Circuit Court for Calvert County
Case No. 04-C-17-000214

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1703

September Term, 2017

GEORGE W. GORE, JR.

v.

CALVERT MEMORIAL HOSPITAL OF CALVERT COUNTY

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*Woodward,
Berger,
Sharer, J., Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: May 26, 2020

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

This appeal arises out of a medical malpractice action filed by George Gore, Jr., appellant, against Calvert Memorial Hospital of Calvert County, appellee. As required by the Maryland Health Care Malpractice Claims Act, Md. Code, Courts & Judicial Proceedings ("CJ") §§ 3-2A-01 *et seq.* (the "Act"), appellant initiated this case by filing a statement of claim with the Health Care Alternative Dispute Resolution Office ("HCADRO"). In his statement of claim, appellant asserted that he suffered injuries as a result of appellee's employees "negligently drop[ping]" appellant into a chair during the course of his recovery from back surgery. In accordance with the Act's requirements, appellant filed a Certificate of Qualified Expert and Report ("CQE"). The CQE was completed and signed by Eileen Snow, a registered nurse. Appellant then filed an election to waive arbitration and proceed in the Circuit Court for Calvert County, which the HCADRO granted.

In the circuit court, appellee filed a motion to dismiss based, in part, on the ground that the CQE was deficient because it was signed by a registered nurse, and not by a medical doctor. The trial court determined that the CQE was deficient, but granted appellant a ninety-day extension of time to file a new CQE. Appellee filed a motion for reconsideration, which the court granted and then dismissed appellant's case without prejudice. Appellant noted this timely appeal.

On appeal, appellant raises two questions for our review, which we have slightly rephrased:

1. Did the trial court err in ruling that appellant's CQE was invalid because his certifying expert was a registered nurse?

2. Did the trial court err in dismissing appellant's complaint, rather than granting a ninety-day extension?

For the reasons set forth below, we answer both questions in the negative and accordingly, affirm the judgment of the circuit court.

BACKGROUND

I. The Surgery

On May 8, 2014, appellant underwent back surgery to correct his back pain and pain that radiated into his lower extremity. The surgery consisted of a left-sided L4-L5 discectomy, an L3 laminectomy, and an L3-L4 discectomy. A "[d]iscectomy is the surgical removal of the whole, or part of, an intervertebral disc," and a "[l]aminectomy is the surgical removal of the back of the vertebra." After the surgery, appellant no longer felt any pain in his lower left extremity. On May 9, 2014, while appellant was recovering in the hospital, hospital employees "attempted to get [him] out of bed and into a chair located in his hospital room." Then, according to appellant, "while holding [appellant] up and assisting him to the chair, [appellee's employees] negligently dropped [him], whereupon he fell heavily into the chair and reinjured his back." Nursing notes from May 10, 2014, state that appellant complained of severe pain to his lower extremity on that date. Appellant was transferred to MedStar Georgetown University Hospital ("MedStar") on May 13, 2014, where he was diagnosed with a left-sided L4-L5 disc re-herniation, which required another surgery. On May 16, 2014, appellant underwent a second left-sided L4-L5 discectomy and exploration of an L3 laminectomy at MedStar.

II. The Negligence Case

On September 14, 2016, appellant filed a statement of claim against appellee with the HCADRO. In this statement of claim, appellant alleged that employees of appellee "were negligent, careless, and reckless" when they "fail[ed] to properly and safely assist [appellant] from his hospital bed to the chair." Appellant further alleged "[t]hat as a direct and proximate result of the negligent acts of" appellee's employees, appellant suffered damages consisting of permanent injuries, pain, mental anguish, additional medical care, lost wages, and lost earning capacity.

On December 14, 2016, appellant filed a motion seeking a ninety-day extension of time to file a CQE with the HCADRO. In an Order dated January 9, 2017, the HCADRO Director granted the motion. On January 18, 2017, appellant filed a CQE signed by Snow. In the CQE, Snow certified that she was qualified to sign the CQE because "[she is] a registered nurse licensed to practice nursing, and that [she] annually devote[s] less than twenty (20%) percent of [her] professional activity to matters that directly involve testifying in personal injury and medical malpractice cases." Snow stated in the CQE that she "reviewed the medical records relative to the treatment of [appellant]," and that "it is [her] opinion that there was a departure from the standard of care rendered to [appellant], and as a direct and proximate result thereof, the [appellant] sustained injuries, economic and non-economic damages as outlined in the Statement of Claim." On January 30, 2017, appellant filed an election to waive arbitration and proceed in the circuit court, which the HCADRO granted on the same day.

