

Circuit Court for Prince George's County  
Case No. CAL15-33788

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 1079

September Term, 2017

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ADRIANA REICHARD

v.

HITESH AMIN, ET AL.

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Berger,  
Arthur,  
Shaw Geter,

JJ.

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Opinion by Arthur, J.

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Filed: August 2, 2018

\*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

In most medical malpractice cases, a party must file a supplemental certificate of a qualified expert within 15 days after the date when discovery is required to be completed. Md. Code (1973, 2013 Repl. Vol.) § 3-2A-06D(b)(1) of the Courts and Judicial Proceedings Article. “[F]or good cause shown,” a court must grant an extension of time to file a supplemental certificate. *Id.*, § 3-2A-06D(b)(2). “If,” however, “a plaintiff fails to file a supplemental certificate of a qualified expert for a defendant, on motion of the defendant the court may dismiss, without prejudice, the action as to that defendant.” *Id.*, § 3-2A-06D(c)(1).

In this case, the plaintiff failed to file a supplemental certificate of a qualified expert within 15 days after the close of discovery. The court denied a motion for additional time to file a supplemental certificate, finding that the plaintiff did not show good cause. Then the court dismissed the plaintiff’s case. Although the dismissal was nominally without prejudice, it had the practical effect of a dismissal with prejudice, because the statute of limitations had run.

We shall remand the case without affirming, reversing, or modifying the judgment under Md. Rule 8-604(d), because it is not entirely clear that the circuit court separated its consideration of whether the plaintiff established good cause for an extension of time to file a supplemental certificate from its consideration of the separate question of whether the failure to file a timely certificate should lead to the sanction of dismissal.

## FACTUAL AND PROCEDURAL HISTORY

On September 17, 2013, Hitesh Amin, M.D., performed a laparoscopic sleeve gastrectomy<sup>1</sup> on Ms. Adriana Reichard at MedStar Southern Maryland Hospital Center. A few weeks after the surgery, Ms. Reichard suffered severe abdominal pains and was diagnosed with an incarcerated incisional hernia at the site of the gastrectomy. During a repair procedure, Dr. Amin lacerated Ms. Reichard’s aorta, the largest artery in the body.<sup>2</sup> As a result, Ms. Reichard lost more than 50 percent of her blood. From December 2013 to March 2014, Ms. Reichard experienced pain in her legs and went through several periods of rehabilitation.

On November 2, 2015, Ms. Reichard filed a medical malpractice complaint against Dr. Amin and MedStar in the Circuit Court for Prince George’s County. Pursuant to a scheduling order, discovery ended on January 9, 2017. Under § 3-2A-06D(b)(1) of the Courts and Judicial Proceedings Article, therefore, Ms. Reichard was required to file a supplemental certificate of qualified expert by January 24, 2017, i.e., 15 days after the

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<sup>1</sup> A “gastrectomy” is the “surgical removal of all or part of the stomach.” <https://www.merriam-webster.com/dictionary/gastrectomy> (last visited July 24, 2018). A “sleeve gastrectomy” is “a surgical weight-loss procedure in which the stomach is reduced to about 15% of its original size, by surgical removal of a large portion of the stomach along the greater curvature.” [https://en.wikipedia.org/wiki/Sleeve\\_gastrectomy](https://en.wikipedia.org/wiki/Sleeve_gastrectomy) (last visited July 24, 2018). The procedure is generally performed laparoscopically (*id.*), “through small incisions (usually 0.5–1.5 cm) with the aid of a camera.” <https://en.wikipedia.org/wiki/Laparoscopy> (last visited July 24, 2018).

<sup>2</sup> <https://www.ncbi.nlm.nih.gov/pubmedhealth/PMHT0022262/> (last visited July 24, 2018).

close of discovery. She did not, however, file a certificate by that time. Nor did she request an extension before the deadline had run.

On January 30, 2017, Dr. Amin and MedStar moved to dismiss Ms. Reichard’s complaint under § 3-2A-06D(c)(1) of the Courts and Judicial Proceedings Article, because of her failure to file a timely supplemental certificate. On February 3, 2017, Ms. Reichard opposed the motion to dismiss and moved for a brief extension of time, *nunc pro tunc*, under § 3-2A-06D(b)(2) of the Courts and Judicial Proceedings Article, to file a supplemental certificate. She argued that because her attorney practiced primarily in the District of Columbia and was unfamiliar with the statutory requirement to file a supplemental certificate, she had shown the requisite “good cause” for failing to meet the deadline and should receive an extension of time.

