

Circuit Court for Prince George's County  
Case No. CAL1805371

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2578

September Term, 2018

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HUBERT LEROY GALLION, JR.

v.

VILLA ROSA NURSING AND  
REHABILITATION, LLC

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Beachley,  
Gould,  
Adkins, Sally D.  
(Senior Judge, Specially Assigned),

JJ.

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Opinion by Adkins, Sally D., J.

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Filed: June 17, 2020

\*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.

The crux of this appeal is whether Appellant Hubert Gallion, Jr.’s delay in filing his malpractice complaint with the circuit court unduly prejudiced Appellee Villa Rosa Nursing and Rehabilitation Center, LLC. Under the Maryland Health Care Malpractice Claims Act (the “Act”), the “failure to file a complaint within 60 days of filing the election to waive arbitration may constitute grounds for dismissal upon . . . a finding of prejudice to the adverse party due to the delay in the filing of the complaint.” Gallion did not file his complaint in the Circuit Court for Prince George’s County until seven months after Villa Rosa waived arbitration, and the circuit court dismissed the claim.

### **FACTS AND PROCEDURAL HISTORY**

Gallion was admitted to Villa Rosa’s nursing facility on April 21, 2013, for rehabilitation after undergoing hip replacement surgery. He claims that by May 6 he had developed pressure ulcers on his right calf, both heels, and sacrum due to Villa Rosa’s negligence. Those ulcers became infected, and ultimately led to a below-the-knee amputation of his right leg.

In Maryland, those who wish to pursue a claim against a healthcare provider for a medical injury are first required to file their claim with the Health Care Alternative Dispute Resolution Office (“HCADRO” or the “Office”). Md. Code (1974, Repl. Vol. 2013), § 3-2A-04(a) of the Courts and Judicial Proceedings Article.<sup>1</sup> The Act envisions that, subject to waiver, settlement, abandonment, or dismissal, such claims will be submitted to

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<sup>1</sup> Unless otherwise indicated, all statutes referenced come from the Courts & Judicial Proceedings Article.

non-binding arbitration. *Salvagno v. Frew*, 388 Md. 605, 609 (2005). The purpose of this process is to weed out non-meritorious claims and reduce the costs of litigation. *Retina Group of Washington, P.C. v. Crosetto*, 237 Md. App. 150, 167 (2018). Once the action is initiated, the parties are required to file certain documents with HCADRO, namely a certificate of qualified expert and an attesting report. § 3-2A-04(b). These administrative filing requirements are a condition precedent to initiating suit in Maryland state courts. *See Lewis v. Waletzky*, 422 Md. 647, 650 (2011). Only after those documents are filed, can a party waive arbitration with the Office. Once arbitration is waived, the plaintiff has 60 days to file a complaint in court. § 3-2A-06B(f)(1).

Gallion was at Villa Rosa’s facility until June 4, 2013. He initiated this action just under three years later, on April 19, 2016, by submitting a statement of claim to HCADRO.<sup>2</sup> Both parties then submitted their required experts’ certificates and attesting reports. After Villa Rosa filed its expert’s report, it waived arbitration on July 5, 2017, by filing the arbitration waiver with HADCRO. That filing triggered the 60-day window in which Gallion was required to file his complaint in the circuit court. § 3-2A-06B(f)(1).

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<sup>2</sup> Gallion’s claim falls within the statute of limitations. *See* Md. Code (1974, Repl. Vol. 2013), § 5-109(a) of the Courts & Judicial Proceedings Article.

Gallion missed the September deadline, and did not file the complaint until five months later, on February 22, 2018.<sup>3</sup>

Villa Rosa moved to dismiss the complaint, arguing that the “delay in filing suit for alleged negligent acts committed nearly five years ago is inherently prejudicial.” A hearing on the motion was held, during which Villa Rosa asserted that, because 38 of the 48 health care providers involved with Gallion’s care have been “separated from employment with the defendant,” they were prejudiced by lacking potential witnesses.

The circuit court granted the motion and dismissed the complaint. Gallion’s timely appeal presents us with the following question:

Did the lower court’s decision to dismiss Mr. Gallion’s case without the statutorily-mandated finding of prejudice constitute reversible error?

