NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0979

DOCTOR PLAINTIFF

VERSUS

LIFEPOINT HOSPITALS, INC., PHC-MORGAN CITY, L.P., HOSPITAL AUXILIARY OF MORGAN CITY, INC. D/B/A TECHE REGIONAL MEDICAL CENTER, BOARD OF TRUSTEES OF TECHE REGIONAL MEDICAL CENTER and MEDICAL EXECUTIVE COMMITTEE OF TECHE REGIONAL MEDICAL CENTER

Judgment Rendered: MAY 12 2016

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On Appeal from the Sixteenth Judicial District Court
In and for the Parish of St. Mary
State of Louisiana
No. 126844

Honorable Lori A. Landry, Judge Presiding

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Stewart E. Niles, Jr.
Bryan J. Knight
New Orleans, Louisiana

Counsel for Plaintiff/Appellant
Doctor Plaintiff

Ann M. Halphen
Amy C. Lambert
Megan F. Bice
Baton Rouge, Louisiana
and
Jeffery D. Moseley
Scott Gardner
Franklin, Tennessee

Counsel for Defendants/Appellees
LifePoint Hospitals, Inc., PHC-Morgan City, L.P., Board of Trustees of Teche Regional Medical Center and Medical Executive Committee of Teche Regional Medical Center

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BEFORE: McDONALD, McCLENDON, AND THERIOT, JJ.

McDonald, J. concurs.
Theriot, J. Concurs.

McCLENDON, J.

In this action for injunctive relief, the plaintiff appeals a judgment that dissolved a temporary restraining order and denied his request for a preliminary injunction. The defendants have filed a motion to dismiss the appeal. For the reasons that follow, we deny the motion to dismiss the appeal and affirm the judgment of the trial court.

FACTS AND PROCEDURAL HISTORY

Plaintiff in this matter is a physician, board certified in the specialty of obstetrics and gynecology (OB/GYN), who served on the medical staff of Teche Regional Medical Center (Teche) in Morgan City, Louisiana.[1] On May 7, 2012, the Teche Medical Executive Committee (MEC) sent plaintiff a letter notifying him that pursuant to the Medical Staff Bylaws (Bylaws) his clinical privileges were being summarily suspended, based upon concerns for care he rendered to four patients at the hospital. Specifically, Section 8.2(a) of the Bylaws provides for a summary suspension "whenever a practitioner willfully disregards these bylaws or other hospital policies, or his/her conduct may require that immediate action be taken to protect the life, well-being, health or safety of any patient[.]" Because of these concerns, an external review by an independent OB/GYN had been conducted. The results of this review were sent to plaintiff with the May 7, 2012 letter. On May 15, 2012, plaintiff was invited to discuss the summary suspension with the MEC and respond to the concerns of the MEC regarding documentation, communication, and availability. Plaintiff attended the meeting with the MEC and on May 17, 2012, the MEC decided to continue plaintiff's suspension until he could demonstrate that he was providing continuous care for his patients at Teche either by securing backup coverage from other physicians or by agreeing to practice only at Teche. The MEC's decision was based on its external review of the four cases,

[1] Plaintiff, identifying himself in these proceedings as Doctor Plaintiff, filed an Ex Parte Motion for Total Confidentiality and Seal of Record on January 17, 2014, the same date he filed his request for injunctive relief. The trial court granted the order on January 17, 2014.

plaintiff's identified trend of unavailability for his patient's in a timely fashion, and plaintiff's written and oral responses to the MEC.

In its May 17, 2012 letter, the MEC advised plaintiff that if he provided sufficient proof of backup coverage he would be reinstated with the following four probationary conditions:

- All patient records must contain complete history and physical examinations and appropriate prenatal records to communicate effectively to other caregivers the status and plan of care of all hospitalized patients.
- You will make daily rounds on all patients admitted to the hospital and make daily progress notes that are concurrently written, dated, and timed.
- You must consult with a pediatrician on all high-risk deliveries and admissions of laboring patients at less than thirty-five (35) weeks' gestational age. The pediatrician will counsel the mother, write recommendations, and evaluate whether transfer to a higher level of care is in the best interest of the mother and child.
- Delays in surgery cases and late arrivals for routine scheduled cases and stat C-sections are unacceptable and will not be tolerated.

