IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

RICHARD J. STERNBERG, M.D.,	:	C.A. No. 07C-10-011(THG)
Plaintiff,	:	
v.	:	
NANTICOKE MEMORIAL HOSPITAL, INC., et. al,	:	CORRECTED AS TO PAGE 39, LINE 1 "the court **explained**"
Defendants.	:	

MEMORANDUM OPINION

Submitted: July 31, 2009

Decided: September 18, 2009

Defendants' Motion for Summary Judgment. **GRANTED.**

Plaintiff's Motion for Summary Judgment
on Attorney's Fees. **DENIED.**

Matthew M. Carucci, Esquire, Carucci Butler, LLC, Wilmington, Delaware; and Christopher A. Iacono, Esquire, and Kevin E. Raphael, Esquire, Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Philadelphia, Pennsylvania, Attorneys for Plaintiff.

David R. Hackett, Esquire, Griffin & Hackett, P.A., Georgetown, Delaware, Attorney for Defendants.

GRAVES, J.

PROCEDURAL AND FACTUAL BACKGROUND

Nanticoke Memorial Hospital (hereinafter "Nanticoke") is a non-profit, tax exempt hospital facility in Seaford, Delaware that offers primary acute care services. Nanticoke's Medical Staff consists of all those physicians, dentists, and podiatrists who have been given the right to exercise clinical privileges within the hospital. The Medical Staff is responsible for the quality of health care provided at Nanticoke, and its By-laws govern the organization, operation, and discipline of those who practice in the facility. All appointees to the Medical Staff exercise their right to practice at the hospital subject to the rules and regulations contained in the By-laws.

Nanticoke's Medical Executive Committee (hereinafter "MEC") is charged with overseeing the Medical Staff. The MEC is comprised of the officers of the Medical Staff, department chairpersons, and the Intensive Care Unit Director. The President of the Medical Staff chairs the MEC, and Nanticoke's CEO is designated as an ex officio member of the group without voting privileges. The MEC is chiefly responsible for administering Nanticoke's Credentials Policy.[1]

Dr. Richard Sternberg (hereinafter "Sternberg") is a board certified orthopedic surgeon who was a member of Nanticoke's Medical Staff from 1999 until 2008. By all accounts, Sternberg is a competent physician. While Sternberg's medical competency is not disputed here, his professional behavior is at the center of the litigation before the Court. Nanticoke claims to have documented thirty-one incidents of inappropriate and disruptive behavior exhibited by Sternberg throughout his tenure at the hospital. It appears from the record presented that these episodes range from emotional outbursts of anger to demeaning and offensive reprimands of

[1] For purposes of this decision, the terms "By-laws" and "Credentials Policy" are used interchangeably. The Court thus recognizes that the "Medical Staff By-laws" includes the "Credentials Policy" at issue here.

staff and patients alike. At least one Orthopedic Specialty Nurse, according to Nanticoke, resigned due to the stress and anxiety caused by Sternberg. Taken altogether, Nanticoke portrays Sternberg as a troublesome figure at the hospital, whose behavior made the tense operating room environment even more stressful for his colleagues -- and potentially dangerous to his patients.

Sternberg, quite naturally, contends that he was not a disruptive presence at Nanticoke. To the contrary, while admitting his irritability at times, Sternberg fashions himself as a zealous reformer whose attempts to improve the quality of care of Nanticoke drew the ire of hospital administrators. Because of his desire to correct the flaws at Nanticoke, Sternberg argues that his conduct became excessively scrutinized by hospital officials who did not appreciate his concern for patient care.

However he is described, it is clear that Sternberg was a well known figure to hospital officials. Nanticoke claims that it dealt with those concerns about Sternberg during his initial years at the hospital by informally warning him about his conduct. As far back as 2004, though, Nanticoke's Chief Executive Officer, Daniel J. Werner (hereinafter "Werner"), appears to have contacted Dr. Carol A. Tavini (hereinafter "Tavini"), Chair of the Delaware Physician's Health Committee, to discuss the possibility of Sternberg being an "impaired physician" or, more accurately, a "disruptive physician."

Thereafter, in January of 2006, Sternberg was referred to the State Physician's Health Committee and Tavini for treatment in managing his behavior. Sternberg asserts that the stress and subsequent breakdown from covering consecutive days of orthopedic call led to the Tavini examination. By letter dated March 17, 2006, the State Physician's Health Committee recommended that Sternberg seek an "excuse from on-call" duty and attend a course on

"physician communication and dealing with others." Sternberg did not attend a course on his workplace behavior at this time.

However, Sternberg agreed to be relieved from on-call responsibility. Sternberg claims that this psychiatric order relieving him from being on-call was detrimental to Nanticoke as it meant one less surgeon for on-call duty, thereby risking Nanticoke's trauma designation. Sternberg further takes the position that the psychiatric order failed to provide hospital officials with the means by which they could "exert control" over him. Despite being excused from on-call duty, Nanticoke claims that his behavior did not improve. In May of 2006, Werner allegedly contacted legal counsel for advice on how to respond to Sternberg's continued outbursts. Legal counsel responded with a memorandum outlining recommended steps for dealing with Sternberg, which Werner relayed to the MEC. All the while, Sternberg claims that Nanticoke was looking for a scenario that would force him into accepting on-call responsibility.

Sternberg's alleged actions during a surgical procedure on July 13, 2006, serve as a key moment in his time at Nanticoke. During the operation, it was discovered that surgical equipment was missing. In order to correct the error, a new instrument tray was ordered. According to Nanticoke, the decision to order a new surgical tray enraged Sternberg. With surgical drill in hand, and while the patient remained under sedation, Sternberg allegedly angrily expressed his frustration to his colleagues. Nanticoke avers that at least one operating room staff member was privately concerned that Sternberg's actions would shatter the patient's tibia. Nanticoke also maintains that Sternberg's alleged outburst threatened patient safety as a result of an open incision that was left unattended to during the lull in surgery. Sternberg disputes this characterization of the incident and argues that he followed hospital protocol, was of no risk to

the patient, and held the drill in a non-threatening way. Ultimately, Sternberg successfully completed the operation.

Not surprisingly, Sternberg's alleged actions during the surgery made the rounds at the hospital. Two co-defendants in this action, Dr. Thomas Benz, Chair of Nanticoke's Surgery Department, and Dr. John Appiott, President of Nanticoke's Medical Staff, authored a letter to Sternberg on July 17, 2006, informing him that his "continuing pattern of unacceptable behavior" was to be referred to the MEC at an upcoming meeting and that any further incident of inappropriate behavior would be met with an immediate suspension.

At the meeting called to discuss Sternberg on July 25, 2006, MEC members unanimously voted to recommend that Sternberg's Medical Staff membership and privileges be revoked. Simultaneously, the MEC voted to offer Sternberg a leave of absence option in lieu of the revocation of his privileges at the hospital. The leave of absence option was conveyed to Sternberg in a letter authored by Werner on July 26, 2006. The letter states, in part:

> This is to inform you that the Executive Committee is prepared to recommend to the Board (subject to the option for you to take a Leave of Absence set forth below) that your medical staff appointment and clinical privileges be revoked, based on the continuing pattern of disruptive behavior that you have exhibited despite numerous attempts to impress upon you the need to improve that behavior pattern. Your behavior has created a work environment that numerous employees consider to be hostile and counterproductive to the provision of good patient care. Some of the incidents of your behavior have placed patients at risk. You have not responded to any of the past efforts to work with you in the hope that you would gain insight into the inappropriateness of your pattern of behavior and take steps necessary to improve it… . You were advised, by letter dated July 17, that if there is any further incident of inappropriate behavior on your part, including, but not limited to, displays of anger, loud tone of voice, or disruption of any kind, you will be immediately suspended. This caution remains in effect.[2]

[2] Letter from Daniel Werner, CEO, Nanticoke Memorial Hospital, to Richard Sternberg, Physician, Nanticoke Memorial Hospital (July 26, 2006).

Again advising Sternberg that any further inappropriate incident would result in an immediate suspension, Werner's offer for a leave of absence required Sternberg to submit a plan to the Executive Committee to address how he would resolve his anger management issues. In addition, Werner wrote "because it is a hardship on other surgeons to take additional call, your plan must address your ability to take a reasonable share of emergency call."[3] Sternberg suggests that Werner's letter was tantamount to an ultimatum requiring him to take emergency call in violation of a psychiatric order.

By way of response, Sternberg wrote Werner on August 18, 2006, to request both a hearing on the recommendation of his revocation and a sixty-day stay so that he could obtain legal counsel. Werner granted both of these requests in a subsequent correspondence with Sternberg, repeated the conditional leave of absence offer, and reiterated that another inappropriate behavioral issue would result in an immediate suspension. Despite these warnings of immediate suspension, Nanticoke claims that it received three complaints regarding Sternberg's behavior in the aftermath of the MEC's decision to recommend that his privileges be revoked. Apparently, Nanticoke did not conclude that these alleged incidents warranted formal action or review.

In October of 2006, Nanticoke had retained a hearing officer, prepared exhibits, and was anticipating holding a hearing on the Sternberg matter in the first week of November. According to Sternberg, the hospital had obtained the services of another orthopedic surgeon – thus making him expendable. By then, Sternberg had also become a candidate for the Thirty-Ninth Representative District in the 2006 election. Concerned, in part, by the hospital's tax-exempt status, Nanticoke advised Sternberg that political campaigning was forbidden within the facility.

[3] *Id.*

Sternberg may have disagreed with Nanticoke's policy, but he was fully aware of the prohibition against political activity on hospital grounds.

The background is thus set for what appears to be the pivotal incident in the long history of tension between Nanticoke and Sternberg. On October 13, 2006, Sternberg invited a newspaper reporter to observe an operation scheduled for that morning. Sternberg argues that he followed hospital procedure by filling out the appropriate visitor attendance forms indicating that the observation was for educational purposes. Sternberg contends that the hospital was given several days notice regarding the observation yet failed to question him regarding the specifics. Sternberg also alleges that the patient was made aware prior to giving consent that the visitor was a newspaper reporter. However, the hospital did not know that the visitor was a reporter covering Sternberg's political campaign before the incident. According to the hospital, it was natural and reasonable to have assumed or inferred that the individual was a nursing or medical student, rather than a newspaper reporter, when Sternberg filled out the forms indicating that the observation was related to educational purposes.

On the morning of October 13, 2006, according to Nanticoke, the hospital's Interim Director for Patient Services, Mary Beth Waide (hereinafter "Waide"), reported to Werner that one of Sternberg's cases was underway when an observer, believed by hospital officials to have been a student, pulled out a note pad and began taking notes. When an operating room nurse questioned the observer, she responded, "I am taking notes for my story." Pressed further, the observer admitted that she was a newspaper reporter covering Sternberg's political campaign. Upon being notified of the reporter's presence in the operating room, Nanticoke suggests that hospital administrator Tom Brown entered the operating room and escorted her out of the facility.

Thereafter, Nanticoke claims that Werner instructed Waide to evaluate the situation with the newspaper reporter and report back to him. Sternberg vigorously asserts that Werner failed to conduct any investigation into the incident with the reporter. In any event, Werner had sufficient information to write a letter to Sternberg later that afternoon.

Werner's letter, dated October 13, 2006, advised Sternberg that Nanticoke was immediately suspending him pursuant to the precautionary suspension provisions contained in Section 6.C.1. of its Credentials Policy. The letter further explained:

> Your behavior this morning has disrupted the entire morning of the Operating Room, and the ability of employees to concentrate on providing appropriate patient care. You breached confidentiality, raising serious issues.... The patient apparently consented to having an individual observe for educational purposes, which was also how you described the reporter prior to bringing her into the Operating Room. This was a misrepresentation.... There were infection risks created at several points in the process. Your behavior has left me no choice but to protect patients from your disruptive conduct by removing you from the hospital immediately. You have exceeded any boundaries of proper behavior.[4]

Suggesting that Sternberg had placed his personal interests above patient care while potentially risking Nanticoke's tax-exempt status, Werner concluded by notifying Sternberg that the MEC would be convened to examine the matter within fourteen days as required under the Credentials Policy.

According to Sternberg, the imposition of a precautionary suspension effectively ends a physician's career since a suspension that lasts more than thirty days must be reported to a federal database pursuant to federal law. Thus, by design, a precautionary suspension for Dr. Sternberg would mean that all future employers would know of his alleged conduct at Nanticoke.

Section 6.C. of Nanticoke's Credentials Policy provides for the precautionary suspension of Medical Staff employees. The relevant portion of the Credentials Policy maintains:

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[4] Letter from Daniel Werner, CEO, Nanticoke Memorial Hospital, to Richard Sternberg, Physician, Nanticoke Memorial Hospital (Oct. 13, 2006).

