Circuit Court for Prince George's County
Case No. CAL16-29277

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1164

September Term, 2017

NIGEL PULLIAM

v.

PRINCE GEORGE'S COUNTY, MARYLAND, ET AL.

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*Woodward,
*Wright,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: February 6, 2020

*Wright, Alexander, J., now retired, and Woodward, Patrick L., J., now retired, participated in the hearing of this case while active members of this Court, and Woodward, Patrick L., J. as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and the preparation of this opinion.

On August 4, 2014, Officer Brandon Peters of the Prince George's County Police Department pursued a dirt bike operated by Amir Brooks-Watson with Nigel Pulliam, appellant, riding as a passenger on the back of the bike. The pursuit began in Prince George's County, Maryland, and ended in Washington, D.C., when Brooks-Watson lost control of the dirt bike and crashed into a tree. Both Brooks-Watson and appellant sustained injuries in the crash, but Brooks-Watson later died as a result of his injuries. On July 22, 2016, appellant filed a four-count complaint in the Circuit Court for Prince George's County against Prince George's County, Maryland ("the County"), Officer Peters, and Sergeant Nicholas Cicale, appellees. On March 29, 2017, appellees filed a motion for summary judgment on all counts of the complaint. On July 14, 2017, a hearing on appellees' motion was held, and at the conclusion of the hearing, the trial court granted the motion. On appeal, appellant raises two questions,[1] which we have consolidated and

[1] As they appear in appellant's brief, appellant's questions presented are:

1. Did the lower court err when it relied upon the *District of Columbia v. Walker* decision, an incomplete surveillance video, and selections from Nigel Pulliam's deposition transcript to conclude that there was "undisputed" evidence that Officer Peters' conduct was not the proximate cause of the collision and Nigel Pulliam's injuries, when the *Walker* court did not decide the issue of negligence and [held] proximate cause determinations should be left to the fact finder?

2. Did the lower court err when it awarded summary judgment to Prince George's County and Officer Brandon Peters because Nigel Pulliam failed to demonstrate that he suffered a "disabling sort" of emotional distress, when the emotional distress and the negligent training and supervision claims arose from conduct which occurred in both Maryland and the District of Columbia,

rephrased as one: Did the trial court err when it granted summary judgment in favor of appellees on all counts?

For the reasons set forth herein, we answer this question in the negative, and accordingly, affirm the judgment of the circuit court.

BACKGROUND

On the afternoon of August 4, 2014, Officer Peters was working "secondary employment" as a security guard at the Fox Club Apartments in Forestville, Maryland.[2] Officer Peters observed Brooks-Watson driving a green Kawasaki dirt bike through the apartment complex with his cousin, appellant, riding as a passenger on the back. Officer Peters recalled that a dirt bike was reported stolen recently in a commercial robbery in the area, and he thought that the dirt bike ridden by appellant and Brooks-Watson may match the description of the stolen dirt bike. Officer Peters began to follow the dirt bike to the back of the apartment complex, but when Brooks-Watson and appellant saw Officer Peters approaching them, Brooks-Watson accelerated the bike, rode over the curb and grass, and left the complex. Officer Peters followed Brooks-Watson and appellant down Brooks Drive and then on to Pennsylvania Avenue. According to appellant, Officer Peters's cruiser's emergency lights were not activated at this time, and Officer Peters's proximity

> and, are actionable against the County for both acts and omissions of their employees?

[2] As required by Prince George's County Police Department rules, Officer Peters was wearing his police uniform and driving his police cruiser. Additionally, Officer Peters's employment contract with the apartment complex provided that he "may, without notice, leave [his] Watchman duties to resume full time duties whenever any emergency may occur that requires [him] to attend to [his] full time employment."

to the bike forced Brooks-Watson to cut across the median of Pennsylvania Avenue and drive on the shoulder on the wrong side of the road. Officer Peters followed the dirt bike to the other side of Pennsylvania Avenue as Brooks-Watson drove against oncoming traffic.

During the pursuit of the dirt bike, Officer Peters asked the police dispatcher to provide a description of the stolen dirt bike. Sergeant Cicale, who was also working secondary employment at the time, responded to Officer Peters's request, informing Officer Peters that the stolen dirt bike was yellow. According to Officer Peters, he was unable to hear Sergeant Cicale's response because Officer Peters's dog was barking in the backseat of his cruiser.

