Circuit Court for Prince George's County
Case No. CAL 18-03956

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2281

September Term, 2018

LUCRETIA DORCHY, et al.

v.

ROBERT C. HSIEH, M.D., et al.

Kehoe,
Reed,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 27, 2019

This appeal involves a medical malpractice action that is governed by the Health Care Malpractice Claims Act ("the Act"), which is codified in Md. Code (2013 Repl. Vol.) §§ 3-2A-01 – 3-2A-10, of the Courts and Judicial Proceedings Article ("CJP"). To bring a suit under the Act, where the amount sought is more than $30,000, a plaintiff must first file a claim with the Director of the Health Care Alternative Dispute Resolution Office ("HCADRO"). Unless the sole claim raised in the complaint is lack of informed consent, the complainant, within 90 days after filing a claim, must ordinarily file a certificate of a qualified expert ("the Certificate") along with a report from that expert. The Certificate and report must attest to a health care provider's departure from the relevant standard of care that proximately caused the injury. *See* CJP § 3-2A-04(b)(1)(i)1, which states:

> 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[.]

There are three exceptions to the requirement that a certificate be filed within 90 days.[1]

The first exception, at CJP § 3-2A-04(b)(1), reads:

> (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:
>
> 1. The limitations period applicable to the claim or action has expired; and

[1] The three exceptions are characterized in *Wilcox v. Orellano*, 443 Md. 177, 185 n.8 (2015) as "escape valves."

2. The failure to file the certificate was neither willful nor the result of gross negligence.

The second exception to the 90-day filing requirement is set forth in CJP § 3-2A-04(b)(5), which provides: "[a]n extension of the time allowed for filing a certificate of a qualified expert under this subsection shall be granted for good cause shown."

The third exception is somewhat similar to the second, and is set forth in CJP § 3-2A-05(j), which provides: "[e]xcept for time limitations pertaining to the filing of a claim or response, the Director or the panel chairman, for good cause shown, may lengthen or shorten the time limitations prescribed in . . . § 3-2A-04 of this subtitle."

In this case, the Director of the HCADRO gave the claimants, Lucretia Dorchy and her husband, Charles Dorchy, two extensions, but by the date that the second extension expired, the claimants had not filed the required certificate or report. Shortly thereafter, the health care providers, Robert C. Hsieh, M.D. and Robert C. Hsieh, M.D., P.A., filed a motion to dismiss the malpractice action because the Certificate and report had not been filed. Five days after the dismissal motion was filed, claimants, by counsel, filed the Certificate together with a report from a qualified expert. Simultaneously with the filing of the Certificate and report, claimants filed a waiver of arbitration. The Director of the HCADRO, as he was required to do, then issued an order transferring the matter to the Circuit Court for Prince George's County. Prior to the removal, the Director did not rule on the health care providers' motion to dismiss.

The claimants, on February 8, 2018, filed a complaint in the Circuit Court for Prince George's County. Mrs. Dorchy alleged medical malpractice on the part of the health care

providers in count one, and in count two, Mr. and Mrs. Dorchy alleged that as a result of the defendant's negligence, they had suffered a loss of consortium.

The health care providers filed a motion to dismiss on March 22, 2018, alleging that the Certificate of qualified expert and the report were not timely filed. According to the movants, the timely filing of a certificate and report by a qualified expert is a condition precedent to a successful medical malpractice claim. In their opposition, Mr. and Mrs. Dorchy admitted that their certificate and report had not been timely filed; they stressed, however, that both the Certificate and the report were "totally valid and sufficient," under the Act. Moreover, according to the Dorchys, "[t]he Court of Appeals has never held that a failure to timely file a **totally valid and sufficient Certificate and report** prior to dismissal of the action by the HCADRO constitutes a failure to satisfy the condition precedent to bringing the action in the Circuit Court." Alternatively, the plaintiffs asked the court to exercise its discretion, pursuant to the second exception, and "permit the late filing of a valid Certificate and report, and permit this action to proceed."