On June 6, 2012, plaintiff again met with the MEC to discuss his summary suspension, the proposed probationary conditions, and the possibility of lifting his summary suspension. In a June 7, 2012 letter, the MEC notified plaintiff that the summary suspension was lifted. However, the MEC was concerned about plaintiff's disruptive behavior and required that plaintiff provide a written apology for allegations contained in a letter that he caused to be published on Facebook and disseminated to patients. The MEC indicated that plaintiff's actions during his suspension were inappropriate and disruptive and that the letter was his "final warning" concerning any disruptive behavior or deviation from Teche's Bylaws, rules and regulations, or standard of care. Plaintiff was also notified that he was subject to the four probationary conditions and that if he violated any of the conditions of his reinstatement, the MEC would recommend revocation of his medical staff membership and clinical privileges for a period of not less than one year.

Plaintiff submitted a written apology and returned to his practice at Teche in June 2012. Thereafter, in November 2012, another physician at Teche complained about being delayed in surgery because of plaintiff's tardiness. As a

result of this complaint, a survey was completed of plaintiff's scheduled surgeries and actual start times, which showed that plaintiff was late for thirty-five surgical cases, including twenty-nine in which he was more than thirty minutes late, between the date of his receipt of the June 7, 2012 probation letter and November 27, 2012. The MEC met and discussed plaintiff's lateness to surgery as well as his lack of completion of contemporaneous daily progress notes.

On December 7, 2012, Teche sent a letter to plaintiff informing him that the MEC was recommending revocation of his privileges at Teche for not less than one year for failing to comply with the terms of his probation. Plaintiff was also notified of his right to a fair hearing in accordance with the Bylaws and the Health Care Quality Improvement Act of 1986 (HCQIA), 42 U.S.C. § 11101, *et seq.*[2] Plaintiff requested said hearing, which was conducted over four days in September 2013. On November 25, 2013, the Hearing Committee issued a 36-page report affirming the recommendation of the MEC.[3]

Plaintiff was notified of the Hearing Committee's findings and recommendations and requested appellate review by the Teche Board of Trustees (Board). The Board reviewed and considered the written and oral statements of the parties, the record and transcript of the fair hearing, and the findings and recommendations of the Hearing Committee. The Board also considered evidence presented by plaintiff, although it stated said evidence was arguably outside the scope of the hearing.

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[2] Congress enacted the HCQIA to facilitate the frank exchange of information among professionals conducting peer review inquiries and to ensure that some minimal amount of information regarding a physician's previous damaging or incompetent performance will follow the physician when he moves from state to state. **Granger v. Christus Health Central Louisiana**, 12-1892 (La. 6/28/13), 144 So.3d 736, 747. Under this law, hospitals and physicians that conduct peer review will be protected from damages in suits by physicians who lose their hospital privileges, provided the peer review actions meet the due process and other standards established in the law. **Id**; see also 42 U.S.C. §§ 11101 and 11111(a)(1). The HCQIA attempts to balance the chilling effect of litigation on peer review with concerns for protecting physicians improperly subjected to disciplinary action. Accordingly, Congress granted immunity from monetary damages to participants in properly conducted peer review proceedings, while preserving causes of action for injunctive or declaratory relief for aggrieved physicians. **Granger**, 144 So.3d at 747.

[3] The Hearing Committee consisted of Drs. Darel Solet, Adam Ziegenbusch, and Stephen Collins. Drs. Collins and Ziegenbusch found that the MEC met its evidentiary burden, whereas Dr. Solet found to the contrary.