<u>6.C.1. Grounds for Precautionary Suspension or Restriction:</u>

a) The President of the Medical Staff, the chairperson of a clinical department, the CEO or the Board Chairperson will each have the authority to suspend or restrict all or any portion of an individuals clinical privileges whenever, in their sole discretion, failure to take such action may result in imminent danger to the health and/or safety of any individual. The individual may be given an opportunity to refrain voluntarily from exercising privileges pending an investigation.

b) Precautionary suspension or restriction is an interim step in the professional review activity, but it is not a complete professional review action in and of itself. It will not imply any final finding of responsibility for the situation that caused the suspension or restriction.

c) A precautionary suspension or restriction will become effective immediately upon imposition, will immediately be reported in writing to the CEO and the President of the Medical Staff, and will remain in effect unless it is modified by the CEO or Executive Committee.

<u>6.C.2. Executive Committee Procedure</u>:

a) The Executive Committee will review the matter resulting in a precautionary suspension or restriction within a reasonable time under the circumstances, not to exceed 14 days. Prior to, or as part of, this review, the individual may be given an opportunity to meet with the Executive Committee. The individual may propose ways other than precautionary suspension or restriction to protect patients and/or employees, depending on the circumstances.

b) After considering the matters resulting in the suspension or restriction and the individual's response, if any, the Executive Committee will determine whether there is sufficient information to warrant a final recommendation, or whether it is necessary to commence an investigation. The Executive Committee will also determine whether the precautionary suspension or restriction should be continued, modified, or terminated pending the completion of the investigation (and hearing, if applicable).

c) There is no right to a hearing based on the imposition or continuation of a precautionary suspension or restriction.[5]

In accordance with the Credentials Policy, the MEC met to review the matter resulting in Sternberg's precautionary suspension on October 16, 2006. During the MEC meeting, it was

[5] Nanticoke Memorial Hospital Staff Credentials Policy §§ 6.C.1, 6.C.2.

recommended that action on the precautionary suspension be continued until the previously scheduled hearing on Sternberg's recommendation of revocation was held. The MEC's decision was relayed to Sternberg via a letter written by Werner on October 18, 2006. It also mentioned the possibility, once again, of treating the matter as Sternberg's choice to pursue a leave of absence for the purpose of focusing on his election campaign.

The record reveals that the MEC never met in early November of 2006, as scheduled, to review Sternberg's recommendation of revocation. Instead, the hospital and Sternberg's representatives engaged in negotiations to resolve both the precautionary suspension and the recommendation of revocation issues. On December 7, 2006, Nanticoke's Board reappointed Sternberg with clinical privileges until the Board's January of 2007 meeting. Sternberg's month-long reappointment was subject to his approval and compliance with certain conditions. One of these conditions required Sternberg to complete a video training portion of the Physicians Universal Leadership Skills Program.

Moreover, both parties reached an agreement that called for Sternberg's precautionary suspension to be characterized as a leave of absence. The agreement to consider the precautionary suspension as a leave of absence signified that Sternberg would not be reported – and Nanticoke would not have to report – Sternberg's alleged conduct to federal authorities. The agreement also meant that both parties were to recognize that the precautionary suspension did not occur. Thereafter, Hospital officials informed staff at that time that Sternberg was returning from a nearly two-month leave of absence upon his reinstatement on December 13, 2006.

This agreement or compromise is important to this case. Sternberg had the chance to seek an injunction or restraining order regarding his precautionary suspension. He did not pursue these options. Furthermore, Sternberg had the opportunity for a full due process

evidentiary hearing as to whether there was a factual basis for the suspension. Instead, he chose to resolve the issue by an agreement that was of benefit to him.

In January of 2007, the MEC lifted the Recommendation of Revocation in favor of a conditional reappointment. Sternberg remained with Nanticoke until his resignation effective January 31, 2008. The record reveals no evidence of alleged disruptive behavior by Sternberg from December of 2007 until his resignation from Nanticoke. After completing a remedial course, the Defendants contend that Sternberg's improved conduct shows that the precautionary suspension ultimately prolonged his career as it forced him to obtain help to control his behavior.

This litigation is brought by Sternberg against Nanticoke, Werner, and fourteen physicians (hereinafter collectively the "Defendants") who were members of the MEC during Sternberg's precautionary suspension. Sternberg's central contention is that the precautionary suspension imposed by Werner and continued by the MEC was improper under both Nanticoke's Credentials Policy as well as state and federal statutes because the failure to impose the suspension would not have resulted in imminent danger to the health and safety of any individual. As a result, Sternberg has brought a multi-count complaint for damages for tortious interference with business relations, negligence, breach of contract and implied covenant of good faith and fair dealing, intentional infliction of emotional distress, defamation, and vicarious liability. As a result of the precautionary suspension issued on October 13, 2006, until his staff privileges were reinstated on December 13, 2006, Sternberg seeks $1.9 million in damages.

The Defendants have filed a counterclaim seeking attorney's fees pursuant to the Health Care Quality Improvement Act of 1986, 42 U.S.C. §§1101-1152, (hereinafter the "HCQIA") and under 2.C.2.(e) of Nanticoke's Medical Staff Credentials Policy. Sternberg has filed a motion for summary judgment as to the Defendants' counterclaim arguing that they have failed to

establish threshold requirements under the HCQIA and the Credentials Policy for the award of attorney's fees. The Defendants have since filed a motion for summary judgment asserting immunity from liability under the HCQIA, the Medical Staff Credentials Policy, and, for all of the Defendants other than the hospital, Delaware's Medical Practices Act, 24 *Del. C.* § 1768(a) (hereinafter "Medical Peer Review Statute").

This decision will examine the Plaintiff's motion for summary judgment regarding attorney's fees pursuant to the HCQIA and Nanticoke's Credentials Policy as well as the Defendants' motion for summary judgment on the assertion of immunity under the HCQIA, the Medical Peer Review Statute, and the Credentials Policy.

STANDARD OF REVIEW

A motion for summary judgment is properly granted if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[6] When a motion for summary judgment is supported by evidence showing no material issue of fact, the burden shifts to the non-moving party to demonstrate that there are material issues of fact requiring trial.[7] Upon motion for summary judgment, the Court must view the facts in a light most favorable to the non-moving party.[8] The Court will accept as established all undisputed factual assertions, made by either party, and will accept the non-movant's version of any disputed facts. From those accepted facts, the Court will draw all rational inferences that favor the non-moving party.[9]

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[6] *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[7] *Urena v.Capano Homes, Inc*., 901 A.2d 145, 150 (Del. Super. 2006).

[8] *Merrill v. Crothall-American, Inc*., 606 A.2d 96, 99 (Del. 1992).

[9] *Id.*

However, the Court is faced with a relatively unusual legal standard for summary judgment motions in matters involving professional review action immunity under the HCQIA. The HCQIA alters the summary judgment burden because Sternberg, the non-mover for summary judgment as to HCQIA immunity, has the burden of demonstrating at the outset that a reasonable fact finder could conclude by a preponderance of the evidence that Nanticoke did not meet HCQIA requirements for a professional review action and had acted unreasonably.[10] As one court has pointed out, "since HCQIA immunity may only be overcome by a preponderance of the evidence, the statutory presumption in favor of the health care entity shifts to the plaintiff 'not only the burden of producing evidence but the burden of persuasion as well.'"[11] In addition, it is well worth noting that HCQIA immunity ultimately is a question of law that the trial court may determine on summary judgment.[12]

DISCUSSION

1. The Factual Basis for Summary Judgment is Supported by the Record

As an initial matter, Sternberg has raised several evidentiary issues in support of his argument that the Defendants fall short of state and federal immunity standards. All of these arguments relating to the evidentiary record have been crafted to create an impression that there

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[10] *Pamintuan v. Nanticoke Memorial Hosp*., 192 F.3d 378, 388 (3d Cir. 1999); *Lipson v. Anesthesia Services, P.A.,* 790 A.2d 1261, 1272 (Del. Super. 2001) ("Plaintiffs bear the burden of establishing that [defendant] is not entitled to immunity under the statute, and, in this regard, the burden on summary judgment is transferred at the outset of the analysis to the non-moving party."); *See also* 42 U.S.C. § 1112(a)(4) ("A professional review action shall be presumed to have met the preceding standards necessary for the protection set out in section 11111(a) of this title unless the presumption is rebutted by a preponderance of the evidence.").

[11] *Singh v. Blue Cross/Blue Shield of Massachusetts, Inc*., 308 F.3d 25, 33 (1st Cir. 2002) (citing Jerome A. Hoffman, *Thinking about Presumptions: The Presumption of Agency from Ownership as Study Specimen*, 48 Ala.L.Rev. 885, 896-897 (1997)).

[12] *Onel v. Tenet Healthsystems*, 2003 WL 22533616, *2 (E.D.La.Oct. 31, 2003).

is a fact question in the case at bar. The Court is not persuaded by these evidentiary claims, and, accordingly, rejects these arguments

The Defendants have presented sufficient evidence in their filings with the Court to dispose of this matter. The Court reaches its decision based on the following undisputed and material facts:

1. Sternberg's behavior had been a subject of concern to hospital officials for a substantial period of time prior to his precautionary suspension.
2. The MEC voted to recommend that Sternberg's privileges be revoked at Nanticoke prior to the incident with the reporter which led to his precautionary suspension.
3. The MEC's decision to recommend the revocation of Sternberg's privileges was based on reports regarding his behavior.
4. After it was recommended that his privileges be revoked at Nanticoke, Sternberg was put on notice by hospital officials, including Werner, through repeated warnings, that behavior deemed by hospital officials to be inappropriate would result in an immediate suspension.
5. Sternberg invited a newspaper reporter to observe a procedure on October 13, 2006. This was done to further Sternberg's political campaign for the legislature even though he had been informed that there was to be no politicking in the hospital.
6. The hospital did not know that the individual who would observe the procedure was a newspaper reporter prior to the incident on October 13, 2006.

7. As a result of the reporter's presence in the operating room, hospital officials had to remove the reporter from the operating room on October 13, 2006.

8. Werner outlined his reasons for issuing the precautionary suspension via a letter to Sternberg on October 13, 2006.

9. On October 18, 2006, the MEC voted to continue Sternberg's suspension until the hearing on the revocation of his privileges was held.

10. A hearing examining the recommendation that Sternberg's privileges be revoked never took place. Instead, Sternberg reached an agreement with hospital officials to remove the precautionary suspension from his record and replace it with a leave of absence. As a condition for removing the precautionary suspension, Sternberg was required to participate in a remedial program as to his conduct.

11. Thereafter, Sternberg successfully completed a Physicians Development Program and returned to his clinical practice on December 14, 2006. Sternberg remained at Nanticoke, without incident, until his resignation on January 31, 2008.

The Court finds any attempt by Sternberg to create a fact question by raising the particulars of how Werner received the information regarding the reporter's presence in the operating room to be irrelevant. For reasons set forth, *infra*, the Court specifically holds that Mary Beth Waide's involvement in any "investigation" is immaterial for purposes of summary judgment.

Nor will the Court disregard the evidentiary record surrounding Sternberg's "pattern of disruptive behavior" as inadmissible hearsay. The evidence of Sternberg's behavior at the

hospital is not being offered for the truth of the matter asserted – that Sternberg was disruptive. To the contrary, this documentary record is proffered by the Defendants for the non-hearsay purpose of showing what potential evidence was known by Werner and the MEC, and what potential evidence was considered, when the precautionary suspension was issued to Sternberg.[13] Other courts have also concluded that documentary evidence is non-hearsay when offered to show what the decision maker considered when engaging in a peer review activity for purposes of the HCQIA.[14]

Moreover, the Court will not strike Werner's affidavit under the "sham affidavit" doctrine. Under our sham affidavit jurisprudence, "the core of the doctrine is that where a witness at a deposition has previously responded to *unambiguous questions* with *clear answers* that negate the existence of a genuine issue of material fact, that witness cannot thereafter create a fact issue by submitting an affidavit which *contradicts* the earlier deposition testimony, without adequate explanation."[15] In order for the sham affidavit doctrine to be applicable, six elements must be met.[16] The Court concludes that at least two of these elements are missing in the present matter.

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[13] *See* D.R.E. 801

[14] See *Johnson v. Christus Spohn*, 2008 WL 375417, at *1 (S.D. Tex. Feb. 8, 2008) (concluding that a timeline that outlined the case for HCQIA immunity was "admissible for the non-hearsay purposes of showing what evidence various peer review committees considered and whether the committee members reasonably believed they were acting to further quality healthcare. These considerations are relevant to whether Defendants are entitled to immunity from damages under both federal and state law….").

[15] *In re Asbestos Litigation*, 2006 WL 3492370, at *5 (Del. Super. Nov. 28, 2006).

[16] *Id.* (The sham affidavit rule "requires the trial court to find the following elements before striking an affidavit or deposition errata sheet as a sham: (1) prior sworn deposition testimony; (2) given in response to unambiguous questions; (3) yielding clear answers; (4) later contradicted by sworn affidavit statements or sworn errata corrections; (5) without adequate explanation; and (6) submitted to the court in order to defeat an otherwise properly supported motion for summary judgment.").

