Circuit Court for Baltimore County
Case No.: 03-C-18001675

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 713

September Term, 2018

ROSEN-HOFFBERG REHABILITATION AND PAIN MANAGEMENT ASSOCIATES, P.A., et al.

v.

MEDICAL MUTUAL LIABILITY INSURANCE SOCIETY OF MARYLAND

Graeff,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: August 20, 2019

On January 31, 2018, the Mayor and City Council of Baltimore ("the City") filed a claim in the Circuit Court for Baltimore City ("Baltimore City lawsuit") against 21 defendants. The important details concerning the allegations against the defendants in that lawsuit will be discussed *infra*. Three of the defendants named in the City's lawsuit are the appellants in the subject case, namely, Dr. Howard J. Hoffberg, Dr. Norman B. Rosen, and Rosen-Hoffberg Rehabilitation and Pain Management Associates, P.A. ("Rosen-Hoffberg").

At all times here relevant, the appellants were insured under a MedGuard Defense Form ("the MedGuard Policy") that was issued by Medical Mutual Liability Insurance Society of Maryland ("Medical Mutual"). The appellants requested that Medical Mutual provide them with a defense of the Baltimore City lawsuit pursuant to the MedGuard policy. Medical Mutual denied that request.

On February 16, 2018, the appellants filed suit against Medical Mutual asking that the Circuit Court for Baltimore County issue a declaratory judgment stating that Medical Mutual owed them a defense to the City's lawsuit under the MedGuard Policy and also asked that the court issue an injunction ordering Medical Mutual to immediately provide them with a defense to the aforementioned Baltimore City lawsuit. Both the appellants and Medical Mutual filed motions for summary judgment. After a hearing, a Baltimore County circuit court judge declared that Medical Mutual had no duty to defend the appellants in the Baltimore City lawsuit and granted Medical Mutual's motion for summary judgment

on that ground. The judge also denied the motion for summary judgment that appellants filed against Medical Mutual.[1]

In this timely appeal, the appellants raise two questions which we have rephrased slightly:

> 1) Did the trial judge err in granting Medical Mutual's motion for summary judgment and declaring that Medical Mutual had no duty to defend the appellants in the Baltimore City lawsuit?
>
> 2) Did the trial court err in failing to grant appellants' motion for summary judgment and failing to declare that Medical Mutual had a duty to defend appellants in the Baltimore City lawsuit?

We shall answer both questions in the negative, and affirm the judgment entered by the Circuit Court for Baltimore County.

I.

STANDARD OF REVIEW

The applicable standard of review in a case like the one *sub judice* was succinctly stated, recently, in the consolidated cases of *Steamfitters Local Union No. 602 v. Erie Insurance Exchange, et al., and Steamfitters Local Union No. 602 v. Cincinnati Insurance*

[1] In the subject lawsuit filed in the Circuit Court for Baltimore County, appellants also alleged that Medical Mutual had a duty to defend them in the Baltimore City lawsuit under an Organization Professional Liability Policy that provided the appellants with indemnity liability insurance coverage and defense coverage, and costs of defense coverage under certain circumstances. The circuit court ruled that Medical Mutual did not provide appellants with coverage for any of the claims made in the Baltimore City lawsuit under the terms of the Organization Professional Liability Policy. In this appeal, the appellants do not take issue with that ruling.

Co., *et al.*, Nos. 1168 and 1142, September Term 2017, ____ Md. App. ____, ____ (2019) (slip op. at page 37), filed May 30, 2019, as follows:

> A circuit court may grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). We review a circuit court's decision to grant summary judgment *de novo* and without deference, by independently examining the record to determine whether the parties generated a genuine dispute of material fact and, if not, whether the moving party was entitled to judgment as a matter of law. *Rowhouses, Inc. v. Smith*, 446 Md. 611, 630 (2016); *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 14 (2004). We consider the record "'in the light most favorable to the non-moving party,'" drawing any reasonable inferences against the moving party. *Rowhouses, Inc.*, 446 Md. at 631 (quoting *Hamilton v. Kirson*, 439 Md. 501, 522 (2014)).
>
> In this case, as all parties agree, there were no factual disputes presented below.