On January 16, 2014, the Board unanimously affirmed the MEC's recommendation, noting that it was not asked to determine if the MEC's recommendation was correct, but rather that it was asked to apply the standard of review as set forth in Section 3.7(2) of the Fair Hearing Plan, which provides, in pertinent part:

> [T]he body whose adverse recommendation or action occasioned the hearing shall have the initial obligation to present evidence in support thereof; but the practitioner thereafter shall be responsible for supporting his/her challenge to the adverse recommendation or action by a preponderance of the evidence that the grounds therefor lack any substantial factual basis or that the action is arbitrary, capricious or impermissibly discriminatory. The standards of proof set forth herein shall apply and be binding upon the Hearing Committee and on any subsequent review or appeal.

The Board determined that the MEC met its initial burden of presenting evidence in support of its recommendation. The Board then found that plaintiff failed to prove that the recommendation lacked any factual basis, concluding that the record clearly established a factual basis for the recommendation. The Board also determined that the action was not arbitrary, unreasonable, or capricious and found no evidence to support a claim that the recommendation was impermissibly discriminatory. Therefore, the Board upheld the revocation of plaintiff's medical staff membership and clinical privileges for a period of not less than one year.

On January 17, 2014, plaintiff filed a Petition for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction against LifePoint Hospitals, Inc., PHC-Morgan City, L.P., the Board and the MEC.[4] On January 22, 2014, the trial court granted plaintiff's request for a temporary restraining order (TRO). The TRO specifically enjoined the defendants from suspending or revoking plaintiff's clinical privileges and staff membership and also prohibited the defendants from reporting any suspension of clinical privileges, revocation of medical staff membership, or other adverse action to any third party.

On August 27, 2014, the trial court held a hearing on the preliminary injunction. The trial court denied plaintiff's request in oral reasons given on

[4] Also named as a defendant was Hospital Auxiliary of Morgan City, Inc., which was dismissed pursuant to a partial judgment of dismissal on August 4, 2014.

September 8, 2014. The trial court held that plaintiff failed to meet his burden of proving irreparable harm and the likelihood of success on the merits. The court also found that plaintiff was treated fairly and afforded due process throughout the peer review. The trial court signed the judgment denying injunctive relief on September 8, 2014. That same day, plaintiff's clinical privileges and medical staff membership at Teche were suspended for not less than one year.

On September 9, 2014, plaintiff filed this devolutive appeal. He also filed a Motion to Stay Effects of September 8, 2014 Oral Ruling and Written Judgment Pending Appeal, which this Court denied on September 15, 2014. Thereafter, on July 24, 2015, the defendants filed a motion to dismiss the appeal with this court. They contend that plaintiff's appeal is moot because the actions sought to be enjoined have already occurred.[5]

THE MOTION TO DISMISS

Plaintiff has raised several assignments of error in his appeal regarding the denial of his request for a preliminary injunction. However, we must first determine whether this case presents a justiciable controversy or whether it is moot as asserted by the defendants.

The defendants assert in their motion to dismiss the appeal that the relief plaintiff seeks in this appeal became moot after September 9, 2015. Specifically, the defendants allege that the action plaintiff seeks to enjoin, i.e., the enforcement of the recommendation to revoke plaintiff's privileges and medical staff membership at Teche for not less than one year, no longer exists as of September 9, 2015, as a means to prevent plaintiff from seeking privileges and membership at Teche. The defendants also argue that the reporting of the adverse action against plaintiff to third parties has already occurred, and thus, there is no act to be enjoined. Plaintiff opposed the motion, claiming that he will continue to be harmed after September 9, 2015. Plaintiff contends that the defendants may

[5] On November 4, 2015, another panel of this Court referred the motion to dismiss the appeal to the panel to which the appeal is assigned. See **Doctor Plaintiff v. LifePoint Hospitals**, 15-0979 (La.App. 1 Cir. 11/4/15) (unpublished action).

continue to prohibit him from practicing at Teche and may continue to report the adverse action to third parties. Additionally, he argues that he will be irreparably harmed every time he completes a credentialing application, submits a license or board renewal request, applies for malpractice insurance, or performs any number of professional activities.