Ms. Reichard filed a supplemental certificate on February 9, 2017, before the court had ruled on her motion for an extension of time.<sup>3</sup> On the same day, Dr. Amin and MedStar moved to strike the supplemental certificate. They argued that they were prejudiced by the untimely certificate, because, they said, the expert’s stated opinions were inconsistent with his deposition testimony and had materially changed the substance of the case.

Ms. Reichard opposed dismissal on two grounds. First, she argued that she had “good cause” for an extension of time to file her supplemental certificate. Second, she argued that even if she lacked “good cause,” dismissal would be a “draconian sanction,”

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<sup>3</sup> Ms. Reichard represents that she gave a copy of the supplemental certificate to the defendants two days earlier, on February 7, 2017.

because the statute of limitations had run, because (she claims) the defendants suffered no prejudice as a result of the brief delay in filing, and because her counsel's error had not been wilful, deliberate, or contumacious. While the various motions were pending, the court postponed the trial date until October 2, 2017, for unrelated reasons.

On April 27, 2017, the circuit court held a hearing on Ms. Reichard's motion for an extension of time to file a supplemental certificate and her adversaries' motions to dismiss her case and to strike her supplemental certificate. On May 31, 2017, the court issued an opinion and order, in which it concluded that Ms. Reichard had not shown good cause for an extension and that her complaint should be dismissed.

In explaining why Ms. Reichard had not shown good cause, the court relied on *Kearney v. Berger*, 416 Md. 628 (2010), which concerns § 3-2A-04(b)(5) of the Courts and Judicial Proceedings Article. Section 3-2A-04(b)(5) provides that, upon a showing of good cause, a court must grant an extension of the time for filing the certificate of a qualified expert that is required at the outset of most medical malpractice cases. In *Kearney*, 416 Md. at 664, the Court of Appeals stated that a party may be entitled to an extension for good cause if he or she exercised the degree of diligence that an ordinarily prudent person would have exercised under the same or similar circumstances. In this case, the circuit court reasoned that Ms. Reichard's counsel had not exercised the degree of diligence that an ordinarily prudent person would have exercised, because he had been the lead attorney for over a year, had had adequate time to acquaint himself with the current requirements of Maryland law, but had failed to file a supplemental certificate.

The court then proceeded to the analytically separate question of whether to dismiss Ms. Reichard’s case without prejudice under the authority of § 3-2A-06D(c)(1), because of her failure to file a supplemental certificate by the statutory deadline. In framing the question before it on page 4 of its opinion, the court seemed to misapprehend Ms. Reichard’s arguments and to conflate the questions of “good cause” for an extension with the separate question of whether the case should be dismissed:

Plaintiff contends that “good cause” exists on two grounds: (1) counsel was not aware of the timeliness requirements of a supplemental certificate of qualified expert and (2) dismissal is unwarranted as a draconian sanction.<sup>4</sup>

In its analysis, on page 5 of its opinion, the court began by stating that it was unconvinced that dismissal was a draconian sanction. It expressed its awareness of the statute of limitations, but went on to say that its obligation was “to determine whether or not ‘good cause’ exists.” It added that, in its view, Ms. Reichard had cited no authority to support her “contention that ‘good cause’ exists” and that the court should not dismiss the case. It concluded by stating that because of Ms. Reichard’s inability “to show ‘good cause’ to allow an extension” for the filing of the supplemental certificate, it would grant the motion to dismiss.

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<sup>4</sup> The court was correct that Ms. Reichard claimed to have good cause for an extension because of her attorney’s unfamiliarity with the statutory deadline for filing a supplemental certificate. The court was also correct that, in Ms. Reichard’s view, dismissal would be a draconian sanction. Ms. Reichard, however, did not contend that the presence of “good cause” should determine whether her case should be dismissed. Instead, she contended that dismissal was inappropriate because that sanction was excessive, because she claims the defendants had suffered no prejudice, and because her counsel’s error had not been wilful, deliberate, or contumacious.

Ms. Reichard filed a timely motion to alter or amend the judgment, which the circuit court denied. This timely appeal followed.