The circuit court heard oral argument concerning the dismissal motion on June 15, 2018. The court, on July 20, 2018, issued an order granting defendants' motion to dismiss plaintiffs' claims without prejudice.[2] This timely appeal followed.

ISSUES PRESENTED

Appellants raise two issues, which they phrase as follows:

[2] Because, at the time of the dismissal, the three-year statute of limitations had expired, the dismissal, in effect, was with prejudice. *See Wilcox*, 443 Md. at 183 n.4.

I. Whether the lower court erred in dismissing Appellants' claim when they had filed a fully proper and sufficient Certificate of Qualified Expert in the Maryland Health Care Alternative Dispute Resolution Office, prior to electing to waive Health Claims Arbitration.

II. Whether the lower court abused its discretion in not granting Appellants an extension of time to file their Certificate of Qualified Expert, pursuant to Code of Maryland, [CJP] § 3-2A-04(b)(5).

STANDARD OF REVIEW

The resolution of the first issue presented requires us to analyze a statute. The standard of review is therefore *de novo*. *Breslin v. Powell*, 421 Md. 266, 277 (2011). In regard to the second issue presented, we must determine whether the trial judge abused her discretion. An abuse of discretion can only be found: [1] "where no reasonable person would take the view adopted by the trial court"; [2] "when the court acts without reference to any guiding rules or principles"; [3] "where the ruling under consideration is clearly against the logic and effect of facts and inferences before the court"; or [4] "when the ruling is violative of facts and logic." *Kearney v. Berger*, 416 Md. 628, 663 (2010).

ADDITIONAL BACKGROUND

On April 23, 2014, Mrs. Dorchy underwent cataract surgery at Doctor's Community Hospital in Lanham, Maryland. Dr. Robert C. Hsieh performed the surgery. Plaintiffs' complaint made the following allegations of medical malpractice against Dr. Hsieh:

8. Robert C. Hsieh, M.D., was negligent, deviated from the standard of care applicable to his care and treatment of Plaintiff Lucretia Dorchy and was guilty of medical negligence specifically including, but not limited to, the following:

a. Negligent performance of cataract extraction and intraocular lens implantation surgery on Plaintiff on April 23, 2014;

> b. Negligent failure to recognize a break in the posterior capsule of Plaintiff's left eye at the time of surgery on April 23, 2014;
>
> c. Negligent placement of a one piece IOL [intraocular lens] in the sulcus of Plaintiff's left eye on April 23, 2014;
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> d. Negligent failure to recognize the presence of lens fragments in the posterior chamber and improper lens placement during follow up care from April 23, 2014 through May 9, 2014.

The complaint also alleged that as a result of the aforementioned acts of negligence, Mrs. Dorchy suffered a loss of vision in her left eye together with other physical and emotional injuries and losses.[3] Appellants filed their statement of claim with the HCADRO on April 10, 2017, which was within the three-year statute of limitations.

As mentioned, pursuant to CJP § 3-2A-04(b), claimants such as appellants, within 90 days from the date of the complaint, ordinarily would be required to file a certificate of a qualified expert and a report of that 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[.]" Ninety days from April 10, 2017 was July 9, 2017. On July 6, 2017, appellants filed a consent motion to extend the time for the filing of the Certificate and report for 90 days. This motion was granted by the Director of the HCADRO and the time to file the Certificate and report was extended to October 7, 2017. On October 16, 2017, appellees moved to dismiss the claim because appellants had not met the October 7, 2017 deadline. Appellants opposed this motion on the grounds that on October 11, 2017 Mrs. Dorchy had undergone additional surgery on her left eye and had not yet been able to obtain

[3] Appellees deny that the alleged injuries suffered by Mrs. Dorchy were caused by any act of negligence on the part of Dr. Hsieh.

all the medical bills concerning that surgery. Appellants also averred that they anticipated that "upon receipt of these additional records and bills, [c]laimants will be in a position to engage in negotiations to attempt to resolve this matter." In their opposition to the dismissal motions, counsel for Mr. and Mrs. Dorchy also stated that the failure to file a certificate of qualified expert was neither willful nor the result of gross negligence. Accordingly, plaintiffs asked the court for a further extension of time to file their certificate.

