Circuit Court for Prince George's County
Case No. CAL15-18272

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1471

September Term, 2017

KEISHA TOUSSAINT

v.

DOCTORS COMMUNITY HOSPITAL

Wright,
Berger,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: January 15, 2019

This appeal arises from a medical malpractice action filed by appellant, Keisha Toussaint, for breaches of the standard of care at appellee, Doctors Community Hospital ("DCH"), that ultimately led to the death of her husband, Daniel Toussaint. On May 18, 2015, Ms. Toussaint filed a statement of claim in the Health Care Alternative Dispute Resolution Office ("HCADRO"). Her Certificate of Qualified Expert ("CQE") named "Amare Abebe, M.D.,[1] Mesfin Gebremichael, M.D., Enrique Samanez, M.D., Richard Lee, M.D., and [DCH] (by and through its agents, apparent agents, servants, and/or employees), and other physicians participating in Mr. Toussaint's care." Upon filing her statement of claim in the HCADRO, Ms. Toussaint waived arbitration and transferred the case to the Circuit Court for Prince George's County. On June 5, 2015, Ms. Toussaint filed her complaint, naming as defendants Drs. Abebe, Gebremichael, Samanez, and Lee, as well as DCH by and through its agents, which allegedly also included those named doctors.

In response to the complaint, DCH filed a motion for partial dismissal, seeking to dismiss the complaint to the extent of any claims against the unnamed agents, apparent agents, servants, and/or employees. Following a hearing on November 9, 2016, the circuit court granted DCH's partial motion to dismiss as it pertained to the unnamed health care providers.

Shortly before trial was to commence, Ms. Toussaint settled with Drs. Abebe, Gebremichael, and Lee, leaving Dr. Samanez and DCH as the only remaining defendants.

[1] Dr. Abebe is referred to as both "Amare Abebe" and "Abebe Amare" in different filings. In its brief, DCH refers to him as "Dr. Abebe." Therefore, he will be referred to as "Dr. Abebe" in this opinion.

On August 8, 2017, after a seven-day trial, the jury awarded Ms. Toussaint $2,459,304 in damages against Dr. Samanez. Additionally, because the jury found that Dr. Samanez was not an agent of DCH, a defense verdict was rendered in favor of DCH. Ms. Toussaint timely appealed. On December 20, 2017, after Ms. Toussaint filed her appeal, she settled with Dr. Samanez, and all claims against him were dismissed with prejudice. Thus, DCH is the sole appellee in this appeal.

In her brief, Ms. Toussaint presents two questions for our review, which we rephrase as follows:

1. Did the trial court err in granting DCH's partial motion to dismiss any claims against DCH's unnamed agents?

2. Did the trial court err by instructing the jury on agency law as it applies to independent contractors where the allegations in the case involved apparent agency?

At oral argument, Ms. Toussaint conceded that the second issue concerning the propriety of the jury instruction on agency law was moot in light of Dr. Samanez's dismissal from the case. Accordingly, we need only resolve the first question—whether the trial court erred in granting the motion to dismiss.

We conclude that the trial court did not err in granting the partial motion to dismiss DCH's unnamed agents, and affirm.

FACTS AND PROCEEDINGS

Because the underlying facts in this case are not in dispute, nor are they necessary to resolve the issue on appeal, we provide only a brief summary. On January 1, 2013, Mr. Toussaint presented to the emergency room at DCH, having experienced increased thirst,

increased urination, and weakness for three days. Mr. Toussaint received treatment from numerous health care providers, including Drs. Abebe, Gebremichael, Lee, and Samanez. Unfortunately, after several days of treatment at DCH, the doctors determined Mr. Toussaint was "brain dead with no reasonable chance of recovery." Mr. Toussaint was transferred to University of Maryland Medical Center where brain death was confirmed and he passed away. A jury would ultimately conclude that Dr. Samanez, in treating Mr. Toussaint, breached the standard of care, and that this breach caused Mr. Toussaint's death.

