beginning as evidenced by the fact that she was asked to make the decision as to what steps should be taken after the MEC's investigation.

Ultimately, the court ruled as follows:

> Having heard the arguments of counsel, having reviewed the file, I do find that the motion for summary judgment will be granted, that there is immunity for all of the Defendants in this case.
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> There has been no showing on behalf of [Dr. Booker] that the actions that were taken by the Kernan Hospital, et al, were not in furtherance of quality healthcare. They had complaints from staff members that the – the rate, the – the number of pulpotomies, which is a dental surgical procedure, for Dr. Booker were out of the norm, that they were concern[ed] about that. It is right, it is the duty of the hospital to investigate why something is out of the norm. Clearly that is in pursuit of furthering quality healthcare, to find out why these numbers of pulpotomies were not within the norm.
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> Second would be whether the reasonable efforts were made to determine the facts. Well, in this case, they not only did an internal investigation, they did an external investigation. People – healthcare providers totally unrelated to this hospital and Dr. Booker looked at it as well as people within the hospital setting. That's clearly reasonable to – as an extra level of precaution, having external investigation, external review as well as internal review.
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> [Dr. Booker] conceded that there was adequate notice given and an opportunity to participate in a hearing of this review, so that's really a non-issue.
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> And lastly, whether the actions taken were warranted by the facts. Clearly after the review had been conducted and a determination had been made that there was a larger number of pulpotomies than were – than the healthcare field deemed to be reasonable were taken, there were reasonable steps that were offered to resolve the issue, both voluntary and mandatory proctoring, monitoring, of Dr. Booker, and these procedures to get a better feel for why these numbers were out of line. And I don't find that that would be an unreasonable or unwarranted action.

> And clearly I do not find under the Maryland statute that there was any lack of good faith in these steps that were taken by the hospital. Much talk has been made about animus towards Dr. Booker. I don't find that the facts suggest that at all. People have opinions, but there was nothing to suggest that there was any personal vendettas, any mean spirited or – or – or otherwise behavior that would not be within the level of good faith under the totality of circumstances.
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> I believe that Dr. Booker was granted every opportunity to be heard in these proceedings and to participate fully.
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> And under – under all of these facts and totality of circumstances, I am going to grant the motion for summary judgment as to all the Defendants under both the federal and the Maryland Healthcare Immunity Acts.
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> Additional facts will be provided below as our analysis requires.

DISCUSSION

Dr. Booker argues, as she did below, that Kernan was not entitled to immunity under either Federal or Maryland law. She asserts that the MSQOC review of her practice was a professional review action under the applicable Federal statute and that it was conducted unreasonably because she was not informed of the review until six months after it had begun. She insists that the action would have been taken more promptly if it had been related to concern for patient safety. Additionally, she claims that because there was no monitoring plan established and she was not allowed to participate in the peer review process, "the MSQOC failed to make a reasonable effort to obtain the facts of the matter."

Next, Dr. Booker contends that the MEC investigation was unreasonable because its conclusion was "based on nothing more than Dr. Booker's general response to a non-specific inquiry" with respect to the "indications she used in performing pulpotomy and ... the intra-

operative findings that she would rely on to indicate the need for pulpotomy when [the] need had not been indicated [pre]-operatively." She asserts that the MEC's recommendation that she submit to voluntary proctoring was unreasonable because "the MEC did not make a reasonable effort to obtain the facts before concluding that Dr. Booker had 'significantly exceeded acceptable rates and usages [of pulpotomies]' and, had violated the standard of care." Dr. Booker argues that the December 7, 2010 hearing was unreasonable because "she was not provided with all of the information she needed in order to give fulsome responses[,]" and because the MEC had not made reasonable efforts to obtain facts by directly observing her practice. Accordingly, Dr. Booker requests that the hearing court's ruling be reversed with instructions for the case to proceed to trial.

In contrast, Kernan argues that the hearing court was correct in granting summary judgment because there was no genuine dispute as to the material facts relating to Kernan's immunity under State and Federal law.

First, Kernan asserts that Dr. Booker's allegation that review of her practice commenced months before she was informed of it, does not rebut the presumption that the review was undertaken in the interest of quality healthcare.

Second, Kernan contends Dr. Booker did not present evidence to rebut the presumption that it made reasonable efforts to obtain the facts. Kernan points out that although Dr. Booker attempts to rebut the presumption by noting that Kernan never

conducted direct observation of her practice, it was Dr. Booker who refused to submit to voluntary proctoring.

Third, Kernan insists that Dr. Booker did not present evidence that would rebut the presumption that the peer review action was taken because Kernan believed it was warranted by the facts. It notes that the review was undertaken following "extensive peer review investigation conducted by two peer review committees, a fair hearing panel, and one appellate review panel examining all of the evidence, including three individual reviewers – two internal and one external – as well as Dr. Booker's extensive comments, in writing and in testimony before the hearing panel."