II.

BACKGROUND

A. <u>The MedGuard Policy</u>

The MedGuard Policy was issued pursuant to Md. Code Ann., Insurance Article (2007 Repl. Vol.) § 19-104(c)(1), which reads:

> A policy issued or delivered under subsection (a) of this section may include coverage for the defense of a health care provider in a disciplinary hearing arising out of the practice of the health care provider profession if the cost of the included coverage is:
>
> (i) itemized in the billing statement, invoice, or declarations page for the policy; and
>
> (ii) reported to the Commissioner in a form and manner required by the Commissioner**.**

The MedGuard Policy provides, in relevant part:

SECTION I – COVERAGES

A. MedGuard Defense Coverage

1. Insuring Agreement

We will pay, on behalf of an insured, **legal expenses** incurred to defend an **insured event**, arising out of the practice of the insured's health care profession. We will make these payments provided that:

(a) The **insured event** takes place in the **coverage territory**;

(b) The **insured event** is first instituted against the insured after the Effective Date of this insurance, but before the end of the policy period; and

(c) These **legal expenses** are incurred by or at the direction of defense counsel selected by us.

2. Additional Insuring Agreement

(a) We will also pay, on behalf of an insured,

(1) out of pocket **legal expenses** incurred by or at the direction of defense counsel selected by us to respond to or defend an **insured event**;

(2) out of pocket expenses to hire a computer security consultant selected by us to determine the cause and extent of a breach of personal health or financial or other private consumer information for which the insured has the legal responsibility to provide notification or mitigation;

(3) out of pocket fees and expenses for legal services actually rendered by a licensed attorney or law firm selected by us and incurred by an insured to defend the insured against a civil action brought by someone alleging damages arising from a breach in his or her personal health or financial or other private consumer information[.]

* * *

SECTION V – DEFINITIONS

* * *

2. Insured event means

(a) an administrative or judicial proceeding instituted by a government agency, or the formal professional review body of any other organization, to examine allegations of:

(1) Improper professional conduct in the practice of the insured's health care profession; or

(2) The performance of health care services in violation of recognized standards of practice or established guidelines for the appropriate utilization of such services.

(b) The discovery of a breach of personal health or financial or other private consumer information for which the insured has the legal responsibility to provide notification or mitigation.

(c) Any administrative or judicial proceeding instituted by a government agency to examine allegations of the insured's failure to appropriately protect personal health or financial or other private consumer information[.]

(Emphasis added.)

The MedGuard policy contains numerous exclusions, but the only exclusions here relevant are from Section I as follows:

5. Exclusions

This insurance does not apply to:

* * *

(b) Any **insured event** which arises out of malicious, dishonest, **or unlawful acts** committed by or with the consent of any insured. This

> includes, but is not limited to, intentional violations of any civil or penal statutes and ordinances. . . .
>
> **(c) <u>Any administrative or judicial proceeding convened to weigh the merits of a claim by a third party for compensation arising out of injury or damage alleged to have been inflicted by the insured</u>**. However, this exclusion will not apply to a civil action brought by someone alleging damages arising from a breach in his or her personal health or financial or other private consumer information.

(Emphasis added.)

B. <u>Allegations in the Complaint Filed by the Mayor and City Counsel of Baltimore Against Appellants</u>

The City sued the appellants along with 18 pharmaceutical manufacturers and/or wholesale distributors of drugs for allegedly participating in, and complicity in, a scheme to mass market and distribute "powerful and addictive prescription opioid painkillers" for monetary gain. Although the complaint filed by the City contained four counts, only two counts named the appellants as defendants. Those counts were captioned "Public Nuisance" [Count I] and "Negligence" [Count II]. The specific allegations against appellants were as follows:

- Rosen-Hoffberg operated pain clinics in Towson and Owings Mills, Maryland; but the pain clinics were, in reality, pill mills. The complaint defined a "pill mill" as a physician's office, clinic, or healthcare facility that prescribes "controlled dangerous substances without a legitimate medical purpose."