## **DISCUSSION**

### **Time Frame For Measuring Delay**

Section 3-2A-06B(f)(3) provides that when arbitration is waived in a medical malpractice claim, the:

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<sup>3</sup> After Villa Rosa filed their arbitration waiver on July 5, HCADRO entered the Order to Transfer to the Circuit Court on July 13. Gallion’s counsel admits he missed the 60-day deadline because he mistakenly believed that the Order of Transfer effectively transferred the matter to the circuit court, much like removal of a case from state court to federal court operates.

Failure to file a complaint within 60 days of filing the election to waive arbitration may constitute grounds for dismissal of the complaint upon:

- (i) A motion by an adverse party; and
- (ii) A finding of prejudice to the adverse party due to the delay in the filing of the complaint.

We are asked to interpret the language “delay in the filing of the complaint,” and decide whether it refers to delay between the waiver of arbitration and the filing of the complaint, or delay between the act of alleged negligence and the filing of the complaint.

In the circuit court, Villa Rosa, claiming it had been prejudiced, moved to dismiss and urged the court to consider the “nearly five-year” period between the alleged negligent act and the filing of the complaint in circuit court. Gallion acknowledged that he filed the complaint five months after the September 5 deadline, but contended that that five-month delay was the only period the court should have considered.

The court accepted Villa Rosa’s time frame and considered the five-year delay between the act of negligence in addition to the five-month delay conceded by Gallion in deciding that Villa Rosa was prejudiced:

[I]n light of the fact that the alleged negligent act occurred nearly five years prior to the date the complaint was filed, this Court is persuaded that [Villa Rosa] has suffered or will suffer prejudice due to the delay in the filing pursuant to § 3-2A-06B(f)(3).

Statutory interpretation begins with the plain language of the statute, and we “read the statute as a whole to ensure that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless or nugatory.” *Fisher v. Eastern Correctional Inst.*, 425 Md. 699, 706 (2012). The statutory language, “failure to file a complaint *within 60*

*days of filing the election to waive arbitration*” establishes a triggering event that may constitute grounds for dismissal, contingent upon the two enumerated elements. The trial court decided that the second element—“a finding of prejudice . . . due to the delay in the filing of the complaint”—included a time **preceding** the triggering event.

Villa Rosa defends this decision, arguing that the court acted within its sound discretion in deciding what time frame to consider in measuring prejudice. To be sure, the decision as to whether prejudice existed was discretionary with the trial court, and an abuse of discretion occurs only “where no reasonable person would take the view adopted by the trial court, or when the court acts without reference to any guiding rules or principles.” *Cobrand v. Adventist Healthcare, Inc.*, 149 Md. App. 431, 437 (2003) (cleaned up). Yet in exercising its discretion, a trial court must correctly apply applicable legal rules and standards. *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 174 (2015). To be legally correct in this instance required that the trial court properly interpret § 3-2A-06B(f)(3), and we give the trial court no deference in its statutory interpretation. *Barnes v. Greater Baltimore Medical Center, Inc.*, 210 Md. App. 457, 471 (2013).

The problem with the circuit’s court reading of the statute is that it is flatly inconsistent with the General Assembly’s articulation of the triggering event—“delay in the filing of the complaint.” That phrase cannot reasonably be construed to include the period statutorily allowed for a plaintiff to file a cause of action under the applicable statute of limitations. We never talk about a plaintiff’s “delay” in filing a complaint, so long as he files within the applicable limitations period. The proper reading of the plain language,

to ensure that no clause is rendered nugatory or prefatory, is to understand § 3-2A-06B(f)(3)(ii)'s "delay" as any delay occurring after the "failure to file a complaint within 60 days of filing the election to waive arbitration." In other words, the statute contemplates a deadline for filing a complaint in court (60 days after the waiver of arbitration), so delay can only occur after that deadline. We shall therefore hold that the circuit court erred in considering a time period preceding that deadline.

### **Showing of Prejudice**

The record reveals that Villa Rosa presented two arguments to the circuit court supporting a finding of prejudice: that prejudice should be presumed from delay, and that it suffered actual prejudice. Neither is persuasive.

First, Villa Rosa asserts that there is an inherent prejudice in any delay, and therefore it is appropriate for the trial court to presume prejudice from delay. "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). But delay is not inherently prejudicial—a less favorable position should not be presumed simply due to delay and delay alone.

In *Buxton*, the Court of Appeals considered laches, a defense in equity against stale claims.<sup>4</sup> Laches is similar to prejudice from delay, in that it "bars a plaintiff's action if the plaintiff was negligent or lacked diligence in asserting his rights, causing prejudice or

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<sup>4</sup> Villa Rosa contends that this is a stale claim.

injury to the defendant.” *Id.* at 644. There, the Court stated that, “the passage of time, alone, does not constitute laches but is simply one of the many circumstances from which a determination of what constitutes an unreasonable and unjustifiable delay may be made.” *Id.* at 645 (cleaned up). As with laches, under § 3-2A-06B(f)(3)(ii), the passage of time alone does not constitute prejudice.

Villa Rosa relies on *Reed v. Cagan*, 128 Md. App. 641, 648 (1999), to argue that a specific demonstration of prejudice is not required because “[p]rejudice from delay can exist that is not amenable to specific delineation.” But in *Reed*, although the trial court did not identify the specifics of how the prejudice to appellee manifested itself, the actual prejudice was clear. There, Reed sued over twenty defendants alleging damages caused by exposure to lead-based paint at houses owned by the defendants. *Id.* at 644. Several defendants were served with process, and discovery proceeded with respect to those defendants. Unfortunately, one of the defendants (Cagan) was not served with process for more than two years, while the case progressed against the other defendants. The circuit court dismissed the complaint against Cagan for lack of jurisdiction. We affirmed and explicitly delineated how Cagan was prejudiced by the delay:

discovery had been conducted, including the deposition of [Reed] and others closely involved in [his] history; documents were exchanged; memories were refreshed, and recollections recorded. [Cagan] missed the opportunity to be present and participate when critical questions were asked of [Reed’s] family members regarding his personal history as it might relate to his alleged exposure to lead paint . . . .



*Id.* at 648. In sum, for a finding of prejudice, facts and circumstances demonstrating that the delay actually placed the defendant in a less favorable position must still be present.

Second, Villa Rosa asserts that it was actually prejudiced, but a review of the record reveals that Villa Rosa did not argue to the circuit court actual prejudice based on the five-month delay alone. In its memorandum of law in support of dismissal, and at the dismissal hearing, Villa Rosa consistently claimed prejudice because “thirty-eight of [Gallion’s] direct care providers at Villa Rosa have separated from the facility in the five years that have lapsed since [Gallion’s] alleged negligent treatment and the instant action,” and “the prejudice arising out [of] the unavailability of key witnesses for Villa Rosa is insurmountable.” For the reasons set forth above, we disagree.

Even if some of Villa Rosa’s employees left within the five-month period, such does not automatically make a witness “unavailable,” or constitute prejudice. By that logic, any employer could discharge an employee immediately after an incident, and then claim prejudice in any subsequent lawsuit.

That “the passage of time can cause memories of witnesses to become obscured,” *Hossainkail v. Gebrehiwot*, 143 Md. App. 716, 728 (2002), is similarly unavailing. Villa Rosa investigated Gallion’s care in 2016 and filed a qualified expert’s certificate with the Office in 2017, attesting to its compliance with the applicable standards of care. *See* § 3-2A-04(b). These may well reflect that witnesses had not become truly unavailable, nor had memories faded too much.

## CONCLUSION

Dismissal due to § 3-2A-06B(f)(3) requires a finding of prejudice due to any delay occurring after the 60-day deadline for filing a complaint in court. Because the circuit court considered a period preceding this deadline, we shall reverse. Analyzing the correct time frame, we hold that denial of the motion to dismiss is appropriate, because, as we discussed above, Villa Rosa came up short in establishing its entitlement to the relief requested.<sup>5</sup> Pursuant to Rule 8-604(e), we instruct the circuit court to deny Villa Rosa's motion to dismiss and proceed accordingly.

**JUDGMENT REVERSED. CASE  
REMANDED TO THE CIRCUIT  
COURT FOR PRINCE GEORGE'S  
COUNTY FOR FURTHER  
PROCEEDINGS CONSISTENT WITH  
THIS OPINION. COSTS TO BE PAID  
BY APPELLEE.**

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<sup>5</sup> If Villa Rosa had any other evidence to provide to the court to establish prejudice from that five-month delay, we can assume it would have done so, and moreover, it should have done so. We decline to remand for further hearings on the issue in order to prevent Villa Rosa from having an inequitable second bite of the apple.