Lastly, with respect to immunity under state law, Kernan asserts that Dr. Booker did not present evidence that raised a genuine dispute of fact that the peer review of her practice was conducted in good faith.

Accordingly, Kernan requests that this Court affirm the judgment of the hearing court and remand to the circuit court for the limited purpose of determining whether Kernan is entitled to an award of costs under the applicable provision of the Federal peer review immunity statute.

Standard of Review

Appellate review of a court's grant of summary judgment involves the determination of whether the court's ruling was legally correct. *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (citations omitted). In conducting such review, we must initially determine if the

record indicates any genuine dispute of material fact. *Id*. (citation omitted). "The record is reviewed 'in the light most favorable to the non-moving party and [we] construe any reasonable inferences that may be drawn from the well-pled facts against the moving party.'" *Id*. (quoting *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 554-55 (2011)) (further citation omitted).

If we are satisfied that the facts are undisputed, "'we review the trial court's ruling on the law, considering the same material from the record and deciding the same legal issues as the circuit court.'" *Id*. at 575 (quoting *Messing v. Bank of America, N.A.*, 373 Md. 672, 684 (2003)) (further citation omitted); *see also* Md. Rule 2-501(f) ("The court shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law.").

Under the Federal Quality Health Care Quality Improvement Act of 1986 ("HCQIA"), those participating in a professional review action are entitled to immunity if the action is taken:

> (1) in the reasonable belief that the action was in the furtherance of quality health care,
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> (2) after a reasonable effort to obtain the facts of the matter,
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> (3) after adequate notice and hearing procedures are afforded to the physician involved or after such other procedures as are fair to the physician under the circumstances, and

> (4) in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirement of paragraph (3).

42 U.S.C. § 11112(a)(1)-(4).

With respect to the Federal statute, the Court of Appeals has previously noted:

> Congress enacted HCQIA to encourage peer review and monitoring of physicians. Part of Congress' strategy was to provide qualified immunity for those who discipline ineffective physicians. Thus, as we observed fifteen years ago; "HCQIA provides participants in peer review activities with qualified immunity from liability for monetary damages in suits brought by the physicians who were the subjects of these review activities." *Goodwich v. Sinai Hospital*, 343 Md. 185, 196-97 (1996).

Freilich v. Upper Chesapeake Health Systems, Inc., 423 Md. 690, 703 (2011) (further internal citation and parentheticals omitted).

Under the HCQIA, a plaintiff bears the burden of rebutting the presumption of immunity by a preponderance of evidence. *Id*. at 704 (citing 42 U.S.C. § 11112(a)) ("A professional review action shall be presumed to have met the ... standards necessary for [professional review immunity protection] ... unless the presumption is rebutted by a preponderance of the evidence.").

Assessing the record before us in light of the first determination we must make, we do not find a genuine dispute of material facts regarding Kernan's action against Dr. Booker.

In August 2009, a Focused Professional Practice Evaluation of Dr. Booker's practice was initiated by Kernan's MSQOC. Subsequently, in March 2010, the MSQOC requested a review of Dr. Booker's use of pulpotomies in her practice. Shortly thereafter, she was

made aware of the review. In July 2010, results from both internal and external review of Dr. Booker's practice indicated concerns with a significant number of the pulpotomies performed. Specifically, the external reviewer noted that the records from approximately 55% of the cases reviewed did not demonstrate circumstances under which performance of a pulpotomy appeared necessary. Based on those findings, the MSQOC requested that the MEC investigate the use of pulpotomies in Dr. Booker's practice. Thus, an *ad hoc* committee was appointed to conduct the investigation.

In the course of the investigation, Dr. Booker was asked to explain the criteria she considered before performing a pulpotomy. She responded by describing the circumstances she typically recognized as requiring the procedure. After the MEC completed its investigation, it concluded that Dr. Booker's rate of performing pulpotomies was "in excess of acceptable rates" and asked her to agree to voluntary proctoring of her practice. Dr. Booker declined to submit to proctoring and requested to be heard. She was provided the opportunity to present her position to the MEC, and she did so. Following her presentation, the MEC decided, unanimously, that mandatory proctoring was necessary. At that point, Dr. Booker requested, and received, a formal hearing. At the formal hearing, Dr. Booker was represented by counsel who presented her argument, examined witnesses, including those who reviewed Dr. Booker's practice, and called an expert to testify on Dr. Booker's behalf

Ultimately, the hearing panel decided, unanimously, that: (1) "Dr. Booker's use of pulpotomies on many patients was inappropriate given the evidence presented and thus not

in line with current pediatric dental practice"; (2) the MEC's recommendation for mandatory proctoring was appropriate; and (3) Dr. Booker's privileges at Kernan Hospital were to be contingent on her agreement to undergo proctoring. Thereafter, Dr. Booker requested appellate review of the MEC hearing panel's decision. After assessing the parties' briefs and hearing oral argument, the appellate panel affirmed the hearing panel's decision. Further, as required by Federal law, Kernan filed, with the National Practitioner Data Bank, a report of the corrective action taken.