First, the sham affidavit doctrine requires that the affidavit be submitted for the purpose of defeating an otherwise properly submitted summary judgment motion.[17] Here, the Defendants have submitted Werner's affidavit in support of its own motion for summary judgment on immunity grounds and in opposition to Sternberg's motion for summary judgment on HCQIA attorney's fees. Thus, it cannot be said that Werner's affidavit was submitted by the Defendants to defeat Sternberg's motion when it was proffered to the Court, in the main part, to support their own motion to the Court.

In addition, the sham affidavit doctrine mandates that the affidavit contradict prior sworn deposition testimony.[18] The doctrine is designed to ensure that summary judgment cannot be defeated by a procedural tactic crafted solely to subvert the process.[19] Yet, at its core, the sham affidavit doctrine requires that the affidavit in question negate genuine issues of material fact.[20] Despite providing the Court with supposed examples to support this claim, Sternberg has failed to show that Werner's affidavit contradicts his prior deposition testimony. And, for purposes of discussion only, even if Werner's affidavit provided contradictory evidence, Sternberg has offered no explanation as to how this supposed contradictory testimony relates to a *material* issue of fact that would preclude summary judgment. Thus, Sternberg's attempt to strike Werner's affidavit under the sham affidavit doctrine must be rejected.

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[17] *Id.*

[18] *Id*.

[19] *Id.*, at *4.

[20] *Id.*, at *5.

2. The Health Care Quality Improvement Act

Having concluded that evidentiary issues do not preclude summary judgment, it is necessary to examine the HCQIA. Congress passed the legislation in 1986 in response to what has been described as a "crisis" in the monitoring of doctors and other health care professionals.[21] By the mid-1980's, state licensing boards had a long history of examining the conduct and competency of their health care workers. With the passage of the HCQIA, Congress found that the increasing occurrence of medical malpractice and the need to improve the quality of medical care were truly national issues that required greater attention than could be undertaken by any one state.[22] Congress also concluded that it was far too easy for incompetent doctors to move to different locales to continue their practices. Therefore, Congress mandated the establishment of a national database that recorded incidents of misconduct and made this information available to all health care entities for the screening of potential employees.[23]

At the same time, Congress also recognized that threats of anti-trust action and other litigation deterred health care entities from engaging in and conducting meaningful peer review. To foster peer review that would truly highlight incompetent health care professionals, the HCQIA was enacted so that health care entities and individual doctors would be shielded from liability for damages stemming from the examination of health care workers.[24] By immunizing peer reviewers from damages, the HCQIA provides a mechanism by which doctors are

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[21]*See Singh*, 308 F.3d at 31.

[22]*Id. See also* 42 U.S.C. § 1101(1).

[23]*Singh*, 308 F.3d at 31-32. *See also H.R. Rep. No. 99-903*, at 2, *reprinted* in 1986 U.S.C.C.A.N. 6384, 6385. (The Court notes, as others have, that the language of H.R. Rep. No. 99-903 referred to legislation that was substantially similar to the HCQIA. Consequently, the Court cites to the committee report as have nearly all other courts who have addressed the considerable legislative history of the HCQIA.).

[24]*Singh*, 308 F.3d at 31-32.

encouraged to "identify and discipline other physicians who are incompetent or who engage in unprofessional behavior."[25] Ultimately, however, the goal of the HCQIA is to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action.[26]

2. Defendants' Actions Were Professional Review Actions under the HCQIA

The Defendants' main contention in this litigation is that they are immune from damages by virtue of the HCQIA. Among his many arguments against this contention, Sternberg asserts that the Defendants' precautionary suspension was not a "professional review action" for purposes of HCQIA protection. Sternberg asserts that Nanticoke's By-laws control the "professional review action" analysis and suggests that because the Defendants allegedly did not follow their own By-laws, they did not take a "professional review action" under the HCQIA.

As a threshold matter, the Court must focus its inquiry on whether the Defendants were engaged in a "professional review action" when Sternberg was suspended. Congress clearly wanted to establish peer review immunity through the HCQIA. On the other hand, Congress did not provide immunity for every individual or entity who engages in investigative activity of health care professionals. Instead, immunity is available under the HCQIA for "professional review actions."[27] The HCQIA defines "professional review actions" as:

> An 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

[25] *H.R. Rep. No. 99-903*, at 2, *reprinted in* 1986 U.S.C.C.A.N. 6384.

[26] *Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1322 (11th Cir. 1994)

[27] 42 U.S.C. § 11111(a).

> professional review body not to take an action or make a recommendation described in the previous sentence and also includes *professional review activities* relating to a professional review action.[28]

For purposes of the definition of "professional review action", a "professional review body" under the statute is a "health care entity and the governing body of a health care entity which conducts professional review activity, and includes any committee of the medical staff of such an entity when assisting the governing body in a professional review activity."[29] A "professional review activity," in turn, 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."[30]

An extensive statutory analysis of the precautionary suspension at issue here under the HCQIA is not required. For purposes of HCQIA immunity, the Court finds that Nanticoke is a health care entity and the MEC a governing body that conducts professional review activity necessary for a "professional review body." The Court also holds that, because the precautionary suspension undisputedly changed, modified, and adversely affected Sternberg's privileges and membership at Nanticoke, the precautionary suspension is both a "professional review activity" and ultimately a "professional review action." Thus, were the examination limited solely to the confines of the HCQIA, the precautionary suspension would most certainly be eligible for HCQIA immunity as a "professional review action."

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[28] 42 U.S.C. §11151(9) (emphasis added).

[29] 42 U.S.C. §11151(11).

[30] 42 U.S.C. §11151(10).

However, Sternberg argues that the Defendants' By-laws exclude precautionary suspensions from being considered HCQIA "professional review actions." First, Sternberg claims that a hearing is an explicit requirement imposed by the HCQIA on professional review actions. Sternberg contends that since the Defendants' By-laws deny aggrieved doctors the right to a hearing for a precautionary suspension, the By-laws thereby violate the HCQIA.[31] Sternberg further notes that the plain language of Nanticoke's Credentials Policy removes a precautionary suspension from "professional review action" status under the HCQIA.[32]

Moreover, Sternberg argues that the Defendants' precautionary suspension was not a "professional review action" as neither Werner nor the MEC made the determination that failure to suspend Sternberg may have resulted in imminent danger to the health and/or safety of any individual as required by the Credentials Policy.[33] Because he reasons that the Credentials Policy controls the analysis of the precautionary suspension, rather than the HCQIA, Sternberg asserts that the Defendants' alleged failure to abide by the Credentials Policy means that the precautionary suspension cannot be considered to be a "professional review action" under the HCQIA.

The Court is unconvinced that any of Sternberg's arguments about the validity of the precautionary suspension here have merit. Sternberg presupposes that the Defendants'

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[31] Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.2.(c) ("There is no right to a hearing based on the imposition or continuation of a precautionary suspension or restriction.").

[32] Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.1.(b) ("A precautionary suspension or restriction is an interim step in the professional review activity, but it is not a complete professional review action in and of itself.").

[33] Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.1.(a) ("The President of the Medical Staff, the chairperson of a clinical department, the CEO or the Board Chairperson will each have the authority to suspend or restrict all or any portion of an individuals clinical privileges whenever, in their sole discretion, failure to take such action may result in imminent danger to the health and/or safety of any individual. The individual may be given an opportunity to refrain voluntarily from exercising privileges pending an investigation.").

Credentials Policy controls the HCQIA analysis when the weight of authority indicates otherwise. The Court concludes that the precautionary suspension was a "professional review action", the propriety of which will be examined according to HCQIA immunity standards.

An analysis of HCQIA case law shows that the HCQIA's definition of "professional review action" is definitive and any deviation with respect to the By-laws is immaterial at this stage of the analysis.[34] "HCQIA immunity is not coextensive with compliance with an individual hospital's bylaws. Rather, the statute imposes a uniform set of national standards. Provided that a peer review action ... complies with those [HCQIA] standards, a failure to comply with hospital bylaws does not defeat a peer reviewer's right to HCQIA immunity from damages." [35]

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[34] *See Wahi v. Charleston Area Med. Ctr.*, 563 F.3d 599, 609 (S.D. W. Va. 2006).

[35] *Id.* (*quoting Poliner v. Texas Health Systems*, 537 F.3d 368, 380-81 (5th Cir. 2008)). *See also Meyers v. Columbia/HCA Healthcare Corp*., 341 F.3d 461, 469-470 (6th Cir. 2003) (Failure to comply with hospital bylaws does not defeat immunity since "even assuming [defendant hospital] did violate the bylaws, the notice and procedures complied with the HCQIA's statutory 'safe harbor'."); *Smith v. Ricks*, 31 F.3d 1478, 1487 (9th Cir. 1994) ("Whether or not [defendant hospital] violated state law or professional guidelines is irrelevant because once the immunity provisions of the HCQIA are met, defendants 'shall not be liable in damages under any law of the United States or of any State based on a professional review action."); *Bakare v. Pinnacle Health Hosps., Inc*., 469 F. Supp. 2d 272, 290 (M.D. Pa.2006)("The court need not determine whether MEC followed the Bylaws. HCQIA immunity attaches when the reviewing body satisfies the requirements under HCQIA, regardless of its own policies and procedures."); *Brader v. Allegheny Hosp*. 167 F.3d 832, 842 (3d Cir. 1999) ("The HCQIA does not require that a professional review body's entire course of investigative conduct meet particular standards in order for it to be immune from liability for its ultimate decision."); *Wieters v. Roper Hosp.,* 2003 WL 550327, at *6 (4th Cir. Feb. 27, 2003) ("Nothing in the HCQIA makes immunity depend on adherence to bylaws…"); *Reed v. Franklin Parish Hosp. Serv. Dist*., 2006 WL 3589676, at *6 (W.D. La. Dec. 11, 2006) ("Dr. Reed also contends that the HCQIA does not authorize a health care facility to violate its own bylaws, but he provides no authority for this position. Deviation from the bylaws, if any occurred, is irrelevant to whether Defendants are entitled to immunity, so long as they complied with the procedures set forth in the HCQIA."); *Christus Spohn*, 2008 WL 375417, at *13 ("Plaintiffs also at times argue that Defendants violated their own Medical Staff Bylaws. The HCQIA, however, does not explicitly require compliance with such bylaws…."); *Taylor v. Kennestone Hosp., Inc*., 596 S.E. 2d 179, 185 (Ga. Ct. App. 2004) ("[T]here is no statutory requirement set forth in the HCQIA that a peer review proceeding must be conducted in accordance with a hospital's own specific internal bylaws or procedures."); *Poliner*, 537 F.3d at 378 ("To be clear, the abeyances are temporary restrictions of privileges, and we use that terminology, which comes from the Medical Staff bylaws, in our discussion; but for the purposes of HCQIA immunity from money damages, what matters is that the restriction of privileges falls within the statute's definition of 'peer review action,' and what we consider is whether these 'peer review actions' satisfy the HCQIA's standards, and not whether the 'abeyances' satisfy the bylaws.").

Even though there is an abundance of case law to support the proposition that adherence to the By-laws is irrelevant in the HCQIA analysis, Sternberg argues that the case *Lipson v. Anesthesia Services, P.A.* creates a unique standard in Delaware such that hospitals must follow their own By-laws to receive "professional review action" status under the HCQIA.[36]

The Court concludes that *Lipson* does not mandate this conclusion. The *Lipson* plaintiff sued his former medical practice group, a private professional association.[37] The *Lipson* Court rejected the group's assertion of HCQIA immunity, concluding that the medical association was not a "professional review body" and was not engaged in an HCQIA protected "professional review action" activity.[38] In doing so, though, the Court explicitly noted that had the record supported the medical association's contention that it conducted the investigation of the plaintiff doctor on behalf of the hospital, the court would have concluded that the medical practice group was a "professional review body" eligible for HCQIA immunity if engaged in a "professional review action."[39]

In the present case, unlike in *Lipson*, the Defendants acted as a "professional review body" engaged in a "professional review action."[40] Consequently, the analysis into the inquiry

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[36] 790 A.2d at 1274.

[37] *Id.* at 1265.

[38] *Id*. at 1274.

[39] *Id* at 1273.

[40] To reiterate, a "professional review body" includes "a health care entity…or any committee of a health care entity…" 42 U.S.C. § 11151(11). A health care entity includes "a hospital that is licensed to provide health care services by the State in which it is located." 42 U.S.C. § 11151(4). A "professional review activity" means an activity of a health care entity which changes or modifies the physicians' privileges or membership in the entity. 42 U.S.C. § 11151(10)(c). A "professional review action" is an action of a professional review body which is taken or made in the conduct of professional review activity and which affects (or may affect) adversely the clinical privileges, or membership in a professional society, of the physician. 42 U.S.C. § 11151(9). To be clear, therefore, Nanticoke Hospital is by definition a "health care entity" and the members of the MEC are a "committee of the health care entity" that was acting as a "professional review body" that engaged in a "professional review action" because the precautionary suspension adversely affected Sternberg's clinical privileges at Nanticoke.

could easily end here. Yet, as in *Lipson*, the Court will nevertheless address the assertion that *Lipson* requires adherence to the By-laws for HCQIA "professional review action" protection.

