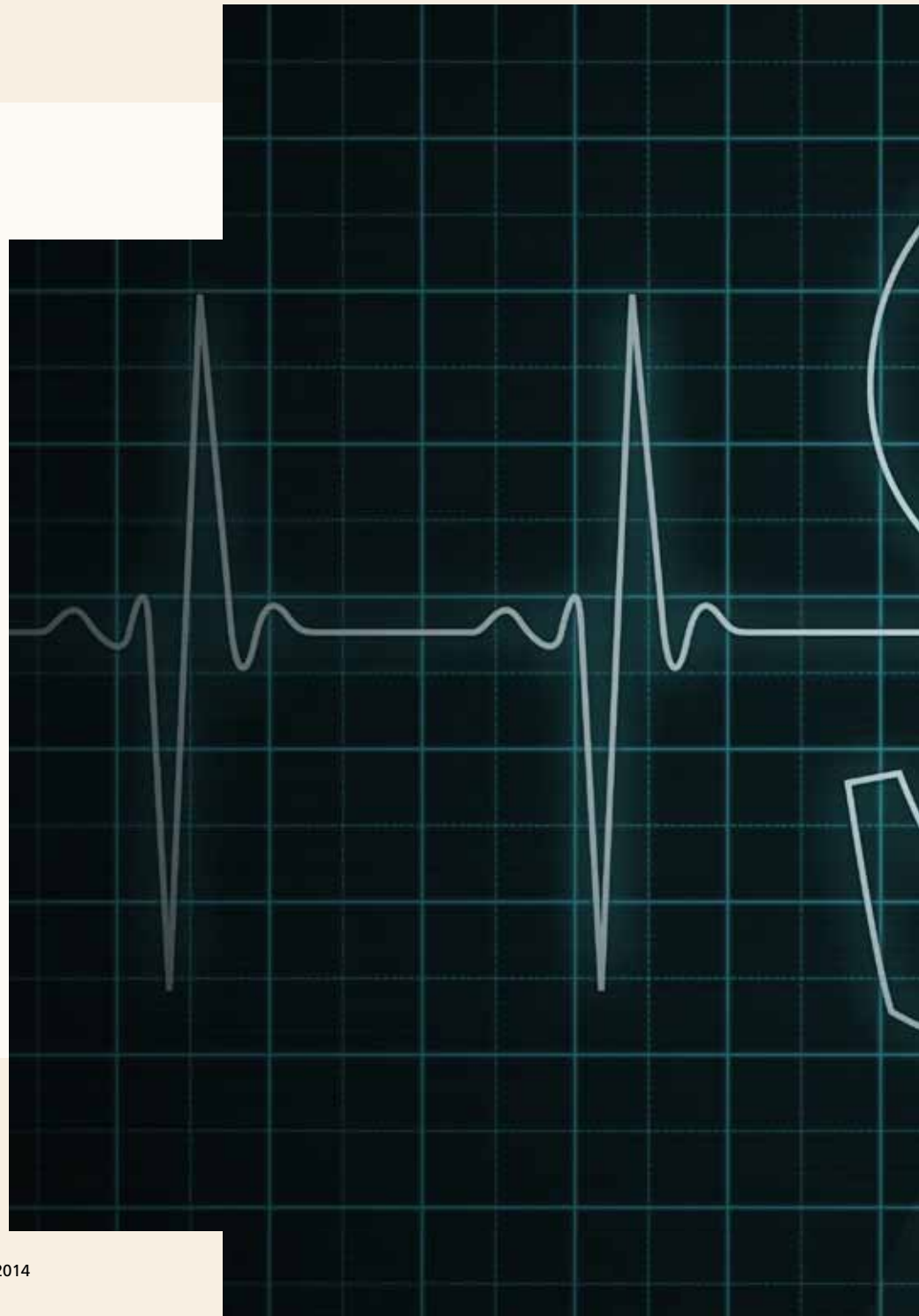
Tar Pits, Gold Mines, and the Expert Certificate Requirement

By Andrew H. Baida



As evidenced by a relatively large number of decisions issued by the Maryland appellate courts over the course of just the last decade, disputes often arise in medical malpractice cases concerning the Maryland Health Care Malpractice Claims Act ("HCMCA") and, more particularly, its requirement that the plaintiff file with the Maryland Health Care Alternative Dispute Resolution Office ("HCADRO") a certificate of a qualified expert's attesting to the defendant's failure to comply with the applicable standard of care.

