Circuit Court for Montgomery County
Case No. 415170-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 714

September Term, 2016

KEITH SMITH

v.

SURESH KHETAN, *et. al.*

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

JJ.

Opinion by Berger, J.

Filed: November 6, 2017

*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.

This appeal arises from an order by the Circuit Court for Montgomery County, which granted the motion to dismiss filed by appellees, Suresh Khetan, M.D., and his medical practice, Complete Family Care (hereinafter collectively referred to as "Dr. Khetan"). In granting Dr. Khetan's motion to dismiss, the circuit court determined that appellant, Keith Smith, had failed to comply with two conditions precedent to the filing of his complaint for medical malpractice against Dr. Khetan.

Mr. Smith, *pro se*, filed a timely notice of appeal, asking us to consider whether the circuit court abused its discretion in granting Dr. Khetan's motion to dismiss. Finding no error or abuse of discretion on the part of the circuit court, we shall affirm its order.

FACTS AND LEGAL PROCEEDINGS

On March 20, 2015, Mr. Smith, *pro se*, filed a statement of claim against Dr. Khetan and his medical practice in the Health Claims Alternative Dispute Resolution Office ("HCADRO"), alleging that Dr. Khetan committed medical malpractice when he misdiagnosed Mr. Smith's cardiovascular disease as acid reflux. Mr. Smith claimed that Dr. Khetan failed to consider Mr. Smith's stated extensive family history of heart disease and to refer him to a cardiologist instead of a gastroenterologist following his complaints of chest pain upon exertion, resulting in a March 20, 2012 heart attack that required a 15-day hospital stay and left him physically and mentally disabled.

On July 8, 2015, Dr. Khetan elected to waive arbitration, and HCADRO ordered the matter transferred to the Circuit Court for Montgomery County. Mr. Smith filed a complaint alleging medical malpractice against Dr. Khetan in the circuit court on February 22, 2016. In accounting for the delay between the transfer of the matter to the

circuit court and the filing of his complaint therein, Mr. Smith claimed that he did not receive the order of transfer until approximately February 15, 2016 and that he acted "as promptly as possible," given his mental disability, to meet "all deadlines in this matter."

Dr. Khetan moved to dismiss Mr. Smith's complaint, on the grounds that Mr. Smith had failed to: (1) file a certificate of a qualified expert attesting to Dr. Khetan's deviation from applicable standards of care within 90 days of filing his statement of claim in HCADRO, as required by Md. Code (1973, 2013 Repl. Vol.), §3-2A-04(b) of the Courts & Judicial Proceedings Article ("CJP");[1] and (2) file his complaint in the circuit court within

[1] CJP §3-2A-04(b)(1) provides:

> (b) *Filing and service of certificate of qualified expert*.— Unless the sole issue in the claim is lack of informed consent:
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> (1)(i)1. Except as provided in item (ii) of this paragraph, a claim or action filed after July 1, 1986, 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; and
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> 2. The claimant or plaintiff shall serve a copy of the certificate on all other parties to the claim or action or their attorneys of record in accordance with the Maryland Rules; and
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> (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, if:
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> 1. The limitations period applicable to the claim or action has expired; and
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> 2. The failure to file the certificate was neither willful nor the result of gross negligence.

60 days of Dr. Khetan's election to waive arbitration and transfer the matter to the circuit court from HCADRO, as required by CJP §3-2A-06B.[2] For the reasons asserted by Dr. Khetan in his motion, the circuit court dismissed Mr. Smith's complaint without a hearing.

DISCUSSION

Mr. Smith argues that the circuit court erred in dismissing his claim on the ground that he failed to timely file his certificate of a qualified expert, as HCADRO deemed the report he filed in June 2015 adequate to meet the requirement of a certificate of a qualified expert. Mr. Smith also avers that the circuit court abused its discretion in dismissing his claim on the ground that he did not file his complaint within 60 days of the transfer of his

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[2] CJP §3-2A-06B(f) provides:

> (f) *Filing of complaint; service; dismissal.*—(1) Within 60 days after the filing of an election to waive arbitration by any party, the plaintiff shall file a complaint and a copy of the election to waive arbitration in the appropriate circuit court or the United States District Court.
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> (2) After filing the complaint, the plaintiff shall serve a summons and a copy of the complaint upon all defendants or the attorney of record for all parties in the health claims arbitration proceeding.
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> (3) Failure to file a complaint within 60 days of filing the election to waive arbitration may constitute grounds for dismissal of the complaint upon:
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> (i) A motion by an adverse party; and
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> (ii) A finding of prejudice to the adverse party due to the delay in the filing of the complaint.

case from HCADRO to circuit court. Dismissal pursuant to CJP §3-2A-06B, he continues, is not mandatory, and the court failed to find prejudice to Dr. Khetan, which it was required to do before ordering a dismissal. Moreover, because he did not receive HCADRO's order of transfer until February 2016, the circuit court was permitted to accept -- and should have accepted -- the late filing of his complaint because his mental disability provided the court good cause to do so.