### QUESTIONS PRESENTED

Ms. Reichard raises two, related questions, which we have combined and rephrased for clarity and concision: Did the circuit court abuse its discretion in dismissing Ms. Reichard’s case because of her failure to file a timely supplemental certificate of a qualified expert?<sup>5</sup>

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<sup>5</sup> Ms. Reichard listed the following questions:

I. Whether the trial court misapplied § 3-2A-06D(c)(1) when it dismissed plaintiff’s case with prejudice because Plaintiff [sic] filed her [supplemental certificate of qualified expert] after the scheduled due date?

II. Whether the trial court abused its discretion in dismissing plaintiff’s case with prejudice because the [supplemental certificate of qualified expert] was filed late where:

1. plaintiff’s [supplemental certificate of qualified expert] was filed within two weeks of the statutory due date,
2. notwithstanding the statute authorizes only dismissal without prejudice” dismissal was with prejudice because the statute of limitations expired;
3. the two-week delay in filing the [supplemental certificate of qualified expert] did not prejudice the defendants;
4. the late filing was not willful nor intended to adversely impact the defense; [and]
5. trial was delayed for six months thereby mooting any possible disadvantage to defendants caused by the delayed filing?

Ms. Reichard does not challenge the circuit court’s decision that she failed to show good cause for an extension of time to file her supplemental certificate. Instead, she challenges the decision to dismiss her complaint.

From the materials before us, it is not entirely clear whether the circuit court conducted a separate inquiry into the analytically separate question of whether to dismiss Ms. Reichard’s case because of her failure to file a timely certificate. Instead, it appears that the court may have combined the two inquiries into one and decided to dismiss the case simply because Ms. Reichard had failed to show good cause for an extension of time. Accordingly, under Md. Rule 8-604(d), we shall remand the case to the circuit court, without affirming, reversing, or modifying the judgment, so that it can expressly explain and decide whether the case should be dismissed because of the failure to file a timely supplemental certificate, or whether some other sanction might be in order.

#### **STANDARD OF REVIEW**

No court has yet determined the precise standard of review for a trial court’s decision about whether to dismiss a case because of the plaintiff’s failure to file a certificate of a qualified expert under § 3-2A-06D(c)(1). Ms. Reichard correctly recognizes, however, that because the statute says that a court “may dismiss” the case because of a failure to file, it vests the court with discretion. *See, e.g., Anne Arundel Cnty. Ethics Comm’n v. Dvorak*, 189 Md. App. 46, 82-83 (2009). Consequently, we review that decision for abuse of discretion.

A trial court abuses its discretion when its ruling is “‘clearly untenable, unfairly depriving a litigant of a substantial right and denying a just result,’ when the ruling is

‘violative of fact and logic,’ or when it constitutes an ‘untenable judicial act that defies reason and works an injustice.’” *King v. State*, 407 Md. 682, 697 (2009) (quoting *North v. North*, 102 Md. App. 1, 13-14 (1994)). To amount to an abuse of discretion, “[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.” *Id.* (quoting *North v. North*, 102 Md. App. at 14).

Nonetheless, we “will reverse a decision that is committed to the sound discretion of a trial judge if we are unable to discern from the record that there was an analysis of the relevant facts and circumstances that resulted in the *exercise* of discretion.” *Maddox v. Stone*, 174 Md. App. 489, 502 (2007) (emphasis in original). Furthermore, “courts ‘do not have discretion to apply inappropriate legal standards, even when making decisions that are regarded as discretionary in nature.’” *Morton v. Schlotzhauer*, 449 Md. 217, 231 (2016) (quoting *Wilson-X v. Dep’t of Human Res.*, 403 Md. 667, 675 (2008)).

### **DISCUSSION**

Ms. Reichard does not challenge the circuit court’s decision that she failed to show good cause for an extension of time to file her supplemental certificate. Instead, she challenges the decision to dismiss her complaint.

Ms. Reichard argues that § 3-2A-06D(c)(1) envisions a two-step process. First, she says, a court must determine whether the plaintiff failed to file a supplemental certificate. If the plaintiff failed to file the certificate, the court, she says, must then exercise its discretion to decide whether dismissal is the appropriate response. Ms. Reichard asserts that the circuit court failed at each of these steps.

Ms. Reichard denies that she failed to file a supplemental certificate. She argues that she did file a certificate, albeit an untimely one. She concedes that the court declined to excuse her untimely filing, but she asserts that her adversaries suffered no prejudice as a result of the delay. She insists that an untimely filing is not the same thing as a failure to file and that only a failure to file should trigger the court’s power to dismiss a case under § 3-2A-06D(c)(1).