I suppose that one way to characterize this area of the law is to call it, as the Court of Appeals did in one of its more recent decisions, a "minefield." *Breslin v. Powell*, 421 Md. 266, 268 (2011). Other descriptive nouns also come to mind – such as "tar pit," which seems an especially apt term to use if you're a plaintiff's lawyer who has been caught in it, and there are clearly plenty who have been in light of the growing number of reported decisions on the subject, representing just the visible tip of a collective body of doomed cases that has sunk and fossilized beneath the surface after getting hopelessly stuck in this quagmire.

But one person's "tar pit" is another's "gold mine," which is what some could say the HCMCA has been, not just for the defense bar as evidenced by the huge amount of litigation it has generated, but also for the health care providers themselves who hit the mother lode when the claims against them were dismissed due to a failure to comply with the HCMCA's expert certificate requirement.

No matter how this area of the law might be described, there seems to be no end to the issues arising out of this requirement. One of these issues is whether the expert certificate requirement can be waived.

I recently argued an appeal in which this issue was raised, but the Court of Special Appeals sidestepped the question when it decided *Barnes v. Greater Baltimore Med. Ctr.*, 210 Md.App. 457 (2013), on other grounds. Some might argue, as my opposing counsel in *Barnes* did on the basis of language from prior appellate decisions, that the expert certificate requirement is a condition precedent that cannot be waived and may be raised as a defense at any time. But the *Barnes* court's discussion of the issue casts doubt as to how much weight to assign to this language and makes fairly certain that this is an issue that will come up again in the future.

A Basic Overview of the HCMCA's Expert Certificate Requirement

For those out there who have passing or no familiarity with the expert certificate requirement, take your pick on whether to accept my condolences or congratulations. The latter is probably more appropriate, but in either case, here's a quick primer.

The HCMCA provides that, unless lack of informed consent is the sole issue in a case involving a claim against a health care provider for damage due to a medical injury, "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 qualified expert with the [HCADRO's] Director attesting to the departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury...." Md. Cts. & Jud. Proc. § 3-2A-04(b)(1)(i) (2013 Repl. Vol.). The HCMCA also requires that the certificate be filed with "a report of the attesting expert attached," *Id.*, § 3-2A-04(b)(3)(i), and states that a health care provider "is not liable for the payment of damages unless it is established that the care given by the health care provider is not in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities at the time of the alleged act giving rise to the cause of action," *Id.*, § 3-2A-02(c)(1).