In light of the undisputed facts, we are not persuaded that the presumption of immunity was rebutted by a preponderance of the evidence.

First, the fact that Kernan Hospital began evaluating Dr. Booker's practice several months before initiating a peer review, and only notified her of the review after it was to commence, does not demonstrate that the steps taken were in the interest of something other than furthering the quality of health care. In our view, a brief period of evaluation before calling a medical professional's methods into question is not, absent more, indicia of an unreasonable motive for peer review.

Further, Dr. Booker's claim that Kernan's review was flawed because it was retrospective and did not involve direct observation of her practice, does not indicate a failure to obtain pertinent facts. Although we recognize that there is some limitation to review of practice records only, it is clear that Dr. Booker declined to allow voluntary proctoring of her practice. As such, it is difficult to understand how Kernan might have directly observed Dr.

Booker's practice prior to the ultimate decision that her privileges would be contingent upon mandatory proctoring. Without Dr. Booker's cooperation, practice records were the most accessible – and perhaps only – resource through which to reasonably accomplish review of her use of pulpotomies.

As to Dr. Booker's assertions that she was not provided appropriate opportunities to respond to Kernan's findings regarding her use of pulpotomies, the evidence demonstrates that as those findings led to progressively more serious consequences, Dr. Booker was provided more substantial opportunities for rebuttal. Those opportunities evolved from explaining the circumstances she saw as requiring pulpotomy, to personally making a presentation in defense of her practice, to participating in a formal, adversial hearing and, finally, appellate review of that hearing decision.

Moreover, we do not agree with Dr. Booker's assertion that the evidence demonstrated that each step in this review process consisted of separate professional review actions, each of which required separate review under the HCQIA. The term "professional review action" is statutorily defined as:

> [A]n action or recommendation of a professional review body which is taken or made in the conduct of professional review activity, which is based on the competence or professional conduct of an individual physician (which conduct affects or could affect adversely the health or welfare of a patient or patients), and *which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician*. Such term includes a formal decision of a professional review body not to take an action or make a

> recommendation described in the previous sentence and also includes professional review activities[4] relating to a professional review action.

42 U.S.C. § 11151(9) (emphasis added).

"The term 'adversely affecting' includes reducing, restricting, suspending, revoking, denying, or failing to renew clinical privileges or memberships in a health care entity." 42 U.S.C. § 11151(1). No adverse action was taken or recommended until the MEC hearing panel decided that Dr. Booker's privileges at Kernan would be contingent upon her agreement to submit to mandatory proctoring. This decision was, effectively, the product of the peer review process. Kernan's earlier requests and recommendations, that Dr. Booker acquiesce to voluntary proctoring, were mere professional review activities which were part of the indicated singular peer review action.

Given our analysis, to this point, regarding the failure to demonstrate unreasonableness in Kernan's review of Dr. Booker's practice, her contention that Kernan ran afoul of its own by-laws does not, in our view, rise to a rebuttal of the presumption of immunity. The by-laws Dr. Booker insists were not followed called for Kernan to monitor the procedures of a practitioner who was under review and to notify that practitioner when the "need for review" was found. Again, although monitoring was not the first step taken,

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[4]The term "professional review activity" is "an activity of a health care entity with respect to an individual physician – (A) to determine whether the physician may have clinical privileges with respect to, or membership in, the entity, (B) to determine the scope or conditions of such privileges or membership, or (C) to change or modify such privileges or membership." 42 U.S.C. 11151(10).

when voluntary proctoring was requested, that measure was declined by Dr. Booker. Moreover, although Dr. Booker was not advised the instant her practice came under evaluation, she was notified as soon as a committee-led peer review was to commence. In light of the comprehensive review that was ultimately conducted, we are not convinced that the interim between Kernan's initial contemplation of peer review and the notice of its onset rendered the hospital's actions unreasonable.

In sum, viewing the record through the lens of the HCQIA, our analysis leads us to conclude that Dr. Booker failed to rebut the presumptions that Kernan's actions were taken in the "reasonable belief" that they were in furtherance of quality healthcare; that Kernan made reasonable efforts to obtain the facts; that Dr. Booker was provided adequate notice and hearing procedures; and that Kernan acted under the reasonable belief that the facts warranted the measures taken. Accordingly, we hold that Kernan was entitled to immunity under Federal law.