Where the purpose of the injunctive relief sought is to prevent specifically threatened future conduct, but the act sought to be enjoined has already been committed or accomplished, there can be no ground for an injunction. **Tobin v. Jindal**, 11-0838 (La.App. 1 Cir. 2/10/12), 91 So.3d 317, 321; **Silliman Private School Corp. v. Shareholder Group**, 00-0065 (La.App. 1 Cir. 2/16/01), 789 So.2d 20, 23, writ denied, 01-0594 (La. 3/30/01), 788 So.2d 1194. A court of appeal will not review a case when only injunctive relief is sought and the need for that relief has ceased to be a justiciable issue. **Tobin**, 91 So.3d at 321. It is well settled that courts will not decide abstract, hypothetical, or moot controversies, or render advisory opinions with respect to such controversies. **City of Hammond v. Parish of Tangipahoa**, 07-0574 (La.App. 1 Cir. 3/26/08), 985 So.2d 171, 178. An issue is moot when a judgment or decree on that issue has been "deprived of practical significance" or "made abstract or purely academic." **Cat's Meow, Inc. v. City of New Orleans, Through Dept. of Finance**, 98-0601 (La. 10/20/98), 720 So.2d 1186, 1193.

In the case *sub judice*, the specific relief sought by plaintiff was a preliminary injunction "enjoining and restraining the MEC or anyone purporting to act on the MEC's behalf from prosecuting the December 7, 2012 recommendation and/or from enforcing the December 7, 2012 recommendation, from suspending [plaintiff's] clinical privileges, from revoking [plaintiff's] medical staff membership, and/or from reporting any adverse action to [the] National Practitioner's Data Bank, any state licensing agency, or any other third party." After reviewing the record, we cannot say that after September 9, 2015, all the issues on appeal have been deprived of practical significance or have been made abstract or purely academic. The suspension that is being enforced against the plaintiff was for "not

less than one year." The suspension and revocation did not simply end after a period of one year with an automatic reinstatement of his privileges and membership at that time. Additionally, although it is undisputed that the adverse action against plaintiff has already been reported to the National Practitioner Data Bank, it does not appear, based on the record before us, that the reporting to "any other third party" was a one-time event. Teche advised plaintiff in its letters regarding his summary suspension and revocation of membership and privileges that "this action may also be reportable to state licensing agencies."

Because appeals are favored, see **Castillo v. Russell**, 05-2110 (La. 2/10/06), 920 So.2d 863, and because we do not believe that plaintiff's request for injunctive relief has ceased to be a justiciable issue, we deny the defendants' motion to dismiss.

THE PRELIMINARY INJUNCTION

In his assignments of error, plaintiff contends that he presented a *prima facie* case at the preliminary injunction hearing that the adverse action violated his contractual and due process rights and that he was held to a more stringent standard than all other Teche physicians. He also asserts that he has presented unrefuted evidence establishing irreparable harm. Thus, he maintains that the trial court erred in denying injunctive relief. Additionally, plaintiff maintains that the trial court erred in refusing to hear certain evidence he attempted to present. Lastly, he asserts the trial court erred in assessing him costs for the preliminary injunction.

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. LSA-C.C.P. art. 3601A. Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury if the injunction does not issue and must show entitlement to the relief sought; this must be done by a *prima facie* showing that the party will prevail on the merits of the case. **Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa**, 04-0270 (La.App. 1 Cir. 3/24/05), 906 So.2d 660, 664.

The writ of injunction is a harsh, drastic, and extraordinary remedy, and should only issue in those instances where the moving party is threatened with irreparable loss or injury, and is without an adequate remedy at law. **Giauque v. Clean Harbors Plaquemine, L.L.C.**, 05-0799 (La.App. 1 Cir. 6/9/06), 938 So.2d 135, 140, writs denied, 06-1720, 06-1818 (La. 1/12/07), 948 So.2d 150, 151.