On November 2, 2017, the defendants withdrew their motion to dismiss and agreed that the plaintiffs should "receive an extension of 60 days from the October 7, 2017 deadline, or until December 6, 2017, to file a Certificate of Qualified Expert and Report." The Director, on November 3, 2017, acting pursuant to the third exception to the 90-day rule set forth in CJP § 3-2A-05(j), signed an order that read, in material part, as follows:

> ORDERED, that, good cause having been shown, Claimants request for further extension of time to file their Certificate of Qualified Expert be and hereby is GRANTED, and it is further
>
> ORDERED, that Claimants' shall file their Certificate of Qualified Expert on or before the 6th day of December, 2017.

Neither the Certificate of qualified expert nor the expert's report were filed on or before the December 6, 2017 deadline. The health care providers filed, on December 14, 2017, a second motion to dismiss. They contended that the plaintiffs had failed to meet a condition precedent to a successful medical malpractice claim by failing to file a timely certificate and report.

The plaintiffs did not directly respond to the second motion to dismiss. Instead, on December 19, 2017, they filed the Certificate of qualified expert together with a copy of

the expert's report. On the same day, plaintiffs filed an election to waive health claims arbitration.

ISSUE ONE

Appellants assert:

> The issue of whether the untimely filing of a fully sufficient Certificate of Qualified Expert in the [HCADRO] . . . prior to the filing of an Election to Waive Health Claims Arbitration and the transfer to the Circuit Court fails to satisfy the condition precedent to filing in the Circuit Court has not been decided by this Court or by the Court of Appeals.

Appellants continue:

> because their Certificate satisfies the purpose of the Health Care Malpractice Act and, more specifically, the purpose for the requirement of a Certificate of Qualified Expert, it was error by the Circuit Court to dismiss their claim.

Quoting *Wilcox v. Orellano*, 443 Md. 177, 184 (2015), appellants assert that "the purpose of the health claims arbitration process and the certificate requirement is 'to weed out non-meritorious claims and reduce the costs of litigation.'"

While it is interesting, as a historical matter, to understand why the General Assembly imposed a certificate requirement, the more relevant issue presented is why the General Assembly not only imposed a certificate requirement but also a temporal one, i.e., a requirement that the claimant file a certificate and report within 90 days of filing a complaint and spelling out under what circumstances the time requirements could be adjusted.

It seems obvious that the General Assembly imposed the temporal requirement to further its intent that health care claims be handled promptly and efficiently. That intent was mentioned in *McCready Memorial Hosp. v. Hauser*, 330 Md. 497, 511 (1993), where

the Court said that the legislature intended for the Act to "assur[e] the prompt and efficient arbitration of health claims."

In *Wilcox*, the Court said that "[a] circuit court is to dismiss a complaint without prejudice if the claimant fails to timely file an expert certificate and report." 443 Md. at 185 (citing CJP § 3-2A-04(b)(1)(i) and *Walzer v. Osborne*, 395 Md. 563, 578-79 (2006)). The *Wilcox* Court went on to say that notwithstanding the fact that the legislature wrote the statute to include several provisions for "enlarging the period of time for filing the expert certificate and report," "failure to file both the certificate and report within the statutory period and any extension will result in dismissal of a complaint." 443 Md. at 185-86.

Appellants argue, impliedly at least, that so long as the expert's certificate and report are substantively adequate, it does not matter if the temporal requirements of the Act are met. Appellants express that implied argument as follows:

> The Court of Appeals has never held that a failure to timely file a **totally valid and sufficient Certificate and report** prior to dismissal of the action by the HCADRO constitutes a failure to satisfy the condition precedent to bringing the action in the Circuit Court. All of the cases that have upheld dismissals in the Circuit Court have been on the basis of the lack of sufficiency of the Certificate and report. The validity and sufficiency of the Certificate and report in this case are unchallenged. The filing of the Certificate and report in this case satisfy both the purpose and intent of the health claims arbitration statute. By submitting a valid Certificate and report from a medical expert who meets all of the statutory requirements as a "qualified expert," the Appellants have demonstrated the merits of their claim.