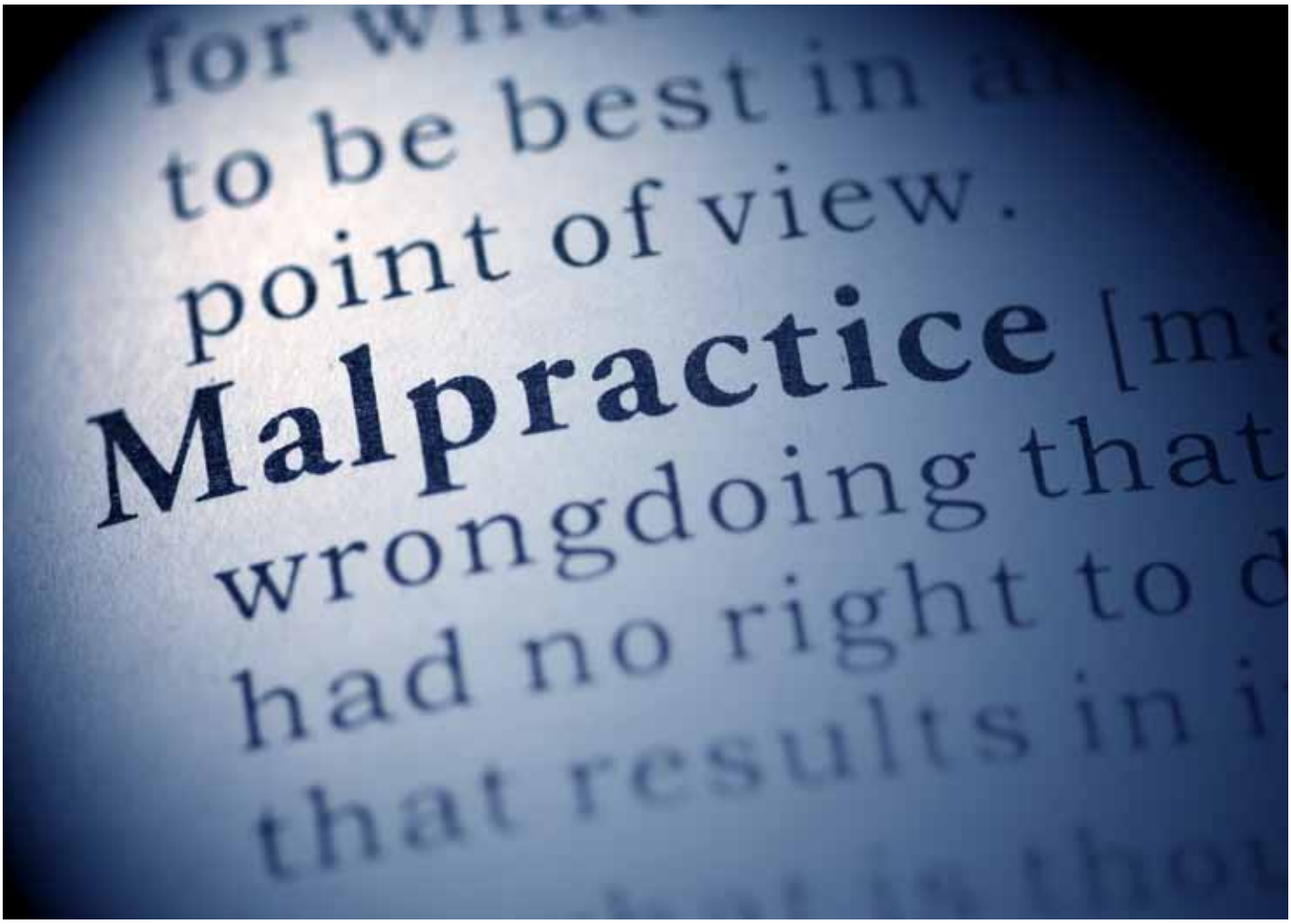
With respect to claims filed on or after January 1, 2005, the HCMCA also provides:

1. 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.
2. Subsubparagraph 1B of this subparagraph does not apply if:
   A. The defendant was providing care or treatment to the plaintiff unrelated to the area in which the defendant is board certified; or
   B. The health care provider taught medicine in the defendant's specialty or a related field of health care.

Id., § 3-2A-02(c)(2)(ii).

Traps for the Unwary

There are several ways in which a plaintiff can run afoul of the expert



certificate requirement. In one of the leading cases, *Walzer v. Osborne*, 395 Md. 563 (2006), the Court of Appeals held that the HCMCA "mandates that the certificate of qualified expert be complete, with an attesting expert report attached, and that dismissal of the claim without prejudice is the appropriate remedy when the claimant fails to attach the report in a timely manner." *Id*. at 567.

Other cases have held that dismissal is warranted when the certificate fails to "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 [state] that such a departure from the standard of care was the proximate cause of the plaintiff's injuries." *Carroll v. Konits*, 400 Md. 167, 201 (2007); *see also Kearney v. Berger*, 416 Md. 628, 650 (2010) ("Like the certificate in *Carroll*, this certificate does not explain what the standard of care was, what Dr. Berger should have done to satisfy that standard of care, or include any details at all about what happened when Dr. Berger allegedly violated the standard of care.").