Sternberg has given great attention in particular to one section of *Lipson* for his contention that Delaware has a new standard in HCQIA jurisprudence. There, the Court stated:

> Even assuming arguendo that [defendant medical practice] was acting as a 'professional review body' or a 'health care entity,' or both, it still can not credibly maintain that its actions with respect to Lipson constituted peer review activity. The Court has been presented with compelling evidence that [defendant medical practice] employed no peer review process at all.[41]

The *Lipson* Court went on to state:

> The Court has concluded that [plaintiff doctor] has satisfied his burden to establish that [defendant medical practice] was not engaged in peer review activity under the HCQIA because it was not acting as a "professional review body." By failing to follow [the hospital's] Corrective Action/Fair Hearing Plan, and in the absence of any internal "formal peer review" process to guide their investigation, [defendant medical practice's] conduct-at least in the eyes of the HCQIA- was nothing more than employee discipline, cloaked with no more protection or immunity from suit than any other personnel decision it may have made.[42]

Sternberg's reliance on *Lipson* is misguided. The emphasis in *Lipson* on the importance of following internal peer review procedures was made precisely because *Lipson* involved a private group medical practice that employed literally no peer review procedures. For purposes of the HCQIA, as the *Lipson* Court intimated, a medical practice could conceivably be considered a "health care entity" and "professional review body" necessary to receive "professional review action" protection when it "follows *a formal peer review process* for the purpose of furthering quality health care…."[43] Nowhere in *Lipson* did the Court state that a

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[41] *Lipson*, 790 A.2d at 1273.

[42] *Id*. at 1274.

[43] 42 U.S.C. 11151(4)(A)(iii) (emphasis added).

designated "health care entity" and "professional review body" – as the Defendants have been defined by the Court – must follow By-laws and internal procedures to become eligible for "professional review action" immunization under the HCQIA. To the contrary, the *Lipson* holding is limited to the factual circumstances of that case in which a medical practice could not be considered a "health care entity" or a "professional review body" because it employed literally no formal internal peer review processes as recognized by the HCQIA. Any other reading of *Lipson* would eviscerate the HCQIA's establishment of a "uniform set of national standards." [44]

In addition, Sternberg, again, presupposes that *Lipson* is appropriate here because the Defendants have failed to follow their own By-laws. The Court rejects the contention, discussed *infra*, that Sternberg has met his burden to show that the Defendants have violated their internal peer review procedures. For purposes of rebutting Sternberg's arguments, the Court has only assumed that the Defendants failed to adhere to their By-laws. With the facts here so dissimilar to those in *Lipson*, the Court cannot see how *Lipson*'s language in dicta about By-law compliance is controlling in circumstances where the HCQIA applies – especially considering the case law cited herein, *supra* at footnote 35.

Because the HCQIA, rather than the Defendants' By-laws, is authoritative in the present controversy, the Court deems the plain language of the Defendants' Credentials Policy outlining precautionary suspensions to be irrelevant.[45] Likewise, the Court finds no merit in the suggestion that the absence of a right to a hearing in the Defendants' Credentials Policy violates

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[44] *Wahi*, 563 F.3d at 609.

[45] *See* Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.1.(b) ("A precautionary suspension or restriction is an interim step in the professional review activity, but it is not a complete professional review action in and of itself.").

the HCQIA.[46] Thus, the Court concludes that Sternberg has presented no issue of material fact to preclude a finding that the precautionary suspension was a "professional review action" eligible for HCQIA immunity.

3. The Four Strands of HCQIA Immunity

As a "professional review action," the precautionary suspension issued and continued by the Defendants potentially offers immunity from damages arising out of the peer review process.[47] Although the Defendants are eligible to receive statutory immunity, the Court is required to review the precautionary suspension under HCQIA immunity standards.

Consequently, in order qualify for HCQIA immunity, the "professional review action" must have been taken:

> 1) in the reasonable belief that the action was in the furtherance of quality health care;
>
> 2) after a reasonable effort to obtain the facts of the matter,
>
> 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).[48]

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[46] *See* Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.2.(c) ("There is no right to a hearing based on the imposition or continuation of a precautionary suspension or restriction."); s*ee also* 42 U.S.C. §11112 (c) ("[N]othing in this section shall be construed as … (2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice an hearing or other adequate procedures, where the failure to takes such action may result in an imminent danger to the health of any individual."). Therefore, the HCQIA does not mandate a hearing as suggested by Sternberg in the event of a precautionary suspension. In any event, Sternberg's argument is rendered moot in light of the fact that his precautionary suspension was to be continued until the hearing on the recommendation of his revocation was held. This hearing was not held because Sternberg and Nanticoke reached a mutual agreement to consider the precautionary suspension as a leave of absence.

[47] *See* 42 U.S.C. § 1111(a).

[48] 42 U.S.C. § 11112(a).

These four HCQIA standards necessary for immunity will be satisfied if "the reviewers, with the information available to them at the time of the professional review action would reasonably have concluded that their action would restrict incompetent behavior or would protect patients."[49] Congress adopted an objective, reasonable belief standard to permit a determination of immunity without an extensive inquiry into the state of mind of peer reviewers.[50] Consequently, the standard is one of objective reasonableness after looking at the "totality of the circumstances."[51] Courts have overwhelmingly concluded that peer review actions should be examined under objective standards. The Court will thus apply those standards here.[52]

In addition, the HCQIA provides that "a professional review action shall be presumed to have met the preceding standards necessary for protection set out in [42 U.S.C. § 11111(a)] unless the presumption is rebutted by a preponderance of the evidence."[53] As other courts have explained:

> [T]he rebuttable presumption of HCQIA section 11112(a) creates an unusual summary judgment standard that can best be expressed as follows: "Might a reasonable jury, viewing the facts in the best light for [the plaintiff] conclude that he has shown, by a preponderance of the evidence, that the defendants' actions are outside the scope of § 11112(a)?" If not, the court should grant the defendants' motion. In a sense, the presumption language in HCQIA means that the *plaintiff* bears the burden of proving that the peer review process was *not reasonable*.[54]

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[49] *Singh*, 308 F.3d at 32 (citing *H.R. Rep. No. 99-903* at 10).

[50] *Singh*, 308 F.3d at 32 (citing *H.R. Rep. No. 99-903* at 12).

[51] *Frelich v. Upper Chesapeake Health, Inc.,* 313 F.3d 205, 212 (4th Cir. 2002) (*citing Imperial v. Suburban Hosp. Ass'n, Inc.,* 37 F.3d 1026, 1030 (4th Cir. 1994)).

[52] *See, e.g., Singh*, 308 F.3d at 32; *Imperial*, 37 F.3d at 1030 ("The standard is an objective one which looks to the totality of the circumstances."); *Smith*, 31 F.3d at 1485 ("[T]he 'reasonableness' requirements of § 11112(a) were intended to create an objective standard, rather than a subjective standard*."); Bryan*, 33 F.3d at 1335 ("The test is an objective one, so bad faith is immaterial. The real issue is the sufficiency of the basis for the [Hospital's] actions.").

[53] 42 U.S.C. § 11112(a)(4).

[54] *Bryan*, 33 F.3d at 1333 (*quoting Austin v. McNamera*, 979 F.2d 728, 734 (9th Cir. 1992)).

Therefore, the Court here will focus the inquiry on whether Sternberg provided sufficient evidence to permit a jury to find that he had overcome, by a preponderance of the evidence, the presumption that the Defendants would reasonably have believed that they had met HCQIA immunity standards. [55]

4. The Defendants Acted in the Reasonable Belief that the Precautionary Suspension was in the Furtherance of Quality Health Care

In order for HCQIA immunity to attach, the precautionary suspension of Sternberg must have been taken "in the reasonable belief that the action was in the furtherance of quality health care."[56] Sternberg argues that the precautionary suspension was not based on the concern for patient safety or for health care improvement but was actually motivated by a desire to discipline him for his zealous advocacy of patient care in the hospital. Citing personal animosity towards him, Sternberg also suggests that the precautionary suspension was reflective of a "one-strike policy" designed to provide hospital leadership with the means to discipline Sternberg outside of the confines of the By-laws.

The HCQIA does not require that the precautionary suspension of Sternberg result in an actual improvement of the quality of health care nor does it require that the conclusions reached by the reviewers be correct.[57] Instead, the analysis is an objective inquiry in which the totality of

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[55] *Bryan*, 33 F.3d at 1333.

[56] 42 U.S.C. §11112(a)(1).

[57] *Imperial*, 37 F.3d at 1030 ("But more importantly to the issue at hand, even if Imperial could show that these doctors reached an incorrect conclusion on a particular issues because of a lack of understanding, that does not meet the burden of contradicting the existence of a *reasonable belief* that they were furthering health care quality in participating in the peer review process.").

the circumstances is considered and the good or bad faith of the reviewers is irrelevant.[58] Moreover, Sternberg must show that the totality of the information available to the Defendants did not provide a basis for a reasonable belief that their actions would further quality health care.[59]

Considering the totality of the information available to the Defendants, the Court concludes that Sternberg has failed to meet his burden. Knowing that Nanticoke had recommended a revocation of his privileges at the hospital, together with multiple subsequent warnings that a disruption of any kind would result in an immediate suspension, Sternberg made the conscious decision to bring a newspaper reporter into the operating room. Sternberg had been informed by his superiors that he was not to be involved in politicking at the hospital. Nevertheless, without informing hospital administrators, Sternberg brought the newspaper reporter into the operating room for the purpose of advancing his political career. It is reasonable to infer that Sternberg did this under the false pretense of "education" – "education" for the reporter as opposed to traditional "education" customarily reserved for nursing or medical students. Hospital officials were entitled to assume that when Sternberg asserted that the observer was present for "education," the individual's presence was related to the practice of medicine rather than to promote his election to office.

When medical staff learned that the newspaper reporter was in the operating room, an administrator was informed of the situation. Hospital personnel entered the operating room and escorted the reporter out of the facility. The hospital could reasonably believe that this incident

[58] *Poliner*, 537 F.3d at 378.

[59] *Pamintuan,* 192 F.3d at 389.

was a disruption of the normal, orderly, and regimented protocol absolutely necessary for the effective treatment of patients.

And it is just as reasonable to find that the Defendants acted in the reasonable belief that suspending Sternberg would result in the furtherance of quality healthcare at Nanticoke. The Defendants knew of the history of allegations regarding Sternberg's behavior of the hospital; they certainly knew that his privileges had been recommended to be revoked; they knew that he had repeatedly been warned not to cause a disruption in the hospital pending the hearing to review his privileges. Nevertheless, they were informed that he caused some sort of disruption by bringing a hospital reporter into an operating room under false pretenses. Faced with possibility that Sternberg would continue to be disruptive at the hospital absent a change in his interpersonal skills, the Defendants' decision to suspend him was reasonably in the furtherance of quality healthcare.

The Court holds that any claim of personal animosity toward Sternberg in this process is irrelevant.[60] Nor can the Court find that the mere allegation of a "one-strike policy" is sufficient to show that the Defendants did not have a reasonable belief that the action would result in the furtherance of quality health care. Even if the Defendants engaged in a "one-strike policy" against Sternberg, which is speculative and immaterial, Sternberg simply does not show that the precautionary suspension was *not* based on the reasonable belief that it would further quality care at Nanticoke considering the long history of allegations surrounding his disruptive behavior. As a result of all the evidence before the Defendants, the Court concludes that Sternberg has failed

[60] See *Bryan*, 33 F.3d at 1335 ("[A]ssertions of hostility do not support his position [that the hospital is not entitled to the HCQIA's protections] because they are irrelevant to the reasonableness standards….").

to raise an issue of material fact as to whether his suspension was taken in the reasonable belief that it would further quality health care.

5. The Defendants Made a Reasonable Effort to Obtain the Facts Before Issuing the Precautionary Suspension

The second prong of HCQIA immunity mandates that the professional review action must have been taken "after a reasonable effort to obtain the facts of the matter."[61] Sternberg asserts that the Defendants did not make a reasonable effort to obtain the facts prior to issuing the precautionary suspension. Sternberg also claims that the Defendant members of the MEC failed to undertake a reasonable investigation when his precautionary suspension was continued.

More specifically, Sternberg's argument centers around the contention that Werner failed to make a reasonable effort to obtain the facts before issuing the precautionary suspension indicating that Sternberg was an imminent danger to the health and safety of any individual. Likewise, Sternberg maintains that the MEC did not fulfill its purported "check and balance" function in the By-laws by reaffirming Werner's decision to suspend Sternberg without examination.

To support these assertions, Sternberg refers to the deposition testimony of several hospital employees to show that the Defendants unreasonably failed to obtain the facts surrounding the precautionary suspension. In particular, Sternberg cites to Waide's deposition testimony which suggests that she did not initiate a formal investigation of the reporter's presence in the room. Waide's testimony, according to Sternberg, conflicts with the claim that Werner asked Waide to investigate the matter. As a result, Sternberg claims to have raised an

[61] 42 U.S.C. § 11112(a)(2).

issue of material fact regarding the reasonableness of the Defendants' efforts to obtain the facts surrounding the suspension.