In our view, the circuit court correctly interpreted an untimely filing as a failure to file. As MedStar observes in its brief, Maryland courts have repeatedly held that if a party files a certificate that does not comply with the applicable statutory requirements, it is as though the party failed to file a certificate at all. *See, e.g., D’Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, 645 (2004) (stating that the “failure to file a proper certificate is tantamount to not having filed a certificate at all”); *accord Breslin v. Powell*, 421 Md. 266, 292-93 (2011) (quoting *D’Angelo* with approval); *Walzer v. Osborne*, 395 Md. 563, 582 (2006) (agreeing with the “general statement” in *D’Angelo* that failure to file a proper certificate is tantamount to not having filed a certificate at all); *see also Watts v. King*, 143 Md. App. 293, 309 (2002) (equating the failure to file a certificate that meets the statutory requirements with the failure to file any certificate at all).

In *Breslin v. Powell*, 421 Md. at 292-93, the Court of Appeals rejected an argument similar to the one that Ms. Reichard has made. In that case, the plaintiff filed a certificate, but it was defective because it had not been signed by a qualified expert. *Id.*

The plaintiff took the position that she had not failed to file a certificate within the statutory deadline, because she had filed something, even if it was defective. *Id.* at 292.

The Court of Appeals disagreed:

We imagine several ways in which a plaintiff could “fail to file a certificate of a qualified expert,” including but not limited to: (1) not filing a certificate at all; (2) filing a certificate of an unqualified expert who does not have the requisite training; (3) filing a certificate of an otherwise qualified expert who devotes more than twenty percent of his [or her] professional activities to testimony in personal injury cases; or (4) filing a certificate of a qualified expert that does not include the required report. These and other ways in which a claimant or plaintiff can “fail to file” are not distinguished in the statute.

*Id.* at 292-93.

It is beyond dispute that the *Breslin* Court did not intend these four examples to exhaust the universe of instances in which a person could “fail to file” a certificate: the list of examples was “not limited to” the four that the Court gave, and the Court recognized that a person could fail to file in “other ways.” Hence, if the timely filing of a defective certificate amounts to a failure to file (as it did in *Breslin*), we see no reason why the untimely filing of a certificate, defective or not, should not amount to a failure to file as well.

But the analysis does not end there. As we see it, even though Ms. Reichard failed to file a timely certificate, the circuit court still had to conduct two distinct inquiries before it could dismiss her case. First, the court had to decide whether Ms. Reichard had shown good cause for an extension of time, *nunc pro tunc*, to file a certificate. Second, if the court found that Ms. Reichard did not show good cause and thus did not deserve an

extension of time, it still had to decide whether dismissal was the appropriate judicial response to her failure to file.

Ms. Reichard does not and could not raise any plausible objection to the circuit court’s handling of the first inquiry. The court reasonably concluded that counsel’s failure to familiarize himself with the law did not constitute good cause. While a different judge might conceivably have reached a different conclusion, it was by no means an abuse of discretion for the circuit court to rule as it did in this case on the issue of good cause. *See Williams v. Montgomery County*, 123 Md. App. 119, 134 (1998) (holding that “the trial court did not abuse its discretion when it found, in effect, that ignorance of the law is no excuse when a party, represented by counsel, fails to give notice” under the Local Government Tort Claims Act “because he was unaware that notice was required”); *compare Kearney v. Berger*, 416 Md. at 663 (citing *Rios v. Montgomery County*, 386 Md. 104, 141-42 (2005), for the proposition that ignorance of a statutory requirement might constitute good cause under some circumstances).

The second inquiry stands on a different footing. The question of whether a party has shown good cause to excuse the belated filing of a supplemental certificate is quite different from the question of whether a court should deprive a party of any remedy at all because of the failure to meet the statutory deadline. The latter question – the question that the court is required to answer before exercising its discretion to dismiss a case under § 3-2A-06D(c)(1) – requires some attention to the purpose of the statute.

From the plain language of § 3-2A-06D, it is obvious that the General Assembly intended the statute to create a bright-line rule governing the supplementation of expert

discovery in medical malpractice cases. Although all parties to all types of civil litigation have a general obligation to “promptly” supplement certain discovery responses if they obtain further material information before trial (Md. Rule 2-401(e)), the General Assembly presumably thought it wise to impose a clear and specific deadline for the supplementation of expert discovery in cases against healthcare providers for damages due to a medical injury, where expert testimony is often central. In effect, through the enactment of § 3-2A-06D, the General Assembly has engrafted a deadline for expert supplementation onto every scheduling order in every medical malpractice case in which expert testimony is required.

