

Circuit Court for Baltimore City
Case No. 24-C-18-000364

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1174

September Term, 2018

CARLA MAHON

v.

HONG KIM

Kehoe,
Nazarian,
Gould,

JJ.

Opinion by Nazarian, J.

Filed: December 26, 2019

* 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.

While a patient at Baltimore Washington Medical Center (“BWMC”) on March 25, 2014, Timothy Mahon died from septic shock. His wife, Carla Mahon, filed a claim for medical malpractice against his health care providers on behalf of Mr. Mahon’s estate and their son in the Health Care Alternative Dispute Resolution Office (“HCADRO”) on March 13, 2017. After obtaining two extensions of time to file her Certificate of Qualified Expert, Ms. Mahon missed the updated deadline. After the deadline passed, she filed a Certificate as to one expert and another motion to extend time. The next day, and before the HCADRO ruled on the motion, she filed another Certificate for a second doctor and an Election to Waive Arbitration. The Director of the HCADRO transferred the case to the Circuit Court for Baltimore City, where it was dismissed for failure to file a Certificate.

Ms. Mahon argues on appeal that the circuit court lacked subject matter jurisdiction over the case: it wasn’t yet eligible to be transferred, she contends, because her Certificates, although filed before she waived arbitration, were untimely under Maryland Code (1975, 2013 Repl. Vol.) § 3-2A-04(b)(1)(i) of the Courts & Judicial Proceedings Article (“CJ”). We disagree and affirm.

I. BACKGROUND

On March 21, 2014, fifty-year-old Mr. Mahon went to the emergency room at Mercy Medical Center (“Mercy”) complaining of severe lower back pain and leg numbness and tingling. Several medical providers examined him and discharged him soon after with a diagnosis of a “pinched nerve.” A few days later, Mr. Mahon called an ambulance because of severe back pain, nausea, and vomiting. He was taken to BWMC and died from

septic shock the next morning.

Ms. Mahon, on behalf of Mr. Mahon’s estate and their son, filed a Statement of Claim for medical malpractice in the HCADRO on March 13, 2017. The named defendants included all physicians and physician assistants¹ who provided services to Mr. Mahon, as well as Mercy and GBMC.² After filing her Statement of Claim under the Health Care Malpractice Claims Act (the “Act”), Ms. Mahon had ninety days to file a Certificate of Qualified Expert (“Certificate” or “CQE”). CJ § 3-2A-04(b)(1)(i).

On June 8, 2017, Ms. Mahon sought additional time to file her Certificate and filed her first Motion for Extension of Time. The Director of the HCADRO found “good and sufficient cause,” granted the motion, and extended the time for her Certificate to September 13, 2017. On September 9, 2017, Ms. Mahon sought additional time to file her Certificate and filed her second Motion for Extension of Time. That too was granted for “good and sufficient cause,” and the deadline for Ms. Mahon’s Certificate extended to December 1, 2017.

But Ms. Mahon didn’t file a Certificate by the December 1, 2017 deadline, and on December 6, 2017, Mercy and PA William Fox (collectively “Mercy”) filed a Motion to

¹ These included Dr. Hong Kim, Physician Assistant (“PA”) William Fox, Dr. Gregory Tokarsky, Dr. Todd Rosen, Dr. Michael Leedom, Dr. Nnaemeka O. Agajelu, PA Kimberly Rausch, Dr. William Hutchens, Dr. Kofi Owusu-Boaitey, and Dr. William Han. Later, Drs. Tokarsky, Rosen, Leedom, Hutchins, and Owusu-Boaitey were dismissed as defendants through a Line of Dismissal.

² Maryland Spine Center was originally a defendant, but Ms. Mahon, through a Line of Dismissal on April 4, 2018, dismissed that defendant without prejudice.

Dismiss in the HCADRO. That same day, Ms. Mahon filed the Certificate and Report of Dr. Stuart Lowson contemporaneously and a third Motion for Extension of Time. The next day, without waiting for the Director’s decision on the third motion, Ms. Mahon filed an Election to Waive Arbitration with the HCADRO and another Certificate and Report, this one from Dr. Gayle Galan. The next day, December 8, 2018, the Director of the HCADRO ordered the case transferred to the circuit court.

The appellees moved to dismiss and on June 22, 2018, after a hearing, the circuit court dismissed the case. The circuit court found that there was “no circumstance in which the CQE filing deadline before HCADRO could be ignored in favor of a belated extension motion and belated CQE filing.” Ms. Mahon filed a timely notice of appeal.