The HCQIA does not require the ultimate decision maker to investigate the matter independently.[62] Only a reasonable effort to obtain the facts is required to meet HCQIA standards, and the Court must consider the totality of the process leading up to the professional review action.[63] To meet his burden here, Sternberg must establish that no reasonable jury could conclude that the Defendants made a reasonable effort to obtain the facts.[64]

Reviewing the totality of the process surrounding Sternberg's precautionary suspension, the Defendants made a reasonable effort to obtain the facts. Before the precautionary suspension, the Defendants were aware that Sternberg's privileges were subject to revocation, pending a hearing, due to allegations of disruptive behavior at the hospital. The Defendants were aware that Sternberg had been repeatedly notified that any further disruptive incident would result in an immediate suspension. Moreover, the Defendants knew that Sternberg had been warned by hospital officials not to engage in activity that could be construed as political in nature.

Given these circumstances, Werner's effort to obtain the facts was reasonable. While Sternberg attempts to create a fact question regarding Werner's investigation of the reporter's presence in the operating room, the nuances of this examination are irrelevant. Werner most assuredly was not in the operating room when the reporter was removed. Later that same day, however, Werner penned a letter outlining the precautionary suspension. Werner had to have

[62] *Poliner*, 537 F.3d at 380 (citing *Gabaldoni v. Wash. County Hosp. Ass'n.*, 250 F.3d 255, 261 (4th Cir. 2001)).

[63] *Poliner*, 537 F.3d at 380 (citing *Matthews v. Lancaster General Hosp*., 87 F.3d 624, 637 (3d Cir. 1996)).

[64] *Poliner*, 537 F.3d at 380.

attained the information relayed in that letter from some source that had knowledge of the situation. Werner was entitled to rely on the information provided to him by hospital staff, and there is nothing in the record to suggest that the information was "so obviously deficient so as to render Defendants' reliance 'unreasonable.'"[65]

A formal examination may not have been initiated by Werner, but an extensive inquiry was not necessary either. As a decision-maker at the hospital, Werner was readily aware of what has been described as a "shock wave" when it was learned that a reporter was in the operating room. In light of all that had occurred and all that was known leading up to the precautionary suspension, Sternberg was only entitled to a reasonable effort to obtain the facts, not a perfect effort.[66] The Court is persuaded that this fact-gathering was entirely reasonable under the circumstances.

While the reasonableness of this inquiry is fact sensitive, other courts have reached the same conclusion when hospitals have performed minimal investigations. The court considering *Onel v. Tenet Healthsystems*, for instance, concluded that a hospital administrator made a reasonable effort to obtain the facts even though he did not have first hand information about the incident giving rise to the precautionary suspension of a practicing internist.[67] There, the doctor was arrested on suspicion of vehicular homicide and driving while intoxicated.[68] A hospital administrator read in the local newspaper that the doctor had been arrested and charged in what

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[65] *Poliner*, 537 F.3d at 380.

[66] *Id.*

[67] *Onel*, 2003 WL 22533616, at *4.

[68] *Id*. at *1.

was reported as an alcohol-related accident.[69] The *Onel* Court noted that the hospital official was aware that the doctor had a history of being verbally abusive. The administrator also was made aware that the doctor was belligerent on the night of the accident. No formal inquiry or extensive investigation was launched by the defendant hospital when the doctor was summarily suspended. Even though it was ultimately determined that alcohol was absent from the doctor's bloodstream, the *Onel* Court nevertheless held that the hospital's fact finding was reasonable under the facts presented.[70]

The Court does not find *Onel* to be persuasive because of any factual similarities. Rather, *Onel* underscores the point that the HCQIA does not require a sweeping inquiry in every case. Just as it was reasonable for the administrator in *Onel* to suspend the doctor, in part, after reading of the accident in a newspaper, Werner's fact finding mission was reasonable given the obvious disruption by a doctor who had been warned time and again not to cause an incident at the hospital.

Similarly, the MEC's examination of the precautionary suspension was reasonable under the circumstances. Having concluded that the HCQIA controls the analysis, Sternberg's contention regarding the MEC's supposed "checks and balances" role is of no consequence here.[71] Even if the MEC was required to review the decision to suspend Sternberg, as it is suggested, the Court is satisfied that the MEC exercised reasonable diligence when it reaffirmed Werner's order. The MEC, for instance, recommended revocation of his privileges, and it is clear from the record that members of the MEC were well aware that Sternberg was asked not to be

[69] *Id.*, at *4.

[70] *Id.*, at **4-5.

[71] Because the HCQIA is the focus of the inquiry, Sternberg's suggestion that the MEC violated the By-laws when it continued the precautionary suspension is not relevant to the fact-gathering discussion.

disruptive after this decision.[72] Considering the MEC's close involvement with Sternberg leading up to the precautionary suspension, a minimal review of Werner's decision would be reasonable under the circumstances.

The record further indicates that the MEC's examination of the suspension meets HCQIA standards. During its meeting on October 18, 2006, the MEC specifically debated Sternberg's suspension, including the circumstances behind Werner's decision, and concluded that "given the previous communications with the physician about the need to control future behaviors, this was something that violated patient rights, disrupted the OR and warranted the action."[73]

The Court thus finds that the MEC engaged in a reasonable fact-finding process when it recommended that Sternberg's precautionary suspension be continued. Weighing the totality of the process leading up to Sternberg's suspension, the Court cannot conclude that Sternberg has met his burden to show that the Defendants failed to make a reasonable effort to obtain the facts under the circumstances presented.

Finally, the Court notes that much of this analysis is necessary to address Sternberg's arguments. Yet, Sternberg does not dispute the core facts known to Werner. Even though he disagreed with it, Sternberg had been informed of the policy prohibiting political activity at the hospital. Sternberg brought a newspaper reporter into the operating room after obtaining permission to have a visitor for educational purposes. It was reasonable for the hospital staff approving the request to conclude that education in this setting was for medical education and training and not for a newspaper reporter's "education" in covering a political campaign. Nor is

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[72] *See, e.g.,* Letter from Dr. Thomas Benz, Chief of Surgery, Nanticoke Memorial Hospital, to Richard Sternberg, Physician, Nanticoke Memorial Hospital (August 28, 2006).

[73] Minutes of Medical Executive Committee, Nanticoke Memorial Hospital (October 18, 2006).

it disputed that a staff member at Nanticoke had to enter the operating room and remove the newspaper reporter. As a result, Sternberg's arguments here must fail.

6. Adequate Notice and Hearing Procedures were provided to Sternberg

A. The Defendants had Reasonable Grounds to Suspend Sternberg as an Imminent Danger to the Health of any Individual.

The HCQIA mandates that professional review actions be taken "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."[74] The law, however, contains an emergency provision that permits suspensions "subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action *may result in an imminent danger to the health of any individual*."[75] The emergency provision does not require that imminent danger actually exist before a summary restraint is imposed. "It only requires that the danger *may* result if the restraint is not imposed."[76]

Ultimately, the central contention in Sternberg's case is that the Defendants did not make the determination that failure to suspend him or continue the suspension would have caused imminent danger to the health of any individual as referenced by the HCQIA emergency provision. Sternberg claims that the "imminent danger" standard is only satisfied when it is shown that a physician was incompetent, has substance abuse issues, or has deliberately harmed patients. Consequently, Sternberg implies that disruptive behavior, outside of these confines, is

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[74] 42 U.S.C. § 11112(a)(3).

[75] 42 U.S.C. § 11112(c)(2) (emphasis added).

[76] *Onel,* 2003 WL 22533616 at *5 (*quoting Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1443 (9th Cir. 1994)).

insufficient to meet imminent danger principles. Further, Sternberg asserts that the Defendants did not make – and could not make – the determination that he was an imminent danger to the health of any individual.

At first glance, Sternberg appears to have sufficient evidence to raise a genuine issue of material fact as to whether he was an imminent danger to any individual. Sternberg notes that Werner did not specifically mention the potential for imminent danger in the letter in which the precautionary suspension was issued. He observes that Werner did not discuss the possibility that Sternberg was an imminent danger when the MEC met to examine the precautionary suspension. In addition, as Sternberg points out, several individual Defendants, comprised of doctors and peer reviewers, testified after the fact that in their estimation he was not an imminent harm to the health or safety of any individual.

While this evidence is interesting, it is not determinative. No magic word or written phrase related to imminent danger by Werner, alone, would have triggered HCQIA immunity, and Werner's failure to communicate the precise imminent danger terminology does not end the inquiry either.[77] Likewise, those assertions made by Sternberg's colleagues that he was not a direct risk to patient safety have the benefit of hindsight. These opinions lack the expertise, perspective, or knowledge of the HCQIA upon which to render a legal conclusion in the eyes of the law. As a result, the Court must review the HCQIA to determine as a matter of law whether a competent physician with behavioral issues can be considered an imminent danger for the emergency provision.

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[77] The Court recognizes that even though Werner may not have stated "imminent danger" in his letter issuing the precautionary suspension to Sternberg, he did write that "your behavior has left me no choice but to *protect patients* from your disruptive conduct by removing you from the hospital *immediately*." Werner Letter (Oct. 13, 2006) (emphasis added). Werner's letter implicitly recognizes that Sternberg was an imminent danger to patients.

Essential to Sternberg's argument is the contention that disruptive doctors cannot be an imminent danger to the health and safety of any individual. The Court rejects this narrow approach to HCQIA jurisprudence. To the contrary, behavioral issues were most certainly contemplated by Congressional officials when the HCQIA was enacted. The Court observes, for instance, that the legislative history for the HCQIA highlights unprofessional conduct or behavior as an area of concern on no less than fifteen occasions.[78]

That Congress meant to include disruptive doctors within the purview of the HCQIA is further exemplified through the statutory construction of a "professional review action." As one court explained:

> The plain language of the statute indicates the breadth of "conduct" encompassed within the definition of "professional review action" by the inclusion of conduct that "could affect adversely the health or welfare of a patient." 42 *U.S.C.* § 11151(9). The statute contemplates not only potential harm through use of the term "could," but it also affords protection to actions taken against physician conduct that either impacts or potentially impacts patient "welfare" adversely, meaning patient "well being in any respect; prosperity." Black's Law Dictionary (West Group, 7th Ed.1999). Even if the statutory language was deemed to be ambiguous, the legislative history would support the same construction. *See* Health Care Quality Improvement Act of 1986, H.R. 5540, 99th Cong.2d Session (1986), 132 Cong. Rec. at 30768 (Oct. 14, 1986) ("competence and professional conduct should be interpreted in a way that is sufficiently broad to protect legitimate actions based on matters that raise concerns for patients or patient care.").[79]

It is clear that in applying the HCQIA, immunity for professional review actions is available to combat behavioral matters, such as a revocation of privileges or a denial of

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[78] *See, e.g., H.R. Rep. No. 99-90* at *2 ("This bill is needed to deal with one important aspect of the medical malpractice problem in this country—incompetent *and* unprofessional physicians."); ("The purpose of this legislation is to improve the quality of medical care by encouraging physicians to identify and discipline other physicians who are incompetent *or* who engage in unprofessional behavior."); ("The bill's focus is on those instances in which physicians injure patients through incompetent *or* unprofessional service, are identified as incompetent *or* unprofessional by their medical colleagues, but are dealt with in a way that allows them to continue to injure patients.");("Unfortunately, groups such as state licensing boards, hospitals and medical societies that should be weeding out incompetent *or* unprofessional doctors often do not do so.") (emphases added).

[79] *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 203 (3d Cir. 2005).

credentialing.[80] In *Frelich v. Upper Chesapeake Health, Inc.*, the court **explained** its rationale for immunizing the denial of a doctor's medical privileges:

> Today's health care environment has become increasingly complex. As [plaintiff's] complaint itself demonstrates, the operation of a hospital requires the coordination of numerous employees and departments, each with different responsibilities that build and depend upon each other. Thus, staff cooperation and communication are essential to ensuring a high quality of patient care. Disruptive behavior in the workplace can not only affect the moral and teamwork of the staff itself, but in so doing cause actual harm to patients. [81]

However, Sternberg further contends that disruptive doctors who have been *suspended* cannot be considered an imminent danger to any individual without a direct risk to patient safety. A review of the case reveals that such an assertion is misplaced.[82]

Given the intent to regulate unprofessional conduct, HCQIA case law indicates that the imminent danger standard is much broader in scope than Sternberg represents.[83] In *Sugarbaker v. SSM Health Care*, for example, the court rejected a contention offered by a surgeon that the

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[80]The Court notes that there is an abundance of HCQIA case of case law invoking immunity for professional review actions based on unprofessional conduct unrelated to medical competence. *See, e.g., Bryan*, 33 F. 3d at 1324 (HCQIA immunity for revoking physician's privileges where inappropriate and unprofessional conduct was exhibited stemming from "being a volcanic-tempered perfectionist, a difficult man with whom to work, and a person who regularly viewed it as his obligation to criticize staff members for perceived incompetence or inefficiency."); *Yashon v. Hunt*, 825 F.2d 1016, 1027 (6th Cir. 1987) ("a physician's unprofessional conduct, incompatibility and lack of cooperation on a hospital staff are appropriate considerations for denying staff privileges"); *Mahmoodian v. United Hosp. Center, Inc*., 404 S.E. 2d 750, 759 (W.Va. 1991) ("A hospital has the right, indeed the duty, to ensure that those persons who are appointed to its medical staff meet certain standards of professional competence *and professional conduct,* so long as there is a reasonable nexus between those standards and the hospital's mission of providing overall quality patient care").