“Scheduling orders are but the means to an end, not an end in and of themselves.” *Maddox v. Stone*, 174 Md. App. at 507. Hence, in exercising its discretion about whether to put a plaintiff out of court because of the failure to meet the statutory scheduling deadline for supplementation or whether to impose some other, lesser sanction, a court may consider factors such as the reason for the failure to file, the effect of the failure to file on other parties, and whether some measure short of dismissal might address the concerns of the affected parties and of the judicial system itself. “[C]ourts must not lose sight of their primary responsibility: to render justice and resolve disputes in a fair and just manner.” *Id.* at 506-07.<sup>6</sup>

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<sup>6</sup> MedStar and Dr. Amin argue that § 3-2A-06D(c) does not mention factors such as prejudice to the defendants or the wilfulness or contumaciousness of the plaintiff’s conduct. They argue that those considerations are appropriate in evaluating discovery violations, but not violations of a statutory deadline – even a statutory deadline that pertains to discovery. In our view, in conducting the discretionary determination about

In this case, we cannot tell if the circuit court considered any factor, other than the absence of good cause for an extension of the deadline, before it dismissed Ms. Reichard’s case and effectively deprived her of any remedy for her alleged injuries. In framing the issue before it, the court seemed to say that the presence of “good cause” was dispositive on both issues. In explaining its rationale for dismissing the case, the court repeatedly referred to the absence of good cause. While the court mentioned the running of limitations and the effect of its ruling, it said that its obligation was “to determine whether or not ‘good cause’ exists.” It faulted Ms. Reichard for citing no authority to support her “contention that ‘good cause’ exists.” In the final sentence, it expressly stated that it would grant the motion to dismiss “[d]ue to the inability of the plaintiff to show ‘good cause’ to allow an extension to [sic] the submission of a Supplemental Certificate of Qualified Expert.” In short, the court may have collapsed two distinct inquiries into one and concluded that the absence of good cause for an extension of time meant that it should dismiss the case altogether.<sup>7</sup>

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whether to dismiss a case because of the untimely filing of a supplemental certificate, a court may consider any factor relevant to its decision, including the extent of any prejudice to the defendants.

<sup>7</sup> Like the circuit court, MedStar and Dr. Amin also seem to conflate the issue of whether a party has good cause for an extension to file a supplemental certificate with the separate issue of whether a case should be dismissed because of the failure to file a timely supplemental certificate. At page 19 of its brief, MedStar writes, “[T]he statute” – by which it presumably means § 3-2A-06D(c) – “*expressly authorizes* the trial court to dismiss the case for failure to file without good cause.” (Emphasis in original.) MedStar’s statement is not entirely accurate: while § 3-2A-06D(b)(2) authorizes a court to deny an extension if a plaintiff fails to show good cause, § 3-2A-06D(c) does not link the dismissal of the case to the presence or absence of good cause for an extension of

Because we cannot be entirely certain about whether the circuit court conducted a second, separate inquiry into whether dismissal was the appropriate remedy for the failure to file a timely supplemental certificate under the circumstances of this case, we conclude that the substantial merits of the case will not be determined by affirming, reversing, or modifying the judgment, and that justice will be served by permitting further proceedings. Accordingly, we remand this case to the Circuit Court for Prince George’s County under Md. Rule 8-604(d). The purpose for the remand is to enable the circuit court to clarify its analysis of the question of whether dismissal was the appropriate remedy, or whether some other remedy might be more appropriate. In conducting that analysis, the circuit court may consider any relevant factors and may give those factors whatever weight it reasonably determines they should have.

**CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE’S COUNTY, WITHOUT AFFIRMANCE, REVERSAL, OR MODIFICATION, FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE EVENLY DIVIDED BETWEEN APPELLANT AND APPELLEES.**

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time. At page 14 of his brief, Dr. Amin writes, “Section 3-2A-06D expressly and properly focuses only on whether the **filing** party has met its burden of showing good cause for the delay.” (Emphasis in original.) Dr. Amin is correct that § 3-2A-06D**(b)(2)** expressly focuses on good cause for an extension of time to file a supplemental certificate. He is incorrect if he intended to imply that § 3-2A-06D**(c)** expressly focuses on good cause as a ground for avoiding dismissal because of the failure to file a timely supplemental certificate.