Appellants, by filing of the expert's Certificate and report, may have demonstrated "the merits of their claim" but such a demonstration ignores the principle expressed in

Wilcox that a circuit court must dismiss, without prejudice, a medical malpractice action where the plaintiff had failed to timely file a certificate and report. 443 Md. at 185.

The exception set forth in CJP § 3-2A-04(b)(1)(ii) allowed plaintiffs, like appellants, to get the benefit of a 90-day extension. *See McCready Memorial Hosp.*, 330 Md. at 510-11.[4] The exception set forth in CJP § 3-2A-05(j) allowed the Director of the HCADRO,

[4] The *McCready* Court said:

> The structure of § 3-2A-04(b)(1) demonstrates that the General Assembly intended subparagraphs (b)(1)(i) and (b)(1)(ii) to operate in tandem. *See Vest v. Giant Food Stores, Inc.*, 329 Md. 461, 466-67, 620 A.2d 340, 342 (1993) ("In determining the meaning of the statutory provisions, the statute must be examined as a whole and the interrelationship or connection among all its provisions are considered."). Subparagraph (b)(1)(i) establishes the general rule that a panel chair "*shall* dismiss" all claims where the claimant failed to file a timely expert's certificate. Subparagraph (b)(1)(ii) provides an express directive to the panel chair. It directs that "*[i]n lieu of* dismissing the claim, the panel chairman *shall* grant an extension of no more than 90 days," under the stated circumstances. (Emphasis added). There is no indication that the claimant need formally or informally request this extension, and we conclude that the claimant need not do so. Instead, we believe the legislature intended that this extension be granted automatically in lieu of dismissal, subject to a defendant's motion to dismiss on the grounds that the claimant's failure to file the expert's certificate within the first 90 days was grossly negligent or willful. The Legislature's use of the clause "an extension of no more than 90 days" in the context of this Statute also indicates a legislative intent that the subparagraph (b)(1)(ii) extension commences at the expiration of the first 90-day period. Webster's defines "extension" as "an increase in length of time: increased or continued duration ... a part that is extended from or attached to a main body or section as an addition, supplement, or enlargement...." *Webster's Third New International Dictionary* 804-05 (1986) (emphasis in original). The term "extension," in the context of this provision, indicates a tacking of an added period of time to the initial 90-day period. *See Revis* [*v. Maryland Automobile Insurance Fund*], 322 Md. [683,] 686, 589 A.2d at 484 [(1991)] (when the language of the statute is plain and has a definite and sensible meaning, it shall be presumed to be the meaning the legislature intended).

(continued)

for good cause shown, to lengthen the time limitations for filing the Certificate and report for a period beyond 180 days. It was that exception that the Director used to grant appellants a sixty-day extension. After the December 6, 2017 deadline, the Director was never asked to grant a further extension.

Appellant argued in the circuit court that appellees were estopped from arguing that the Act requires the expert's certificate and report within 180 days. That argument was phrased as follows:

> Defendants now complain that Plaintiffs failed to file their Certificate of Qualified Expert within 180 days of filing of the case, arguing the statute mandates dismissal of the action. Defendants make this argument in the face of having consented to two extensions of time to permit the late filing of Plaintiffs' certificates. If they really believed that the statute mandated dismissal, why did they consent to two extensions outside of the 180-day limit? Clearly, Defendants are estopped to make this argument. If the running of 180 days from filing is an absolute barrier to filing a Certificate, why would they ever have consented?

The appellees never argued in the circuit court or in this Court that there was an absolute 180-day deadline for filing of the expert's certificate. When appellees consented

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> The Legislature specifically provided that this additional time period shall be "no more than 90 days." This language indicates that the General Assembly intended to create a limited 90-day extension that commences immediately and automatically upon the expiration of the initial 90-day period. The reason for the time limit is obvious - for subparagraph (b)(1)(ii) claimants, the statute of limitations has run and the claimants have already had a considerable period of time to prepare their claims. In contrast to the "good cause" extensions under §§ 3-2A-04(b)(5) and 3-2A-05(j), subparagraph (b)(1)(ii) gives claimants in a limited set of circumstances up to 180 days to file an expert's certificate without the need to prove "good cause."