Standard of Review

We review *de novo* as questions of law both a circuit court's grant of a motion to dismiss and its interpretation of a statute. *Gomez v. Jackson Hewitt, Inc.*, 427 Md. 128, 142 (2012). Our task is "confined to determining whether the trial court was legally correct in its decision to dismiss." *Debbas v. Nelson*, 389 Md. 364, 372 (2005). In determining matters within the discretion of a circuit court, we decide only whether the court abused that discretion by rendering a decision that was arbitrary, unreasonable, based upon errors of law, or without reference to guiding rules and principles. *Bartlett v. Portfolio Recovery Assocs., LLC*, 438 Md. 255, 273 (2014).

Analysis

In *Wilcox v. Orellano*, 443 Md. 177, 184-86 (2015), the Court of Appeals provided a comprehensive explanation of Maryland's Health Care Malpractice Claims Act and its requirement that a claimant file a proper certificate of a qualified expert:

> The Health Care Malpractice Claims Act ("HCMCA"), codified at Maryland Code, Courts & Judicial Proceedings Article, ("CJ"), §3-2A-01 *et seq*., establishes 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." CJ §3-2A-02(a)(1). The HCMCA creates a mandatory arbitration system for all medical malpractice claims alleging damages over a certain limit in order to weed out non-meritorious claims and reduce the costs of litigation. *Walzer v. Osborne*, 395 Md. 563, 582, 911 A.2d 427 (2006).

Pertinent to this case, the HCMCA sets forth the process that an individual must follow as a prerequisite to bringing a civil action in court. The individual must first file a claim with the Health Care Alternative Dispute Resolution Office ("HCADRO"). CJ §3-2A-04(a)(1)(i). The claimant must then file, within 90 days of filing the claim, a certificate of a qualified expert with "a report of the attesting expert attached." CJ §3-2A-04(b)(1), (3).

The expert certificate and report must attest that the treatment in question departed from the standard of care and that the departure was the proximate cause of the claimant's alleged injury. CJ §3-2A-04(b)(1)(i). (No certificate or report need be filed if the sole issue is lack of informed consent. CJ §3-2A-04(b)). The expert report is an integral part of the certificate—the failure to attach an expert report is tantamount to filing no certificate at all. *Walzer*, 395 Md. at 578-79, 911 A.2d 427. Defending parties, if they contest liability, must then file their own expert certificate and report attesting to their compliance with the standard of care. CJ §3-2A-04(b)(2), (3). The expert certificate and report requirement is a mechanism to reduce the number of frivolous claims by requiring the parties to substantiate the merit of their claims and defenses early in the process. *See Carroll v. Konits,* 400 Md. 167, 199-201, 929 A.2d 19 (2007) (1986 amendment adding expert certificate requirement to HCMCA was "intended to curtail frivolous malpractice claims").

Once the claimant has filed an expert certificate and report, the claimant may either proceed with arbitration or, in the alternative, unilaterally waive arbitration and file a complaint in a circuit court. *See* CJ §3-2A-06B.

A circuit court is to dismiss a complaint without prejudice if the claimant fails to timely file an expert certificate

> and report. CJ §3-2A-04(b)(1)(i); *Walzer*, 395 Md. at 578-79, 911 A.2d 427. Although the statute mandates that the dismissal be without prejudice, a claimant may be barred from refiling if the statute of limitations has expired in the interim. To ameliorate the possibility that a claim dismissed without prejudice for failure to file a timely certificate might be barred by the concurrent running of the limitations period, the statute includes several provisions for enlarging the period of time for filing the expert certificate and report. Nevertheless, a failure to file both the certificate and report within the statutory period and any extension will result in dismissal of a complaint.

(Footnotes omitted).