The trial court has broad discretion in determining whether to grant or deny a preliminary injunction. **Piazza's Seafood World, LLC v. Odom**, 07-2191 (La.App. 1 Cir. 12/23/08), 6 So.3d 820, 826. Additionally, appellate review of a trial court's ruling on a preliminary injunction is limited. The question of whether a preliminary injunction should be granted or denied is addressed to the sound discretion of the trial court and will not be disturbed on review unless a clear abuse of discretion has been shown. **Lassalle v. Daniels**, 96-0176 (La.App. 1 Cir. 5/10/96), 673 So.2d 704, 708, writ denied, 96-1463 (La. 9/20/96), 679 So.2d 435, cert. denied, 519 U.S. 1117, 117 S.Ct. 963, 136 L.Ed.2d 848 (1997).

With regard to his first three assignments of error, plaintiff asserts that he was not allowed to present certain evidence at the preliminary injunction hearing. He argues that the trial court erred in refusing to hear testimony from Dr. Thomas Nolan, Dr. Paul Crawford, and Dr. Darrell Solet. Plaintiff maintains that the trial court erred in preventing him from fully examining these witnesses and in preventing questioning on relevant topics. Plaintiff also urges that the trial court erred in prohibiting him from presenting evidence of disparate treatment. We find no merit in these assignments of error.

Louisiana Code of Civil Procedure article 3609 provides that at the hearing for a preliminary injunction, the trial court "may take proof as in ordinary cases" and "may further regulate the proceeding as justice may require." Louisiana Code of Civil Procedure article 1631A also provides that the court has the power to require that the proceedings shall be conducted with dignity and in an orderly and expeditious manner, and to control the proceedings at the trial, so that justice is

done.[6] Although the due process clauses of the Louisiana Constitution and the Fourteenth Amendment to the United States Constitution guarantees litigants a right to a fair hearing, "due process" does not mean litigants are entitled to an unlimited amount of the court's time. **Chauvin v. Chauvin**, 10-1055 (La.App. 1 Cir. 10/29/10), 49 So.3d 565, 570.

In seeking to enjoin the disciplinary action taken against him, plaintiff had the burden of making a *prima facie* case that the grounds for the disciplinary action lacked any substantial factual basis or that the action was arbitrary, capricious or impermissibly discriminatory. See Section 3.7(2) of the Fair Hearing Plan. He was not entitled to retry the case for the disciplinary action, as noted by the trial court several times throughout the trial. The trial court allowed plaintiff to call several witnesses and introduce documentary evidence at the hearing on the preliminary injunction, but did not allow plaintiff to call Dr. Nolan, Dr. Crawford, and Dr. Solet as witnesses. However, plaintiff proffered the testimony of these witnesses. In this regard, we note that the trial court reviewed the entire transcript of the fair hearing wherein Dr. Nolan had testified.[7] Additionally, Dr. Crawford had no association with Teche and it appears that his testimony would have been repetitive of Dr. Nolan's. Further, Dr. Solet was a member of the Fair Hearing Committee and his opinion was already in the record. Upon our thorough review of the record, we cannot say that plaintiff was prevented "from meaningfully trying his case." The trial court's control of the case was much less about time than it

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[6] Also, LSA-C.E. art. 611A provides that the parties to a proceeding have the primary responsibility of presenting the evidence and examining the witnesses. However, the court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth, avoid needless consumption of time, and protect witnesses from harassment or undue embarrassment.

[7] Plaintiff argued that he wanted to call Dr. Nolan to testify to refute the MEC's claims that he was repeatedly late for scheduled surgeries. The trial court stated that such testimony was not in the scope of what it was allowing, that it had already heard enough on the subject, and that Dr. Nolan had testified before the Fair Hearing Committee. The trial court stated that it was provided a full transcript from the fair hearing, which comprised approximately 700 pages, and the trial judge specifically stated that she read the entire transcript.

was about restricting the presentation of evidence to conform to the appropriate standard of review.[8] We find that the trial court did not abuse its discretion.