Id. at 510-11 (emphasis added).

to the 60-day extension, they recognized, at least implicitly, that the Director had the discretion, for good cause shown, to grant an extension that would allow the Certificate to be filed after 180 days. *See* CJP § 3-2A-05(j). In his order granting the 60-day extension that gave appellants until December 6, 2017 to file the Certificate and report, the Director found good cause. Under such circumstances, appellants' estoppel argument has no merit.

As can be seen, by reading appellants' first issue presented (*see* p. 4, *supra*), they contend that regardless as to when a claimant files the Certificate and report with the HCADRO, their malpractice action should not be dismissed (even if good cause for the late filing is not shown) so long as the expert's certificate and report is "fully proper and sufficient." We hold that this contention has no merit because it is at odds with what the Court of Appeals said in *Wilcox*, 443 Md. at 185-86:

> A circuit court is to dismiss a complaint without prejudice if the claimant fails to timely file an expert certificate and report. [CJP] § 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.

(Footnote omitted, emphasis added.)

ISSUE TWO

The only exception that might arguably be here applicable is the "good cause exception" set forth in CJP § 3-2A-04(b)(5) that allows the circuit court to grant an extension ("[a]n extension of the time allowed for filing a certificate of a qualified expert

under this subsection shall be granted for good cause shown."). Appellants claim that the circuit court erred in not granting an extension, *nunc pro tunc*, to December 19, 2017, which was the date the Certificate and report were filed.

So long as the claimant in a medical malpractice case can show "good cause" for not filing an expert's certificate together with a report from the expert within 180 days, the circuit court can grant an extension. This was explained in *Kearney v. Berger*, 182 Md. App. 186, 198-99 (2008):

> In *Carroll v. Konits*, 400 Md. 167, 929 A.2d 19 [(2007)], the Court of Appeals examined whether an extension could be granted for good cause if the request was made outside the 180-day period. Dr. Konits raised the argument to the Court that the Director did not have discretion to grant Carroll an extension of time because it was not filed within the 180-day period and good cause was not established. He maintained that the Court should therefore not address the propriety of the purported Certificate of Merit. Relying on *Navarro-Monzo v. Washington Adventist Hosp.*, 380 Md. 195, 200-04, 844 A.2d 406, 409-12 (2004), the Court noted that this exact argument was previously rejected by the Court of Appeals and expressly rejected Dr. Konits's argument as well. Citing *McCready*, 330 Md. at 509, 624 A.2d at 1255, the Court characterized extensions for good cause as "'malleable,'" noting that they provide "room for the Director's discretion." *Id*. at 185, 624 A.2d 1249. Though *Carroll* did not resolve whether the Director did in fact have good cause to grant the extension, the Court observed: "In accordance with the statutory language and consistent with our prior case law, we believe that the General Assembly made it clear that the good cause extensions are discretionary and without time limitations, so long as the Claimant demonstrates good cause." *Id*.
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> Appellee insists that the analysis in *Carroll* does not control and is simply dicta because "the Court did not determine the validity of the 'good cause' extension because a determination on that issue did not impact the Court's final decision." Appellee continues that the analysis in *Carroll* was primarily based upon *Navarro-Monzo*, where the Court held that if a valid certificate was not filed within the requisite statutory period, "§ 3-2A04(b)(1)(i) became applicable and the claim was required to be dismissed." *Navarro-Monzo*, 380 Md. at 203, 844 A.2d at 411. While appellee is correct in noting that the analysis in *Carroll* was based upon

> *Navarro-Monzo*, it remains that the Court in *Carroll* determined that a good cause extension could be granted beyond the 180-day time period, and that determination binds this Court.

(Footnote omitted.)