Following Mr. Toussaint's death, on May 18, 2015, Ms. Toussaint filed a statement of claim as well as a CQE in the HCARDO. Of particular relevance on appeal, the CQE named "Amare Abebe, M.D., Mesfin Gebremichael, M.D., Enrique Samanez, M.D., Richard Lee, M.D., and *[DCH] (by and through its agents, apparent agents, servants, and/or employees), and other physicians participating in Mr. Toussaint's care*." (Emphasis added). Ms. Toussaint then waived arbitration and the case was transferred to the Circuit Court for Prince George's County.

On June 5, 2015, Ms. Toussaint filed a Complaint and Election for Jury Trial. The complaint named Drs. Abebe, Gebremichael, Samanez, and Lee as defendants. Additionally, the complaint named DCH as a defendant through its "agents and/or apparent agents, servants, or employees"—including, but not limited to, Drs. Abebe, Gebremichael, Lee, and Samanez.

On July 27, 2015, DCH filed its answer, and on September 13, 2016, DCH filed a motion for partial dismissal of Ms. Toussaint's claims. In the partial motion to dismiss, DCH argued that Ms. Toussaint's CQE did not comply with the Healthcare Malpractice

Claims Act (the "Act"). Specifically, DCH contended that Ms. Toussaint could not maintain claims against DCH through unnamed agents never specifically identified in the CQE.[2]

The trial court held a hearing on November 9, 2016, to resolve all outstanding motions in the case. On November 21, the trial court issued its Opinion and Order of Court, which granted DCH's partial motion to dismiss the complaint as it pertained to DCH's unnamed agents. By granting the partial motion to dismiss, DCH remained a defendant based on a potential agency relationship with one or more of the named defendant doctors.

Trial was scheduled from July 31 through August 8, 2017. Prior to trial, Ms. Toussaint settled with, and consequently voluntarily dismissed Drs. Abebe, Gebremichael, and Lee as defendants. This left only Dr. Samanez individually, and DCH, as Dr. Samanez's alleged principal, as defendants. The jury ultimately found that Dr. Samanez breached the applicable standard of care, and awarded Ms. Toussaint $2,459,304 in damages. Regarding DCH, the jury found that Dr. Samanez was not DCH's apparent agent, and consequently did not find DCH liable. On December 20, 2017, Dr. Samanez settled with Ms. Toussaint, and she dismissed all claims against him with prejudice.

DISCUSSION

THE CQE MUST EXPLICITLY NAME HEALTH CARE PROFESSIONALS

[2] On October 28, 2016, Ms. Toussaint filed an amended complaint, which, among other things, specifically identified the unnamed agents. Ms. Toussaint did not, however, file a new CQE to include the identities of the unnamed agents. The trial court ultimately struck the amended complaint as untimely, and noted that Ms. Toussaint also failed to seek leave of court prior to its filing.

Because it governs the outcome of this appeal, we first provide a brief explanation of the Act, codified at Md. Code (2013 Repl. Vol.) §§ 3-2A-01 *et seq*. of the Courts and Judicial Proceedings Article ("CJP").

> The Act, in general, "governs procedures for all 'claims, suits, and actions . . . by a person against a health care provider for medical injury allegedly suffered by the person in which damages of more than the limit of the concurrent jurisdiction of the District Court are sought.'" To initiate a claim under the Act, "a person with a medical malpractice claim [must] first file that claim with the Director of the [HCADRO]." Within 90 days after filing a claim with the HCADRO, the plaintiff "must file a [CQE] . . . attesting to a defendant's departure from the relevant standards of care which proximately cause the plaintiff's injury."

Dunham v. Univ. of Md. Med. Ctr., 237 Md. App. 628, 645-46 (2018) (internal citations omitted).