- Rosen-Hoffberg operates the pill mills under the direction of Drs. Rosen and Hoffberg.

- The three appellants, on their website, participated with the manufacturing defendants, in a deceptive campaign to rebrand pain as the "fifth vital sign," and advertised through that website that the appellants were "willing to prescribe opioids," although it advised patients that "the use of opioids is

more effective when used as part of a multi-disciplinary approach," which the appellants provided.

- According to a report prepared by an organization called ProPublica, titled "Prescriber Checkup," the data showed that opioids prescribed by the appellants had "red flags hanging all over" it. More specifically the Prescriber Checkup Report showed that in 2015, Dr. Hoffberg issued 7,046 Medicare Part D prescriptions, more than all but 15 prescribers in the same specialty working in the State of Maryland that year; the data also showed that Dr. Hoffberg prescribed opioids to 92% of his patients in contrast to other prescribers within the same specialty, who prescribed opioids to only 14% of their patients; the data also showed that Dr. Hoffberg filled an average of 20 prescriptions per patient as compared to an average, in Maryland, of 8 prescriptions per patient within the same specialty.

- Prescribers Checkup data showed that Dr. Rosen filled 1,041 Medicare Part D prescriptions in 2015 and that he prescribed opioids to 88% of his patients.

- Dr. Rosen had been the subject of "multiple disciplinary actions before the Maryland State Board of Physicians" ["the Board"] in relation to his excessive prescribing of opioid medications for patients with chronic pain and due to his failure "to monitor patient's for addiction and diversion."[2]

- According to paragraph 209 of the complaint, Dr. Rosen, on June 30, 2017, was issued a public reprimand by the Board for "violat[ing] the prevailing standards of quality care from 2005-2007 by prescribing excessive amounts of opioids and failing to monitor [a] patient's risks for addiction and diversion"; more specifically, the Board found that Dr. Rosen relied "almost exclusively on opioids to manage the patient's pain in 2006 and 2007 and that, in 2007, Dr. Rosen increased the patient's dosage of opioids to 40 pills per day, totaling over 1,200 tablets in one four-week period"; those levels were, according to the panel, "very, very high and outside the standard of care[.]"

- In Paragraph 209 of the complaint, the City further alleged that the Board had found that "Dr. Rosen's regimen of short-acting opioid pills was ineffective"; and that he, along with "other practitioners recognized the patient's risk factors for potential addiction," but nevertheless "continued to prescribe high levels and volumes of this short-acting opioid for a patient

[2] The word "diversion" as used by the Board, meant distribution of the drugs to someone other than the person for whom the drugs were prescribed.

with unremarkable pathology based on the patient's requests[.]" Moreover, according to the Board, Dr. Rosen "never screened the patient to verify that he was taking all the oxycodone prescribed" even though "a patient taking 40 pills a day raises a concern that some of it could go elsewhere"; yet "Dr. Rosen ignored the inherent risks to the patient and society in this case, and deviated from the standard of care."

- In Paragraph 210 of the complaint, the City alleged that on November 13, 2017, a disciplinary panel of the Board brought further public charges against Dr. Rosen related to his opioid prescribing practices. In the course of that last mentioned investigation, the records of Dr. Rosen were reviewed by a peer review entity that found that Dr. Rosen "consistently prescribed excessively high dosages of highly addictive short-acting opioids and long-acting opioids over prolonged periods of time in the absence of clinical evidence to support the dosages prescribed"; additionally, the peer reviewers determined that Dr. Rosen "maintained patients on excessively high levels of opioids for months and even years despite lack of improvement of functionality or pain control"; and Dr. Rosen also "failed to adequately monitor patients for the potential risk of diversion or addiction[.]" Finally, the peer reviewers found that Dr. Rosen "failed to taper or wean patients from excessive dosages of opioids in spite of the lack of functional improvement or pain control over extended periods of time," and that he "continued to maintain or escalate opioid doses in spite of patient behavior indicating opioid use disorder."