[81] *Frelich*, 313 F. 3d at 219.

[82] As multiple cases have pointed out, "other courts have gone as far as to conclude a finding that the peer reviewer's actions were taken in a reasonable belief the action furthered quality health care necessitates a finding that a summary suspension was taken to prevent the possibility the physician could harm an individual." *Christus Spohn*, 2008 WL 375417, at *12 (*citing Peyton v. Johnson City Med*., 101 S.W. 3d 76, 88 (Tenn.Ct. App. 2002)). The Court is perplexed as to how Sternberg could imply that disruptive behavior cannot meet the imminent danger standard as a matter of law in light of all the evidence to the contrary, discussed *infra*.

[83] *See Sugarbaker v. SSM Health Care*, 190 F.3d 905 (8th Cir. 1999); *Jenkins v. Methodist Hosps. of Dallas, Inc.,* 2004 WL 3393380 (N.D.Tex. Aug. 14, 2004); *Straznicky v. Desert Springs Hosp*., 2009 WL 1905298 (D. Nev. July 1, 2009); *Onel*, 2003 WL 22533616.

hospital was not entitled to HCQIA protection because the doctor had no patients admitted at the time of his suspension, thus implying that the physician was of no imminent danger to any one individual. The court explained:

> We see no reason to limit the HCQIA emergency provisions to situations in which there is a currently identifiable patient whose health may be jeopardized. The HCQIA does not require imminent danger to exist before a summary restraint is imposed. It only requires that the danger may result if the restraint is not imposed.[84]

Other cases highlight the breadth of the imminent danger standard described in *Sugarbaker*. The plaintiff internist in *Onel* argued that he was of no imminent danger to any individual because his medical competency was not at issue.[85] In rejecting this claim, the *Onel* Court reasoned:

> Dr. Onel argues that the emergency provision does not apply because the accident had nothing to do with patient care or his ability to practice medicine. Dr. Onel argues that prior cases have used the summary suspension provision only following evidence of incompetence in patient care. Although the plaintiff correctly observes that the summary suspension provision can and has been invoked in cases of physician incompetence in patient care, § 11112(c)(2) is not limited to instances of incompetence in patient care. The emergency provision's language is broad, and permits summary action in any case where the failure to act "may result in imminent danger" to any individual's health, subject only to subsequent notice and hearing.[86]

Sternberg attempts to distinguish the holding of *Onel* by suggesting that the case applies only where a physician has a substance abuse problem. In doing so, Sternberg ignores the permissive nature of the emergency provision underscored by the "*may* result in imminent danger" language. He also fails to consider that substance abuse fits in squarely with the proposition that disruptive behavior can result in imminent danger.

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[84] *Sugarbaker*, 190 F.3d at 918.

[85] *Onel,* 2003 WL 22533616, at *5.

[86] *Id.*

Similarly, in *Jenkins v. Methodist Hospitals of Dallas, Inc.*, although there was some suggestion that the plaintiff doctor was incompetent, the Court focused its analysis on accusations that the cardiologist fostered a "hostile work environment." [87] The court recognized that the complaints against the physician "allege demeaning comments to staff, berating the staff, threatening the staff with loss of employment, and other disruptive behavior."[88] In concluding that the summary suspension was reasonable pursuant to HCQIA emergency provision standards, the *Jenkins* Court specifically relied upon evidence that the doctor was "largely responsible for a hostile work environment…that was potentially injurious to patient care" and an indication that the physician made the staff feel "rushed to perform their duties, causing them to fear mistakes."[89]

While *Jenkins* directly counters Sternberg's contention that disruptive doctors do not represent an imminent danger to the health of any individual, the *Straznicky v. Desert Springs Hospital* case further reinforces the point. There, the plaintiff physician entered an operating room where one of his colleagues was performing a surgical procedure.[90] In need of a lead shield, the plaintiff asked his colleague about using the surgical instrument in his own surgery. When the colleague denied this request, the plaintiff became "confrontational" and "visibly upset" and took the lead shield anyway.[91]

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[87] *Jenkins*, 2004 WL 339380, at *2.

[88] *Id.*, at *3.

[89] *Id.*, at *19.

[90] *Straznicky*, 2009 WL 1905298 at *2.

[91] *Id.*

Thereafter, the plaintiff was summarily suspended for "disruptive conduct that caused a distraction" to his fellow surgeon.[92] Challenging the propriety of his suspension, the plaintiff argued that he needed the shield for his own protection and did not directly harm any individual. In response, the *Straznicky* Court observed that "by removing this equipment from the operating room where it was needed for a procedure, Straznicky placed someone in that adjacent operating room at harm."[93] The *Straznicky* Court thus rejected the supposition that the physician had to cause *direct* harm to any individual to satisfy imminent harm criteria. In addition, the court responded to a contention that the taking of the shield was an isolated incident ill reflective of "on-going imminent harm to patients":

> The argument ignores that past disruptive conduct can be indicative of an underlying characteristic that could manifest in future disruptive conduct. When the nature of the disruptive conduct indicates both that an imminent harm to a patient occurred and that the failure to take immediate action may result in imminent danger to the health of individuals, a reviewing body can reasonably believe that an immediate, summary suspension is warranted.[94]

As the *Straznicky* Court further explained, "the court readily concludes that a patient is placed in danger of imminent harm when someone causes the surgeon, who is performing a procedure on a patient, to become visibly disturbed and distracted during the procedure."[95]

The common thread in all of these cases is that summarily suspended doctors have been found to be an imminent danger to the health of any individual as a result of their unprofessional behavior rather than their competency. Because a review of the case law reveals that a disruptive

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[92] *Id.*

[93] *Id.*, at *11

[94] *Id.*, at *9.

[95] *Id.*

physician can be an imminent danger for purposes of the emergency provision, Sternberg's narrow reading and application of HCQIA jurisprudence misses the mark.

Thus, the question before the Court is not whether Sternberg *was* an imminent danger when he was suspended. If it were, the Court would be highly persuaded by the testimony of Sternberg's colleagues suggesting otherwise. Instead, the Court holds that the proper inquiry is whether the Defendants had reasonable grounds for suspending Sternberg if imminent danger *may* have resulted had the restraint not been imposed .[96]

From the record presented, the Court finds that it was reasonable for the Defendants to consider Sternberg an imminent danger to the health of any individual when they issued and continued the precautionary suspension. Both Werner and the members of the MEC had knowledge of those allegations against Sternberg which led to the recommendation that his privileges be revoked. After recommending that his privileges be revoked, and by bringing in a reporter to the operating room under what they reasonably inferred was false pretenses, Sternberg engaged in behavior that most certainly disrupted the normal order at the hospital. Since, from the Defendants' viewpoint, Sternberg had shown an inclination to disregard repeated warnings and a history of disconcerting behavior, the Court finds that it was imminently reasonable for both Werner and the MEC to conclude reasonably that if Sternberg were not removed from the hospital imminent danger to patients *might* result. At the end of the day, it was reasonable for the Defendants to conclude that Sternberg's continued disruptive behavior required action to safeguard against the possibility of imminent danger to their patients.

[96] *Christus Spohn*, 2008 WL 375417 at *12 (citing *Patel v. Midland Mem'l Hosp. & Med. Ctr.*, 298 F.3d 333, 343-344 (5th Cir. 2002) ("[W]hen determining the amount of process constitutionally due [a physician] prior to [a summary suspension] of his privileges, the key question is not whether [the physician] was actually a danger, but whether the [committee implementing the suspension] had reasonable grounds for suspending him as a danger.")).

The Court further notes that Sternberg's occupation as a surgeon plays some role in the imminent danger analysis. At least two incidents of his disruptive behavior allegedly occurred in the operating room close in time to surgical procedures. As *Straznicky* recognized, surgeons are members of a select few occupations where "life and death decisions" are a distinct possibility each time they enter the workplace. In such an extremely stressful environment, surgeons, in the course of their employment, have a responsibility, if not duty, to avoid causing distractions. To take *Straznicky* one step further, this Court readily accepts that a patient is placed in danger of imminent harm when a surgeon, who is in the process of performing a procedure on a patient, becomes visibly disturbed and distracted --- regardless of the cause of the disturbance. In light of the foregoing, Sternberg fails to convince the Court that the Defendants did not have reasonable grounds to suspend him as an imminent danger to the health of any individual.

B. <u>The Adequacy of the Notice and Hearing Procedures Provided to Sternberg</u>

Since the Defendants had reasonable grounds to suspend Sternberg as an imminent danger to the health of any individual, the Court is satisfied that the precautionary suspension was appropriate under the HCQIA emergency provision. However, the analysis of this HCQIA prong does not end there. The HCQIA states that nothing in the act precludes an immediate suspension based on imminent danger to the health of any individual "subject to subsequent notice and hearing or other adequate procedures."[97]

Sternberg correctly notes in this respect that the HCQIA requires a hearing or other fair procedures before a professional review action can be taken.[98] Sternberg also recognizes that the hearing requirement can be delayed under the emergency provision if imminent danger may

[97] 42 U.S.C. § 11112(c)(2).

[98] 42 U.S.C. § 11112(a)(3).

result from the failure to act. Because Sternberg argues that the Defendants could not find imminent danger here, he contends that a hearing was required before the professional review action was initiated. Thus, according to Sternberg, the failure to provide a hearing before the suspension was issued and continued violates HCQIA notice and hearing requirements. Sternberg supports his argument here by suggesting that Nanticoke's By-laws do not entitle a doctor to a hearing at any time regarding a precautionary suspension.

The Court has little trouble in rejecting these contentions. As has been discussed, the Defendants had reasonable grounds to suspend Sternberg as an imminent danger to the health of any individual. By meeting this standard, the Defendants were not required to provide Sternberg with a hearing before he was suspended. Thus, Sternberg's arguments here are not persuasive.

The Court reiterates that the By-laws do not control the HCQIA analysis. Yet, assuming they did, there is nothing in Nanticoke's Credentials Policy that violates the HCQIA on its face. Nanticoke's By-laws state that "there is no *right* to a hearing based on the imposition or continuation of a precautionary suspension or restriction." [99] Likewise, the HCQIA's emergency provision indicates that an immediate suspension can be taken subject to subsequent notice "*or other adequate procedures*."[100] With the inclusion of the "or other adequate procedures" language, the HCQIA, itself, does not provide a right to a hearing when a doctor is suspended. Consequently, this Court cannot say that the restriction of a *right* to a hearing in the Credentials Policy violates the HCQIA -- even if the inquiry was material.

Moreover, the Court notes that the Defendants did provide Sternberg with the opportunity for a hearing in the wake of his suspension. At the time Sternberg was suspended, a hearing

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[99] Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.2.(c) (emphasis added).

[100] 42 U.S.C. § 11112(c)(2) (emphasis added).

regarding the revocation of his privileges at the hospital had already been both scheduled and delayed to accommodate Sternberg's need for counsel. The MEC voted that action on the precautionary suspension should be continued until the hearing on the revocation of Sternberg's privileges was held.

In light of the recommendation that Sternberg's privileges be revoked, it was entirely adequate under the circumstances for the MEC to continue the suspension until the hearing about his privileges was held. Sternberg and the Defendants mutually agreed not to have this hearing when it was decided that the precautionary suspension would be characterized as a leave of absence. This circumstance further reinforces the point that there were no deficiencies in the due process procedures offered to Sternberg. Outside of his contentions surrounding the failure of the Defendants to find that he was an imminent danger, Sternberg does not allege any other due process inadequacies. Because his imminent danger argument is without merit, the Court finds that Sternberg has failed to show by preponderance of the evidence that the notice, hearing, or other procedures afforded to him were inadequate or not fair under the circumstances.

7. The Precautionary Suspension was made in the Reasonable Belief that the Action was Warranted by the Known Facts

The fourth and final strand of the HCQIA requires that the professional review action must have been taken "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts and after meeting the requirements of paragraph (3)."[101] This prong "essentially combines the first three elements" of the HCQIA.[102] The Court's analysis here mirrors that regarding the standard for professional review actions taken in

[101] 42 U.S.C. § 11112(a)(4).