Assessing Kernan's actions in light of the Maryland peer review immunity statute, we note that "[a] person who acts in good faith and within the scope of the jurisdiction of a medical review committee is not civilly liable for any action as a member of the medical review committee or for giving information to, participating in, or contributing to the function of the medical review committee." Md. Code Ann. (2006 Repl. Vol.) Courts and Judicial Proceedings Article ("C.J.P.") § 5-637(b). The Court of Appeals, effectively

recognizing that peer review immunity provided by state law may be broader than that provided in the HCQIA, has reiterated that:

> [B]ecause the Maryland statute requires that a member of a review committee act in good faith, while the HCQIA employs objective standards of reasonableness, "[t]he [Maryland] law is preempted by the Federal only to the extent that it provides *less* immunity than the Federal, not to the extent that it provides *more*."

Goodwich v. Sinai Hospital of Baltimore, Inc., 343 Md. 185, 214 (1996) (quoting *Goodwich v. Sinai Hospital of Baltimore, Inc.*, 103 Md. App. 341, 355 (1995)) (emphasis in original); *Freilich v. Board of Directors of Upper Chesapeake Health, Inc.*, 142 F. Supp. 2d 679, 695-96 (D. Md. 2001) ("Maryland has its own peer review immunity statutes ... which ... provide broader immunity to peer review boards than the HCQIA.") (citations omitted); 42 U.S.C. § 11115(a) (" ... nothing in this subchapter shall be construed as changing the liabilities or immunities under law or as preempting or overriding any State law which provides incentives, immunities, or protection for those engaged in a professional review action that is in addition to or greater than that provided by this part.").

We have explained the interplay between the Maryland and Federal immunity statutes as:

> [T]he standard under the Maryland statute is different from that under Federal law. Maryland law requires that a member of a review committee act in good faith, whereas Federal law, as noted, provides objective standards of reasonableness. Although the State law may thus appear to be inconsistent with the Federal law in that regard, it is not necessarily so....
>
> * * *

> In practice, the State and Federal statutes may co-exist. If a medical review body's actions are performed with malice, but nonetheless are deemed to be objectively reasonable, the body will be immune under Federal law; the lack of State immunity because of the absence of good faith would be immaterial, for the Federal law would govern. If, however, the review actions are not objectively reasonable, thereby providing no Federal immunity, the court would then have to consider whether the actions were nonetheless taken in good faith, for, if they were, State immunity might exist.

Goodwich, 103 Md. App. at 355. (internal quotation and citation omitted).

Our conclusion as to Kernan's immunity based on the HCQIA notwithstanding, Dr. Booker's only contentions regarding a lack of good faith by Kernan are that it disregarded "numerous procedural safeguards" by beginning the peer review process in contravention of its own by-laws and "consistently failed to allow Dr. Booker to actively participate in the peer review process." Simply stated, we are not persuaded that the circumstances in this case, without more, indicate that the subject peer review was not conducted in good faith.

First, as we have noted above, Dr. Booker was provided adequate opportunity to defend her practice during the peer review process. As the review became progressively more serious, and entailed potentially greater consequences, Dr. Booker was afforded more in-depth *fora* through which to present her position and to challenge the peer review findings. From these circumstances, we are unable to discern a basis for concluding that Kernan's actions were not taken in good faith.

Second, we are not convinced that the timing and substance of the start of Kernan's evaluation of Dr. Booker's practice indicated a lack of good faith. The fact that Dr. Booker's practice was assessed before a recommendation for peer review was made, using only records

of procedures performed prior to that time, is, to us, unremarkable. We are unwilling to read a lack of good faith into a seemingly reasonable sequence of steps taken before Kernan was satisfied that a peer review was appropriate. Accordingly, we see no basis to conclude that the peer review of Dr. Booker's practice was conducted in violation of C.J.P. § 5-637(b).

The circuit court did not err in granting summary judgment.

Counsel Fees and Costs

Kernan has requested a remand for the purpose of a determination whether it was entitled to reasonable attorneys' fees. The pertinent provision of the HCQIA provides:

> In any suit brought against a defendant, to the extent that a defendant has met the standards set forth under section 11112(a) of this title and the defendant substantially prevails, *the court shall, at the conclusion of the action, award to a substantially prevailing party defending against any such claim the cost of the suit attributable to such claim, including a reasonable attorney's fee*, if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith. For the purposes of this section, a defendant shall not be considered to have substantially prevailed when the plaintiff obtains an award for damages or permanent injunctive or declaratory relief.

42 U.S.C. § 11113 (emphasis added).

The circuit court made no determination as to whether summary judgment in Kernan's favor reached the "substantially prevailing" standard. Nor did the court make a finding of whether Dr. Booker's suit "was frivolous, unreasonable, without foundation, or in bad faith."

Accordingly, we shall remand to the circuit court for the limited purpose of making findings contemplated by the above-noted provision of the HCQIA.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED.
CASE REMANDED TO THAT COURT FOR CONSIDERATION OF COUNSEL FEES.
COSTS TO BE PAID BY APPELLANT.