On March 6, 2017, appellant filed a complaint against appellee in the circuit court,

alleging negligence based on the same underlying facts as those set forth in the statement of claim. Appellee filed its answer to appellant's complaint on April 10, 2017. On June 15, 2017, appellee filed a motion to dismiss, arguing that the CQE signed by Snow was invalid because (1) CJ § 3-2A-04(b)(1)(i) requires that the CQE attest to the "departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury;" and (2) "Snow is not qualified as a registered nurse to testify as to proximate cause." Appellee contended that, because the CQE is a "condition precedent to the waiver of arbitration and transfer of a plaintiff's claims against a health care provider to a trial court" and such condition precedent had not been satisfied, appellee was entitled to "dismissal of all claims against it in this case." On July 3, 2017, appellant filed a response, arguing that a registered nurse is qualified to sign a CQE and that, even if the CQE was deficient, he was entitled to a ninety-day extension under CJ § 3-2A-04(b)(1)(ii). CJ § 3-2A-04(b)(1)(ii) mandates that the Panel Chairman or court grant an extension of no more than ninety days if the statute of limitations applicable to the claim has expired, and the failure to file the CQE was neither willful nor the result of gross negligence.

On August 21, 2017, the circuit court held a hearing on the motion to dismiss, after which the parties submitted memoranda on the issue of an extension of time under CJ § 3-2A-04(b)(1)(ii). On August 31, 2017, the circuit court issued an opinion and order denying appellee's motion to dismiss. In the opinion, the court determined that "Snow is not qualified to make a determination that a breach of the standard of care was the proximate cause of" appellee's injuries, and therefore, the appellant failed to file a valid CQE. The court, however, found that "[appellant]'s counsel's good faith, but mistaken belief that [ ]

Snow's opinion was valid, constitutes good cause to allow [appellant]'s counsel ninety (90) days to amend the certificate to offer the opinion of a qualified medical professional[.]" Therefore, the court "conclude[d] that [appellant] has demonstrated that good cause exists, and shall permit an extension of time for ninety (90) days to comply with the requirements of the [Act]."

On September 8, 2017, appellee filed a motion for reconsideration, arguing that "the Court of Appeals and Court of Special Appeals have been unwavering" that "a CQE that has been filed and found to be deficient results in a dismissal of the action without prejudice." Additionally, appellee contended that "based on the plain language of the statute, there is nothing that would permit this Court to grant a ninety (90) day extension when a CQE has been filed, but has been found to be deficient." On September 22, 2017, appellant filed an opposition to appellee's motion for reconsideration, arguing that the circuit court judge correctly found good cause, which "resulted in a legally permissible 90-day extension for [appellant] to file a [CQE] that complied with the Court's opinion and order."

On October 18, 2017, the circuit court issued an order granting appellee's motion for reconsideration and dismissing appellant's case without prejudice. In arriving at its ruling, the court reasoned that, "[b]ecause a proper certificate has not been filed, a condition precedent to advancing the instant case to this Court has not been met and dismissal is required." The court "conclude[d] that to permit [appellant] to advance without having filed a proper CQE would effectively defeat the purpose underlying the statute." Appellant noted his appeal to this Court on October 27, 2017. We will include additional facts as

necessary to the disposition of this appeal.

STANDARD OF REVIEW

"Our review of the [circuit] court's decision in this case involves the court's grant of [a] motion[ ] to dismiss, as well as questions of statutory interpretation, and therefore, our review is *de novo*." *Dunham v. Univ. of Md. Med. Ctr.*, 237 Md. App. 628, 645, *cert. denied*, 461 Md. 507 (2018).

DISCUSSION

I. Validity of the CQE

Appellant argues that the trial court erred by dismissing appellant's complaint on the ground that a registered nurse is not permitted to sign a CQE. Appellant contends that "the plain, unambiguous language of the Act makes clear that a registered nurse is permitted to sign a CQE." To support his argument, appellant asserts that only a "health care provider" can sign a CQE, and the definition of a "health care provider" under CJ § 3-2A-01(f)(1) includes registered nurses. According to appellant, the Act "places no other limitation on who may sign a CQE (such as 'only a doctor'), and does not prohibit a registered nurse from signing . . . ; it simply requires that a plaintiff file a certificate of qualified expert, signed by a health care provider, which includes a registered nurse." Additionally, appellant argues that the trial court did not sufficiently consider the plain language of the Act, and as a result, read limitations into the Act that do not exist. In particular, appellant complains about the court's "unnecessary consideration" of the meaning of the terms "nursing diagnosis" and "medical diagnosis" in determining "that a person who signs a CQE must be able to make a medical diagnosis." Appellant concludes

that the court erred, because "[t]he procedural requirement of a certificate of qualified expert is indisputably not a medical diagnosis, and need not be a medical diagnosis."

Furthermore, appellant contends that the filing of a CQE is a procedural requirement, and "the trial court did not address the CQE question as the procedural question it is." Instead, according to appellant, the court "actually addressed the evidentiary question of whether a nurse may offer a substantive causation opinion." Appellant asserts that the trial court's ruling was "premature, and should only have been raised, and ruled upon, had [appellant] attempted to prove his case through the causation testimony of [ ] Snow." Appellant concludes that the trial court's ruling was incorrect, because "[t]he question of whether that procedural hurdle has been satisfied is not one founded in an analysis of evidentiary admissibility . . . but on one founded in the plain language of the Act."