[102] *One*l, 2003 WL 22533616, at *6 (*quoting Rogers v. Columbia/HCA Cent. Louisiana, Inc.*, 971 F. Supp 229, 237 (W.D. La. 1997)).

the furtherance of quality health care.[103] Accordingly, the Court will not reweigh matters that have been thoroughly discussed. For the reasons stated above, the Court holds that no reasonable jury could conclude that Sternberg has demonstrated by a preponderance of the evidence that the Defendants did not act in the reasonable belief that the precautionary suspension was warranted by the facts known after a reasonable effort to obtain the facts.

The Court recognizes that, by design, the standards and presumptions for HCQIA immunity are weighted in favor of those hospitals and physicians that engage in the peer review process. Undoubtedly, the HCQIA has the potential to reach unjust results.[104] Yet, the analysis in *Poliner v. Texas Health Systems* on this issue is directly on point:

> It bears emphasizing that this does not mean that hospitals and peer review committees that comply with the HCQIA's requirements are free to violate the applicable bylaws and state law. The HCQIA does not gainsay the potential for abuse of the peer review process. To the contrary, Congress limited the reach of immunity to money damages. The doors to the courts remain open to doctors who are subjected to unjustified or malicious peer review, and they may seek appropriate injunctive and declaratory relief in response to such treatment. The immunity from money damages may work harsh outcomes in certain circumstances, but that results from Congress' decision that the system-wide benefit of robust peer review in rooting out incompetent physicians, protecting patients, and preventing malpractice outweighs those occasional harsh results; that giving physicians access to the courts to assure procedural protections while denying a remedy of money damages strikes the balance of remedies essential to Congress' objective of vigorous peer review.[105]

Although it is clear that the HCQIA is potentially unforgiving to doctors, such is not the case here. Considering the record presented, the Court is satisfied that this matter is precisely the type of case that Congress intended to be adjudicated under HCQIA immunity standards.

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[103] *Id. See also Sugarbaker*, 190 F.3d at 916; *Brader*, 167 F.3d at 843.

[104] *See* Yann H.H. van Geertruyden, *The Fox Guarding The Henhouse: How The Health Care Quality Improvement Act of 1986 And State Peer Review Protection Statutes Have Helped Protect Bad Faith Peer Review In The Medical Community*, 18 J. Contemp. Heath L. & Pol'y 239 (Winter 2001).

[105] *Poliner*, 537 F.3d at 381.

Moreover, balancing all of the evidence indicating that Sternberg was a disruptive doctor with the *potential* to cause imminent harm to patients, the Court will not substitute its judgment "for that of health care professionals and of the governing bodies of hospitals in an area within their expertise."[106]

In sum, the Court finds that Sternberg has failed to produce any evidence from which a reasonable jury could conclude that he has overcome, by a preponderance of the evidence, the presumption of compliance with the four prongs of the HCQIA. Immunity, pursuant to the statute, therefore applies to this matter.

The HCQIA immunizes "(a) the professional review body (b) any person acting as a member or staff to the body, (c) any person under a contract or other formal agreement with the body, and (d) any person who participates with or assists the body with respect to the action" from all damages claims which arise out of the peer review process.[107] HCQIA immunity applies not only to individual physicians, but it also is extended to hospitals and corporate entities.[108] As a result, the Court concludes that Nanticoke Hospital, Werner, and the other fourteen named individual Defendants who were members of the MEC receive immunity under the HCQIA in this case.

Moreover, all of Sternberg's claims for damages are precluded by HCQIA immunity.[109] Sternberg's claims include tortuous interference with business relations, negligence, breach of

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[106] *Bryan*, 33 F.3d at 1337.

[107] 42 *U.S.C.* §11111(a)(1).

[108] *See* 42 *U.S.C.* § 11151(4)(A)(i), (11); *Bakare*, 469 F. Supp 2d at 291; *Matthews*, 883 F.Supp at 1025-1026.

[109] *See Lipson,* 790 A.2d at 1272 fn. 14 ("In this case, however, immunity provided by the HCQIA would blunt all of plaintiffs' claims. The relief sought is limited to money damages; plaintiffs do not seek reinstatement or other equitable relief in their pleadings.").

contract, breach of implied covenant of good faith and fair dealing, intentional infliction of emotional distress, defamation, and vicarious liability. All arise out of the peer review process on the premise that he was improperly suspended under the HCQIA. The Court has concluded that this premise was unfounded. Since Sternberg claims no other remedy other than monetary damages in this case, the Court grants the Defendants' motion for summary judgment on HCQIA immunity grounds.

8. The Individual Defendants are Immune from Suit under Delaware's Peer Review Statute

A. Delaware's Medical Peer Review Statute

The Defendants have also argued that Delaware's Medical Peer Review Statute provides a separate basis for immunity independent of the HCQIA analysis. Like the HCQIA, Delaware's Medical Peer Review Statute was crafted to foster the peer review process and improve the quality of care in our state by conferring immunity upon the good-faith actions of peer reviewers.[110] As a result, the Medical Peer Review Statute maintains that hospital employees or committees:

> [W]hose function is the review of medical records, medical care and physicians' work … are immune from claim, suit liability, damages or any other recourse, civil or criminal, arising from any act, omission, proceeding, decision or determination undertaken or performed, or from recommendation made, so long as the person acted in good faith and without gross or wanton negligence in carrying out the responsibilities, authority, duties, powers, and privileges of the offices conferred by law upon them, with good faith being presumed until proven otherwise, and gross or wanton negligence required to be shown by the complainant.[111]

[110] *See Quinn v. Kent General Hosp., Inc.,* 617 F. Supp. 1226, 1234 (D. Del. 1985).

[111] 24 *Del. C.* § 1768(a).

As the Defendants acknowledge, the Medical Peer Review Statute applies only to Werner and the fourteen individual doctors and MEC members who were named as Defendants in this action. The state statute does not apply to Nanticoke as a hospital entity.[112]

The immunity offered by Delaware's Medical Peer Review Statute is broader than that provided by the HCQIA. Thus, unlike its federal counterpart, Delaware's legislation extends beyond claims for damages. It should be reiterated, however, that "good faith" is presumed in the Medical Peer Review Statute.[113] In addition, the complainant in litigation surrounding the Medical Peer Review Statute has the burden of establishing bad faith or gross or wanton negligence.[114]

B. Sternberg's Reliance upon *Lipson* is Unfounded and does not Bar Immunity under the Medical Peer Review Act

In an attempt to defeat summary judgment under the Medical Peer Review Statute, Sternberg repeats the same arguments he employed with the HCQIA. For example, Sternberg argues that *Lipson* requires peer review committees to follow hospital By-laws in order to receive immunity under Delaware's Medical Peer Review Statute. Sternberg contends that Werner and the members of the MEC violated Nanticoke's By-laws by ignoring the imminent danger provision or even referencing hospital policy on visitors in the operating room before issuing and continuing his suspension. Thus, Sternberg reasons that *Lipson* bars immunity under the Medical Peer Review Statute due to these alleged violations of the By-laws.

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[112] *Id. See also Dworkin v. St. Francis Hosp.*, 517 A.2d 302, 303 (Del. Super. 1986).

[113] *See* 24 *Del. C.* § 1768(a).

[114] *Id.*

The Court once again declines to accept Sternberg's analysis of *Lipson* as being controlling in the present matter. First, Sternberg simply has not raised an issue of material fact indicating that the Defendants have failed to follow Nanticoke's By-laws. Because this point has been addressed above in the context of the HCQIA, it need not be repeated here.[115] However, the Court adopts the reasoning employed there for purposes of Delaware's Medical Peer Review Statute.

Moreover, the Court emphasizes that the holding in *Lipson* is not germane for purposes of Delaware's Medical Peer Review Statute in circumstances, like the present case, where a formal peer review process was utilized. It bears repeating that the defendant in *Lipson* was a private medical practice group.[116] In the context of the Medical Peer Review Statute, the *Lipson* Court reasoned that the private medical practice could engage in protected peer review activity even though prior case law was silent on the issue.[117] Yet, *Lipson* made it clear that immunity pursuant to the Medical Peer Review Statute was available to that defendant "to the extent it acted in accordance with the Act's provisions."[118]

In holding that the *Lipson* defendant was not entitled to immunity under Delaware's Medical Peer Review Statute, the *Lipson* Court found that no evidence had been supplied to suggest that the defendant medical practice group "even considered, much less actively enforced,

[115] The Court recognizes that Sternberg endeavors to establish a fact question for the first time here by observing that a number of the individual Defendants testified that they did not review hospital policy on visitors in the operating room. That some of the Defendants did not formally review these guidelines in connection with Sternberg's suspension is immaterial. The simple fact of the matter is that Sternberg brought the reporter into the operating room under what can reasonable be inferred as false pretenses. The Court is satisfied that an examination of hospital policy in this regard was therefore not necessary.

[116] *Lipson,* 790 A.2d at 1265.

[117] *Id.* at 1275.

[118] *Id*.

professional standards" by which the plaintiff doctor's conduct was examined to support the suspension at issue there.[119] As a result, the *Lipson* Court observed that the defendant's conduct was inconsistent with "the Legislature's goal of creating an environment for the establishment and enforcement of professional standards."[120]

Furthermore, while troubled that the private medical practice did not employ professional standards, the *Lipson* Court deemed the defendant's failure to conduct its peer review process in accordance with established procedures to be fatal.[121] There, the defendant considered the doctor's suspension on an "ad hoc basis at a regularly scheduled meeting of its board of directors. No process attached to the 'peer review' aspects of the meeting, e.g. there was no formal notice of the meeting or a meeting agenda provided to [the plaintiff], no explanation of the process to be followed by the board when considering [plaintiff's] behavior, no explanation of possible corrective action to be taken by the board, and no explanation of [plaintiff's] rights during the process."[122]

The *Lipson* Court reasoned that that the Medical Peer Review Statute's mandate of good faith and fairness was not preserved since the private medical group extended literally no peer review process.[123] The court concluded that the private medical practice was removed from the umbrella of immunity because Delaware's legislation "provides no protection for members of a medical practice (or other health care entity) who take steps to discipline a rogue care provider

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[119] *Id.* at 1276.

[120] *Id. (*citing *Danklef v. Wilmington Med. Ctr.*, 429 A.2d 509, 513 (Del. Super. 1981)).

[121] *Lipson*, 790 A.2d at 1276.

[122] *Id.* at 1277.

[123] *Id.*

outside of a clearly defined peer review process, even if the ultimate goals are the enforcement of professional standards and patient safety."[124]

As has already been discussed, the peer review processes employed by the private medical practice there in comparison to the Defendants actions are so dissimilar as to make *Lipson* distinguishable. Sternberg does not argue that that the Defendants' issuance and continuation of the suspension were proffered in the absence of a defined peer review process. If he had, the totality of the peer review process used by the Defendants including Nanticoke's By-laws, the peer review committees defined by the By-laws, and the imminent danger standard referenced in the By-laws would quickly end the argument.

Yet, Sternberg argues that the decision-making process of Werner and his fellow Defendants on the MEC was so tainted as to remove them from the umbrella of immunity under Delaware's Medical Peer Review Statute. Even if the steps taken to discipline Sternberg were flawed, an argument the Court has repeatedly rejected, Delaware's Medical Peer Review Statute provides immunity to individuals "who act in good faith without gross or wanton negligence in carrying out the responsibilities, authorities, duties, powers, and privileges of the offices conferred by law upon them."[125] Nothing in Delaware's statute requires the process employed by peer reviewers to be perfect or even correct. Instead, the process utilized must be made in good faith and without gross or wanton negligence.

As a result, the Court concludes that *Lipson* is the appropriate authority when the process employed by peer reviewers is so insufficient that it offends the Medical Peer Review Statute's mandate of good faith and fairness. Since Sternberg has not raised a material issue of fact in this

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[124] *Id.* at 1276.

[125] 24 *Del C.* § 1768 (a).

regard, the Court finds that *Lipson's* holding does not remove the Defendants from consideration under Delaware's Medical Peer Review Statute.

C. Sternberg has not Rebutted the Presumption that the Defendants Acted in Good Faith and Without Gross or Wanton Negligence Under Delaware's Medical Peer Review Act.

The Court finds that the examination of the Medical Peer Review Statute focuses on whether the Defendants acted in good faith and without gross or wanton negligence. Under the statute, immunity is available for hospital employees who act acted in "good faith and without gross or wanton negligence in carrying out the responsibilities, authority, duties, powers, and privileges of the offices conferred by law upon them."[126] The Defendants are statutorily presumed to have acted in good faith until proven otherwise.[127]

At the outset, the Court finds that the precautionary suspension provision in Nanticoke's Credentials Policy represents "duly adopted rules and regulations" envisioned by the Medical Peer Review Statute in this case.[128] Moreover, the Court concludes that the issuance of his suspension by Werner and the continuation of the suspension by the MEC relate to the "authority, duties, powers, and privileges" of the Medical Peer Review Statute. Thus, the key question here is whether Werner and the members of the MEC acted in good faith when the suspension was issued and continued, respectively.