Plaintiff also contends that he was treated differently than other physicians at Teche. Particularly, he contends that it is improper disparate treatment to single out one physician for discipline when the rule at issue is routinely violated by others. Plaintiff states that he tried to elicit testimony that other surgeons were late for surgery at Teche, but he was not allowed to do so. The trial court determined that such evidence was irrelevant and inadmissible. We agree. The issue before the MEC was plaintiff's conduct and whether he violated the terms of his probation, terms that he agreed to abide by for reinstatement.

In his next six assignments of error, plaintiff asserts that the trial court erred in failing to find that he proved that he was likely to suffer irreparable harm and that he proved a likelihood of success on the merits. Plaintiff alleges irreparable injury to his career, his reputation as an OB/GYN, his financial well-being, and his patient relationships if injunctive relief is not granted. Plaintiff also argues that he proved a likelihood of success on the merits in that he presented evidence that the probationary terms were unilaterally imposed, that he did not receive a fair hearing regarding the imposition of probationary terms, that the adverse action was based on flawed data, that he complied with all bylaws, and that he was practicing within the "norm" for Teche physicians. On the other hand, the defendants maintain that any harm to plaintiff is an unfortunate consequence of his own breach of the Bylaws and failure to exhibit professional conduct, despite the numerous chances he was given to correct his behavior. The defendants further contend that plaintiff failed to prove that Teche denied him due process or breached its Bylaws.

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[8] The trial court recognized its limited review when it stated in oral reasons for judgment:

> [I]t is not my job to determine whether the decision of the MEC, the fair hearing MEC, or the board was right or wrong. Rather it is my decision to make – it's my job to make a decision as to whether they did comply with their bylaws and the spirit of the bylaws that denied this plaintiff due process in such a manner that would require the overruling of the decision of the MEC, fair hearing committee, and the board of trustees. That's my job. And so I don't get to make a credibility assessment, but I need to look at it – I did have to look at it with an eye towards fairness.

Initially, with regard to plaintiff's argument that he should have received a fair hearing in June 2012 when his conditions for reinstatement were imposed, plaintiff was given the opportunity to contest the MEC's position through a fair hearing as indicated in the May 17, 2012 letter. Instead, plaintiff chose to accept the conditions of reinstatement and return to his practice at Teche.

Additionally, we find no merit to plaintiff's other contentions that he proved a likelihood of success on the merits. The trial court found that plaintiff did not meet his burden of proof because he could not prove that Teche failed to comply with its Bylaws or that he was denied due process. After thoroughly reviewing the record, we agree that the peer review MEC's decision was made after a reasonable effort to obtain the facts and after affording plaintiff adequate notice and hearing procedures.

As a reviewing court, our role is not to substitute our judgment for that of the Board or to reweigh the evidence regarding the revocation of plaintiff's medical staff privileges and membership for at least one year. See Section 3.7(2) of the Fair Hearing Plan. We find that the evidence supports the MEC's findings that plaintiff was often late for surgery and failed to chart daily progress notes, both violations of his conditions of reinstatement. The MEC's recommendation, affirmed by the Board, was reasonable and supported by the evidence and was not arbitrary capricious, or impermissibly discriminatory. Accordingly, we can find no abuse of the trial court's discretion in denying plaintiff's request for a preliminary injunction.

Lastly, plaintiff challenges the judgment taxing the costs of the preliminary injunction to him. Louisiana Code of Civil Procedure article 1920 authorizes a trial court to render such judgment for costs or any part thereof against any party as it may consider equitable. We do not find any error by the trial court in assessing the costs related to the preliminary injunction to plaintiff.

CONCLUSION

For the foregoing reasons, we deny the defendants' motion to dismiss the appeal. Additionally, we affirm the September 8, 2014 judgment of the trial court. Costs of this appeal are assessed to plaintiff.

MOTION TO DISMISS APPEAL DENIED; JUDGMENT AFFIRMED.