The certificate of a qualified expert is an "indispensable step" in the arbitration process, such that arbitration cannot occur in the absence of the filing of a proper certificate. *D'Angelo v. St. Agnes Healthcare, Inc.*, 157 Md. App. 631, 645 (2004).[3] Because a claim cannot continue in circuit court without meeting all of the requirements for arbitration as set forth in CJP §3–2A–04, which include the filing of a certificate of a qualified expert, if a proper certificate has not been filed, the case should be dismissed without prejudice, *sua sponte*, in accordance with the HCMCA. *Id*. Failure to file a proper certificate is tantamount to not having filed a certificate at all. *Id*.

With regard to the contents of the certificate of a qualified expert, the Court of Appeals has explained that CJP §3–2A–04(b) provides requirements for both the certificate and the "qualified expert" attesting to the certificate, so as not to allow a claim or action to

[3] The Court of Appeals has held that "'the General Assembly intended for the certificate of qualified expert to consist of *both* the certificate and the attesting expert report.'" *Kearney v. Berger*, 416 Md. 628, 645 (2010) (quoting *Walzer v. Osborne*, 395 Md. 563, 579 (2006)) (emphasis added).

go forward with an unqualified expert. *Breslin v. Powell*, 421 Md. 266, 288–89, 299 (2011). That section provides, in pertinent part:

> (4) A health care provider who attests in a certificate of a qualified expert or who testifies in relation to a proceeding before an arbitration panel or a court concerning compliance with or departure from standards of care may not devote annually more than 20 percent of the expert's professional activities to activities that directly involve testimony in personal injury claims.
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> 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:
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> 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, or in the 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
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> 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.
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> (7) For purposes of the certification requirements of this subsection for any claim or action filed on or after July 1, 1989:
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> (i) A party may not serve as a party's expert; and
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> (ii) The certificate may not be signed by:
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> 1. A party;
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> 2. An employee or partner of a party; or

> 3. An employee or stockholder of any professional corporation of which the party is a stockholder.

Additional qualifications for the certificate are found in CJP §3–2A–02(c)(2)(ii), which provides that:

> 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, or in the 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.

The Court of Appeals made clear, in *Breslin*, 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. In other words, "[b]ecause the Certificate is vital, an action in circuit court (or federal court) will be dismissed without prejudice if *any* of the Certificate's material requirements are not met." *Id*. at 298 (emphasis in original). Mr. Smith's action suffers from several deficiencies in relation to the requirements of the certificate of a qualified expert.

Mr. Smith filed his statement of claim in HCADRO on March 20, 2015, three years to the day after he suffered the heart attack he claims was the result of Dr. Khetan's

malpractice. Pursuant to CJP §3-2A-04(b)(1), he was therefore required to file his certificate of a qualified expert with the Director of HCADRO no later than June 18, 2015.

Mr. Smith filed, on June 19, 2015, a report authored by Elena Tilly, M.D., in which Dr. Tilly offered her opinion, as Chief of Medicine at University of Maryland/Shore Health System, that Mr. Smith suffered an acute myocardial infarction on March 20, 2012 as "a direct result of Dr. Khetan's negligence" and that Dr. Khetan "failed to act according to the standard of care, in a patient complaining of epigastric discomfort, to rule out a cardiac cause of the patient's symptoms before proceeding with a gastrointestinal evaluation."[4]

The fact that the report was filed one day past the 90-day limit would not have been fatal to Mr. Smith's action,[5] had it met the certificate requirements of CJP §§3-2A-02 and

[4] The report Mr. Smith filed with HCADRO was electronically "signed" by Dr. Tilly. A hand-signed copy of the report was filed with HCADRO on June 22, 2015.

[5] Because the applicable statute of limitations expired within that 90-day time period -- *see* CJP §5-109 -- pursuant to CJP §3–2A–04(b)(1)(ii), Mr. Smith was entitled to a 90–day extension, without the necessity of a request, upon the expiration of the initial 90–day period, unless Dr. Khetan filed a motion to dismiss on the ground, and established, that Mr. Smith was not entitled to a subparagraph (b)(1)(ii) extension because Mr. Smith's initial failure to file an expert's certificate was either willful or a result of gross negligence. *Hauser*, 330 Md. at 512. The extension in lieu of dismissal is only available, however, "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. The 180 days expired on September 16, 2015. There is no evidence that Mr. Smith filed a proper certificate of qualified expert with the director of HCADRO by that date.

Mr. Smith was also permitted to request an indefinite extension to file his certificate of expert for "good cause," but there is no indication in the record that he made such a request, and that extension is conditioned upon a request and is not automatic.

3-2A-04. The report, however, did not meet the requirements, and therefore, cannot be considered a proper certificate of a qualified expert.

Although the report did assert that Dr. Khetan's treatment departed from the standard of care and that the departure was the proximate cause of Mr. Smith's alleged injury, it did not include statements that Dr. Tilly: (1) does not devote more than 20 percent of her professional activities annually to activities that directly involve testimony in personal injury claims; (2) is not a party, an employee or partner of a party, or an employee or stockholder of any professional corporation of which the party is a stockholder; (3) has clinical experience, provided consultation relating to clinical practice, or taught medicine in Dr. Khetan's specialty or a related field of health care, or in the field of health care in which Dr. Khetan provided care or treatment to Mr. Smith, within five years of the date of the alleged act or omission giving rise to the cause of action; and (4) if she is board certified, that she is board certified in the same or a related specialty as Dr. Khetan. Therefore, HCADRO was unable to determine whether Dr. Tilly was a qualified expert supporting a meritorious claim, and her report, standing alone, cannot be considered a properly filed certificate of a qualified expert.[6]

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[6] Mr. Smith's assertion, in his brief, that HCADRO deemed Dr. Tilly's report "adequate to meet the requirements of the Health Arbitration Board as a valid Certificate of Qualified Expert and was accepted as such by the Health Arbitration Board" has no support in the record. Although HCADRO did accept the report for filing as part of the record of the claim, there is no indication that it determined that the report was sufficient to meet the stringent requirements of a certificate of a qualified expert. *See Kearney*, 416 Md. at 664 ("The problem with this argument is that there is no evidence that the Director made any such representation when he accepted the certificate, nor did he have any responsibility to do so. Nothing in the HCMCA instructs the Director to evaluate the certificate, and Petitioners have presented nothing to suggest that the Director actually

Mr. Smith did file a certificate of a qualified expert that appears to meet all the requirements of the HCMCA in the circuit court on May 16, 2016, but that was eight months after the 180-day filing deadline. Therefore, even if it were acceptable to file the certificate in the circuit court rather than with the director of HCADRO, as required by the statute, the court's grant of Dr. Khetan's motion to dismiss on the ground that Mr. Smith failed timely to file the required certificate of a qualified expert would have been proper, as the report timely filed was deficient and the proper certificate was untimely.

The late filing of Mr. Smith's complaint in the circuit court also provided sufficient ground for the court's dismissal of his claim. CJP §3-2A-06B(f) requires that a plaintiff file a complaint, along with any party's election to waive arbitration, in the circuit court within 60 days after the filing of the election to waive arbitration. According to the statute, failure to file the complaint within that 60-day window "may" constitute grounds for dismissal of the complaint upon a motion by an adverse party and a finding of prejudice to the adverse party due to the delay in filing the complaint.

To be sure, the use of the word "may" in a statute "'is generally permissive rather than mandatory.'" *James B. Nutter & Co. v. Black*, 225 Md. App. 1, 15 n. 12 (2015) (quoting *Brodsky v. Brodsky*, 319 Md. 92, 98 (1990)), *cert. denied*, 446 Md. 220 (2016). Therefore, the circuit court was not required to dismiss Mr. Smith's claim for late filing of

represented to them that the certificate was sufficient. Petitioners could not have reasonably relied on a representation that the Director did not make.")

his complaint; instead, it had the option to do so, upon a motion by Dr. Khetan and a finding of prejudice to the doctor.

Mr. Smith contends that the trial court abused its discretion in dismissing his claim on the ground of late filing of his complaint because he did not timely receive the order transferring the matter to the circuit court and was presumably unaware of the start of the 60-day period within which he was required to file his complaint. Moreover, he continues, the circuit court should have made accommodations for his mental disability by permitting the late filing of his complaint. Finally, he claims that the court did not make the requisite finding of prejudice to Dr. Khetan before dismissing his complaint on that ground. None of his arguments is availing.

The record indicates that Dr. Khetan filed his election to waive arbitration on July 8, 2015.[7] Therefore, Mr. Smith's complaint was required to be filed by September 8, 2015.[8] He did not file his complaint until February 22, 2016, more than five months after it was due.

Mr. Smith offers, as an excuse for his late filing, the argument that he did not receive the order transferring the matter to the circuit court until February 2016. The applicable

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[7] The election of waiver of arbitration contained in the record extract does not contain a filing date stamped by HCADRO. It does, however, indicate a service date of July 8, 2015, and neither party, in his brief, disputes that the election of waiver was filed on that date. HCADRO's order of transfer based on the election of waiver was signed by the Director on July 15, 2015. Even were we to determine that the waiver of arbitration was filed as late as July 15, 2015, it would not change the outcome of our decision.

[8] Sixty days after July 8, 2015 was September 7, 2015, but because that date fell on a Sunday, the complaint would have been due on September 8, 2015, the next business day. *See* Maryland Rule 1-203(a).

statute, however, does not tie the timing of the filing of the complaint in the circuit court to the transfer order. Instead, it requires a plaintiff to file his complaint in the circuit court within 60 days of the filing of the election to waive arbitration, which, according to the certificate of service signed by an officer of the court, was mailed to Mr. Smith on July 8, 2015. *See* Md. Rule 1-323 (A certificate of service is *prima facie* proof of service). Mr. Smith makes no claim that he did not receive that document.

In addition, the filing of the election to waive arbitration would have been docketed by HCADRO, so a check of the docket entries would have revealed the fact and date of the filing to Mr. Smith. His alleged failure to receive the order of transfer provides no support for the late filing of his complaint.

Mr. Smith also claims that the circuit court should have made accommodations for his mental disability and permitted him to file his complaint late. First, there is no indication in the record that Mr. Smith requested that the court permit a late filing based on his alleged mental disability, and we are aware of no authority that requires a court to do so, *sua sponte*. Second, Mr. Smith appears to have had no problem, as a result of his disability, filing other documents in a timely manner, so his plea for accommodations in relation to the single document filed in an untimely manner is without merit.

As for Mr. Smith's argument that the court did not find prejudice to Dr. Khetan, as required by CJP §3-2A-06B(f)(3) before dismissing his claim, we agree with the doctor that the court was permitted to presume prejudice to him by the late filing of Mr. Smith's complaint. "'What amounts to 'prejudice,' such as will bar the right to assert a claim after the passage of time, depends upon the facts and circumstances of each case, but it is

generally held to be anything that places [the defendant] in a less favorable position.'" *Buxton v. Buxton*, 363 Md. 634, 646 (2001) (quoting *Parker v. Board of Elec. Sup.,* 230 Md. 126, 130–31 (1962)). And, a specific demonstration of prejudice is not required; "[p]rejudice from delay can exist that is not amenable to specific delineation." *Reed v. Cagan*, 128 Md. App. 641, 648 (1999).

In *Reed*, the issue centered on the circuit court's dismissal of the plaintiff's claim when he failed to serve one of the defendants for approximately two years following the filing of his complaint. *Id*. at 648-49. This Court affirmed the circuit court's dismissal after it found prejudice to the defendant in the suit that was not filed until three days before the expiration of the statute of limitations, with service not achieved until almost two years after that, on the ground that the claim was "stale." *Id*. at 649, 654. As we explained in *Warehime v. Dell*, 124 Md. App. 31, 49 (1998), "[m]any times, there is prejudice inherent in delaying a trial, because the memories and even the location of witnesses can become problematic when, as here, the years go by. Moreover, there is often an emotional toll on parties who are immersed in a pending lawsuit."

In this matter, Mr. Smith filed his claim with HCADRO on the last day before the expiration of the statute of limitations, and he did not file his complaint in the circuit court for an additional 11 months. Given the passage of time and the considerations discussed in *Warehime*, the circuit court did not abuse its discretion in inferring prejudice to Dr. Khetan in the late filing of Mr. Smith's complaint, nor did it abuse its discretion in

dismissing his claim on that ground, even in the absence of a specific finding of prejudice to Mr. Smith.[9]

ORDER OF DISMISSAL OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[9] The exercise of a court's discretion is presumed to be correct, and the court is presumed to know the law and perform its duties properly. In the absence of any indication from the record that the court misapplied the applicable legal principles or took inappropriate considerations into account, the presumption is sufficient for us to find no abuse of discretion, even if the court does not "'set out in intimate detail each and every step in [its] thought process.'" *Smith v. Johns Hopkins Cmty. Physicians, Inc.*, 209 Md. App. 406, 425–26 (2013) (quoting *Cobrand v. Adventist Healthcare,* 149 Md. App. 431, 445 (2003)).