The Court concludes that Sternberg cannot rebut the presumption that the Defendants' acted in good faith throughout the process leading up to the MEC's continuation of the suspension. Nor does Sternberg show that Werner and his named Defendant colleagues acted

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[126] 24 *Del. C.* § 1768(a).

[127] *Id.*

[128] Nanticoke Memorial Hospital Staff Credentials Policy § 6.C.1.

with gross or wanton negligence in this case. Rather, Sternberg contends that the Defendants had a history of animosity towards him, presumably stemming from his advocacy for patient care at the hospital. As a result, according to Sternberg, the Defendants continually sought to terminate his employment at the hospital and did so as soon as he was no longer needed to satisfy the hospital's requirements for orthopedic emergency call.

Beyond these unsubstantiated allegations, Sternberg fails to produce evidence sufficient to negate the presumption that the Defendants acted in good faith under Delaware's Medical Peer Review Statute. While Sternberg offers an affidavit suggesting that some of the Defendants wanted to "get rid" of him, he fails to provide the context in which the statement was uttered. The affidavit is nothing short of conclusory and cannot defeat summary judgment.

The Court also fails to be convinced that the Defendants acted in bad faith or with gross or wanton negligence considering the totality of the circumstances surrounding Sternberg's suspension. The Court observes, for instance, that the Defendants moved the original date for the hearing on the revocation of his suspension to accommodate Sternberg's need for counsel. The Defendants appear to have been fully prepared to present their case for a revocation of his privileges at the hearing until it was postponed due to his precautionary suspension. No evidence suggests that the Defendants even attempted to skirt due process in their dealings with Sternberg as one might assume had they been motivated by gross or wanton negligence or bad faith.

In addition, the record provides evidence that directly contradicts Sternberg's claim that the Defendants acted in bad faith. On multiple occasions, the Defendants reached out to Sternberg, offering to characterize the precautionary suspension as a leave of absence in an ostensible effort to provide him with an opportunity to receive help related to his behavior at the workplace. The Defendants negotiated with him, and they ultimately agreed to consider the

suspension to be a leave of absence – thus salvaging Sternberg's career by not reporting him to the federal database. Thereafter, Sternberg remained a practicing physician at Nanticoke hospital for over one year before he chose to resign.

None of the above suggests that the Defendants were out to "get rid of him" as Sternberg would have the Court believe. Nor can Sternberg rebut the presumption of good faith in the Medical Peer Review Statute. Thus, the individual named Defendants are entitled to summary judgment as a matter of law on the basis of Delaware's Medical Peer Review Statute.

9. Immunity under the Credentials Policy

The Defendants next claim that that they are entitled to absolute immunity pursuant to Nanticoke's Credentials Policy. The Defendants argue that when he applied for reappointment in August of 2006 and agreed to abide by the Medical Staff By-laws, including Nanticoke's Credentials Policy, Sternberg expressly consented to release the Defendants from any and all liability. Accordingly, Nanticoke's Credentials Policy states the following:

2.C.2. Grant of Immunity and Authorization to Obtain/Release Information:

a) Immunity:

> To the fullest extent permitted by law, the individual releases from any and all liability, extends absolute immunity to, and agrees not to sue the Hospital, any member of the Medical Staff, their authorized representatives, and appropriate third parties for any matter relating to appointment, reappointment, clinical privileges, or the individual's qualifications for the same. This includes any actions, recommendations, reports, statements, communications, or disclosures involving the individual which are made, taken, or received by the Hospital, its authorized agents, or appropriate third parties.[129]

The Defendants do not argue that the Credentials Policy constitutes an enforceable contract immunizing them from liability. Rather, the Defendants suggest that Sternberg waived all claims

[129] Nanticoke Memorial Hospital Staff Credentials Policy § 2.C.2.(a).

when he applied for reappointment to Nanticoke in 2006 and acquiesced to its Credentials Policy.[130]

Sternberg urges the Court to consider the Credentials Policy to be a contract, contending that the Bylaws are contractually unconscionable and void as a matter of law. Sternberg further argues that the Defendants breached this contract as a result of the alleged improper suspension of Sternberg thereby excusing him from performance.

Having reviewed the considerable record in this matter, it is clear that both parties have focused their efforts primarily on immunity under the HCQIA and, to a lesser extent, under Delaware's Medical Peer Review Statute. Consequently, the record was not fully developed on the contractually based claims. Because the Defendants' have been found to be immune from liability under the HCQIA and Delaware's Medical Peer Review Statute, the Court need not rule on the immunity provision in Nanticoke's Credentials Policy.

10. Attorney's Fees

A. The HCQIA

While the HCQIA offers immunity in certain prescribed situations from a suit for damages, the statute offers yet another potential benefit – the payment of reasonable attorney's fees. Sternberg initially filed a motion for summary judgment arguing that the attorney's fee provision was inapplicable here because the Defendants could not establish that they qualified for HCQIA immunity protection. The Defendants, in turn, argue that they meet statutory prerequisites for attorney's fees. More specifically, the Defendants contend that Sternberg's claims are without foundation and were brought in bad faith.

[130] *See, e.g., Deming v. Jackson-Madison County Gen. Hosp.*, 553 F. Supp. 2d 914, 936 (W.D. Tenn. 2008).

The HCQIA provides that:

> In any suit brought against a defendant, to the extent that a defendant has met the standards set forth in 42 *U.S.C.* § 11112(a) and the defendant substantially prevails, the court shall, at the conclusion of the action, award to a substantially prevailing party defending 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.[131]

In order to recover reasonable attorney's fees, the Defendants must establish:

1) that they are among the persons covered by 42 *U.S.C.* § 11111;

2) that the standards set in 42 *U.S.C.* § 11112(a) were followed;

3) that they substantially prevailed; and

4) that the plaintiff's claim, or the plaintiff's conduct during the litigation, was frivolous, unreasonable, and without foundation or in bad faith.[132]

The determination of whether the party's conduct was frivolous or without foundation is a question committed to the sound discretion of the trial court.[133]

The Court readily concludes that the Defendants meet the first three elements necessary for attorney's fees under the HCQIA. However, even if the first three elements are met, the Defendants must establish that Sternberg's claims are frivolous, unreasonable, and without foundation or in bad faith. Sternberg disavows any suggestion that his claims are frivolous, unreasonable, without foundation or brought in bad faith as required by the forth prong for HCQIA attorneys fees.

It is clear from a review of the case law that a finding that the Defendants are immune from suit pursuant to the HCQIA does not automatically result in the award of attorney's fees.[134]

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[131] 42 U.S.C. § 11113.

[132] *Matthews,* 87 F.3d at 637.

[133] *Johnson v. Nyack Hosp.*, 964 F.2d 116, 123 (2d Cir. 1992).

In this regard, the Court will "resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation."[135]

While evaluating the attorney's fees matter, the Court again observes that all of Sternberg's claims are grounded on the argument that the precautionary suspension was improper since he was not – and could not have been as a matter of law – an imminent danger to the health of any individual. In carrying out this responsibility, the Court gives considerable weight to the assertion that Sternberg's claims were brought in bad faith, particularly considering that the parties' leave of absence agreement kept Sternberg's name out of the federal HCQIA database.

Although a precautionary suspension surely does not advance a physician's career, one wonders why this Court should not consider Sternberg's claims to be rooted in bad faith. After all, Nanticoke made apparently good faith overtures on multiple occasions to remove the precautionary suspension and replace it with a leave of absence. Sternberg and the Defendants negotiated and reached an agreement whereby the precautionary suspension disappeared. Sternberg thereby received the benefit of not being reported to the federal database and having had his career as a practicing physician severely prejudiced as a result. After satisfying the condition that he complete a remedial course on his behavior, he returned to work at Nanticoke for over one year without incident before resigning and initiating the process that led to this action. Sternberg appears to have "had his cake" when he was not reported to the federal database. By pursuing this litigation, the Court assumes that he wants to "eat it, too."

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[134] *See, e.g., Matthews*, 87 F.3d at 642.

[135] *Id.*

In addition, Sternberg's arguments about the imminent danger standard in the emergency provision of the HCQIA were less than persuasive. Even though some of Sternberg's colleagues indicated that he was not considered to be an imminent danger at the time he was suspended, there nevertheless was substantial authority indicating that the Defendants had reasonable grounds to suspend Sternberg as an imminent danger due his disruptive behavior.[136] To stress as a matter of law in briefings and at oral argument that the imminent danger standard could only be satisfied when a doctor had substance abuse issues, deliberately harmed patients, or was incompetent is without foundation and is unreasonable in the eyes of this Court in light of the abundance of case law to the contrary.

Furthermore, the Court recognizes that the purpose of providing for attorney's fees in the HCQIA is to "discourage the kind of litigation that is so baseless that the cost of litigating would discourage people from serving on peer review panels."[137] Using that concept as a guiding factor in this analysis, the Court is struck here by Sternberg's acknowledgement of the core facts that led to his precautionary suspension.[138] He does not dispute that Nanticoke had informed him that he was not to engage in politicking at the hospital. He does not dispute that a newspaper reporter was brought into the operating room despite this prohibition. And, the Court notes he does not dispute that hospital personnel removed the newspaper reporter from the operating room. In the alternative, Sternberg attempts to place the blame on Nanticoke for the newspaper reporter's visit to the operating room when it was entirely reasonable for hospital officials to consider an observation for "education" to be related to medical training. Ultimately,

[136] *See Sugarbaker*, 190 F.3d 905; *Jenkins,* 2004 WL 3393380; *Straznicky,* 2009 WL 1905298; *Onel*, 2003 WL 22533616. The Court appreciates that Sternberg was first made aware of *Straznicky* at oral argument. Nevertheless, the point remains the same.

[137] *Gordon v. Lewistown Hosp.*, 2006 WL 2816493, at *4 (M.D. Pa. Sept. 28, 2006).

[138] *See id*.

the Court fails to be convinced that an award of attorney's fees to the Defendants in light of these facts is contrary to the HCQIA's mission to discourage baseless litigation and to promote meaningful peer review.

As a result, the Court holds that the Defendants have established that they are among the persons covered by the HCQIA, that the standards set forth in the HCQIA were followed, and that the Defendants substantially prevailed in this matter. Moreover, the Court finds that Sternberg's claims were unreasonable and brought in bad faith. In light of the Court's discretionary authority, the Defendants are entitled to reasonable attorney's fees for the costs associated with defending this matter. Sternberg's motion for summary judgment is therefore denied.

Counsel for the Defendants and for Sternberg shall file affidavits and documentation regarding fees earned in this matter within twenty days from the date of entry of this order. As the Court advised counsel earlier in this case, when this Court considers an award of attorney's fees, the Court prefers to know the attorney's expenses of both sides. Plaintiff's counsel shall have the opportunity to respond within fifteen days upon receipt of Defendants' documentation on the amount of attorney's fees incurred. The Court will award a reasonable amount of attorney's fees to the Defendants after the parties have supplemented the record on this issue.

B. The Credentials Policy

Finally, Sternberg seeks summary judgment on the Defendants' claim that they are entitled to attorney's fees under the Credentials Policy. In this regard, Nanticoke's Credentials Policy states:

> If, notwithstanding the provision in this section, an individual institutes legal action and does not prevail, her or she will reimburse the hospital and any member of the Medical Staff named in the action for all costs

incurred in defending such legal action, including reasonable attorney's fees.[139]

Sternberg contends that the Defendants are not entitled to attorney's fees under the Credentials Policy because the By-laws represent a contract of adhesion. Consequently, he claims that that provision awarding attorney's fees is unconscionable and void as a matter of law. Sternberg further argues that he is excused from performance under the contract of adhesion as a result of the Defendants' material breach related to the improper issuance and continuation of his suspension.

Sternberg is an experienced physician and is not an unsophisticated individual. There is no overreaching or improper leverage shown here for the Court to conclude that the provision is so one-sided as to be unconscionable as a matter of law. [140]

The Court thus denies Sternberg's motion for summary judgment regarding attorney's fees under the Credentials Policy. Since attorney's fees have been awarded pursuant to the HCQIA, however, the Court declines to render an opinion as to the propriety of an award for attorney's fees to the Defendants under the Credentials Policy.

CONCLUSION

For the reasons set forth above, Defendants' motion for summary judgment is **GRANTED** on the basis of HCQIA immunity and, for those Defendants who were individually named, is **GRANTED** as to Delaware's Medical Peer Review Statute. Plaintiff's motion for summary judgment on attorney's fees under the HCQIA and the Credentials Policy is **DENIED**.

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[139] Nanticoke Memorial Hospital Staff Credentials Policy § 2.C.2(e).

[140] *See Tretheway v. Basement Waterproofing Nationwide, Inc.*, 1994 WL 680072, at *3 (Del. Super. Oct. 19, 1994) (The Superior Court found unconscionability as a matter of law when,"at the time the contract was made, the questionable provision amounted to one party taking unfair advantage of another.").

The Court will establish the amount of attorney's fees owed to the Defendants pursuant to the HCQIA at a later date.

IT IS SO ORDERED.