When Brooks-Watson and appellant approached the border between Maryland and the District of Columbia, they crossed over the median and began driving on the correct side of Pennsylvania Avenue. Once in the District of Columbia, Officer Peters slowed down and was five or six car lengths behind the dirt bike. Brooks-Watson then turned left on to Alabama Avenue, and Officer Peters lost sight of the bike. Officer Peters also turned on to Alabama Avenue and drove until he saw a plume of smoke. When he reached the origin of the smoke, Officer Peters saw that the dirt bike had been involved in a single vehicle accident. Officer Peters informed the dispatcher that two bikers had been injured in an accident and instructed the dispatcher to call for help. Officer Peters also asked the dispatcher to run a check on the dirt bike, and the dispatcher informed Officer Peters that it was not the dirt bike that had been reported stolen. Appellant was seriously injured in the accident, and Brooks-Watson died as a result of the injuries that he sustained in the

accident.

On July 22, 2016, appellant filed the instant litigation, alleging four counts. Count I alleged Intentional Infliction of Emotional Distress against the County and Officer Peters. Count II alleged Negligent Infliction of Emotional Distress against the County and Sergeant Cicale. Count III alleged Negligence/Gross Negligence for failure to train and supervise against the County and Sergeant Cicale. Count IV alleged Negligence/Gross Negligence against the County and Officer Peters. Appellees filed a motion for summary judgment on March 29, 2017. On July 14, 2017, a hearing on the motion was held before the circuit court, and that court granted the motion as to all counts. Appellant noted a timely appeal to this Court on August 11, 2017. Additional facts will be supplied as necessary to the resolution of the instant appeal.

STANDARD OF REVIEW[3]

[3] Although both parties cite to District of Columbia substantive law throughout their respective briefs, we review the trial court's grant of the motion for summary judgment under Maryland law. The Court of Appeals has explained:

> "[W]here by the law of the place of wrong, the liability-creating character of the actor's conduct depends upon the application of a standard of care, the application of such standard will be made by the forum in accordance with its own rules of evidence, inference and judgment." In other words, **the substantive standard of care to be applied is that of the place of wrong, but its application to the facts presented to the forum court is to be determined in accordance with the rules of evidence, inference, and judgment of the forum State.**

Lab. Corp. of Am. v. Hood, 395 Md. 608, 616 (2006) (emphasis added) (quoting Restatement (First) of Conflict of Laws § 380(1) (1934)).

We review the decision of a circuit court to grant a motion for summary judgment *de novo*. *Hogan v. Hogans Agency, Inc.*, 224 Md. App. 563, 567–68 (2015). Under Maryland Rule 2-501(f), a trial court shall grant a motion for summary judgment if "there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." "'[W]e independently review the record to determine whether the parties properly generated a dispute of material fact, and, if not, whether the moving party is entitled to judgment as a matter of law.'" *Kennedy Krieger Inst., Inc. v. Partlow*, 460 Md. 607, 632–33 (2018) (quoting *Chateau Foghorn LP v. Hosford*, 455 Md. 462, 482 (2017)). In doing so, "[w]e review the record in the light most favorable to the nonmoving party and construe any reasonable inferences that may be drawn from the facts against the moving party." *Id.* Generally, we "will consider only the grounds upon which the lower court relied in granting summary judgment." *PaineWebber Inc. v. East*, 363 Md. 408, 422 (2001) (citations omitted).

DISCUSSION

I.
Count I—Intentional Infliction of Emotional Distress

Appellant argues that the circuit court applied the wrong law when analyzing his intentional infliction of emotional distress claim. Specifically, appellant claims that the court relied on only Maryland case law when his claim "included the emotional distress suffered in Maryland and in the District of Columbia." According to appellant, Maryland law requires a plaintiff to demonstrate "a severely disabling emotional response" while District of Columbia law "does not appear to require a disabling emotional response."

Additionally, appellant asserts that, because the circuit court assumed that Officer Peters's conduct was "outrageous and extreme," appellant's claim for intentional infliction of emotional distress should have been submitted to a jury. We disagree and shall explain.