- According to records kept by the Centers for Medicare and Medicaid Services ["CMS"], for every year that was available for review, the CMS data showed that Dr. Hoffberg received payments from pharmaceutical companies well above the national average. In 2013, he received payments of $36,147.38 as compared to the national mean of $1,583.31; in 2014, Dr. Hoffberg received payments of $63,988.69 as compared to the national mean of $3,379.13; in 2015, Dr. Hoffman received payments of $60,569.87 as compared to the national mean of $3,269; and in 2016, Dr. Hoffberg received payments of $18,041.61 as compared to the national mean of $3,273.71.

- Dr. Hoffberg repeatedly promulgated misleading messages, developed by the manufacturing defendants, describing the use of opioids to treat chronic pain in the Baltimore City area.

In Paragraphs 215 and 216, the City details allegedly false or misleading public statements made by Dr. Hoffberg in his presentations to the public concerning the use of opioids in the treatment and management of chronic pain.

The complaint alleges that "[t]he establishment of Rosen-Hoffberg as a pill mill that supplied individuals with massive quantities of prescription opioids with few questions asked encouraged the development of opioid use disorders, ensured a source for drugs for individuals with those disorders, and exacerbated the opioid crisis in Baltimore." As a result of appellants' actions, the City asked for money damages and an injunction ordering appellants to abate the public nuisance that was described in the complaint.

Additionally, the Baltimore City complaint alleges unlawful acts by Rosen-Hoffberg. Those unlawful acts include, but are not limited to: "the creation and maintenance of a secondary, criminal market for opioids"; improperly over-billing City-funded health plans for "ineligible prescriptions" that were medically unnecessary; conduct involving the provision of improper and unethical services resulting in disciplinary actions by the Maryland Board of Physicians; and creating and maintaining a public nuisance that is a significant interference with public health and safety.

C. Arguments Made by Medical Mutual, in the Circuit Court, in Support of its Motion for Summary Judgment

In support of its motion, Medical Mutual argued as follows:

> There is . . . no defense coverage or any potentiality of coverage applicable to the Baltimore City Complaint pursuant to the Plaintiffs' Med[G]uard Defense Coverage Form.

As noted above, the Plaintiffs' Med[G]uard Defense Coverage only applies to "an administrative or judicial proceeding ***instituted by a government agency***, or the formal ***professional review body*** of any other organization, ***to examine*** allegations of: (1) improper professional conduct in the practice of the insured's health care profession; or (2) the performance of health care services in violation of recognized standards of practice or established guidelines for the appropriate utilization of such services." *See* Section V – Definitions, Plaintiffs' Exhibit A, page 5 of 6 (emphasis added).

First, there is absolutely no dispute that the Mayor and City Council of Baltimore are not professional review bodies or government agencies tasked with the duty and responsibility of reviewing a Maryland health care provider's professional conduct in the practice of medicine. To the very contrary, the Baltimore City Council is the legislative body of Baltimore City having the power to enact ordinances and resolutions. *See* MD Constitution, Art. 11, § 2 City Council. The Council members and the Mayor act only by ordinance, resolution or motion. *See* MD Constitution, Art. 11, § 1-2. The government agency in Maryland tasked with the duty and responsibility of reviewing a Maryland health care provider's professional conduct in the practice of medicine is the Maryland Board of Physicians. *See* Md. Code Ann., Health Occupations § 14-201, *et seq.*; *see also* § 14-205(a) (stating that the Maryland Board of Physicians shall oversee the licensing requirements for physicians, review and investigate complaints, and ensure the ongoing competence of licensees).

More importantly, there is absolutely no dispute that the Mayor and City Council of Baltimore are not "examining" the Plaintiffs' professional conduct in the practice of medicine, and they are not engaging in a professional peer review of any nature whatsoever. Rather, the Mayor and City Council of Baltimore are suing the Plaintiffs for economic losses. *See* Plaintiffs' Exhibit B at ¶ 248-262. The plain language of the Plaintiffs' policy is "to examine," defined by Merriam-Webster as "to inspect closely," "to test the condition of," "to inquire into carefully; investigate," and "to interrogate closely." *See e.g.* https://www.merriam-webster.com/dictionary/examine. The Plaintiffs are not insured for defense coverage for third party tort claims seeking compensatory damages. The Plaintiffs' Med[G]uard Defense Coverage is entirely inapplicable to the Baltimore City Complaint, and the Defendant is entitled to summary judgment in its favor as a matter of law.