II. DISCUSSION

On appeal, Ms. Mahon asks us to reverse the circuit court and remand this case to the HCADRO for a ruling on her Third Motion. She raises a single issue: because, she says, she had not filed a timely Certificate (her two Certificates were late and her belated motion for extension of time hadn’t yet been ruled on) before she waived arbitration, the circuit court never had jurisdiction over the case and, therefore, could not dismiss it.³ She points us to CJ § 3-2A-06B(b)(1), which, as she says, authorizes a claimant to waive arbitration anytime after a Certificate is filed:

³ Ms. Mahon frames her Question Presented as follows:

Did the Circuit Court have jurisdiction over this matter, when Appellant failed to comply with Md. Code, Cts. & Jud. Proc. §§ 3-2A-06B, which required the filing of a CQE before unilaterally waiving arbitration?

Subject to the time limitation under subsection (d) of this section, any claimant may waive arbitration at any time after filing the certificate of qualified expert required by § 3-2A-04(b) of this subtitle by filing with the Director a written election to waive arbitration signed by the claimant or the claimant’s attorney of record in the arbitration proceeding.

We review *de novo* a court’s decision to grant a motion to dismiss, as well as questions of statutory interpretation. *Dunham v. Univ. of Md. Med. Ctr.*, 237 Md. App. 628, 645 (2018).

To be sure, a Certificate is a condition precedent to prosecuting a claim against a health care provider in Maryland:

[A] plaintiff alleging medical malpractice must file a claim with the HCADRO. CJ § 3-2A-04(a)(1)(i). Within 90 days after filing such a claim, the plaintiff must “file a certificate of a qualified expert . . . attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury[.]” CJ § 3-2A-04(b)(1)(i). “[A] report of the attesting expert” must be attached to the certificate. CJ § 3-2A-04(b)(3)(i). After filing the certificate, the plaintiff may waive arbitration and pursue his claim in the circuit court. CJ § 3-2A-06B(b)(1). If a plaintiff fails to file the certificate before filing suit in the circuit court, the action must be dismissed without prejudice.

Retina Grp. of Wash., P.C. v. Crosetto, 237 Md. App. 150, 165–66 (2018) (citations omitted) (alterations in original). A plaintiff also can waive arbitration and file suit in the circuit court after filing a Certificate. CJ § 3-2A-06(b)(1). Whether in the HCADRO or in court, though, the claim “shall be dismissed, without prejudice,” if a timely Certificate is not filed by the claimant. CJ § 3-2A-04(b)(1)(i); *accord D’Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, 645 (2004), *cert. denied*, 384 Md. 158 (2004) (“It is so important that, if the certificate requirement is not followed, a circuit court action will be dismissed, *sua sponte*.”).

There is no dispute that Ms. Mahon had filed two Certificates in the HCADRO at or before the time she filed her Election to Waive Arbitration. On the face of CJ § 3-2A-06B(b)(1), then, the prerequisites for waiving arbitration and proceeding to circuit court were met—and, it bears repeating, she availed herself of that option. Now, though, she asks us to treat the Certificates as though they didn’t exist because (a) they (indisputably) were late and (b) the HCADRO had not yet ruled on her third motion to extend time to file the certificates (which had only been filed the day before she filed the second Certificate and Waiver).

But although the Certificate “is a condition precedent to filing a medical malpractice case in circuit court, failure to satisfy that condition does not . . . divest the court of subject matter jurisdiction.” *Dunham*, 237 Md. App. at 646 (*quoting Crosetto*, 237 Md. App. at 165–66 n.9); *accord Kearney v. Berger*, 416 Md. 628, 660 n.13 (2010) (“We have . . . explicitly rejected the notion that failure to satisfy the [Act’s] procedures divests a trial court of subject matter jurisdiction.”). There is no difference between a Certificate that falls short because, for example, the expert is not from an appropriate specialty, CJ § 3-2A-02(c), or fails the Twenty-Five Percent Rule, CJ § 3-2A-04(b)(4)(ii), or the expert’s opinion isn’t sufficiently detailed, *Crosetto*, 237 Md. App. at 167, and a Certificate that fails because it wasn’t filed on time. The sufficiency of the Certificate isn’t a prerequisite for waiving arbitration, only the filing. And we are bolstered in this view by the fact that the statute directs either the HCADRO or the court to grant extensions of time to file Certificates when appropriate. *See* CJ § 3-2A-04(b)(1)(ii) (“In lieu of dismissing the claim

or action, the panel chairman *or the court* shall grant an extension of no more than 90 days for filing the certificate required by this paragraph”) (emphasis added).

The ministerial act of transferring the case from the HCADRO to the circuit court—an action the Director took at Ms. Mahon’s express request—did not prevent the circuit court from considering the appellees’ motion to dismiss. After two extensions, Ms. Mahon failed to file her Certificates by the deadline specified in the second extension. And for reasons that remain unclear, she waived arbitration before the HCADRO decided her third motion for extension of time. “The effect of this waiver was that the claims would not be heard in the HCADRO and would instead be heard in the Circuit Court.” *Kearney*, 416 Md. at 660. We hold that the circuit court had jurisdiction to grant Mercy’s motion to dismiss, and that its otherwise unchallenged decision stands.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED.
APPELLANT TO PAY COSTS.**