UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1851

September Term, 2015

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SYLVIA B. LEWIS

v.

ST. THOMAS MORE NURSING HOME

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Meredith,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Zarnoch, J.

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Filed: November 3, 2016

* 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.

Following the death of her mother, Reverend Sylvia B. Lewis, appellant, filed a claim with the Health Care Alternative Dispute Resolution Office ("HCADRO") against St. Thomas More Skilled Nursing Facility ("St. Thomas More"). The claim was later dismissed after appellant failed to name the proper legal entity as the defendant. Appellant filed a motion for reconsideration that was subsequently denied. Appellant then filed a rejection of the award with HCADRO and a petition for judicial review with the Circuit Court for Prince George's County. The petition for judicial review was dismissed as untimely.

Appellant appealed, and now presents two issues for our review:

1. Whether the circuit court erred in dismissing appellant's Petition for Judicial Review in light of appellant's substantial compliance with the provisions of CJP § 3-2A-06.

2. Whether the HCADRO Panel Chairperson erred in dismissing appellant's Statement of Claim and failing to grant her leave to amend her Statement of Claim.

For the following reasons, we affirm the judgment of the circuit court dismissing appellant's petition. We do not address appellant's second issue.

**BACKGROUND**

On February 24, 2011, Mattie Byrd, a ninety-six year old woman, was admitted to St. Thomas More for wound care. Ms. Byrd already had a Foley Catheter in place at the time she was admitted to St. Thomas More. Ms. Byrd's daughter, appellant, regularly visited her mother at the nursing home. During a visit on May 13, 2011, appellant found Ms. Byrd to be in pain and alerted the staff. The staff administered pain medication, but

the pain persisted. Appellant insisted that Ms. Byrd be taken to a hospital, and she was taken to Washington Hospital Center ("WHC"). The doctors at WHC removed Ms. Byrd's Foley Catheter, which revealed a backup of urine. They then replaced her catheter and diagnosed her with a urinary tract infection. WHC continued to treat Ms. Byrd for another two weeks before discharging her. Four days after being released from WHC, Ms. Byrd died from Urosepsis.

On March 26, 2014, appellant filed a claim with HCADRO against St. Thomas More and its doctors. Appellant claimed that St. Thomas More violated state and federal law by not having a comprehensive care plan for her mother's Foley Catheter. On May 30, 2014, St. Thomas More filed a motion to dismiss for failing to sue the proper legal entity, arguing that the proper legal entity was Neiswanger Management Services, LLC, which managed St. Thomas More. On July 1, 2014, HCADRO granted the motion and dismissed the claim. Appellant filed a motion for reconsideration, arguing that she did not receive the motion to dismiss prior to her claim being dismissed. HCADRO vacated its order dismissing the case and allowed appellant time to file an opposition. On September 13, 2014, appellant filed her opposition to the motion to dismiss. On October 14, 2014, HCADRO denied the motion to dismiss.

On February 6, 2015, St. Thomas More filed a renewed motion to dismiss, reiterating its previous argument and adding that appellant had failed to correct the error. On February 21, 2015, appellant filed another opposition. On March 2, 2015, HCADRO granted the motion and dismissed appellant's claim. Appellant filed a motion for

reconsideration on March 16, 2015. The motion was denied on April 17, 2015. Fourteen days later, on May 1, 2015, appellant filed a Rejection of the Award with HCADRO. On May 13, 2015, appellant filed a Petition for Judicial Review in the Circuit Court for Prince George's County.

On May 27, 2015, St. Thomas More filed a motion to dismiss the petition for judicial review. St. Thomas More argued that appellant had failed to meet the filing requirements for such a petition. Appellant filed an opposition on June 12, 2015. On August 27, 2015, the Circuit Court for Prince George's County held a hearing, after which the court granted the motion to dismiss.

On September 11, 2015, appellant filed a motion for reconsideration. The court denied the motion on September 23, 2015. Appellant appealed the court's dismissal.

## STANDARD OF REVIEW

"[W]here an order involves an interpretation and application of Maryland constitutional, statutory or case law, our Court must determine whether the trial court's conclusions are 'legally correct' under a *de novo* standard of review." *Schisler v. State*, 394 Md. 519, 535 (2006).

## DISCUSSION

Section 3-2A-06 of the Courts and Judicial Proceedings Article sets forth the procedural requirements necessary to obtain judiciary review of a HCADRO award. Subsection (a) provides that:

> A party may reject an award or the assessment of costs under an award for any reason. A notice of rejection must be filed

> with the Director and the arbitration panel and served on the other parties or their counsel within 30 days after the award is served upon the rejecting party, or, **if a timely application for modification or correction has been filed within 10 days after a disposition of the application by the panel**, whichever is greater.

Md. Code (1973, 2013 Repl. Vol.), Courts and Judicial Proceedings Article ("CJP"), § 3-2A-06(a) (Emphasis added). Subsection (b) adds that this same time period for filing applies when the party rejecting the "award" files an action in court to nullify the award, and that "[f]ailure to file this action timely in court shall constitute a withdrawal of the notice of rejection." CJP § 3-2A-06(b). Therefore, when a party files a motion for reconsideration, as appellant in this case did, the party's petition for judicial review must be filed with the circuit court within ten days of the denial of that motion for reconsideration.

In the instant case, appellant's claim was dismissed by HCADRO on March 2, 2015. Appellant's motion for reconsideration was filed on March 16, 2015, and denied on April 17, 2015. Therefore, in accordance with the requirements of CJP § 3-2A-06(b), appellant had ten days from April 17, 2015 to file her petition for judicial review. Instead, appellant filed her petition for judicial review on May 13, 2015, twenty-six days after the disposition of her motion for reconsideration.

Appellant asserts that even though the motion was denied on April 17, 2015, the order was not mailed until April 21, 2015, and not received by her until April 23, 2015. Accordingly, appellant contends that it would be "unconscionable, and a denial of appellant's right of due process, to calculate the ten-day period from the date of the

order." Appellant argues that the deadline should instead be ten days from April 23, 2015, which would be May 3, 2015. Appellant did file her notice of rejection with HCADRO on May 1, 2015, which was within that timeframe. However, appellant did not file her petition for judicial review until May 13, 2015. On appeal, appellant argues that her late filing constituted "substantial compliance" with the provisions of CJP § 3-2A-06.

In *Tranen v. Aziz*, 304 Md. 605 (1985), the Court of Appeals recognized the importance of the two filing requirements in CJP § 3-2A-06. The Court stated:

> Submission of the malpractice dispute to arbitration does not in itself satisfy the condition precedent to court action; the litigants must follow the special statutory procedures prescribed by the Act. Both the notice of rejection provision ("notice of rejection *must* be filed" § 3-2A-06(a) (emphasis supplied)) as well as the action to nullify provision ("the party rejecting the award *shall* file an action in court to nullify the award" § 3-2A-06(b) (emphasis supplied)) are posed in imperative terms. More important, **the statutory context of these directives plainly shows that compliance with them is mandatory and that noncompliance mandates dismissal**.
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> The purpose of the legislative scheme is clear upon careful analysis. The notice of rejection serves as the final step in the arbitration procedure by which the award may be held non-binding and the claim held open for judicial resolution. The action to nullify, on the other hand, is the exclusive step by which the aggrieved party may initiate proceedings in court.

*Tranen*, 304 Md. at 612 (Emphasis added) (Citations omitted). In other words, "*strict* compliance with the statutory scheme was required." *Curry v. Hillcrest Clinic, Inc.*, 99 Md. App. 477, 489 (1994), *aff'd*, 337 Md. 412 (1995).

Appellant contends that this strict compliance standard has since eroded in recent cases, and that substantial compliance with the statute is sufficient. St. Thomas More does not dispute that the substantial compliance standard does exist, but it contends that this case is not an example of substantial compliance. We described this development in *Wimmer v. Richards*, stating that:

> Erosion of the strict compliance standard announced in *Tranen* began in *Mitcherling v. Rosselli*, 61 Md. App. 113, 484 A.2d 1060 (1984), *aff'd*, 304 Md. 363, 499 A.2d 476 (1985). In that case, the appellant-claimant failed to send a Notice of Rejection to each of the members of the arbitration panel in violation of § 3-2A-06(a). This Court affirmed the refusal by the circuit court to dismiss the appeal, holding that the claimant had "substantially complied" with the statutory provisions. *Mitcherling*, 61 Md. App. at 121, 484 A.2d 1060. We also noted that technical irregularities will not be permitted to deprive a party of an opportunity to assert his or her legal rights when the other party has not been prejudiced. *Mitcherling*, 61 Md. App. at 121, 484 A.2d 1060. The Court of Appeals held that filing the notice with the Director constituted literal compliance and thus expressly declined to reach the question of substantial compliance. *Mitcherling*, 304 Md. 363, 367, 499 A.2d 476 (1985).
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> That same year, this Court decided two more cases consistent with the "substantial compliance" standard. In the first case, *Osheroff v. Chestnut Lodge, Inc.*, 62 Md. App. 519, 490 A.2d 720, *cert. denied*, 304 Md. 163, 497 A.2d 1163 (1985), the claimant incorrectly filed a pleading in the circuit court entitled, "Action to Nullify HCA Award" instead of filing a "declaration" as required by Rule BY4. We held that, despite the deficiencies in the pleadings, the document filed "substantially constituted" a declaration within the meaning of the Rules and the Act. *Osheroff*, 62 Md. App. at 525, 490 A.2d 720.
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> In the second case, *Brothers v. Sinai*, 63 Md. App. 235, 492 A.2d 656 (1985), *aff'd sub nom*, *Cherry v. Brothers*, 306 Md. 84, 507 A.2d 613 (1986), we rejected a claim that filing copies of pleadings captioned for the HCAO in the circuit court warranted

> dismissal. Our decision was based on the fact that appellees were not prejudiced or misled by appellants' failure to comply fully with the statutory procedures. *Brothers v. Sinai*, 63 Md. App. at 238, 492 A.2d 656. The Court of Appeals, affirming our decision, held that the papers appellees filed fully complied with the prescribed statutory procedures, stating, "we need not address the role, if any, the prejudicial effect of noncompliance plays in this statutory scheme." *Cherry*, 306 Md. at 86-87, 507 A.2d 613.
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> In *Ott v. Kaiser-Georgetown Community Health Plan Inc.*, 309 Md. 641, 526 A.2d 46 (1987), the Court of Appeals resolved the uncertainty over substantial versus strict compliance and the role prejudice would play. In *Ott*, the claimant wished to reject an arbitration award in favor of a health care provider, and to invoke federal court jurisdiction. Instead of filing the complaint (or "declaration" as it is referred to in Rule BY4) in the same court where notice of the action to nullify was originally filed, a complaint was filed in federal district court. The claimant also filed a one-page pleading in the correct state circuit court, which stated that a complaint had been filed in federal court. The circuit court subsequently dismissed claimants' action for failure to comply with Rule BY4. *Ott*, 309 Md. at 644-45, 426 A.2d 46.
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> The Court of Appeals reversed despite a finding that the claimant did not fully comply with the Rules. Instead, the Court held that "*substantial compliance* with the Rules is sufficient if the purpose of the Rules is gratified." *Ott*, 309 Md. at 651, 526 A.2d 46 (emphasis added). The Court noted that all of the required documents had been served in timely fashion on the health care provider, and that the provider could not have been misled about the claimant's rejection of the award or his intent to pursue a malpractice action against it. *Ott*, 309 Md. at 652, 526 A.2d 46.

75 Md. App. 102, 109-11 (1988).

Appellant contends that like the cases cited in the *Wimmer* decision, she substantially complied with CJP § 3-2A-06. We are not persuaded. Those cases in which substantial compliance was found are clearly distinguishable from the instant case. In *Mitcherling*, although the appellant erred by not sending his notice of rejection to each

member of the arbitration panel, he did file the notice of rejection with the director. 61 Md. App. at 121. In *Osheroff*, the title of the pleading was incorrect, but filed on time. 62 Md. App. at 525. In *Brothers*, a pleading with an incorrect caption was deemed substantially compliant. 63 Md. App. at 238. In *Ott*, the appellant mistakenly filed in two different courts, but the health care provider was still served in a timely fashion. 309 Md. at 652. Unlike this instant case, all of those cases involved minor technical irregularities with pleadings that were otherwise sufficient and timely filed. There is no case in which the Court has found that filing a late petition constitutes "substantial compliance." As St. Thomas More has argued, "[t]here is no technical irregularity in the instant case because [appellant] failed to file both the Notice of Rejection and the Petition for Judicial Review within the statutorily required time frame. Simply stated, [appellant] failed to comply with the statute altogether."

The motion for reconsideration was denied on April 17, 2015. Appellant claims she was served with the denial on April 23, 2015. Appellant also claims that Maryland Rule 1-203(c) must be read into CJP § 3-2A-06 to provide her an extra three days to file the pleadings. Thus, under appellant's calculations, she needed to file both pleadings by May 6, 2015. We disagree with appellant's interpretation of the statute. We reject appellant's argument regarding service because it goes against the clear, plain language of the statute. CJP § 3-2A-06 clearly states that a party has "10 days after a disposition" of a motion for reconsideration to file the rejection of award and petition for judicial review. There is nothing in the language of the statute regarding the date of service, or

how service affects the filing deadlines. The motion was denied by the court on April 17, 2015; therefore, appellant had until April 27, 2015 to file. Furthermore, the three-day extension provided in Rule 1-203(c) is inapplicable because it only applies when a party needs to take some action *after service* is made by mail. As discussed *supra*, it is the "disposition" date that matters in claims of this type, not the date of service. Appellant filed her rejection of award with HCADRO on May 1, 2015, and her petition for judicial review with the circuit court on May 13, 2015. Therefore, appellant filed her rejection of award four days late and her petition for judicial review sixteen days late. Clearly, appellant failed to satisfy the express requirements of the statute.

Moreover, assuming *arguendo* that appellant's interpretation of the statute is correct, appellant's petition for judicial review would still be untimely. Even if appellant had until May 6, 2015 to file, she did not file the petition for judicial review within that timeframe. Instead, she filed her petition on May, 13, 2015, which would still be a week late. Additionally, the fact that she filed her notice of rejection on May 1, 2015 undercuts her substantial compliance argument because it clearly shows that she was aware of the disposition of the motion and was aware that she needed to file these pleadings. Nevertheless, despite being put on notice, she did not file her petition for judicial review for yet another twelve days. We also note that a petition for judicial review is not a substantial pleading. In the instant case, appellant's petition, in its entirety, read as follows:

> NOW COMES Petitioner Rev. Sylvia B. Lewis, claimant, Pro Se and Petitions this Honorable Court for Judicial Review of

> the April 17, 2015, Order of the Healthcare Alternative Resolution Office (Panel Chairman) Dissmal [sic] of the Claimant's Motion of Reconsideration to dismiss the Respondent's Renewed Motion to Dismiss Petitioner was a party to the proceedings below.

It is a one-line petition, and imposing a deadline of ten days for filing such a petition is not an overly burdensome request. Appellant wants this Court to hold that a late filing is substantial compliance simply by virtue of the fact that it was eventually filed. If we were to do so we would essentially be finding that the timing requirements of CJP § 3-2A-06 are meaningless. We decline to do so. Appellant failed to file her petition for judicial review in a timely fashion; accordingly, dismissal was appropriate.[1]

Appellant's petition for judicial review was properly dismissed by the circuit court; therefore, we need not address the issue of whether HCADRO erred in dismissing appellant's statement of claim.

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

[1] Appellant's assertion that the ten-day filing period is "unconscionable" and a violation of due process is essentially an argument that the statutory period is unfair. We reject this contention for the reasons stated above.