Finally, there is absolutely no dispute that the Plaintiffs' Med[G]uard Defense Coverage Form Section I (A)(5) also specifically excludes defense coverage to the Plaintiffs. *See* Plaintiffs' Exhibit A, pages 2-3. More

> specifically, the Plaintiffs are not insured for defense coverage for "[a]ny insured event which arises out of malicious, dishonest, or ***unlawful acts*** committed by or with the consent of any insured," or for "[a]ny administrative or ***judicial proceeding convened to weigh the merits of a claim by a third party for compensation arising out of injury or damage alleged to have been inflicted by the insured***." *See* Plaintiff's Exhibit A, pages 2-3 (emphasis added.) Pursuant to the plain language of the Plaintiffs' Med[G]uard Defense Coverage Form, there is no defense coverage or any potentiality of coverage applicable to the Baltimore City Complaint. For each of these reasons, the Plaintiffs' Motion for Summary Judgment should be denied, and summary judgment should be entered in favor of the Defendant as a matter of law.

D. Appellants' Opposition to Medical Mutual's Motion for Summary Judgment as Presented to the Motions Judge

In their opposition, the appellants started out by stressing that the complaint filed by the City, as against them, was a tort case.

Appellants admitted that under the MedGuard Policy, Medical Mutual is only required to defend:

> [A]n administrative or judicial proceeding instituted by a government agency, or the formal professional review body of any other organization, to examine allegations of: (1) [i]mproper professional conduct in the practice of the insured's health care profession; or (2) [t]he performance of health care services in violation of recognized standards of practice or established guidelines [that govern] for the appropriate utilization of such services.

Appellants contended that the tort suit filed by Baltimore City was instituted by the City to examine allegations of the type mentioned in the "duty to defend" section of the policy. According to appellant's opposition, the purpose of the lawsuit filed by the City was to "examine" improper professional conduct or performance of health care service in violation of recognized standards of practice and established guidelines.

The appellants took the position that Medical Mutual's argument as to the definition of the word "examine" is too narrow. In support of that position, appellants' attached to their opposition a printout of a portion of the Merriam Webster website which, under the heading, "legal [d]efinition of examine," includes the following language:

> examined; examining
> 1 : to investigate or inspect closely
>
> - examine the title
>
> — compare audit
> 2. to question closely especially in a court proceeding — compare depose

Appellants then asserted:

> It is a fundamental, article, that courts examine the facts and the law to render a judg[]ment. Courts do this through the adversarial process. The judge in the Baltimore Lawsuit will "examine" the facts and evidence to render a judge [sic]. The claim otherwise by Med. Mutual strains credulity. Accordingly, the Baltimore Lawsuit falls within the definition.

(Footnote omitted.)

In their written response to Medical Mutual's motion for summary judgment, the appellants made no argument as to why Medical Mutual was wrong in relying on the exclusions set forth in Section I, 5, quoted *supra*, at pages 5-6. Likewise, in their oral argument before the circuit court, appellants did not make any argument as to the applicability, *vel non,* of the exclusions.

III.

ANALYSIS

Appellants' brief contains no meaningful argument in support of their position that the MedGuard Policy provided them with defense coverage for the Baltimore City lawsuit. Instead, appellants simply summarize the various allegations made against them in the lawsuit and then, after doing so, simply proclaim that those allegations "are clearly within the definition of Insured Event as they allege improper professional conduct in the practice of Insured's professional health care profession and [allege the conduct] to be in violation of standards of practice or established guidelines for the appropriate utilization of such service." Appellants also argue:

> In addition the allegations accuse the Insureds of violating Health Occupations Article 14-404, particularly Section (a) i, ii, (4), (5), (10), (17), (19), (22), (27), as to grossly over utilizing health[]care services, failing to meet appropriate standards for the delivery of quality medical care, and other improper professional conduct in the practice of Insureds health[]care profession and the performance of health[]care services in violation of recognized standards of practice or established guidelines [that govern] the appropriate utilization of such services.
>
> Although either implied or expressed are allegations which could be considered violations of law but that is not the import of the claim that Insured has a duty to defend.