Ms. Toussaint essentially argues that the trial court erred in granting DCH's partial motion to dismiss simply because her CQE generically referred to unnamed agents for DCH. In her brief, Ms. Toussaint asks:

> whether, in a [CQE], a plaintiff must name not only a hospital, but all health care providers employed by or working for the hospital who were allegedly negligent, or whether it is sufficient to identify, at the outset of the lawsuit, the care that is in question, name identifiable health care providers, and to then learn through the discovery process if individuals should be added to, or dropped from, the case.

Ms. Toussaint argues that the latter approach is acceptable, and that the trial court erred by preventing her from pursuing claims against DCH's unnamed agents. As we shall explain, however, Maryland law clearly requires the plaintiff to specifically name all allegedly negligent healthcare providers in the CQE.

This Court's recent opinion in *Dunham* is directly on point and therefore

controlling.[3] In *Dunham*, the plaintiffs filed a medical malpractice claim against several Maryland medical centers. *Id*. at 633. The plaintiffs filed a statement of claim with HCADRO, and filed a CQE that read, in pertinent part, that the medical centers, "through their agents, servants, and/or employees, breached the applicable standard of care[.]" *Id*. at 635-36. Notably, the CQE "did not identify the specific agents, servants, or employees whose care was at issue." *Id*. at 636. The medical centers moved to strike the certificate, and the circuit court ruled that the CQE was deficient for failing to identify the specific licensed healthcare providers who violated the standard of care. *Id*. at 639-40.

On appeal, the plaintiffs argued that "Maryland law does not require naming specific health care providers in a [CQE] for agency purposes when institutional defendants are properly named." *Id*. at 651. Our Court expressly rejected that contention, stating "Maryland appellate cases . . . have made clear that a [CQE] must 'mention explicitly the name of the licensed professional who allegedly breached the standard of care.'" *Id*. (quoting *Carroll v. Konits*, 400 Md. 167, 196 (2007)). Reviewing the plaintiffs' CQE, we noted,

> Here, the [CQE] filed with the statement of claim . . . stated that [the medical centers], acting through their agents, servants, or employees, breached the standard of care, but it did not specifically identify any individuals who breached the standard of care. Without more detail regarding the licensed professionals who allegedly breached the standard of care, thereby making [the medical centers] liable, the [CQE] did not contain the 'information necessary for evaluating whether the defendant breached the standard of care.'

[3] As noted during oral argument in this case, the parties did not have the benefit of *Dunham*'s guidance, as *Dunham* was decided after Ms. Toussaint noted her appeal.

Id. at 652 (quoting *Kearney v. Berger*, 416 Md. 628, 651 (2015)).

To the extent that Ms. Toussaint's CQE failed to specifically identify DCH's unnamed agents who allegedly breached the standard of care, any claim against DCH through those unnamed agents is barred under *Dunham*. Accordingly, the trial court did not err in granting DCH's partial motion to dismiss as it pertained to any unnamed agents in the CQE.[4]

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[4] Ms. Toussaint additionally argues that she should be permitted to identify the unnamed health care providers in her supplemental certificate of qualified expert pursuant to CJP § 3-2A-06D. Specifically, she relies on *Retina Grp. of Wash., P.C. v. Crosetto*, 237 Md. App. 150, 170-71 n.12 (2018), which provides:

> There may be situations in which, until discovery is undertaken, the plaintiff cannot determine the name of a health care provider agent whose conduct is implicated in causing the injury or death at issue. Until clarified in discovery, the health care provider agent can be identified by position or role. Similarly, there may be situations in which only through discovery does it become known that a particular health care provider agent was involved in the care at issue at all. Under the holding in *Debbas v. Nelson*, 389 Md. 364, 885 A.2d 802 (2005), the plaintiff's certifying expert's supplemental certificate, filed after the close of discovery, can attest to a breach of the standard of care by such an agent and, of course, should fully identify all health care provider agents alleged to have breached the standard of care.

Unlike in *Crosetto*, however, the trial court here expressly found that Ms. Toussaint possessed sufficient medical record documents which "contained information identifying non-named physicians that could have been used to further investigate their actual involvement in Mr. Toussaint's care." Ms. Toussaint did not challenge this fact-finding on appeal.