In their memorandum of points and authorities filed in the circuit court, in support of their opposition to appellees' motion to dismiss, appellants devoted only one sentence to support their argument that "good cause" had been shown. That sentence reads: "Certainly the filing of a totally sufficient and unchallenged Certificate and report in the HCADRO, prior to the transfer of this case to this court, would constitute good cause." In oral argument before the circuit court, appellants' counsel did not even argue that his clients had shown good cause for the late filing of the Certificate and report.

In this Court, when addressing in their brief the good cause issue, appellants simply reiterate, almost verbatim, the one sentence set forth in their circuit court memorandum. They argue: "[c]ertainly the filing of a totally sufficient and unchallenged Certificate and report in the HCADRO, prior to the transfer to the Circuit Court, would constitute good cause." That argument is not persuasive. It is the equivalent of arguing that they showed good cause for not filing the expert's certificate and report in a timely manner, because they filed an untimely, but otherwise valid, certificate and report. If such an argument were to prevail, a plaintiff who filed a medical malpractice action would be free to file, without sanction, a certificate and report, whenever he or she felt like it. The General Assembly could not possibly have intended such a result because, if it had, there is no reason that it would have gone to the trouble of setting forth a 90-day time limit for filing a certificate

and report and then spelling out when and under what circumstances the time limit could be expanded.

The Act does not define "good cause" and, the parties to this case have not referred us to any case, nor have we found any, where the meaning of "good cause" was discussed in a case involving the Certificate and report requirement in a medical malpractice action. Nevertheless, courts, when interpreting other statutes requiring "good cause" to avoid time requirements, have discussed the issue. For instance, in *Heron v. Strader*, 361 Md. 258, 272 (2000) the Court said:

> Several other jurisdictions have sought to define good cause for late filing under public tort claims acts. While courts generally consider a combination of factors, circumstances that have been found to constitute good cause fit into several broad categories: excusable neglect or mistake (generally determined in reference to a reasonably prudent person standard), *see, e.g.*, *Viles* [*v. State*], 56 Cal. Rpts. 666, 423 P.2d at 821-22 [(1967)]; *Black v. Los Angeles County*, 12 Cal.App.3d 670, 91 Cal. Rptr. 104, 107-08 (1970); *Kleinke v. Ocean City*, 147 N.J. Super. 575, 371 A.2d 785 (App. Div.1977); serious physical or mental injury and/or location out-of-state, *see, e.g.*, *Silva v. New York*, 246 A.D.2d 465, 668 N.Y.S.2d 189 (1998); *Butler v. Ramapo*, 242 A.D.2d 570, 662 N.Y.S.2d 93 (1997); *Hilda B. v. Housing Auth.*, 224 A.D.2d 304, 638 N.Y.S.2d 36 (1996); *Lamb* [*v. Global Landfill Reclaiming*], 543 A.2d [443] at 451 [(1988)]; *S.E.W. Friel Co. v. New Jersey Turnpike Auth.*, 73 N.J. 107, 373 A.2d 364 (1977); *Kleinke*, 371 A.2d at 788; the inability to retain counsel in cases involving complex litigation, *see, e.g.*, *Torres v. Jersey City Med. Ctr.*, 140 N.J.Super. 323, 356 A.2d 75 (Law Div.1976); and ignorance of the statutory notice requirement, *see, e.g.*, *Bell v. Camden County*, 147 N.J.Super. 139, 370 A.2d 886 (App.Div.1977) . . . .

(Footnote omitted.)

Here, the appellants literally gave no excuse or "cause" for their untimely filing of the Certificate and report. Quite obviously, the requirement that good cause be shown, calls for some explanation as to why the Certificate and report were not filed on time.

Appellants had three years from May 9, 2014 (the date that the last act of alleged negligence occurred) to obtain a certificate and report. Additionally, when the second extension to file a certificate and report expired on December 6, 2017, 240 days had elapsed between the date the claim was filed and the date the extension expired. Under such circumstances, absent at least some explanation as to why appellants did not meet the December 6, 2017 deadline, it clearly was not an abuse of discretion for the circuit court to conclude that no "good cause" had been shown.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANTS.