

<b>RUSSELL SHAVER</b>	)	IN THE
	)	
Plaintiff	)	CIRCUIT COURT
	)	
v.	)	FOR
	)	
<b>RIDGE MD LEASING CO. LLC et al</b>	)	HOWARD COUNTY
t/a Ellicott City Healthcare Center	)	
	)	Case No. 13 C 15 102901
Defendants	)	

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**MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS**

Russell Shaver, Plaintiff, through counsel, submits this Memorandum of Law in opposition to Defendants’ motion to dismiss for deficient certificate of qualified expert and report.

**Background**

The Statement of Claim filed in the Health Care Alternative Dispute Resolution Office [“HCADRO”] names two (2) corporate entities as defendant Health Care Providers: Ridge MD Leasing LLC t/a Ellicott City Healthcare Center and Health Care Facility Management, LLC t/a Communicare Family of Companies. The Statement of Claim does not name any individual doctor, nurse, or other licensed health care provider as a respondent.

Similarly, the only defendants named in the Complaint filed in this Court are the corporate entities named as defendants in the HCADRO Statement of Claim. No individual licensed health care provider is named as a defendant in the Complaint.

Ellicott City Healthcare Center [“ECHC”], which is a member of the Communicare Family of Companies, is a skilled nursing facility.

The Complaint alleges various breaches of nursing standards of care by Defendants during Russell Shaver’s ECHC admission from 11/15/2011 to 1/26/2012. The Complaint alleges

that these breaches caused Shaver to develop lower extremity pressure sores, as well as non-pressure related skin bruises and lacerations. The Complaint alleges that Defendants' negligence caused Shaver's pressure sores, bruises, and lacerations to progress to gangrene, infection, and ultimately a left above the knee amputation.

In HCADRO, Shaver filed a Certificate of Qualified Expert and Report ["CQE"] signed by Gina D'Angelo, R.N. The CQE attests to violations of nursing standards of care by Defendants Ellicott City Healthcare Center and Communicare Family of Companies. The CQE further attests that Defendants' departures from nursing standards of care were the proximate cause of Shaver's injuries. A true and correct copy of the CQE is attached hereto as **Exhibit A**.

Shaver served Interrogatories in HCADRO which, among other things, asked Defendants to identify all ECHC nursing staff (including RN's, LPN's, aides, orderlies, attendants, technicians, and other direct care workers) who provided healthcare services to Shaver during his ECHC admission [Interrogatory No. 3]. Defendant objected to this interrogatory as "overly broad, unduly burdensome, and not calculated to lead to the discovery of admissible evidence". Defendant further referred Shaver to his ECHC medical records to obtain the requested information. A true and correct copy of Defendants' answers to interrogatories are attached hereto as **Exhibit B**.

Attached hereto as **Exhibit C** is the index to Plaintiff's ECHC medical records which Defendant produced in response to Shaver's request for production of documents.

Attached hereto as **Exhibit D** are the "Skin Treatment Records" listed in the index. These handwritten records contain two (2) pages and contain entries for only three (3) days (11/15/11, 11/28/11, 12/5/11) during Shaver's two (2) month ECHC admission. The names of the individual health care providers who made these entries are either missing or illegible.

Attached hereto as **Exhibit E** are handwritten “Treatment Records” which purport to document ECHC nursing interventions intended to prevent and treat the pressure sores which Shaver developed during his ECHC admission. The names of the individual health care providers who provided the services documented in the Treatment Records are either missing or illegible.

### **Argument**

Defendant's motion to dismiss asserts that Shaver's CQE is deficient because **(1)** it fails to name any individual “licensed professional” employed by ECHC who breached the standard of care [Motion to Dismiss, p. 4], and **(2)** Shaver's certifying expert, a registered nurse, is not qualified to attest to the causal connection between Defendant’s departures from nursing standards of care and Shaver’s injuries [*Id.*, p. 5].

For the reasons stated herein, there is no basis in Maryland statutory or case law for Defendant's motion to dismiss.

#### **1. Shaver's CQE sufficiently identifies the defendant health care providers who breached the standard of care.**

Shaver does not dispute that Maryland law requires that a CQE identify the defendant health care provider(s) who breached the standard of care. Shaver disputes Defendant’s contention that Plaintiff’s CQE fails to satisfy this requirement.

The certificate requirement is set forth in §3-2A-04(b) of the Maryland Courts & Judicial Proceedings Code:

(b) Filing and service of certificate of qualified expert.--Unless the sole issue in the claim is lack of informed consent:

(1)(i) .... a claim filed after July 1, 1986 shall be dismissed, without prejudice, if the claimant 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....

The § 3-2A-04(b) certificate requirement applies to claims against a "health care provider". This term is defined in §3-2A-01(f) of the Courts & Judicial Proceedings Code as follows:

“Health care provider” means a hospital, a related institution as defined in §19-301 of the Health-General Article, a medical day care center, a hospice care program, an assisted living program, a freestanding ambulatory care facility as defined in §19-3B-01 of the Health-General Article, a physician, an osteopath, an optometrist, a chiropractor, a registered or licensed practical nurse, a dentist, a podiatrist, a psychologist, a licensed certified social worker-clinical, and a physical therapist, licensed or authorized to provide one or more health care services in Maryland.

Section 19-301(o) of the Health-General Code defines the term “related institution”, as this term is used in §3-2A-01(f), as follows:

"Related institution" means an organized institution, environment, or home that:

(i) Maintains conditions or facilities and equipment to provide domiciliary, personal, or nursing care for 2 or more unrelated individuals who are dependent on the administrator, operator, or proprietor for nursing care or the subsistence of daily living in a safe, sanitary, and healthful environment; and

(ii) Admits or retains the individuals for overnight care.

ECHC is a skilled nursing facility, which is a "related institution" within the meaning of §3-2A-01(f) and §19-301(o). Accordingly, the certificate requirement set forth in §3-2A-04(b) applies to Shaver's claims against ECHC.

Shaver's CQE identifies the corporate Defendants - ECHC and Communicare - as the health care providers whose negligence caused Shaver's injuries. Maryland cases which have interpreted §3-2A-04(b) have consistently held that a CQE is sufficient if it identifies the defendant health care provider(s) who allegedly breached the standard of care.

[W]e hold that a Certificate is a condition precedent and at a minimum, must identify with specificity, the *defendant(s)* (licensed professional(s)) against whom the claims are brought, include a statement that the named *defendant(s)* breached the applicable standard of care, and that such a departure from the standard of care was the proximate cause of the plaintiff's injuries.

*Carroll v. Konits*, 400 Md. 167, 929 A.2d 19, 39 (2007)(emphasis added). See *Kearney v. Berger*, 416 Md. 628, 7 A.3d 593 (2010)(certificate sufficient because it sufficiently identified *defendant* against whom claims were brought); *Barber v. Catholic Health*, 180 Md. App. 409, 951 A.2d 857 (2008)(certificate sufficient because it referred to health care providers named as defendants in Statement of Claim); *Witte v. Azarian*, 369 Md. 518, 801 A.2d 160 (Md. 2002) (claimant must file certificate of qualified expert attesting that *defendant's* conduct constituted departure from standard of care); *McCready Memorial Hospital v. Hauser*, 330 Md. 497, 624 A.2d 1249 (1993)(certificate of qualified expert must attest to *defendant's* departure from relevant standards of care); *Watts v. King*, 143 Md. App. 293, 794 A.2d 723 (2002)(claimant must file certificate of qualified expert attesting that the “licensed professional *against whom claim was filed*” breached the standard of care).

In *Barber v. Catholic Health, supra*, the Court explained the requirement that a CQE identify the *defendant(s)* whose negligence allegedly caused claimant's injuries. The Statement of Claim in *Barber* named as defendants six (6) individual physicians and six (6) corporate entities, which included a hospital and several medical practice groups. The CQE did not identify each defendant individually. Instead, the CQE stated that “Health Care Providers” breached the standard of care. In the Statement of Claim, the term “Health Care Providers” was defined to include all defendants, including both individual and corporate health care providers. The court held that the CQE was sufficient, as to both individual and corporate defendants, because the CQE, when read together with the Statement of Claim, clearly identified the *defendants* whose negligence allegedly caused plaintiff’s injuries:

[T]he Certificate here stated that all the Health Care Providers, whose identities were previously supplied by the Claim Form and Statement of Claim, breached the standard of care, thereby causing injury to the decedent. Moreover, as we discussed in

Barber I, in the context of this case the term "Health Care Providers" was used as a defined term; it specifically and collectively referred to a discrete group — the *defendants* — all of whom were fully identified and named in the prior submissions of the plaintiffs to the HCAO.

951 A.2d at 871.

In the motion to dismiss, Defendant ECHC contends that Shaver's CQE is deficient because it fails to identify "the names of any health care professional at Ellicott City Health and Rehabilitation Center who breached the standard of care" [Defendant's Memorandum of Law at p. 6]. Defendant essentially argues that in a case against a corporate defendant, where no individual health care providers are named as defendants, a CQE is defective if it fails to identify the corporate defendant's individual agents and employee(s) who provided the allegedly negligent care. The requirement which Defendant asks this Court to impose cannot be found in §3-2A-04(b) or in any of the cases that have interpreted this statute.

Defendant's reliance on *Carroll v. Konitz, supra*, is misplaced. In *Carroll*, the statement of claim named two individual doctors as defendants. There were no corporate defendants in *Carroll*. The CQE identified five individual physicians, but did not indicate which of the five had breached the standard of care. The court held that the CQE was deficient because it failed to specify that the two defendant physicians had breached the standard of care. It was in this factual context that the Court held that a CQE "must identify with specificity, the defendant(s) (licensed professional(s)) against whom the claims are brought." *Carroll* does support Defendant's contention that in a case against a corporate defendant, where no individual health care provider is named as a defendant, the CQE must identify the corporate defendant's individual agents and employees whose negligence allegedly caused claimant's injuries.

Defendant's reliance on *Barber* is also misplaced. As noted above, the statement of claim in *Barber* named twelve individual and corporate defendants. The court held that the CQE was

sufficient as to all defendants, both individual and corporate, because the CQE specified that all *defendant* health care providers were negligent. Notably, the *Barber* Court did not impose any requirement that a CQE identify a corporate defendants' individual agents and employees whose negligence allegedly caused claimant's injuries.

As noted above, ECHC is a skilled nursing facility, which is licensed as a comprehensive care facility within the meaning of COMAR §10.07.02.01 *et seq.* Comprehensive care facilities are required to employ "supervisory personnel and a sufficient number of supportive personnel, trained and experienced, or both, to provide [required] bedside care", COMAR §10.07.02.12. Bedside care in a comprehensive care facility may be provided by "registered nurses, licensed practical nurses, and supportive personnel." *Id.* "Supportive personnel" means "an aide assigned to a particular service such as nursing, dietary, physical therapy, or occupational therapy, who has been approved by the chief of the services as having sufficient training and experience to perform his assigned duties", COMAR §10.07.02.01. There is no requirement under Maryland law that "supportive personnel" be licensed. To this extent, bedside care in a skilled nursing facility need not be performed by a "licensed professional".

For this reason, a health care malpractice claim against a skilled nursing facility may arise out of the negligence of an employee(s) who is not a "licensed professional". If this Court were to adopt Defendant's interpretation of §3-2A-04(b), many (if not most) health care malpractice claims against skilled nursing facilities would not be viable, because the claimant would be unable to identify an individual "licensed professional" whose negligence caused claimant's injuries. For this reason, an order granting Defendant's motion to dismiss would in effect endorse a rule that skilled nursing facilities in many cases enjoy immunity from health

care malpractice claims. This was not the intended result when the Maryland legislature enacted the §3-2A-04(b) certificate requirement.

In HCADRO, Shaver served written discovery requests which asked Defendant to identify all ECHC nursing staff (including RN's, LPN's, aides, orderlies, attendants, technicians, and other direct care workers) who provided healthcare services to Shaver during his ECHC admission. Defendant objected to this interrogatory on the grounds that the requested information was *irrelevant*. Defendant can not stonewall Shaver's information request in this manner, and at the same time argue inconsistently that Shaver's CQE is defective because it fails to identify the nurses, aides, and others whose negligence allegedly caused Shaver's injuries. If information is irrelevant, there should be no requirement that it be contained in a CQE.

Defendant's stonewalling is compounded by the inadequacy of Shaver's ECHC medical records. As noted above, the skin care records which Defendant has produced appear incomplete. Furthermore, the skin treatment records which were produced do not identify the individuals who provided the nursing care which the records purport to document. In short, Defendant has created or permitted circumstances which make it impossible for Plaintiff to identify the individual nurses, aides, and others whose negligence caused Shaver's injuries. For this further reason, this Court should reject Defendant's disingenuous argument that this case should be dismissed because Plaintiff's CQE fails to identify the individual nurses, aides, and others who breached the standard of care.

**2. Shaver's certifying expert is qualified to attest to the causal connection between Defendant's negligence and Shaver's injuries**

Defendant next contends that Shaver's certifying expert, a registered nurse, is not qualified to attest that Defendant's negligence was the proximate cause of Shaver's injuries.



Because Shaver sustained injuries that required medical diagnosis and treatment, Defendant contends that only a physician is qualified to attest in a CQE that Defendant's negligence was the proximate cause of Shaver's injuries. Defendant concedes that there is no statutory or case law support for this argument [Memorandum in support of motion to dismiss, at p.8].

The short answer to Defendant's argument is that the prevention, assessment, and treatment of pressure sores is within the scope of a licensed nurse's competence. For this reason, Shaver's certifying expert, a registered nurse, is competent to attest that the pressure sores which Shaver developed during his ECHC admission were the result of nursing negligence.

To be sure, Shaver developed serious medical complications - including gangrene, infection, and amputation - as the result of Defendant's negligent failure to treat Shaver's bedsores. As Defendant points out, only a physician may be qualified to *testify at trial* with respect to the medical complications which Shaver developed during his ECHC admission. However, Defendant's contention that only a medical doctor is qualified to attest to the cause of Shaver's injuries in the CQE conflates the requirements of §3-2A-04(b) with the rules of evidence respecting the admissibility of expert testimony at trial. Defendant essentially argues that this Court, when determining whether a CQE satisfies the requirements of §3-2A-04(b), must determine whether the certifying expert is qualified under the rules of evidence to testify at trial respecting the opinions contained in the CQE. Once again, Defendant argues for a requirement that can not be found in §3-2A-04(b).

*In Kearney v. Berger*, 416 Md. 628, 7 A.3d 593 (2010), the Court of Appeals explained that issues concerning a certifying expert's qualification to testify at trial and the admissibility of the certifying expert's opinions in evidence are not relevant considerations when determining the

sufficiency of a CQE under §3-2A-04(b). The only relevant consideration when determining the sufficiency of a CQE is whether the CQE complies with the requirements of §3-2A-04(b):

.... As we have explained, the certificate requirement is intended to help weed out non-meritorious claims. *Carroll*, 400 Md. at 196, 929 A.2d at 37. The claimant or plaintiff is not required to prove his or her case with the certificate, but instead must present an expert's opinion that provides enough information to support the conclusion that the defendant may have violated the standard of care. For this purpose, *the HCADRO or trial court accepts the assertions in the certificate*, just as courts accept a plaintiff's well-pleaded facts and allegations in a complaint. *See RRC v. BAA*, 413 Md. 638, 643-44, 994 A.2d 430, 433-34 (2010) (discussing the appropriate review of a motion to dismiss). If the HCADRO or trial court determines that some information required by § 3-2A-04(b) is missing from the certificate, dismissal is required because the claimant or plaintiff has necessarily failed to establish that the claim has merit. In this manner, the certificate requirement allows for the weeding out of a non-meritorious claim. *If the certificate includes the information that § 3-2A-04(b) requires, then the claimant or plaintiff has shown that the claim may have merit and dismissal pursuant to § 3-2A-04(b) is inappropriate.*

At the early stage when the certificate is filed, neither the HCADRO nor the trial court is in a position to make determinations about the strength of the expert's opinions. Those determinations arise later. In further proceedings, the defendant may challenge the expert's opinions on the basis that they are not expressed to a reasonable degree of medical probability. *See Karl*, 100 Md.App. at 52-53, 639 A.2d at 219 (approving the dismissal of a claim in the HCADRO when the claimant's expert did not express his opinions to a reasonable degree of medical probability). The claimant or plaintiff may also provide additional expert testimony that supplements or even changes the expert's opinions as stated in the certificate. *Debbas v. Nelson*, 389 Md. 364, 382-83, 885 A.2d 802, 813-14 (2005). *The evaluation of the expert's opinion, however, is separate from whether the certificate satisfies §3-2A-04(b)....*

468 Md. at 653.

Shaver's CQE clearly satisfies all of the requirements of §3-2A-04(b). The CQE attests to Defendants' departures from nursing standards of care, and attests that these departures proximately caused Shaver's injuries. Furthermore, Shaver's certifying expert has certified in the CQE that she has had "clinical experience, provided consultation relating to clinical practice, and/or taught in the fields of long term care/ post-acute rehabilitation and gerontology or a related field of health care, within five (5) years of the date of the alleged acts or omissions

giving rise to this cause of action" [CQE, ¶3]. She further certifies that she is licensed in Maryland as a registered nurse and/or is licensed in a related specialty, and/or has taught in that specialty or a related field of health care [CQE, ¶4]. These certifications satisfy the requirements of §3-2A-02(c)(2)(ii) of the Courts & Judicial Proceedings Code. In *Powell v. Breslin*, 195 Md.App. 340, 6 A.3d 360 (2010), the court explained that an expert is a "qualified expert" within the meaning of §3-2A-04(b) and may attest to the applicable standard of care and *proximate causation* so long as the expert satisfies the requirements in §3-2A-02(c)(2)(ii).<sup>1</sup>

For all of these reasons, Shaver's certifying expert is a "qualified expert" within the meaning of §3-2A-04(b). Accordingly, this Court should reject Defendant's challenge to the qualifications of Plaintiff's certifying expert.

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<sup>1</sup> Section 3-2A-02(c)(2)(ii) provides as follows:

In addition to any other qualifications, a health care provider who attests in a certificate of a qualified expert ... concerning a defendant's compliance with or departure from standards of care:

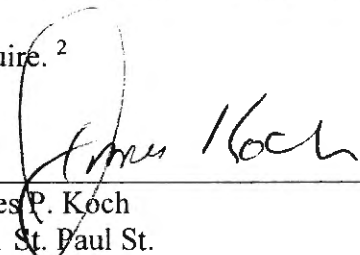
A. Shall have had clinical experience, provided consultation relating to clinical practice, or taught medicine in the defendant's specialty or a related field of health care, or in the field of health care in which the defendant provided care or treatment to the plaintiff, within 5 years of the date of the alleged act or omission giving rise to the cause of action  
....

The *Powell* court further explained that the "other qualifications" to which § 3-2A-02(c)(2)(ii)(1) refers are those defined in §3-2A-04(b)(4) of the Courts & Judicial Proceedings Code, which provides that a qualified expert may not allot more than 20 percent of his professional activities to providing testimony in personal injury claims; a party to the litigation may not act as an expert; and a certificate may not be signed by a party to the litigation, nor by any employee or partner of a party. Defendant in the case *sub judice* has not raised any issues concerning the qualifications of Plaintiff's certifying expert under §3-2A-04(b)(4).

### Conclusion

In support of its motion to dismiss, Defendant has asked this Court to engraft certification requirements onto §3-2A-04(b) that can not be found in the statute. The Maryland Court of Appeals has held that because §3-2A-04(b) is in derogation of common law, the statute must be strictly construed, *see Carroll v. Konitz, supra*. For this reason, this Court must review Defendant's dismissal request with considerable skepticism. For all of the reasons stated in this Memorandum, neither Maryland statute nor Maryland case law supports Defendant's motion to dismiss. Shaver therefore respectfully requests that this Court deny the motion, and for such other and further relief as justice may require.<sup>2</sup>

Date: 11/30/2015



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<sup>2</sup> Defendant attached to its motion to dismiss circuit court orders in some other cases which granted motions similar to Defendant's motion to dismiss. Attached to this Memorandum as **Exhibit F** are circuit court opinions and orders which have denied similar motions.