Circuit Court for Prince George's County
Case No. CAL-1928883

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1736

September Term, 2021

KAHIL JOHNSON,

v.

WEXFORD HEALTH SOURCES INC., et al.

Wells, C.J.
Zic,
Ripken,
JJ.

Opinion by Ripken, J.

Filed: November 2, 2022

This appeal involves a challenge by Kahil Johnson ("K. Johnson") to the Circuit Court for Prince George's County's grant of summary judgment and a motion *in limine* in favor of Appellees, Wexford Health Sources, Inc. ("Wexford") and Dr. Wright. The court determined that Wexford and Dr. Wright could not be held liable, under a theory of negligence, for their actions related to a delay in treatment of Thomas Johnson's ("T. Johnson") terminal cancer. For the reasons discussed below, we shall affirm.

ISSUES PRESENTED FOR REVIEW

The parties present the following issues for our review, which we have condensed and consolidated:[1]

I. Whether the court erred in considering Dr. Wright's Joinder in Wexford's Motion for Summary Judgment.

II. Whether the court erred in determining that there was no genuine dispute of material

[1] K. Johnson presented the following issues:

I. Did Judge Mittelstaedt err in granting judgment in favor of Defendant Wexford on the basis that none of Appellant's experts testified that Mr. Johnson was injured by the months-long delay in beginning the treatment prescribed by Dr. Mannuel, despite both experts testifying to the harm caused by the delay?

II. Did Judge Jackson err in granting judgment in favor of Dr. Wright on the basis that neither of Appellant's experts testified to an applicable standard of care, despite Dr. Mannuel testifying to the Defendants' breach of the standard of care?

III. Did Judge Mittelstaedt and Judge Jackson both err in granting Defendant Wexford and Dr. Wright's omnibus motions on the same grounds as each defendant's motion for summary judgment?

Wexford and Dr. Wright presented the following issues:

I. By failing to cite or submit any evidence to demonstrate a factual dispute in the trial court, did Appellant fail to preserve the issue for appellate review?

fact.

III. Whether the court erred in concluding that Wexford and Dr. Wright were entitled to judgment as a matter of law.

IV. Whether, after granting Wexford and Dr. Wrights' motion for summary judgment, the circuit court erred in granting their then-moot motion *in limine*.

The Circuit Court for Prince George's County considered and granted Dr. Wright's motion for joinder, found no genuine dispute of material fact, held that Wexford and Dr. Wright were entitled to judgment as a matter of law, and granted the motion *in limine*.

FACTUAL AND PROCEDURAL BACKGROUND

In the spring of 2013, T. Johnson developed pain in his groin and was subsequently diagnosed with prostate cancer. After a bone scan in November of 2014 confirmed T. Johnson's cancer had spread to his left hip, the cancer was reclassified as metastatic, a form of terminal cancer. From the initial cancer diagnosis until his incarceration, T. Johnson was treated by Dr. Dawson, a medical oncologist at the Georgetown Hospital's

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II. Where Appellant failed to show the court how he could present admissible evidence supporting essential elements of his claim, did the circuit court err in granting summary judgment based on a finding that there was no genuine dispute of material fact?

III. Setting aside issues 1 and 2, *supra*: If a plaintiff who has lost on summary judgment in the trial court after failing to comply with Rule 2-501(b) may attempt to show the existence of a genuine factual dispute for the first time on appeal, has Appellant demonstrated the existence of a genuine dispute of material fact sufficient to require reversal of the trial court's orders granting summary judgment for Wexford and Dr. Wright?

IV. If the mootness doctrine does not bar this Court from addressing the issue, did the trial court abuse its discretion when it ordered that Appellant's expert, Dr. Mannuel, be prohibited from testifying at trial that a delay in switching Johnson from Xtandi to Zytiga caused injury to Johnson?

Lombardi Cancer Center ("Lombardi Center"). In February of 2015, T. Johnson underwent cryoablation to remove as much of a cancerous tumor from his hip as possible.[2] After the procedure, T. Johnson required a walker for mobility and had constant hip pain. In the months leading up to his incarceration, T. Johnson's pain lessened only slightly, and he continued to rely on his walker.

On September 14, 2015, the Circuit Court for Prince George's County convicted T. Johnson and subsequently sentenced him to a period of incarceration in the Maryland Division of Corrections. On November 19, 2015, about a week into the commitment, T. Johnson underwent an initial health assessment and was enrolled in the chronic care clinic at the Jessup Regional Infirmary. To help optimize T. Johnson's cancer treatment, he was referred to Dr. Mannuel, an oncologist at the University of Maryland Medical Center ("UMMC"). At T. Johnson's initial visit with Dr. Mannuel on April 29, 2016, T. Johnson shared that "[h]e feels well overall aside from residual leg and hip pain" and that he relies on a walker to move around. The pain and mobility issues described in the initial visit made up T. Johnson's baseline symptoms. The effect of treatments in reducing pain and improving mobility were measured against T. Johnson's baseline for medical consistency.

On September 9, 2016, Dr. Mannuel reviewed T. Johnson's recent CT scan and noticed a mild increase in the size of his lymph nodes. The increased size, coupled with the

[2] The procedure had to be discontinued after 90% of the tumor was removed, because the tumor was located close to a nerve and Johnson's nerve conduction (a measure of functioning ability) began to slow.

rise in T. Johnson's PSA level to 17 ng/ml from 10 ng/ml in July of 2016,[3] indicated to Dr. Mannuel the diminished effectiveness of T. Johnson's current medications. Dr. Mannuel consulted with Dr. Dawson, and they agreed that T. Johnson should switch medication from Xtandi to Zytiga. Dr. Mannuel expected the Zytiga to reduce T. Johnson's pain and suffering. Per routine, Dr. Mannuel marked the change in medication in a note sent back to the prison facility with T. Johnson's accompanying correctional officers.

Starting on September 14, 2016, Dr. Wright began to oversee T. Johnson's cancer treatment. Dr. Wright was an independent contractor hired by Summerfield and Associates, Inc. to treat Maryland prison inmates on Wexford's behalf. Wexford, in turn, had a contract with the State of Maryland to provide health services to inmates of facilities operated by the Maryland Division of Corrections. In his initial visit with Dr. Wright, T. Johnson was "chronically ill-appearing" and walked with a cane. Dr. Wright was aware of T. Johnson's most recent visit with Dr. Mannuel, but the record of the visit was not promptly available for Dr. Wright's review.[4]

Dr. Mannuel attempted to reach Dr. Wright numerous times to ensure that T. Johnson began Zytiga treatment. However, the phone number that Dr. Mannuel used

[3] PSA level is an indicator of the disease progression and is not, itself, a symptom or measure of pain.

[4] There is no evidence in the record explaining why Dr. Mannuel's note was not accessible to Dr. Wright until much later.

was never associated with Maryland prison medical facilities.[5] Dr. Mannuel's nurse separately tried to reach Dr. Wright. On one occasion, someone answered the nurse's call and agreed to leave a message for Dr. Wright, but there is nothing in the record to suggest that a message reached him.

When T. Johnson saw Dr. Wright on October 27, 2016, Dr. Wright had not received a note from Dr. Mannuel and T. Johnson's medications remained unchanged. A week later, on November 3, Dr. Wright saw T. Johnson again. At this appointment, Dr. Wright prescribed Zytiga, indicating that he had received and reviewed Dr. Mannuel's note with his recommendation.

T. Johnson visited Dr. Wright again on November 17 and November 30, 2016. T. Johnson did not begin receiving Zytiga until approximately a week before his appointment with Dr. Mannuel on December 14, 2016.[6] Prior to starting on Zytiga, T. Johnson's PSA level rose from 17 ng/ml on September 9 to 53 ng/ml on November 16, 2016. Additionally, T. Johnson reported baseline leg pain to Dr. Mannuel on November 16, but increased groin pain the next day to Dr. Wright. On November 30, T. Johnson spoke to Dr. Wright about persistent pain in his lower left groin area, and on December 3, 2016 he reported to a different doctor that he was not feeling well.

[5] Dr. Mannuel had been calling 410-370-6237. The closest relevant number was that of a nurse's station at Dorsey Run Correctional Facility, which was 410-379-6237.

[6] It is unclear from the record exactly when in December T. Johnson began taking Zytiga. His December 2016 prescription list included Zytiga and he told Dr. Mannuel on December 14 that "he had only started to get his medication about a week before this appointment."

After at least one week into taking Zytiga, T. Johnson reported to Dr. Mannuel on December 14, 2016 that his pain and overall symptoms were baseline. At the same time, T. Johnson's PSA level had risen from 53 ng/ml to 70 ng/ml. Dr. Mannuel took the position that the PSA increase "might reflect his months off-therapy."

On January 11, 2017, T. Johnson's PSA level had decreased to 63 ng/ml and his medical records read that he, "appear[ed] to be tolerating [Zytiga] well." However, his chronic pain remained unchanged. Dr. Mannuel recommended palliative radiation to help with continuing leg and groin pain and that T. Johnson continue with Zytiga treatment.

On February 8, 2017, T. Johnson's PSA level had decreased again to 61 ng/ml, but his thigh and groin pain persisted. Dr. Mannuel also noted that Radiation Oncology would be following up with T. Johnson later in the week to begin therapy. Dr. Mannuel subsequently indicated that T. Johnson "[b]oth subjectively and objectively" appeared better and that "the medication and radiation combination" were helping T. Johnson. However, it is unclear from the record whether Dr. Mannuel's description refers to T. Johnson's February 8 visit or a visit in May of 2017.[7]

On March 21, 2017, T. Johnson was released from prison on medical parole and stopped receiving medical care from Dr. Wright and Dr. Mannuel. Two days later,

[7] Dr. Mannuel added that T. Johnson "reported that he felt significantly better than the last time I saw him, which was in January." While this comment points to the February 8, 2017 visit, the radiation that Dr. Mannuel credits for at least part of T. Johnson's betterment had not begun by February 8. Moreover, Dr. Mannuel stated that "the last time that I saw him while he was incarcerated, was January 11th, 2017." T. Johnson was not released until March 21, 2017 again suggesting May as the visit in which T. Johnson appeared better.

T. Johnson reestablished care with Dr. Dawson at the Lombardi Center. Dr. Dawson reported that T. Johnson had "ongoing pain in joints, lower back pain, knees and hips."

On May 12, 2017, T. Johnson had a medical appointment at UMMC. There, he told his doctor that radiation therapy had significantly lessened his pain for two months and that he could now walk short distances, albeit weakly and unsteadily. However, his chronic pain was slowly returning, and over the last two weeks he had been developing worsening headaches. Ultimately, T. Johnson's pain and condition worsened. His constant pain had increased, and his PSA level rose from 59 ng/ml on May 2 to 85 ng/ml on May 23, 2017.

During post-release treatment, T. Johnson remained on Zytiga. After a CT scan on June 13, 2017 showed the further spread of T. Johnson's cancer, a certified nurse practitioner at the Lombardi Center recommended chemotherapy to begin on June 23. T. Johnson passed away in his sleep on June 13, 2017.

Per Dr. Mannuel, the chance of Zytiga having a positive effect is just 15% when given as a second line of therapy after Xtandi. Because T. Johnson's cancer was terminal, there was no treatment that could have permanently stopped the cancer's progression and accompanying pain increases. Even so, Dr. Mannuel articulated that effective treatment could have slowed the cancer and improved and prolonged quality of life.

The Johnsons jointly[8] filed a claim against Wexford and Dr. Wright in the Health Care Alternative Dispute Resolution Office on May 13, 2019. After the Johnsons waived arbitration, their claim was transferred to the Circuit Court for Prince George's County. Their claim against Wexford and Dr. Wright, filed on September 5, 2019, included counts of: (I) medical negligence, (II) wrongful death, and (III) deliberate indifference to a serious medical need. The claims purport to hold Dr. Wright directly liable and hold Wexford liable under agency and/or apparent agency theories.[9] In preparation for trial, the Johnsons deposed Dr. Mannuel on August 6, 2020, and Dr. Dawson on September 18, 2020.

In response, Wexford filed a Motion for Summary Judgment on August 2, 2021 and an Omnibus Motion in Limine to Exclude or Limit Evidence ("motion *in limine"*) on October 11, 2021. The Johnsons conceded count II, the wrongful death claim, at circuit court hearings on November 2 and 4, 2021. Additionally, the court found in favor of Wexford on count III, deliberate indifference to a serious medical need, on the grounds that the constitutional claim cannot be asserted against a private entity. With respect to count I, medical negligence, the court granted judgment in favor of Wexford on the basis that the

[8] The following Johnsons filed individually: K. Johnson, Antar Johnson, Mansa Johnson, Kephran Johnson, and Dakari Johnson. Each of them, except K. Johnson, also filed as an heir of T. Johnson. K. Johnson also filed as personal representative of the estate of T. Johnson. Denise Smith Johnson solely filed as personal representative of the estate of Kwasi Johnson, heir of T. Johnson.

[9] With respect to the agency claims, K. Johnson's complaint stated that "Wexford is legally responsible for the actions and inactions of [Dr. Wright]" while "Wright was responsible for his own medical care, treatment, …."

undisputed facts showed that Johnson suffered no harm from the delay in receiving Zytiga. On the same grounds, the court also granted Wexford's motion *in limine*.

Dr. Wright was neither present nor represented during the November 2 and 4, 2021 circuit court hearings. Though Dr. Wright was originally represented by the same attorney as Wexford, the attorney withdrew their representation of Dr. Wright after Dr. Wright ceased responding to any communications.[10] While the case was still pending against Dr. Wright, the parties prepared for trial by taking *de bene esse* depositions of Dr. Mannuel and Dr. Dawson on November 9, 2021. The Johnsons attempted to depose Dr. Wright as well but were unable to conduct such deposition. Then, on November 8, 2021, Dr. Wright submitted a Motion for Joinder in Defendant Wexford's Motion for Summary Judgment and, on November 9, 2021, a motion *in limine*. On November 12, 2021, the circuit court conducted a hearing on Dr. Wright's motions and ruled in Dr. Wright's favor.[11] The court based its judgment on the Johnsons' inability to present evidence that Dr. Wright violated a standard of care.[12] On December 21, 2021, K. Johnson, individually and as personal

[10] Dr. Wright became temporarily unable to communicate due to a disability.

[11] During the hearing, the court explicitly ruled on Dr. Wright's motion for summary judgment, but never addressed Dr. Wright's motion *in limine*. However, the motion *in limine*, along with the motion for summary judgment, were entered as granted by the court on December 1, 2021.

[12] The court asked the Johnsons' attorney, "What expert do you have that presents evidence that Dr. Wright violated the standard of care?" The attorney answered "Kahil Johnson," which the court found to be unresponsive because K. Johnson was not an expert witness. K. Johnson contends on appeal that the attorney was confused by the court's question and responded in connection with a statute of limitations issue not before this court.

representative of the estate of T. Johnson, filed a Notice of Appeal with respect to count I.

DISCUSSION

This Court reviews de novo the grant of a motion for summary judgment. *Cain v. Midland Funding, LLC*, 475 Md. 4, 33 (2021). We thus examine the grant of summary judgment without deference given to the circuit court, *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012), and apply a two-step analysis. *Cain*, 475 Md. at 33. To start, we determine whether a genuine dispute of material fact exists. *Id.* at 34. Second, absent such a dispute, we determine "whether the circuit court correctly entered summary judgment as a matter of law." *Id.*

I. THE COURT PROPERLY CONSIDERED DR. WRIGHT'S MOTION FOR SUMMARY JUDGMENT.

The circuit court's final scheduling order required that all dispositive motions be filed by August 2, 2021. However, Dr. Wright did not file his Motion for Joinder in Defendant Wexford's Motion for Summary Judgment until November 8, 2021. The circuit court nevertheless granted Dr. Wright's Motion for Joinder and ruled in his favor, granting summary judgment in a November 12, 2021 hearing. K. Johnson contends that Dr. Wright's joinder of Wexford's motion violated the timeliness standards set forth in Rule 2-501(a) and did not provide K. Johnson with either a chance to depose Dr. Wright or sufficient time to file a written opposition.

Under Maryland Rule 2-501(a), "[a]ny party may make a motion for summary judgment on all or part of an action on the ground that there is no genuine dispute as to any material fact and that the party is entitled to judgment as a matter of law." Additionally, "a

motion for summary judgment may not be filed . . . *unless permission of the court is granted*, after the deadline for dispositive motions specified in the [Rule 2-504] scheduling order."[13] *Id.* (emphasis added). Given that the circuit court has discretion under Rule 2-501 to grant a motion for summary judgment filed past the deadline to be timely, we review the decision under an abuse of discretion standard. *See id.* Our review is deferential; an abuse of discretion exists "where no reasonable person would take the view adopted by the [circuit] court, or when the court acts without reference to any guiding rules or principles." *Stidham v. Morris*, 161 Md. App. 562, 566 (2005).

We discern no abuse of discretion here. First, K. Johnson was not unreasonably hindered or disadvantaged by Dr. Wright's late filing. Dr. Wright's motion raised the same issues raised by Wexford's motion. K. Johnson would have thus been prepared to respond to and to rebut those same issues in an additional hearing concerning Dr. Wright's motion. Even though K. Johnson did not submit a separate written opposition to Dr. Wright's motion, his already-submitted opposition to Wexford's motion was likewise responsive to those same issues addressed in the November 12, 2021 hearing on Dr. Wright's motion. If K. Johnson sought or needed additional time to prepare, he did not make such a request to the court.[14]

[13] According to Maryland Rule 2-504, titled "Scheduling Order," "the court shall enter a scheduling order in every civil action." Md. Rule 2-504(a)(1). "A scheduling order shall contain … a date by which all dispositive motions must be filed[.]" Md. Rule 2-504(b)(1)(E).

[14] At the beginning of the November 12 hearing, K. Johnson's attorney stated that they were "prepared and ready to start[.]"

Additionally, the circuit court acted within guiding principles in allowing Dr. Wright's late filing. Prior to July of 2004, Rule 2-501 allowed the filing of "a motion for summary judgment 'at any time during the proceeding.'" *Benway v. Md. Port Admin.*, 191 Md. App. 22, 42 (2010). Despite the amendments to Rule 2-501, which removed the term "at any time" from the Rule, Maryland courts have recognized a party's ability to file a motion for summary judgment at any time. *See, e.g.*, *Benway*, 191 Md. App. at 43 (determining that "the circuit court did not err in considering appellee's Motion for Summary Judgment, even though it was filed after the deadline in the Scheduling Order"); *Rodriguez v. Clarke*, 400 Md. 39, 74 n.21 (2007) (explaining that a "motion for summary judgment may be made, even orally, at any time during proceedings"); *see also Minutes of the Court of Appeals Standing Committee on the Rules of Practice and Procedure*, 57 (Nov. 19, 2004) ("A motion for summary judgment under Rule 2-501 may be made at any time, even at trial[.]"). Accordingly, the circuit court did not abuse its discretion in permitting Dr. Wright's late motion for joinder despite the filing of the motion after the deadline set forth in the scheduling order.

Moreover, despite allowing the late filing, the circuit court's decision furthered the purpose of the rules, which are to "be construed to secure simplicity on procedure, fairness in administration, and elimination of unjustifiable expense and delay." Md. Rule 1-201. Summary judgment was earlier granted on the same issues for Wexford; failing to consider Dr. Wright's motion for summary judgment likely would have led to a needless and taxing trial. Therefore, it would have thwarted the interests of judicial economy to proceed with

the trial involving Dr. Wright merely because the deadline for dispositive motions had passed, where there were no material facts in dispute and Dr. Wright was entitled to judgment as a matter of law. Hence, we can find no error in the trial court's consideration of Dr. Wright's motion.

II. THERE ARE NO GENUINE DISPUTES OF MATERIAL FACT.

As a preliminary matter, Wexford and Dr. Wright argue that K. Johnson's response to their motion for summary judgment did not preserve for appeal any dispute of material fact. They rely on Maryland Rule 2-501(b), which states:

> A response to a written motion for summary judgment shall be in writing and shall (1) *identify with particularity each material fact as to which it is contended that there is a genuine dispute and (2) as to each such fact, identify and attach* the relevant portion of the specific document, discovery response, transcript of testimony (by page and line), or other statement under oath that demonstrates the dispute. A response asserting the existence of a material fact or controverting any fact contained in the record shall be supported by an affidavit or other written statement under oath.

(emphasis added). According to Wexford and Dr. Wright, K. Johnson did not preserve the issue on appeal because he failed to note any material facts in dispute and attach relevant evidence demonstrating such dispute. K. Johnson counters that there were disputes of material fact evident from the parties' respective motions, and that his response motion relied on evidence already placed in the record. Additionally, for the first time on appeal, K. Johnson has attempted to show specific factual disputes between the two parties regarding the proximate cause of T. Johnson's suffering and the beneficial effect of Zytiga on T. Johnson.

For an issue to be preserved on appeal, the issue must "plainly appea[r] by the record

to have been raised in or decided by the trial court." Md. Rule 8-131(a). "To be sufficient to generate a dispute, the evidence adduced by the non-moving party must be more than mere general allegations which do not show facts in detail and with precision." *Crews v. Hollenbach*, 126 Md. App. 609, 624 (1999) (internal quotations omitted). Unsupported statements and conclusions of law are insufficient to demonstrate a dispute of material fact. *Arroyo v. Bd. of Educ. of Howard Cnty.*, 381 Md. 646, 655 (2004). The party's written opposition must "'identify with particularity each material fact as to which it is contended there is a genuine dispute'" and "specify the evidence that demonstrates the dispute." *Zilichikis v. Montgomery Cnty.*, 223 Md. App. 158, 194–95 (2015) (quoting Md. Rule 2-501(b)) (finding that, because the relevant information "was not properly before the court [under Rule 2-501(b)] at the time of summary judgment," the information was not preserved and any arguments relying on the information to show factual disputes could not be made).

Where, as here, factual disputes were not raised in the circuit court, they cannot be raised on appeal. *See* Md. Rule 8-131(a). K. Johnson's written opposition to Wexford and Dr. Wright's motion for summary judgment did not articulate any factual disputes. The opposition instead focused on which witnesses would be called to testify, an explanation of related case law, and the results of attempts by Dr. Mannuel and Dr. Dawson to communicate with Dr. Wright. Though there may be disputes drawn from the facts in the record, K. Johnson failed to articulate any such factual disputes to the circuit court. Moreover, no supporting affidavits, exhibits, depositions, or written statements under oath

were attached to K. Johnson's opposition.[15] Thus, no factual disputes or supporting evidence were raised in accordance with Maryland Rule 2-501(b). That K. Johnson explains factual disputes and supporting evidence on appeal does not obviate the need to have done so in the circuit court. *See* Md. Rule 8-131(a); *see also Zilichikis*, 223 Md. App. at 194 – 95. Factual disputes and supporting evidence cannot be introduced at the appellate level absent being properly raised before to the circuit court. *Id.* Given the absence of disputes raised, the circuit court did not err in ruling that there were no genuine disputes of material fact.

With no facts in dispute presented by K. Johnson to the trial court, we rely on the facts as presented on appeal by Wexford and Dr. Wright: (1) T. Johnson had been diagnosed with incurable cancer before his incarceration began; (2) he developed mobility issues and significant chronic pain in his left hip and leg area after a cryoablation procedure in February of 2015; (3) the pain and mobility issues from the procedure made up his baseline symptoms throughout his incarceration and treatment by Dr. Wright and Dr. Mannuel; (4) Johnson's cancer and symptoms both progressed despite using Zytiga; and (5) there is no reason to believe that Zytiga would have been more effective had it been

[15] K. Johnson asserted during oral argument that issues raised in the complaint were incorporated into the opposition by reference. However, upon review of the memorandum in opposition to Wexford's motion for summary judgment to the circuit court, we note that K. Johnson's only reference to the complaint was with respect to count II, the wrongful death claim. Thus, the reference was not preserved with respect to count I, the medical negligence claim that is before us. *See Zilichikis*, 223 Md. App. at 194–95.

started in September of 2016.[16]

III. WEXFORD AND DR. WRIGHT ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW.

"[T]o establish a *prima facie* case of medical negligence, a plaintiff must establish: (1) the applicable standard of care; (2) that this standard has been violated; and (3) that this violation caused the complained of harm." *Jacobs v. Flynn*, 131 Md. App. 342, 354 (2000). As previously stated, K. Johnson contends that the circuit court's granting of summary judgment was improper for two reasons. First, he argues that the three-month delay in prescribing and administering Zytiga harmed T. Johnson. Second, he argues that Dr. Wright and Wexford breached their duty to T. Johnson by breaching the applicable standard of care they owed to him.

In addition to contesting K. Johnson's claims regarding harm to T. Johnson and the applicable standard of care, Wexford argues in the alternative that it cannot be held vicariously liable for any of Dr. Wright's actions because Dr. Wright's status as an independent contractor is undisputed. However, because we shall affirm the circuit court's grant of summary judgment in favor of Wexford and Dr. Wright, we need not address

[16] As part of our review, we have only included those undisputed facts relevant to the issues on appeal before us. Specifically, we decline to include Wexford and Dr. Wright's undisputed assertion that T. Johnson's symptoms did not worsen during the delay in treatment with Zytiga. Whether T. Johnson's terminal cancer progressed during the three-month delay in treatment is not relevant to whether Zytiga was effective or would have been effective if timely administered.

Wexford's alternate theory of liability.[17]

A. The Delay in Treatment with Zytiga

In a negligence action, "the threshold inquiry is whether a defendant's conduct produced an injury, or causation-in-fact." *Barton v. Advanced Radiology P.A.*, 248 Md. App. 512, 534 (2020). Because of the complexity of medical malpractice cases, "[e]xpert witnesses play a pivotal role in medical malpractice actions." *Id.* (internal quotations omitted). For medical malpractice claims, a personal representative of the deceased must "prove that due to [a defendant's] negligence, the decedent incurred medical expenses or endured pain or suffering that [they] would not have endured if there had been no negligence." *Wadsworth v. Sharma*, 251 Md. App. 159, 192 (2021).

K. Johnson argues that the three-month delay in providing Zytiga allowed T. Johnson's cancer to progress unchecked and caused T. Johnson to experience increased and unnecessary pain during the remainder of his life. He contends that Zytiga improved T. Johnson's symptoms and, if timely administered, would have prevented lasting damage to his quality of life as a result of delayed treatment. K. Johnson also asserts that the timely administration of Zytiga could have extended T. Johnson's life expectancy by at least a few months because, per Dr. Dawson, Zytiga has successfully extended the life of other patients with T. Johnson's condition by one year to two and a half years.

Wexford and Dr. Wright argue that Zytiga did not work for T. Johnson and more

[17] Additionally, whether Wexford could be held vicariously liable does not impact our review of the circuit court's grant of summary judgment.

timely treatment would not have reduced his symptoms. They assert that T. Johnson's condition did not worsen between September 9, 2016, when Zytiga was first recommended, and December 16, 2016, a week into taking Zytiga. Moreover, they contend that any improvement felt by T. Johnson was at least as much the result of palliative radiation and pain relief medication as from Zytiga.

Relying on the undisputed facts, we cannot find that the circuit court erred in determining that T. Johnson was not harmed as a result of the delayed Zytiga treatment. Pre-incarceration, T. Johnson had developed chronic pain stemming from his metastasized cancer and aborted cryoablation. One month and two months after beginning to take Zytiga, T. Johnson reported the same baseline chronic hip and leg pain during visits to Dr. Mannuel in January and February of 2017. During the January visit, Dr. Mannuel recommended that T. Johnson begin palliative radiation to reduce his ongoing chronic pain.[18] At a later visit, Dr. Mannuel believed T. Johnson to be "[b]oth subjectively and objectively better," but he credited the change to "the medication and radiation combination" instead of Zytiga.[19] Notably, T. Johnson told his treating physician at UMMC in May of 2017 that his pain significantly improved for about two months as a result of radiation therapy, which had begun in mid-February of 2017. Overall, T. Johnson's pain was not reduced as a direct

[18] Per Dr. Mannuel, palliative treatment, such as pain relief medication, reduces a patient's pain without treating the underlying cause or disease.

[19] T. Johnson was on various medications throughout his treatment, including pain relief medications such as Percocet, which he started taking some time after February of 2017.

result of taking Zytiga.

Both Dr. Dawson and Dr. Mannuel agreed that, despite their hope to the contrary, T. Johnson's cancer and symptoms progressed while using Zytiga. Though T. Johnson's PSA level stabilized a few weeks into taking Zytiga, the treatment's overall ineffectiveness was undisputed.[20] Both doctors agreed that Zytiga was ultimately ineffective.

Dr. Mannuel also stated during her deposition that she believes Zytiga would have had the same ineffectiveness if K. Johnson started the medication three months earlier. Therefore, even if T. Johnson's cancer naturally progressed and worsened during the months of delay, administering Zytiga earlier would have been just as ineffective. Moreover, any increase in life expectancy opined by Dr. Dawson was simply a "hope" through the use of "various medications." Dr. Dawson neither tied increased life expectancy to the use of nor to earlier treatment with Zytiga. We conclude the circuit court did not err in ruling that, per the experts and the record, T. Johnson was not injured as a result of delayed Zytiga treatment.[21]

B. Standard of Care

To establish a *prima facie* claim of medical negligence, the plaintiff must

[20] Because PSA is a measure of overall disease advancement, T. Johnson's decreased PSA level does not necessarily mean that his symptoms or pain improved as well.

[21] The parties also disagree about the proper weight that should be given to Dr. Mannuel's deposition testimony indicating that T. Johnson could have enjoyed a better quality of life with proper treatment. However, K. Johnson never disputed (and both experts agreed) that Zytiga was ineffective for T. Johnson. Thus, Dr. Mannuel's opinion regarding T. Johnson's quality of life holds no significance in our review of the circuit court's decision regarding harm to T. Johnson.

demonstrate "that a healthcare provider breached a duty to exercise ordinary medical care and skill based upon the standard of care in the profession." *Shannon v. Fusco*, 438 Md. 24, 47 (2014) (internal quotations omitted). "[E]xpert testimony is generally necessary to establish the requisite standard of care owed by the professional … because professional standards are often beyond the ken of the average layman[.]" *Bd. of Trs., Cmty. Coll. of Balt. Cnty. v. Patient First Corp.*, 444 Md. 452, 478 (2015) (internal quotations omitted). Additionally, "the requirements of a legal duty" to follow a standard of care are "dependent upon the specific facts and circumstances." *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 469 Md. 704, 727 (2020).

On appeal, K. Johnson frames the standard of care as requiring a non-specialized physician to enact those treatment protocols requested by a specialized physician treating the patient. Moreover, K. Johnson argues that the standard, opined by Dr. Mannuel and Dr. Dawson, is equally as applicable to inmates as to individuals treated outside the correctional context. Additionally, K. Johnson posits that any unresponsiveness to direct questioning by the circuit court regarding a standard of care was due to confusion rather than an inability to present a standard of care during the hearing.

Wexford and Dr. Wright counter that, as a preliminary matter, K. Johnson did not present an applicable standard of care, or qualified expert to testify as to one, in either the written or verbal opposition to their motion for summary judgment. They further assert that K. Johnson's two experts, Dr. Mannuel and Dr. Dawson, were both unqualified to set a

standard of care applicable to the circumstances of Dr. Wright, a primary care physician working as a part-time independent contractor without a regular office.

Once again, we are confronted with the underlying matter of issue preservation. For an issue to be preserved on appeal, the issue must "plainly appea[r] by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a). The "purpose of Rule 8-131(a) is to make sure that all parties in a case are accorded fair treatment, and also to encourage the orderly administration of the law." *Conyers v. State*, 354 Md. 132, 148–49 (1999). "Fairness and the orderly administration of justice [are] advanced 'by requiring counsel to bring the position of their client to the attention of the lower court at the trial so that the trial court can pass upon, and possibly correct any errors in the proceedings.'" *Robinson v. State*, 410 Md. 91, 103 (2009) (quoting *State v. Bell*, 334 Md. 178, 189 (1994) (internal quotations omitted)). This court "is not an advocate tasked with searching for each party's winning argument." *Granados v. Nadel*, 220 Md. App. 482, 499 (2014). Instead, "the appellate court is limited ordinarily to issues preserved by the parties." *Id.*

In opposing Wexford and Dr. Wright's motion for summary judgment, K. Johnson failed to articulate an applicable standard of care. Even though his experts may have, at some point, opined as to a standard of care,[22] K. Johnson did not present evidence of a standard to the circuit court. With the opportunity to ask the circuit court to consider a

[22] During deposition, Dr. Mannuel proposed that "the standard of care would have been to transition [T. Johnson] to therapy." Dr. Dawson said that she "think[s]" Dr. Mannuel's job was to "direc[t] [T. Johnson's] medical oncology care when he was in prison." Dr. Dawson also admitted, referring to prison medical facilities, "I don't know anything about their procedures or how they work."

standard of care, K. Johnson failed to describe a standard. *See Patient First Corp.*, 444 Md. at 478. The circuit court directly inquired, "What expert do you have that presents evidence that Dr. Wright violated the standard of care?" Instead of responding with the name of an expert qualified to define a standard of care, K. Johnson's attorney replied, "Kahil Johnson." Even if the attorney was confused by the circuit court's direct questioning, and even though K. Johnson has articulated a standard of care on appeal, no such standard was "raised in or decided by the trial court." Md. Rule 8-131(a). Similarly, it is neither our duty nor is it in line with the orderly administration of justice to extrapolate unmade standards of care from the record on K. Johnson's behalf. *See Robinson*, 410 Md. at 103; *see also Granados*, 220 Md. App. at 499. Therefore, we do not find that the circuit court erred in finding no standard of care was presented and granting judgment as a matter of law.[23]

IV. WEXFORD AND DR. WRIGHT'S MOTION IN LIMINE TO EXCLUDE OR LIMIT EVIDENCE IS MOOT.

We review the grant of a motion *in limine* under an abuse of discretion standard.

[23] Even if a standard of care was properly presented to the circuit court, no argument was made connecting any of Dr. Wright's actions to a breach. K. Johnson wrote in his opposition to the motion for summary judgment that, "[a]t no time did Wright ever respond in any way whatsoever to the efforts that Dr. Mannuel was making to assure that her instructions, prescriptions, and treatment plans were being carried out." However, Dr. Mannuel had been trying to reach Dr. Wright using an incorrect phone number. Additionally, no expert indicated that Dr. Wright's actions or lack thereof were not appropriate under the facts and circumstances. Dr. Wright saw T. Johnson five times between when Dr. Mannuel first recommended Zytiga and when T. Johnson started receiving the medication, and at no point did T. Johnson (or anyone) alert Dr. Wright to either Dr. Mannuel's recommendation or T. Johnson's delayed receipt of Zytiga once prescribed. Once Dr. Wright received Dr. Mannuel's note, Dr. Wright prescribed Zytiga. The delays, before Dr. Wright received the Zytiga recommendation and after he prescribed the medication, were both due to unknown causes.

Saxon Mortg. Servs., Inc. v. Harrison, 186 Md. App. 228, 252 (2009). To overturn a ruling based on abuse of discretion, "the trial court's decision must be 'well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable.'" *Devincentz v. State*, 460 Md. 518, 550 (2018) (quoting *North v. North*, 102 Md. App. 1, 14 (1994)).

The circuit court granted the motion *in limine* because all the issues raised in the motion were ruled on through the motion for summary judgment. K. Johnson thus contends that the granting of the motion *in limine* should be reversed under the same arguments proffered against the motion for summary judgment. Wexford and Dr. Wright assert however that the motion *in limine* was moot because there was no pending claim against either party after summary judgment was granted.

"A question is moot 'if, at the time it is before the court, there is no longer an existing controversy between the parties, so that there is no longer an effective remedy which the court can provide.'" *Bd. of Physician Quality Assurance v. Levitsky*, 353 Md. 188, 200 (1999) (quoting *Att'y Gen. v. Anne Arundel Cnty. Sch. Bus Contractors Ass'n.*, 286 Md. 324, 327 (1979)). Because the granting of summary judgment obviated the need to hold a trial, the motion *in limine* was rendered moot before the circuit court. *See id.* So too, because we shall affirm the court's granting of summary judgment, the motion *in limine* is moot on appeal.

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