Appellee responds that under CJ § 3-2A-04(b)(1)(i), "[i]t is not enough for a qualified expert to only attest that the defendant departed from the standard of care. The qualified expert must also attest that the departures were the proximate cause of the alleged injury." According to appellee, Snow was not capable of addressing proximate cause and therefore could not sign the CQE. Appellee supports this argument by examining Md. Code, Health Occupations ("HO") § 8-101(f) and finding in that section that "the only type of diagnosis that a registered nurse is qualified to make is a 'nursing diagnosis,' which is defined as *a description* of the actual or potential, overt or covert health problems which registered nurses are licensed to treat." Conversely, appellee points out that under HO § 14-101(o), a physician "is allowed to perform a significantly broader scope of acts than a

registered nurse," including diagnosing medical problems. Appellee concludes that, because

> a registered nurse's ability to diagnose the condition of a patient is limited to providing a description of the health problems, as opposed to diagnosing a patient's medical problem as a physician is allowed to do, a registered nurse is not qualified to execute a [CQE] attesting to the proximate cause of [ ] [a]ppellant's alleged injury.

The Act requires that a claimant file a CQE with the Director of the HCADRO within ninety days of filing his or her statement of claim with the HCADRO. CJ § 3-2A-04(b)(1)(i). There are two provisions in the Act that detail the requirements of who may sign the CQE. First, CJ § 3-2A-02(c)(2)(ii) states:

> 1. In addition to any other qualifications, **a health care provider who attests in a certificate of a qualified expert** or testifies in relation to a proceeding before a panel or court concerning a defendant's compliance with or departure from standards of care:
>
> > A. Shall have had clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or a related field of health care in which the defendant provided care or treatment to the plaintiff, within 5 years of the date of the alleged act or omission giving rise to the cause of action; and
> >
> > B. Except as provided in subsubparagraph 2 of this subparagraph, if the defendant is board certified in a specialty, shall be board certified in the same or a related specialty as the defendant.

(emphasis added).

Second, CJ § 3-2A-04(b)(1)(i) states:

> [A] **claim or action . . . shall be dismissed, without prejudice, if the claimant or plaintiff fails to file a certificate of a qualified expert** with the Director **attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury**, within 90 days from the date of the complaint . . . .

(emphasis added).

In *Breslin v. Powell*, 421 Md. 266 (2011), the Court of Appeals discussed the relationship of the requirements in CJ §§ 3-2A-02(c)(2)(ii) and 3-2A-04(b)(1)(i). In that case, the claimant brought an action against a vascular surgeon, but filed a CQE signed by an anesthesiologist. *Id.* at 270. The circuit court determined that the CQE was deficient under CJ § 3-2A-02(c)(2)(ii) because an anesthesiologist could not attest to the standard of care provided by a vascular surgeon. *Id.* at 274–76. The circuit court therefore granted the defendant's motion for summary judgment. *Id.* The claimant noted a timely appeal, and in a reported opinion, this Court reversed, holding that CJ § 3-2A-02 and CJ § 3-2A-04 should be treated equally and that dismissal without prejudice is the appropriate disposition if a CQE fails to meet the requirements in either statute. *Id.* at 276. After the Court of Appeals granted the defendant's petition for certiorari, it affirmed our decision. *Id.* at 270. In holding that the requirement of dismissal without prejudice contained in CJ § 3-2A-04(b)(1)(i) also applies to CJ § 3-2A-02(c)(2)(ii), the Court stated:

> The use of the words "in addition to any other qualifications" in CJ § 3-2A-02(c)(2)(ii) shows clearly and unambiguously that the Legislature intended the qualifications in CJ § 3-2A-02 and CJ § 3-2A-04 to be read together. **The various qualifications for attesting experts, in both CJ § 3-2A-02 and CJ § 3-2A-04, are all necessary in order to have a proper Certificate.** Therefore, because the two provisions act in tandem, filing a Certificate of an unqualified expert, in contravention of CJ § 3-2A-02, mandates dismissal without prejudice of the claim or action, as provided in CJ § 3-2A-04.

Id. at 290 (emphasis added) (footnote omitted).

There is no dispute that Snow is a "health care provider" under CJ § 3-2A-01(f)(1) and is qualified to attest to appellee's breach of the standard of care for nurses. The issue

is whether a registered nurse is a "qualified expert" who can attest "that the departure from standards of care is the proximate cause of the alleged injury" as required by CJ § 3-2A-04(b)(1)(i). Contrary to appellant's argument, the language of the statute is ambiguous as to whether a registered nurse can opine as to proximate cause in a CQE, because as appellant points out, a registered nurse is a health care provider who can sign a CQE as a qualified expert under CJ § 3-2A-02(c)(2)(ii), but as appellee argues, the "qualified expert" must be able to attest to whether the departure from the standard of care was the proximate cause of the alleged injury under CJ § 3-2A-04(b)(1)(i). We therefore "look for other clues—*e.g.*, the construction of the statute, the relation of the statute to other laws in a legislative scheme, the legislative history, and the general purpose and intent of the statute." *Id.* at 287.

Md. Rule 5-702 governs admissible expert testimony in trials. It states:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) **whether the witness is qualified as an expert by knowledge, skill, experience, training, or education**, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

(Emphasis added).

HO § 14-101(m) defines "physician" as "an individual who practices medicine." The practice of medicine is defined in HO § 14-101(o):

> (1) **"Practice medicine" means to engage, with or without compensation, in medical:**
>
> (i) **Diagnosis**;

(ii) Healing;

(iii) Treatment; or

(iv) Surgery.

(2) **"Practice medicine" includes doing, undertaking, professing to do, and attempting any of the following:**

(i) **Diagnosing**, healing, treating, preventing, prescribing for, or removing **any physical, mental, or emotional ailment** or supposed ailment of an individual:

1. By physical, mental, emotional, or other process that is exercised or invoked by the practitioner, the patient, or both; or

2. By appliance, test, drug, operation, or treatment;

(ii) Ending of a human pregnancy; and

(iii) Performing acupuncture as provided under § 14-504 of this title.

(Emphasis added).

The term "medical diagnosis" is not defined in the Act or regulations. According to Black's Law Dictionary, "diagnosis" means "[t]he determination of a medical condition (such as a disease) by physical examination or by study of its symptoms." (11th ed. 2019). Merriam Webster's Dictionary includes in its definition of "diagnosis" the "investigation or analysis of the cause or nature of a condition, situation, or problem" and "a statement or conclusion from such an analysis." Diagnosis, Merriam-Webster's Dictionary, www.merriam-webster.com/dictionary/diagnosis. Thus, using the plain meaning of the term "diagnosis," we conclude that "medical diagnosis", as that term is used in the

definition of "practice medicine" under HO § 14-101(o), means the determination of a medical condition, as well as the cause or nature of such condition.

By contrast, under HO § 8-101(o)(1), "practice registered nursing" means

> **the performance of acts requiring substantial specialized knowledge, judgment, and skill based on the biological, physiological, behavioral, or sociological sciences as the basis for** assessment, **nursing diagnosis**, planning, implementation, and evaluation of the practice of nursing in order to:
>
> (i) Maintain health;
>
> (ii) Prevent illness; or
>
> (iii) Care for or rehabilitate the ill, injured, or infirm.

(Emphasis added). "Nursing diagnosis" is defined as "*a description* of the actual or potential, overt or covert health problems which registered nurses are licensed to treat." COMAR 10.27.09.01.B(16) (emphasis added).

By using the term "medical diagnosis" in its definition of "practice medicine" and "nursing diagnosis" in its definition of "practice registered nursing," the General Assembly clearly indicated that registered nurses in Maryland are not permitted to make a medical diagnosis; they are permitted to only describe a health problem that they are licensed to treat. Moreover, a registered nurse cannot provide expert medical causation testimony, because the expert's opinion as to whether the tortfeasor's actions caused the medical condition necessarily involves a medical diagnosis of said condition. *See Frausto v. Yakima HMA, LLC*, 188 Wash.2d 227, 229 (2017) ("The ability to independently diagnose and prescribe treatment for a particular malady is strong evidence that the expert might be qualified to discuss the cause of that same malady."); *State v. One Marlin Rifle, 30/30, 30*

AS, Serial No. 12027068, 319 N.J. Super. 359, 369 (App. Div. 1999) (holding that, because New Jersey law did not allow a nurse to make a medical diagnosis, "opinion testimony regarding the specific identity and cause of [a patient's] mental condition would clearly have constituted a medical diagnosis" and was therefore inadmissible); *Richardson v. Methodist Hosp. of Hattiesburg, Inc.*, 807 So.2d 1244, 1248 (Miss. 2002) (holding that a nurse "lack[ed] the requisite education and experience as an expert to testify concerning the causal link between [the patient's] death and the alleged deviations in nursing care"); *Kent v. Pioneer Valley Hosp.*, 930 P.2d 904, 907 (Utah Ct. App. 1997) (holding that a nurse's "affidavit [did] not provide the requisite foundation to qualify her as an expert capable of testifying as to the proximate cause of plaintiff's alleged nerve damage").

As previously stated, CJ § 3-2A-04(b)(1)(i) mandates that the CQE attest "that the departure from standards of care is the proximate cause of the alleged injury." Because registered nurses cannot testify as to medical causation, it follows that they cannot sign a CQE as a qualified expert. Although no Maryland case has arrived at this conclusion, we find support from *Esquivel v. El Paso Healthcare Sys., Ltd.*, 225 S.W.3d 83, 90 (Tex. App. 2005). In *Esquivel*, the Texas Court of Appeals addressed the issue of whether a nurse can sign a preliminary expert report. *Id.* at 88. Similar to Maryland, the Texas statute at the time required that "plaintiffs must, within 180 days of filing their claim, provide each defendant physician and health-care provider an expert report with the expert's *curriculum vitae* or they must voluntarily nonsuit the action." *Id.* The statute also mandated that the expert report contain

> a fair summary of the expert's opinions as of the date of the report regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed.

Tex. Rev. Civ. Stat. Ann. art. 4590i, § 13.01(r)(6), *repealed by* Acts 2003, 78th Leg., ch. 204, § 10.09.[1]

The plaintiffs in *Esquivel* had Dr. Mary Helen M. Castillo, a registered nurse and doctor of education, sign an expert report stating that the defendant hospitals "failed to use proper care to assure that [the patient] received the basic nursing care she needed and both nursing staffs failed to observe and document skin integrity and breakdown of tissue which contributed to skin deterioration and formation of decubitus ulcers." *Id.* at 86–87. The defendant hospitals moved to dismiss the case because Dr. Castillo "was not qualified to render a medical diagnosis, and therefore, she was not qualified to render an expert opinion as to the cause of Stage IV decubitus ulcers." *Id.* at 87. The trial court granted the motions to dismiss. *Id.* The plaintiffs appealed, and the Texas Court of Appeals noted that as a nursing expert, Dr. Castillo "could testify regarding the nursing standard of care and how that standard was breached," because that was within her experience and training. *Id.* at

[1] The requirements of the expert report are now codified in Tex. Civ. Prac. & Rem. Code Ann. § 74.351. Under § 74.351(r)(5)(C), an expert means

> with respect to a person giving opinion testimony about the causal relationship between the injury, harm, or damages claimed and the alleged departure from the applicable standard of care in any health care liability claim, **a physician** who is otherwise qualified to render opinions on such causal relationship under the Texas Rules of Evidence[.]

(Emphasis added).

90. The Court, however, held that nurses are "prohibited from making a medical diagnosis or prescribing corrective or therapeutic treatment" because the relevant statute "does not include acts of medical diagnosis or prescribing therapeutic or corrective measures." *Id.* Therefore, the Court held that the trial court did not abuse its discretion in determining that Dr. Castillo was not qualified to provide an expert opinion on causation in the expert report. *Id.* at 91.

Nonetheless, appellant argues that, because the filing of a CQE is a procedural requirement, the evidentiary question of whether a nurse may offer a substantive causation opinion is irrelevant to the ability of a registered nurse to sign a CQE. Appellant's argument was rejected by the Court of Appeals in *Breslin* when the Court upheld the trial court's determination that an anesthesiologist could not attest to the standard of care of a vascular surgeon and the alleged breach thereof in a CQE. 421 Md. at 274, 299. The Court stated that "[t]he various qualifications for attesting experts, in both CJ § 3-2A-02 and CJ § 3-2A-04, are all necessary in order to have a proper Certificate," *id.* at 290, and thus "*any deficiency* in the [CQE] requires the arbitration panel or court to dismiss the claim or action without prejudice." *Id.* at 299 (emphasis added). Thus, because Snow, as a registered nurse, could not provide an opinion as to the proximate cause of appellant's alleged injury, a CQE signed by her as a qualified expert constitutes a deficiency in the CQE.

Finally, "the General Assembly enacted [the Act] for purposes of weeding out non-meritorious claims and to reduce the costs of litigation." *Walzer v. Osborne*, 395 Md. 563, 582 (2006). In our view, to adopt appellant's argument that a registered nurse can sign a CQE simply because a registered nurse is a "health care provider" and a health care

provider can sign a CQE would defeat the purposes of the Act. If registered nurses were able to sign CQEs, which would require an attestation of medical causation, they would be providing an opinion as a qualified expert that is outside the scope of the practice of registered nursing, which does not allow registered nurses to make medical diagnoses. *See* HO § 8-101(o) & § 14-101(o). As a result, CQEs could be filed where there is no competent evidence of medical causation, thus allowing non-meritorious medical malpractice claims to be prosecuted.

In sum, as a health care provider licensed to practice registered nursing, a registered nurse is qualified to opine on the standard of care for registered nurses and any alleged breach thereof. Under Maryland's statutory scheme, however, a registered nurse cannot make a "medical diagnosis," and thus cannot determine a medical condition, nor the cause of such condition. *See* HO § 14-101(o) & § 8-101(o); COMAR 10.27.09.01.B(16). Because CJ § 3-2A-04(b)(1)(i) requires a CQE to attest, among other things, "that the departure from standards of care is the proximate cause of the alleged injury," we hold that a registered nurse cannot sign a CQE. Accordingly, the trial court did not err by ruling that the CQE signed by Snow, a registered nurse, was invalid.

II. Statutory Extensions

Both parties agree that there are three provisions in the Act that allow a claimant to receive an extension of time to file a proper CQE. First, under § 3-2A-04(b)(1)(ii):

> In lieu of dismissing the clam 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, if:

> 1. The limitations period applicable to the claim or action has expired; and
>
> 2. The failure to file the certificate was neither willful nor the result of gross negligence.

Second, under § 3-2A-04(b)(5): "An extension of the time allowed for filing a certificate of a qualified expert under this subsection shall be granted for good cause shown." Finally, under § 3-2A-05(j): "[T]he Director or the panel chairman, for good cause shown, may lengthen or shorten the time limitations prescribed . . . [for filing a CQE]."

In his opening brief, appellant raises and argues only the issue of whether the trial court erred by dismissing his complaint "without granting a mandatory 90-day extension" under CJ § 3-2A-04(b)(1)(ii).

A. Extension Under CJ § 3-2A-04(b)(1)(ii)

Appellant argues that "[t]he plain, unambiguous language of [CJ] § 3-2A-04(b)(1)(ii) makes clear that the trial court was required to grant [appellant] a 90-day extension to file a valid CQE." According to appellant, the trial court erred because appellant had satisfied the three requirements of CJ § 3-2A-04(b)(1)(ii), namely, (1) appellant filed his statement of claim with the HCADRO before the statute of limitations ran; (2) the statute of limitations passed at the time the court dismissed the case; and (3) appellant did not fail to file the certificate as a result of willful or gross negligence. Appellant also contends that the legislative intent of CJ § 3-2A-04(b)(1)(ii) shows that the 90-day extension was enacted specifically to prevent a defendant from "sandbagging" a claimant, which is what occurred in the instant case.

Appellee responds that the circuit court did not have the ability to grant appellant an extension once it found the CQE deficient, and "[t]he deficiency could only be cured by dismissing the action without prejudice, as the circuit court did[.]" Furthermore, appellee contends that, even if the court could have granted appellant an extension to cure the deficient CQE, appellant was not entitled to an extension under CJ § 3-2A-04(b)(1)(ii). That statute, according to appellee, only provides a claimant with an automatic 90-day extension to file a CQE, *i.e.*, 180 days from the date of filing of the statement of claim, when the statute of limitations has run within 90 days of the date of filing of the claim. Appellee contends that appellant filed the CQE 126 days after the claim was filed, which was within the statute of limitations. Appellee concludes that, "because the statute of limitations had not run within ninety (90) days following [a]ppellant's filing of his Statement of Claim," CJ § 3-2A-04(b)(1)(ii) does not apply.

In *McCready Memorial Hospital v. Hauser*, 330 Md. 497 (1993), the Court of Appeals interpreted CJ § 3-2A-04(b)(1)(ii) for the first time. In that case, the claimants filed a malpractice claim with the Health Claims Arbitration Office (now HCADRO) shortly before the statute of limitations expired. *Id.* at 501. The claimants, however, failed to file a CQE within ninety days of filing the claim, as required by CJ § 3-2A-04(b)(1)(i). *Id.* at 502. Each defendant then filed a motion to dismiss on the grounds that the claimants had failed to file a timely CQE. *Id.* The claimants responded to the motions to dismiss 111 days after the filing of their claim. *Id.* They did not file a CQE, but requested an extension under CJ § 3-2A-04(b)(1)(ii). *Id.* No action was taken on the motions until after a hearing, the Panel Chair dismissed the claimants' case 217 days after the filing of the

claim "for failure either to file an expert certification or request an extension within the initial 90-day period following the filing of their claim." *Id.* at 503. At this point, the claimants still had not filed a CQE. *Id.* The claimants then filed a notice rejecting the orders and findings of the Panel Chair and instituted an action in the Circuit Court for Wicomico County to nullify those orders and findings, asserting an identical malpractice claim. *Id.* The defendants filed motions to dismiss, which the circuit court granted. *Id.* In doing so, the court "essentially interpreted [CJ] § 3-2A-04(b)(1)(ii) as providing a mandatory and automatic 90-day extension." *Id.* The court ruled that the claimants "had already received their required 90-day extension because the Panel did not dismiss their claim until thirty-seven days after the total 180-day period provided for in the Statute." *Id.*

After the claimants appealed, this Court reversed and held that the 90-day extension does not begin to run until a claimant has received notice that the extension has been granted. *Id.* at 503–04. The defendants petitioned the Court of Appeals for a writ of certiorari, which the Court granted. *Id.* at 504. The Court of Appeals reversed our decision and held that

> under § 3-2A-04(b)(1)(ii) a bare request for an extension does not entitle a claimant to a 90-day additional filing period commencing whenever the claimant receives notice that an extension has been granted. **Rather, this 90-day extension commences, without the necessity of a request, upon the expiration of the initial 90-day period and is only available where the expert's certificate is filed within the 90-day extension period, *i.e.*, within 180 days of filing the initial complaint.**

Id. at 508 (emphasis added). The Court of Appeals further explained that the limitation of the extension to "no more than 90 days" indicated that

> the General Assembly intended to create a limited 90-day extension that commences immediately and automatically upon the expiration of the initial 90-day period. **The reason for the time limit is obvious—for subparagraph (b)(1)(ii) claimants, the statute of limitations has run and the claimants have already had a considerable period of time to prepare their claims.**

Id. at 511 (emphasis added).

In a subsequent decision, *Dunham v. University of Maryland Medical Center*, 237 Md. App. at 634, this Court considered whether the claimants were entitled to an extension under § 3-2A-04(b)(1)(ii). The claimants in *Dunham* filed with the HCADRO a statement of claim on October 14, 2016, and a CQE on November 16, 2016. *Id.* at 635. The claimants then waived arbitration, and the HCADRO issued an order for transfer to the circuit court. *Id.* at 635–37. On February 2, 2017, the defendants filed a motion to dismiss, in which they argued that the CQE was insufficient because it failed to identify by name or specialty any licensed health care provider who was alleged to have breached the standard of care. *Id*. at 637–38. The statute of limitations expired on February 6, 2017, and on February 17, 2017, the claimants responded to the motion to dismiss by, among other things, requesting a 90-day extension under CJ § 3-2A-04(b)(1)(ii). *Id.* at 639 n.5. The circuit court held a hearing on March 8, 2017, and granted the motion to dismiss. *Id.* at 639–40. The claimants appealed to this Court, and after examining the language of the statute and pertinent case law, we held:

> The conditions that must exist for the mandatory extension are: (1) the limitations period has expired; (2) there has been no assertion by the defense, and finding by the court, that the failure to file the requisite certificate was grossly negligent or willful; and (3) no more than 180 days have passed since the claim was filed.

Id. at 657. We further held that this mandatory extension applied to the claimants' insufficient CQE because

> there is no dispute that the limitations period had expired, and there was no allegation before the court in this case that the failure to file the requisite certificate was grossly negligent or willful. And, as discussed *infra*, the request for an extension was made within 180 days of the filing of the claim.

Id. at 658–59.

Finally, we cited to *McCready* for the proposition that "the 90-day extension available under CJ[ ] § 3-2A-04(b)(1)(ii) permits an extension for filing a proper certificate only up to 180 days from the date the claimant filed the claim with the HCADRO." *Id.* at 659. Because the 90-day extension to file a proper certificate was automatically available to the claimants and the 180-day deadline was April 12, 2017, 35 days after the trial court erroneously dismissed the case, we directed the trial court, on remand, to grant the claimants 35 days to file a proper certificate. *Id.* at 659–60.

Here, appellant filed his statement of claim with the HCADRO on September 14, 2016. Appellant requested an extension to file a CQE on December 14, 2016, which the HCADRO granted on January 9, 2017. On January 18, 2017, appellant filed what the trial court later determined to be (and we have upheld) an invalid CQE. The 180-day deadline to file a proper CQE was March 13, 2017. Unfortunately for appellant, the statute of limitations on his claim did not expire until May 9, 2017, 57 days after the end of the 180-day period from the filing of his claim, and appellant did not request a 90-day extension under CJ § 3-2A-04(b)(1)(ii) until July 3, 2017.

From the above facts, it is clear that appellant is not entitled to a 90-day extension of time to file a new CQE under CJ § 3-2A-04(b)(1)(ii) for two reasons. First, the *McCready* Court held that the 90-day extension "commences immediately and automatically upon the expiration of the initial 90-day period," 330 Md. at 511, and thus a proper CQE must be filed "within the 90-day extension period, *i.e.*, within 180 days of filing the initial complaint." *Id.* at 508. Here, appellant did not file a proper CQE on or before March 13, 2017, which was 180 days from the filing of his claim. Second, CJ § 3-2A-04(b)(1)(ii) requires the statute of limitations to expire within 180 days of the filing of a statement of claim and prior to the request for an extension of time to file a new CQE. *See Dunham*, 237 Md. App. at 657. In the instant case, appellant did file his request for an extension to file a new CQE after the statute of limitations had expired, but limitations expired 237 days after the filing of appellant's claim. Therefore, because appellant was not entitled to a mandatory 90-day extension to file a proper CQE under CJ § 3-2A-04(b)(1)(ii), we hold that the trial court did not err by dismissing appellant's complaint without prejudice.

In his reply brief, however, appellant argues that the holding in *McCready* is no longer valid because of the 2004 amendments to CJ § 3-2A-04(b)(1)(ii). Appellant notes that the prior version of the statute "did not include the terms 'court' or 'action,'" which were added by the amendments. Appellant reasons that in *McCready* the Court of Appeals

> did not consider what "extension" might mean if courts also had the ability to grant the 90-day statute of limitations extension, . . . Had such an analysis been undertaken, the *McCready* court should have ruled, as this Court should, that the extension was also available – in fact required – after 180 days.

Contrary to appellant's argument that the 2004 amendments overruled *McCready*, we indicated in *Dunham* that the amendments did not affect our analysis. In *Dunham*, we specifically noted these amendments and explained that "the General Assembly amended the statute to authorize 'the court' to approve the 90-day extension." 237 Md. App. at 655. We then provided a detailed analysis of *McCready* and applied its holding to the facts in *Dunham*. *Id.* at 656–58. Therefore, we hold that *McCready* is still good law, and thus, regardless of whether the panel chairman or the court grants a 90-day extension under CJ § 3-2A-04(b)(1)(ii), the 90-day period "commences immediately and automatically upon the expiration of the initial 90-day period." *McCready*, 330 Md. at 511.

B. Extension Under CJ § 3-2A-04(b)(5)

Under § 3-2A-04(b)(5), "[a]n extension of the time allowed for filing a certificate of a qualified expert under this subsection shall be granted for good cause shown." As previously stated in the Background section, the trial court determined that appellant did not file a valid CQE, because Snow, as a registered nurse, was not qualified to opine that a breach of the standard of care was the proximate cause of appellant's injuries. Instead of dismissing appellant's complaint, however, the court found that appellant had demonstrated that "good cause" existed under CJ § 3-2A-04(b)(5) to allow a 90-day extension of time for appellant to file a new CQE. Appellee then filed a motion for reconsideration, arguing that there is no statutory basis to grant a 90-day extension of time to cure a deficient CQE. The court agreed with appellee, granted the motion for reconsideration, and dismissed the case without prejudice.

Notwithstanding the above rulings of the trial court, appellant did not raise or argue in his initial brief any issue regarding a "good cause" extension of time to file a CQE under CJ § 3-2A-04(b)(5).[2] This Court, and the Court of Appeals, have "consistently held that a question not presented or argued in an appellant's brief is waived or abandoned and is, therefore, not properly preserved for review." *Health Servs. Cost Review Comm'n v. Lutheran Hosp. of Md.*, 298 Md. 651, 664 (1984); *Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006) (stating that "it is necessary for the appellant to present *and argue* all points of appeal in his initial brief"); *Fed. Land Bank of Baltimore, Inc. v. Esham*, 43 Md. App. 446, 457 (1979) (same). Indeed, simply raising an issue is insufficient for appellate review. Failure of an appellant to provide supporting argument for a question presented will preclude consideration of that question by an appellate court. Md. Rule 8-504(a)(6) (stating that a party must present "argument in support of the party's position"); *Esham*, 43 Md. App. at 457–58 (stating that "where a party initially raised an issue but then failed to provide supporting argument, this Court has declined to consider the merits of the question so presented but not argued").

We note, however, that the instant case is unusual because, despite appellant's failure to raise any issue regarding a "good cause" extension of time under CJ § 3-2A-04(b)(5) in his initial brief, appellee did address that section in its brief, arguing that "[a]ppellant did not provide the trial court with good cause to grant an extension" to cure

[2] Appellant cites to CJ § 3-2A-04(b)(5) only one time in his initial brief: "The trial court then ruled that [appellant] was entitled to a 90-day 'good cause' extension, though based that decision on § 3-2A-04(b)(5)." (Footnote omitted).

his deficient CQE. Nevertheless, in his reply brief, appellant again failed to raise any issue regarding the trial court's finding of "good cause" for an extension of time under CJ § 3-2A-04(b)(5) and then reversing that decision by granting appellee's motion for reconsideration.[3] Appellant cites to CJ § 3-2A-04(b)(5) in his reply brief only as support for his argument that the trial court has the ability to grant a 90-day extension under CJ § 3-2A-04(b)(1)(ii) beyond 180 days after the filing of a claim with the HCADRO.

Therefore, under the circumstances of the instant case, we do not see any reason to deviate from our well-established rule that we will not consider any issue that is not raised and argued in an appellant's initial brief. Because appellant did not raise and argue in his initial brief any issue regarding the trial court's rulings on the "good cause" extension of time to file a CQE under CJ § 3-2A-04(b)(5), any such issue has been waived by appellant, and thus is not subject to review by this Court. *See Health Servs. Cost Review Comm'n*, 298 Md. at 664.

JUDGMENT OF THE CIRCUIT COURT FOR CALVERT COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[3] An appellant cannot raise and argue an issue for the first time in his or her reply brief. *Oak Crest Village, Inc. v. Murphy*, 379 Md. 229, 241 (2004) (stating that "[a]n appellant is required to articulate and adequately argue all issues the appellant desires the appellate court to consider in the appellant's initial brief"); *Chang v. Brethren Mut. Ins. Co.*, 168 Md. App. 534, 550 n.7 (2006) (stating that "[t]his section was not argued prior to the reply brief and thus is not properly before us").