Under District of Columbia law, intentional infliction of emotional distress consists of three elements: "(1) extreme and outrageous conduct on the part of [the defendant] that (2) intentionally or recklessly (3) caused [the plaintiff] severe emotional distress." *Newmyer v. Sidwell Friends School*, 128 A.3d 1023, 1037 (D.C. 2015). "Recovery is not allowed merely because conduct causes mental distress." *Crowley v. North Am. Telecomm. Ass'n*, 691 A.2d 1169, 1172 (D.C. 1997) (citation omitted). Instead, plaintiffs must demonstrate "emotional distress 'of so acute a nature that harmful physical consequences might be not unlikely to result.'" *Kotsch v. District of Columbia*, 924 A.2d 1040, 1046 (D.C. 2007) (quoting *Clark v. Associated Retail Credit Men of Wash. D.C.*, 70 App. D.C. 183, 186 (1939)).[4] Similarly, under Maryland law, a *prima facie* claim of intentional infliction of emotional distress requires a plaintiff to show: "(1) the conduct is intentional or reckless; (2) the conduct is extreme and outrageous; (3) there is a causal connection between the wrongful conduct and the emotional distress; [and] (4) the emotional distress is severe." *Thacker v. City of Hyattsville*, 135 Md. App. 268, 315 (2000). Also, for the distress to be sufficiently severe, the plaintiff must show "'that he suffered a *severely* disabling emotional response to the defendant's conduct,' and that the distress was so

[4] We observe that, at the summary judgment hearing, the trial court accurately noted this standard, stating that "[i]t has been described as so acute that harmful physical consequences may be not unlikely to result[.]"

severe that 'no reasonable man could be expected to endure it.'" *Id.* (emphasis in original) (quoting *Harris v. Jones*, 281 Md. 560, 570–71 (1977)).

Here, appellant's complaint simply states that he "has suffered, and will continue to suffer, severe and extreme emotional distress." In the summary judgment proceeding, appellant did not present any evidence about any specific symptoms of emotional distress that he suffered as a result of the accident. *See Ortberg v. Goldman Sachs Group*, 64 A.3d 158, 164 (D.C. 2013) (overturning a grant of a preliminary injunction where plaintiff "did not complain of any symptoms of emotional distress, like a loss of sleep or an inability to concentrate"). Nor did appellant offer any evidence of counseling or other professional treatment for emotional distress allegedly suffered from the accident. *See Kotsch*, 924 A.2d at 1046 (affirming a grant of summary judgment where the "appellant did not seek medical assistance for . . . psychological injury"). Finally, appellant offered no evidence that his emotional distress was more than a reasonable person could be expected to endure. *See Kitt v. Capital Concerts, Inc.*, 742 A.2d 856, 862 (D.C. 1999) (affirming a grant of summary judgment where plaintiff "offered no evidence proving that his discomfort was greater than a reasonable person could be expected to tolerate"). We therefore conclude that under both District of Columbia and Maryland law, appellant failed to adduce sufficient facts to demonstrate the requisite emotional distress for a claim of intentional infliction of emotional distress.

Further, we disagree with appellant that the instant case should have been submitted automatically to the jury because the trial court judge "assum[ed] the conduct was outrageous and extreme." Appellant cites to *Howard University v. Best*, 484 A.2d 958

(D.C. 1984) to support the proposition that "in the event the conduct is determined to be extreme and outrageous, District of Columbia courts consider the severity of the conduct, a matter to be decided by the jury." The *Best* court held:

> It is for the trial court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. The case should be submitted to the jury if reasonable people could differ on whether the conduct is extreme and outrageous.

Id. at 985 (citations omitted). Two years after the *Best* decision in *Green v. American Broadcasting Companies, Inc.*, 647 F. Supp. 1359, 1362 (D.D.C. 1986), another intentional infliction of emotional distress case, the United States District Court for the District of Columbia analyzed *Best* and explicitly stated: "Plaintiff must prove all three elements to prevail on her claim." As explained above, appellant failed to provide sufficient facts to support a finding of the third element, severe emotional distress. Therefore, the trial court's assumption that appellees' conduct was extreme and outrageous does not preclude the grant of summary judgment in favor of appellees on appellant's claim of intentional infliction of emotional distress.

II.
Counts II and III—Negligent Infliction of Emotional Distress and Negligence in Failing to Train and Supervise

Appellant asserts that the trial court erred when it granted appellees' motion for summary judgment regarding Counts II and III. Count II set forth a claim of negligent infliction of emotional distress, and Count III stated a claim of negligence/gross negligence for failure to train and supervise. Both Counts II and III are against Sergeant Cicale and the County.

As an initial matter, we will address appellees' contention that Maryland law, not District of Columbia law, governs appellant's claim for negligent training and supervision. Appellees rely on *Jones v. Prince George's County*, 378 Md. 98 (2003) to argue that, because appellant's claim stems from acts or omissions that occurred in Maryland, Maryland law governs. *Jones* involved a wrongful death claim, and the Court of Appeals pointed to Section 3-903 of the Courts and Judicial Proceedings Article, which creates a special choice-of-law rule specifically for wrongful death actions brought in Maryland courts. *See id.* at 107–08. The Court held that "[u]nder the plain language of the statute, it is the place of the wrongful *act*, and not the place of the wrongful *death*, which determines the substantive tort law to be applied in a particular wrongful death action." *Id.* (emphasis in original) (citation omitted). In the absence of a wrongful death claim, however, Maryland's traditional rule of *lex loci delicti* applies. *Lab. Corp. of Am. v. Hood*, 395 Md. 608, 615 (2006) ("Maryland continues to adhere generally to the *lex loci delicti* principle in tort cases."). The *lex loci delicti* doctrine states that, "where the events giving rise to a tort action occur in more than one State, we apply the law of the State where the injury—the last event required to constitute the tort—occurred." *Id.*

Because appellant's injuries occurred in the District of Columbia, District of Columbia law governs the claim for negligent training and supervision. The same result applies to appellant's claim for negligent infliction of emotional distress, at least insofar as appellant sustained emotional distress in the District of Columbia. Unlike Maryland law,

which does not recognize the tort of negligent infliction of emotional distress,[5] District of Columbia law provides that a plaintiff can recover for negligent infliction of emotional distress if:

> "(1) the defendant has a relationship with the plaintiff, or has undertaken an obligation to the plaintiff, of a nature that necessarily implicates the plaintiff's emotional well-being, (2) there is an especially likely risk that the defendant's negligence would cause serious emotional distress to the plaintiff, and (3) negligent actions or omissions of the defendant in breach of that obligation have, in fact, caused serious emotional distress to the plaintiff."

Lesesne v. District of Columbia, 146 F.Supp.3d 190, 195 (2015) (quoting *Hedgepeth v. Whitman Walker Clinic*, 22 A.3d 789, 810 (D.C. 2011)).As previously stated, Counts II and III are each asserted against Sergeant Cicale and the County. We will discuss each appellee separately.

a. Sergeant Cicale

The circuit court held that Sergeant Cicale's conduct "certainly [was] not negligent[.]" The court reasoned that "the only allegation about [Sergeant Cicale] is he heard a call over the radio from Officer Peters as to the color of the lookout, and the color of the bike on the lookout, and responded accurately as to what that color was." The record supports the court's holding. The only evidence presented with regard to Sergeant Cicale's conduct was his affidavit and Officer Peters's Mobile Video System (MVS). In the MVS, Officer Peters inquired about the color of the stolen dirt bike. In his affidavit, Sergeant Cicale stated that he responded to Officer Peters's inquiry with the color of the stolen dirt

[5] "Maryland does not recognize the separate and distinct tort of negligent infliction of emotional distress." *Williams v. Prince George's Cty.*, 112 Md. App. 526, 556 (1996).

bike. Sergeant Cicale also stated that providing the color of the dirt bike was his only involvement with the incident of August 4, 2014, regarding Officer Peters, appellant, and Brooks-Watson. Therefore, we agree with the trial court that Sergeant Cicale was not negligent as a matter of law. Accordingly, Sergeant Cicale could not have negligently inflicted emotional distress on appellant. *See Lesesne*, 146 F.Supp.3d at 190 (explaining that in order to bring a claim for negligent infliction of emotional distress, the plaintiff must prove "defendant's *negligence* would cause serious emotional distress to the plaintiff") (emphasis added).

Sergeant Cicale also cannot be held liable, as a matter of law, for the negligent failure to train and supervise. Appellant failed to present any evidence that Sergeant Cicale was responsible for training Officer Peters. At the time of the pursuit, Sergeant Cicale was not acting as a supervisor to Officer Peters and did not have the authority to order Officer Peters to terminate his pursuit, as appellant contends he should have done. Therefore, we hold that appellant's claim for negligent failure to train and supervise against Sergeant Cicale fails as a matter of law.

b. The County

In its ruling on Counts II and III as to the County, the circuit court stated: "[T]he [appellant]'s counsel has agreed that the claims against the County in those counts are as *respondeat superior*. Since . . . Sergeant [Cicale] is not liable, the County can't be liable either." We agree with the circuit court. Because Sergeant Cicale was not negligent, the County cannot be found negligent under a theory of *respondeat superior* as to Counts II and III.

Appellant, however, argues on appeal that, even if Sergeant Cicale is not liable for negligent training and supervision, the County is directly liable for the negligent failure to train and supervise. In particular, appellant contends that the County itself "is responsible for failing to provide adequate supervision to Officer Peters." Appellant claims that the County is liable because "[a]ny supervisor . . . should have instructed Officer Peters that his pursuit did not meet the criteria for initiating pursuit in Maryland or continuing the pursuit of a vehicle in the District of Columbia under the [County's] policy." We hold that under Rule 8-131(a), the issue of the County's direct liability on the claims alleged in Counts II and III has not been preserved for appellate review.

Under Maryland Rule 8–131(a), "[o]rdinarily, the appellate court will not decide any . . . issue unless it plainly appears by the record to have been raised in or decided by the trial court." We have previously explained:

> The application of the rule limiting the scope of appellate review to those issues and arguments raised in the court below is a matter of basic fairness to the trial court and to opposing counsel, as well as being fundamental to the proper administration of justice. Therefore, if a party fails to raise a particular issue in the trial court, . . . the general rule is that he or she waives the issue on appeal.

Dunham v. Univ. of Maryland Med. Ctr., 237 Md. App. 628, 649–50, *cert. denied*, 461 Md. 507 (2018) (cleaned up). In *Dunham*, a case involving a medical malpractice suit, we held that, because "the premise of [the hospital's] liability was grounded in the theory of vicarious liability," the plaintiffs did not preserve "claims of direct negligence" for appellate review. *Id.* at 650. We have come to similar conclusions in cases involving other types of claims. *See Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 80 n. 18 (2015)

(holding that because the plaintiff did not allege a Maryland constitutional violation at the circuit court level in an action to enjoin a merger, we would not address that allegation on appeal); *McKinney v. State Deposit Ins. Fund Corp.*, 99 Md. App. 124, 138 (1994) (rejecting a party's privity arguments because those arguments were not raised before the circuit court).

It is undisputed that appellant did not raise the issue of the direct liability of the County before the trial court. Also, the trial court never ruled on such theory when granting the motion for summary judgment on Counts II and III. Therefore, Rule 8-131(a) precludes appellant from raising in the instant appeal the issue of the County's direct liability on the claims alleged in Counts II and III.

Nevertheless, Rule 8-131(a) permits this Court, in the exercise of our discretion, to address the issue of the County's direct liability in Counts II and III. If we were to do so, we would hold that the County is not negligent as a matter of law. To bring a claim for negligent supervision under District of Columbia law, a plaintiff must "show that an employer knew or should have known its *employee* behaved in a dangerous or otherwise incompetent manner, and that the employer, armed with that actual or constructive knowledge, failed to adequately supervise the employee." *Giles v. Shell Oil Corp.*, 487 A.2d 610, 613 (1985) (emphasis in original). "Negligent supervision and retention claims therefore require proof that the employer breached a duty to plaintiff to use reasonable care in the supervision or retention of an employee which proximately caused harm to plaintiff." *Blair v. District of Columbia*, 190 A.3d 212, 229 (D.C. 2018) (footnote and quotation omitted).

Appellant asserts that the County "is responsible for failing to provide adequate supervision to Officer Peters so that he would not recklessly or negligently disregard the County's policy on pursuits." Furthermore, appellant states that "[t]he County's employees and supervisors failed to instruct Officer Peters to terminate the pursuit in Maryland or in the District of Columbia when the pursuit clearly violated the standard of care outlined in the pursuit policy." Appellant points out that the pursuit policy "only permits an officer to engage in a pursuit inside or outside the County when there is a reason to believe that the fleeing suspect is committing, has committed, or attempted to commit a homicide, cont[r]act shooting, armed robbery, or armed carjacking."

Appellant, however, failed to produce any evidence that the County "knew or should have known [Officer Peters] behaved in a dangerous or otherwise incompetent manner." *Giles*, 487 A.2d at 613. Further, under the County pursuit policy, a vehicle pursuit is defined as "[a]n active attempt by a police officer in an emergency vehicle to apprehend a motorist who exhibits a clear intention to avoid apprehension." Here, Officer Peters stated that he relaxed his pursuit and lost sight of the dirt bike when the latter turned on Alabama Avenue. Appellant also stated that he lost sight of Officer Peters once the dirt bike entered the District of Columbia. Finally, at the time of the accident, Officer Peters was approximately ten seconds behind the dirt bike and another vehicle was ahead of Officer Peters's police cruiser. We therefore conclude that the trial court did not err in granting summary judgment in favor of the County as to Counts II and III.

III.
Count IV—Negligence/Gross Negligence

Appellant challenges the circuit court's grant of summary judgment in favor of the County and Officer Peters as to Count IV on the grounds that the circuit court should have allowed a jury to determine the issue of proximate cause. Specifically, appellant contends that the court erroneously relied on the case of *District of Columbia v. Walker*, 689 A.2d 40 (D.C. 1997) when it concluded that Officer Peters's conduct could not have been the proximate cause of the accident. Appellant also argues that the court relied on incomplete video evidence when it determined that there was no genuine issue of material fact on the proximate cause issue.

a. The *Walker* Case

Generally, "[t]o establish proximate cause, the plaintiff must present evidence from which a reasonable juror could find that there was a direct and substantial causal relationship between the defendant's breach of the standard of care and the plaintiff's injuries." *District of Columbia v. Zukerberg*, 880 A.2d 276, 281 (D.C. 2005) (quotation omitted). In other words, a proximate cause is one "'which, in natural and continual sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred.'" *St. Paul Fire & Marine Ins. Co. v. James G. Davis Constr. Corp.*, 350 A.2d 751, 752 (D.C. 1976) (quoting *Wagshal v. District of Columbia*, 216 A.2d 172, 175 (D.C. 1966)).

In *Walker*, District of Columbia police officers pursued a juvenile driving a stolen car beginning in the District of Columbia and ending in Prince George's County, Maryland.

689 A.2d at 41. Shortly after entering Maryland, the juvenile pulled into the lane of oncoming traffic to pass three cars, but did not return to the correct side of the road before colliding with an oncoming car and killing the driver of that car. *Id.* at 43. The husband of the decedent driver brought suit against the police department, alleging gross negligence by the pursuing officers. *Id.* at 41. After a jury found for the husband of the decedent, the District of Columbia Court of Appeals reversed, holding that the officers' conduct did not constitute gross negligence. *Id.* at 48. In reaching such holding, the court stressed that "the primary focus must be not upon the conduct of the [ ] officers in all its aspects, but only upon that particular conduct that might be said to have proximately caused the collision." *Id.* at 46. In other words, if the officers "were grossly negligent at an earlier point in the pursuit . . . such gross negligence did not in itself cause any injury." *Id.* Consequently, the court limited its inquiry to conduct by the officers that occurred on that part of the road where the collision occurred. *Id.* at 46–47.

Appellant first argues that the trial court erred in relying upon *Walker* to make a holding related to proximate cause. Specifically, appellant points out that the *Walker* court's ultimate holding was that the conduct of the officers did not constitute gross negligence, but in arriving at such holding, the court stated that the officers' conduct "may have constituted negligence, an issue we expressly do not decide." *Id.* at 48. Appellant reasons that, because proximate cause is an element of negligence, and the *Walker* court did not decide the issue of negligence, then *Walker* cannot "support the lower court's conclusion that Officer Peters could not have been the cause of [appellant]'s injuries." Contrary to appellant's argument, the *Walker* court did include proximate cause in its

analysis. The court did so by considering only the conduct of the officers that could, as a matter of law, have proximately caused the decedent's injury, and such conduct took place on the roadway where the accident occurred at a time immediately preceding the accident. *Id*. at 46–47.

Appellant next argues that Officer Peters's conduct proximately caused appellant's injury, because Officer Peters based his initial decision to pursue the dirt bike on an obvious error that the dirt bike matched the description of a stolen dirt bike, and that Officer Peters's decision to continue the pursuit into the District violated police department policy. Under the *Walker* analysis, however, we must examine the events in the record that occurred immediately before the crash on Alabama Avenue. Here, it is clear that there could not have been "a direct and substantial causal relationship" between Officer Peters's conduct and appellant's injuries. *Zukerberg*, 880 A.2d at 281. A stationary traffic surveillance video ("the video") of the part of Alabama Avenue immediately preceding the crash site was introduced at the summary judgment hearing. The video shows Brooks-Watson and appellant, travelling at a high rate of speed on Alabama Avenue, enter the video from the right and exit to the left. Less than two seconds after the dirt bike leaves the video, a part of the dirt bike comes back into the video from the left, sliding on the road in the opposite direction of Brooks-Watson and appellant's travel; also from the left, a shoe and other debris are seen flying through the air and landing on the other side of Alabama Avenue. A civilian vehicle enters the video from the right, traveling in the same direction as Brooks-Watson and appellant, approximately eight seconds behind the dirt bike followed two seconds later by Officer Peters's cruiser with its emergency lights on. According to both

Officer Peters and appellant, neither Officer Peters nor appellant saw each other after Brooks-Watson turned on to Alabama Avenue. Given the lack of visual contact and the ten seconds between the vehicles, Brooks-Watson could have slowed down the speed of the dirt bike to make a turn off of Alabama Avenue to avoid Officer Peters's pursuit or stopped the dirt bike and fled on foot. Examining the facts in the record, we hold that, as a matter of law, Officer Peters's conduct did not proximately cause the accident. Accordingly, the trial court did not err in granting summary judgment in favor of the County and Officer Peters on Count IV.

b. Genuine Dispute as to any Material Fact

Appellant, nevertheless, argues that summary judgment was inappropriate because the video did not completely refute appellant's version of events. Appellant contends that the video relied upon by the trial court "ignores a litany of material disputed facts including numerous false statements made by Officer Peters." We disagree.

When the moving party has provided the trial court with sufficient grounds to grant summary judgment in its favor

> "[i]t is . . . incumbent upon the other party to demonstrate that there is indeed a genuine dispute as to a material fact. He [or she] does this by *producing factual assertions, under oath,* based on the *personal knowledge* of the one swearing out an affidavit, giving a deposition, or answering interrogatories. Bald, unsupported statements or conclusions of law are insufficient."

Reiter v. ACandS, Inc., 179 Md. App. 645, 660 (2008) (emphasis in original) (quoting *Miller v. Ratner*, 114 Md. App. 18, 27 (1997)). In other words, the party opposing the grant of a motion for summary judgment must adduce facts that are not only detailed and precise, but are admissible in evidence. *James v. Tyler*, 269 Md. 48, 52–53 (1973); *Shaffer*

v. Lohr, 264 Md. 397, 404 (1972). Moreover, "the mere presence of a factual dispute in general will not render summary judgment improper." *Remsburg v. Montgomery*, 376 Md. 568, 580 (2003) (citation omitted). "'A material fact is a fact the resolution of which will somehow affect the outcome of the case.'" *Ratner*, 114 Md. App. at 26 (quoting *King v. Bankerd*, 303 Md. 98, 111 (1985)).

None of the facts identified by appellant create a genuine dispute as to a material fact. Appellant asserts that Officer Peters stated that his dash cam video automatically began recording when his emergency lights were turned on, that the surveillance video shows Officer Peters's cruiser with its emergency lights on, and yet there is no dash cam footage from this period of time. No material fact is raised by such evidence, because the lack of a dash camera from Officer Peters's cruiser does not change the video showing Officer Peters's cruiser too far behind the dirt bike to have caused it to crash. Appellant also points to Officer Peters's statement in an interview that he was five or six cars behind the bike, but the video shows only one car in between Officer Peters's cruiser and the dirt bike. Again, such conflict does not change the evidence from the video that Officer Peters's cruiser was too far behind the dirt bike to have caused it to crash.

More importantly, appellant relies on a 911 telephone call by an anonymous caller and the transcript of a police interview with an eyewitness, Samantha Johnson. The 911 caller stated that "I think they were scared. They were scared because there was an officer right up behind them with a light on." In Johnson's interview, the following relevant colloquy took place:

Q: . . . You see, um, the - them, hit the tree, the bike spin around. This is what you said earlier. And then what I'm askin' you is when you went to look back, do you remember seeing a police car there or was there some time before . . .

A: No, the police car was right there.

The 911 call and the transcript of Johnson's interview are classic hearsay statements. *See* Maryland Rule 5-801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"). Under Rule 5-802, hearsay is not admissible unless it fits into one of the exceptions provided in the rules or under applicable statutes or constitutional provisions. Pertinent to the instant appeal, Rule 5-803(b)(1) creates an exception for a present sense impression, defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Although a statement need not necessarily be made at precisely the moment the declarant is experiencing the event or condition, the Court of Appeals has stressed that "the time interval between observation and utterance must be very short. The appropriate inquiry is whether, considering the surrounding circumstances, sufficient time elapsed to have permitted reflective thought." *Booth v. State*, 306 Md. 313, 324 (1986). Also, Rule 5-803(b)(2) creates an exception for an excited utterance, defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." The Court of Appeals has stated: "The rationale for overcoming the inherent untrustworthiness of hearsay is that the situation produced such an effect on the declarant as to render his reflective capabilities inoperative." *Mouzone v.*

State, 294 Md. 692, 697 (1982), *overruled on other grounds by Nance v. State*, 331 Md. 549 (1993). Finally, "'[w]hen urging an exception to a rule of exclusion, . . . *the burden is upon the proponent of the exception*. The correct procedural posture is, 'Hearsay will be excluded, unless the proponent demonstrates its probable trustworthiness.'" *Morten v. State*, 242 Md. App. 537, 546–47 (2019) (emphasis in original) (quoting *Cassidy v. State*, 74 Md. App. 1, 8 (1988)).

Here, appellant makes no effort to show that the 911 call satisfies any exception to Rule 5-802. Upon reading the transcript of the 911 call, however, it appears that the excited utterance exception will apply. On three occasions before the above quoted statement and one time afterwards, the caller said: "Oh my God." *See Morten*, 242 Md. App. at 546 (quoting the late Irving Younger describing an excited utterance: "'It begins with 'My God' and ends with an exclamation point!'"). Unfortunately for appellant, even assuming that the 911 call qualifies as an excited utterance, the caller's statement is insufficient to raise a genuine issue of material fact. The phrase "an officer right up behind them" lacks any precision or detail concerning the distance between Officer Peters's cruiser and the dirt bike at the time of the accident. When such ambiguity is considered with the video that clearly shows Officer Peters's cruiser being no less than ten seconds behind the dirt bike, the 911 call cannot be the basis for a genuine dispute of material fact. *See Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (holding that the lower court "should have viewed the facts in the light depicted by [a] videotape" because the other party's "version of events [was] so utterly discredited by the [videotape] that no reasonable jury could have believed him").

Similarly, appellant makes no argument that the transcript of Johnson's interview satisfies any exception to the hearsay rule. Indeed, our review of Johnson's statements to the police indicate that they do not satisfy either the present sense impression or excited utterance exception. Johnson witnessed the crash on August 4, 2014. Her interview with the police occurred four days later, on August 8, 2014. Four days represents ample opportunity for "reflective thought," and thus precludes the application of the present sense impression exception. *See Booth*, 306 Md. at 324. Also, it cannot be said that witnessing an accident four days earlier "produced such an effect on [Johnson] as to render [her] reflective capabilities inoperative;" thus the excited utterance exception is not satisfied. *Mouzone*, 294 Md. at 697.

Lastly, on or about August 8, 2014, Johnson signed the transcript of the interview under the following statement: "THIS RECORDED STATEMENT IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE." In general, admissible evidence can be adduced in a summary judgment proceeding by means of an affidavit that (1) is by an individual who has personal knowledge and is competent to testify, and (2) sets forth such facts as would be admissible in evidence. *See* Md. Rule 2-501(c). The transcript of the police interview does not qualify as an affidavit of Johnson, because the transcript is not in the form required by Maryland Rule 1-304. Rule 1-304, entitled Form of Affidavit, reads in relevant part:

> The statement of the affiant . . . may be made by signing the statement in one of the following forms:
>
> ***
>
> Personal Knowledge. "I solemnly affirm under the penalties of perjury and upon personal knowledge that the contents of the foregoing paper are true."

See Mercier v. O'Neill Assocs., Inc., 249 Md. 286, 287 n. 1 (1968) (holding that an affidavit stating that it was "true and correct to the best of his knowledge and belief . . . [was] defective in form and substance"); *Cty. Comm'rs of Caroline Cty. v. J. Roland Dashiell & Sons, Inc.*, 358 Md. 83, 103 (2000) ("When an affidavit is required, it must contain language that it is made on 'personal knowledge,' in order for it to be sufficient to sustain a motion for summary judgment, and that wording such as 'to the best of my knowledge, information and belief' is generally insufficient to satisfy this requirement.").

For the foregoing reasons, we hold that the trial court did not err by granting summary judgment in favor of appellees on all counts.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.