As demonstrated by the HCMCA's plain language, the expert's and defendant's specialties need not be identical. *See Nance v. Gordon*, 210 Md.App. 26, 45, *cert. denied*, 432 Md. 468 (2013) (holding that "nephrology and urology are 'related specialt[ies]' pursuant to section 3-2A-02(c)(2) of the Act" and that a nephrologist was qualified to attest in his certificate that a urologist deviated from the standard of care in failing to include nephritis on the differential diagnosis for an emergency room patient complaining of blood in his urine); *DeMuth v. Strong*, 205 Md.App. 521, 545 (2012) (holding that "in the context of the malpractice allegations in this case, the specialties of orthopedic surgery and vascular surgery overlap, so that the board certification specialties are 'related' within the meaning of CJP section 3-2A-02(c)(2)(ii)1B").

Nevertheless, claims for medical injuries are subject to dismissal when the expert "does not satisfy the 'same or related specialty' board certification requirement" of the HCMCA and neither of the "two exceptions to that requirement is satisfied...." *Hinebaugh v. Garrett County Mem. Hosp.*, 207 Md.App. 1, 29 (2012); *see also Breslin v. Powell*, 421 Md. at 277 (answering affirmatively the question of "[w]hether, in

a medical malpractice case where a party files a certificate signed by an expert who does not meet the qualifications set forth in CJ § 3-2A-02(c)(2)(ii), CJ § 3-2A-04(b)(1)(i)(1) mandates dismissal without prejudice, regardless of whether the case is pending in the HCADRO or the Circuit Court at the time of the revelation").

The Waiver Issue

The passage of time and development of the case law have shed significant light on the circumstances in which a medical injury claim will be dismissed due to a deficient expert certificate. Still unresolved, however, is the question of whether a health care provider can waive his or her challenge to an expert's certificate by failing to raise it on a timely basis. That issue came up in *Barnes v. Greater Baltimore Med. Ctr.*, 210 Md.App. 457 (2013).

In that case, the plaintiffs brought a medical malpractice action against a hospital and other healthcare providers after filing an expert's certificate and report with the HCADRO. After the parties initiated discovery and the expert was deposed, the defendants filed motions *in limine* and motions for summary judgment, none of which challenged the sufficiency of the expert's certificate and report. Following the denial of the summary judgment motions, the case proceeded to trial, where the expert testified that the standard of care was violated and that the breach of the standard of care proximately caused the plaintiffs' injuries. No issue concerning the sufficiency of the expert's certificate and report was raised during the trial. As a result of a snow storm, a mistrial was declared and a second trial was scheduled to begin

13 months later. The day before the second trial began, the hospital filed a motion to dismiss the case, contending that the expert's certificate and report failed to "describe the standard of care, how the specific defendants violated the standard of care, and how the violation proximately caused the plaintiffs' injuries." *Id*. at 464. The circuit court denied the motion, finding that it was filed "too late." *Id*.

On appeal, the hospital argued that its challenge could be raised at any time. The hospital based its argument on cases in which the Court of Appeals stated that "the filing of a proper Certificate operates as a condition precedent to filing a claim in Circuit Court." *Carroll v. Konits*, 400 Md. at 181 *see also Walzer v. Osborne*, 395 Md. at 578 (stating that "the Statute 'mandates that claimants arbitrate their claims before the [Health Care Office] as a condition precedent to maintaining a suit in a circuit court'" and that a "'claimant's filing of an expert's certificate is an indispensable step in the [Health Care Office] arbitration process'") (brackets in original) (quoting *McCready Mem'l Hosp. v. Hauser*, 330 Md. 497, 512 (1993)). Noting that in a non-HCMCA case it had "discussed the mandatory nature of conditions precedent, albeit in a dif-

ferent context," the Court in *Carroll v. Konits* observed that "[t]here we said: ''[a] condition precedent cannot be waived under the common law and a failure to satisfy it can be raised at any time because the action itself is fatally flawed if the condition is not satisfied.''" 400 Md. at 182 n.12 (quoting *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 84 (2006) (quoting *Rios v. Montgomery County*, 386 Md. 104, 127-28 (2005))).