(Emphasis added.)

We interpret the portion of the aforementioned argument that we have emphasized, as conceding that the complaint does allege that they acted unlawfully, but Medical Mutual is nevertheless obligated to defend them against all other allegations.

From the remaining part of appellants' argument, it appears that appellants' position in this appeal is that Medical Mutual, under the MedGuard Policy, is obligated to defend them in any lawsuit in which it is alleged that they engaged in negligent or otherwise improper professional conduct in their practice of the health care profession and in any lawsuit where it is alleged that their actions constituted a violation of standard practices or established guidelines for the provision of professional medical services.

There is no merit in appellants' argument because it misinterprets the definition of the term "insured event" as set forth in the policy. Baltimore City, of course, is a government agency. As such, it has the right to sue. But, under its Charter, it has no right to bring either an administrative or judicial proceeding to examine allegations of either improper professional conduct in the practice of appellants' health care profession or to examine whether the performance of health care services by appellants was in violation of recognized standards of practice or established guidelines for the appropriate utilization of such services. The only government agency in Maryland that has the right to review a Maryland health care provider's professional conduct in the practice of medicine, is the Maryland State Board of Physicians. *See* Md. Code Ann., Health Occupations Article (2014 Repl. Vol.) § 14-201 *et seq.* Section 14-205(a) of the Health Occupations Article, provides that the Maryland Board of Physicians shall oversee the licensing requirements for physicians, review and investigate complaints, and ensure the ongoing competence of licensees.

In the lawsuit that Baltimore City filed against appellants, and others, it made allegations against appellants of improper professional conduct and improper performance of health care services in violation of recognized standards of practices or appropriate utilization of health care services. But to come within the definition of an "insured event," Baltimore City would have to institute a judicial proceeding so that it, not a court, could examine allegations of whether appellants engaged in unprofessional conduct or violated recognized standards of practice that were established for appropriate utilization of health care services. The tort lawsuit filed against appellants did not require the City to examine anything. Moreover, when it instituted the lawsuit, Baltimore City was not engaged in a professional peer review of any nature whatsoever. Rather the City was simply suing the appellants for economic losses and to enjoin them from continuing to perpetrate an unlawful public nuisance. In short, Baltimore City did not institute the lawsuit so that it could examine the validity, *vel non*, of it's own allegations.

But even if we were to assume, *arguendo*, that appellants were correct when they maintained that the tort suit filed by Baltimore City was an "insured event," they would not succeed in this appeal. First, Baltimore City's complaint alleges several unlawful acts on the part of appellants. Appellants admit this. The policy in Section I, paragraph 5(b) excludes coverage for any insured event that "arises out of malicious, dishonest, or unlawful acts committed by or with the consent of any insured." (emphasis added). Therefore, there can be no coverage of any part of the complaint alleging that the appellants acted unlawfully.

Second, Section I, paragraph 5(c) excludes coverage for any "administrative or judicial proceeding convened to weigh the merits of a claim by a third party for compensation arising out of injury or damage alleged to have been inflicted by the insured." Baltimore City, a third party, brought its lawsuit against appellants to recover compensation for the damages it suffered as a result of appellants' actions. Therefore, because of the exclusion set forth in Section I, paragraph 5(c), Medical Mutual does not provide appellants with coverage.

In their brief, appellants set forth no argument, whatsoever, as to why the exclusions set forth in Section I, paragraph 5(b) or 5(c) would not be applicable. And, in oral argument, before this panel, appellants' counsel provided no meaningful argument as to why the exclusions should not be applied.

For all the above reasons, we hold that the circuit court was correct when it granted Medical Mutual's motion for summary judgment and denied appellants' cross-motion for summary judgment. Also, the circuit court was correct when it issued a declaratory judgment in favor of Medical Mutual.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.