The court in *Barnes* stated that "were we to resolve the case on waiver grounds, if ever there was a case where a defendant has waived a challenge to the certificate requirement, this would be it." 210 Md.App. at 479. Noting that "the challenge was not raised for over six years," the court stated:

> The claim was filed in 2005, the expert was deposed, he testified in the first trial in 2010, a mistrial occurred because of a snow storm, and yet [the hospital] never questioned the amount of information in the expert report – not in its answer, not during discovery, not in a pre-trial motion, and not during trial. [The hospital] raised the subject only on the eve of the second trial.
> *Id*.

The *Barnes* court nevertheless expressly refrained from deciding whether the hospital in that case "was too late in filing" its motion to dismiss "and therefore waived any argument that the certificate requirement was not met," stating that "dismissal was not required in this case, although for a slightly different reason than the circuit court articulated." *Id*. at 474. The Court of Special Appeals held that the hospital's challenge "lacked merit because the hospital possessed [the expert's] testimony and ample detail from the mistrial before the second trial," concluding that this testimony "cured the report's apparent lack of detail" by explaining "exactly what [the hospital] argued was absent from the expert report: the standard of care that was required of Nurse Stopa [the hospital's employee], how Nurse Stopa did not follow the standard of care, and how her failure to follow the standard of care led to Mr. Barnes' injury." *Id*.

Predicting the Future

Although the *Barnes* court did not decide the issue of whether a challenge to an expert's certificate cannot be waived and may be raised at any time, it is not a foregone conclusion that, as the hospital argued, the Court of Appeals had resolved this issue in *Carroll v. Konits*. Acknowledging the language from *Carroll* that the failure to satisfy a condition precedent can be raised "at any time," the Court of Appeals in *Kearney v. Berger*, 416 Md. 628 (2010), expressly left open the question of "whether or not a party can ever waive the certificate requirement" and pointed out that, in *Oxtoby v. McGowan*, 294 Md. 83 (1982), it had "explicitly rejected the notion that failure to satisfy the [Act's] procedures divests a trial court of subject matter jurisdiction." 416 Md. at 659, 660 n.13. Noting that "the *Kearney* court specifically declined" to decide the waiver question, the court in *Barnes* stated, "We find this position hard to reconcile with the Court's opinion in *Carroll* that the requirement is a condition precedent that can never be waived." 210 Md.App. at 479.

Given this language from *Barnes* and the past practices of both the plaintiffs' and defense bars, it's a pretty safe bet that the waiver question will arise in a future appeal. I'm on the verge of exceeding my word limit for this article, but here are my concluding remarks. As the Court of Special Appeals stated in another case, *Rice v. Univ. of Md. Med. Sys. Corp.*, 186 Md.App. 551 (2009), *dismissed*, 412 Md. 494 (2010), neither *Carroll* nor *Walzer* "rule[d] out the possibility that a defendant might be precluded in some cases by principles of waiver or estoppel from belatedly raising an issue regarding an inadequate certificate of merit." 186 Md.App. at 567-68. The Court of Appeals in *Kearney* noted that *Rice* "inappropriately" relied on an "inapplicable" case for the proposition that "[e]ven a condition precedent can be deemed waived under some circumstances." 416 Md. at 659 n.11 (quoting *Rice*, 186 Md.App. at 568). But there is nothing exceptional about the proposition itself, which the Court of Appeals has recognized since deciding *Kearney*. *See Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Centre at Parole, LLC*, 421 Md. 94, 121-22 (2011) (holding that "a party may waive, by its actions or statements, a condition precedent in a contract, even when that contract has a non-waiver clause").

Having said that, I learned years ago not to predict what the Court of Appeals will do in deciding any issue. The only prediction I will make is that it will not be long before another hapless soul falls into this tar pit. Or, depending on your perspective, lands in someone else's gold mine.

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