UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1278

September Term, 2015

SONIQUE WARD

v.

REBUILDING TOGETHER BALTIMORE, INC. ET AL.

Krauser, C.J.,
Graeff,
Kehoe,

JJ.

Opinion by Kehoe, J.

Filed: June 8, 2016

Sonique Ward appeals from an order of the Circuit Court for Baltimore City granting summary judgment in favor of Rebuilding Together Baltimore, Inc. and Rebuilding Together, Inc. (collectively, "Rebuilding Together" or "the companies"), appellees. In 2014, Ms. Ward filed a tort action against Rebuilding Together, among others, claiming that Ward suffered from lead-based paint induced injuries due to Rebuilding Together's disruption of paint dust during a renovation of the dwelling Ward lived in from 1992 to 1999. In its answer, Rebuilding Together raised charitable immunity as an affirmative defense. After discovery was completed, Rebuilding Together filed a motion for summary judgment, claiming that it was immune from tort liability pursuant to Maryland's doctrine of charitable immunity. The circuit court agreed with Rebuilding Together's position and granted its motion. This appeal followed, and Ms. Ward presents us with one issue, which we have re-worded:

> Did the exhibits to Rebuilding Together's motion for summary judgment contain legally sufficient evidence to support the court's grant of judgment on the basis of charitable immunity?

We will affirm the judgment of the circuit court.

Background

In January of 2014, Ms. Ward filed the present negligence action against Rebuilding Together.[1] Shortly thereafter, Rebuilding Together filed an answer to Ms.

[1]Ms. Ward's original complaint identified two additional defendants: Christmas-In-April Baltimore, Inc. and Mary L. Alston and/or the Estate of Mary L. Alston. Christmas-In-April Baltimore, Inc. is the former name of Rebuilding Together Baltimore,

(continued...)

Ward's complaint and discovery was commenced on the issues. Discovery continued until April 2015. In June 2015, Rebuilding Together filed a motion for summary judgment, claiming that it was immune from liability pursuant to the charitable immunity doctrine. Rebuilding Together attached several exhibits to its motion in support of its claim, including: the companies' articles of incorporation and bylaws; and two affidavits, one by Bonnie Bessor, the companies' executive director, and the other by John White, the companies' chief business officer. In part, these exhibits were offered to show that all of the companies' assets were held in trust in trust for charitable purposes, one of the necessary elements for a charitable immunity defense. *See James v. Prince George's County*, 288 Md. 315, 337 (1980) ("[O]nly when the assets of the charitable organization are held in trust, either expressly or by implication . . . does the charitable immunity doctrine apply.").

On this point, the articles of incorporation state the following:

> No part of the net earnings of the Corporation shall inure to the benefit of or be distributable to any private person, including without limitation the Corporation's incorporators, directors or officers, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered to it and to make payments and distributions in furtherance of the purposes set forth in Article III hereof.

[1](...continued)
Inc., and is thus not an independent party. As for Ms. Alston, the action against her was dismissed on January 15, 2015 for lack of jurisdiction pursuant to Md. Rule 2-507(b).

As to the affidavits, both White's and Bessor's affidavits included the following statement concerning the companies' assets:

> All of [Rebuilding Together's] assets and net earnings, if any, have been, and are, held in trust in furtherance of the foregoing charitable purpose and have been, and are, devoted exclusively to the charitable purpose.

Ms. Ward filed an opposition to Rebuilding Together's motion for summary judgment. She did not contend that there was a dispute of material fact as to Rebuilding Together's charitable status. Instead, she argued that the facts contained in the documents attached to Rebuilding Together's motion did not meet the requisite burden of proof. Thus, she argued that she was not required "to produce any evidence in response to or to survive a defense motion for summary judgment on [the] affirmative defense [of charitable immunity]." Specifically, she argued that the companies:

> have not produced the necessary information concerning the ownership of its assets, and specifically, if those assets are held in charitable trust. The only evidence [Rebuilding Together] supplied on this issue is a self-serving Affidavit. However, [the companies] have not produced one single document, such as deeds or account statements, to prove the assets [are] in fact held in a charitable trust.

The circuit court granted the motion for summary judgment, concluding that the companies did submit sufficient evidence showing that all of their assets were held in trust. Ms. Ward subsequently filed this appeal.

Analysis

I. Standard of Review

Summary judgment is appropriate when "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." Rule 2-501(f). "[O]nce the moving party has provided the court with sufficient grounds for summary judgment, the nonmoving party must produce sufficient evidence to the trial court that a genuine dispute of a material fact exists." *Jones v. Mid-Atl. Funding Co.*, 362 Md. 661, 675 (2001). To be "genuine" in this context, a factual dispute must be more than hypothetical or conjectural. *Beatty v. Trailmaster Products, Inc*., 330 Md. 726, 738 (1993). Put another way, "when a movant has carried its burden, the party opposing summary judgment 'must do more than simply show there is some metaphysical doubt as to the material facts.'" *Id*. (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 (1986)).

II. Charitable Immunity

We begin by noting that charitable immunity is an affirmative defense, Md. Rule 2-323(g)(20), and Building Together had the burden of production and persuasion on the issue. *See, e.g., Maryland Com'r of Labor & Indus. v. Cole Roofing Co*., 368 Md. 459, 469-70 (2002).

Charitable immunity is a "judge-made doctrine [] intended to protect charitable organizations from tort liability." *Montrose Christian School Corp. v. Walsh*, 363 Md.

565, 582 (2001). It consists of three elements: First, the predominate activities of the organization must be charitable in nature. *Abramson v. Reiss*, 334 Md. 193, 205 (1994). Second, funds must be held in trust, either expressly or by implication, for the furtherance of the charitable purpose. *James v. Prince George's County*, 288 Md. 315, 336 (1980). Third, the organization must have no liability insurance covering the complained-of act. *Abramson*, 334 Md. at 197.

The conceptual basis for Maryland's rule of charitable immunity is "the trust fund theory, that is, because funds of the organization are impressed with a trust for charitable purposes, those funds should not be diverted to pay tort damage awards." *Montrose Christian*, 363 Md. at 582; *see also Loeffler v. Trustees of Sheppard & Enoch Pratt Hosp.*, 130 Md. 265, 271 (1917). Ms. Ward focuses on the word "trust." From this starting point, she directs us to language from *Long Green Valley Ass'n v. Bellevale Farms, Inc*., 432 Md. 292, 315 (2013), wherein the Court stated that a charitable trust is an express trust and that proof of an express trust must be by clear and convincing evidence. She contends that the circuit court erred in granting Rebuilding Together's motion for summary judgment because Rebuilding Together did not present the court with clear and convincing evidence that its assets were held in a charitable trust. These arguments are unpersuasive.

Ms. Ward is correct that the existence of a charitable trust, like any other form of trust, must be established by clear and convincing evidence. *See Meyer v. Meyer*, 193 Md. App. 640, 657 (2010) ("A party wishing to establish a trust, whether express, implied or resulting, must do so by clear and convincing evidence.") (citing, among other authorities, *From the Heart Church Ministries v. African Methodist Episcopal Zion Church*, 370 Md. 152, 183 (2002)). But this principle is irrelevant to the present case because the charitable immunity defense is not and never has been restricted in Maryland to charitable trusts. This has been clear since the *fons et origo* of the charitable immunity doctrine in Maryland, *Perry v. House of Refuge*, 63 Md. 20, 28 (1885). In that case, the Court held that the House of Refuge was immune from a tort claim brought against it by a former resident because the Court concluded that "damages cannot be recovered from a fund held in trust for charitable purposes." However, as the Court's opinion made clear, the House of Refuge itself was not a charitable trust but was instead a private charitable corporation funded by a combination of state, local and private contributions. *Id.* at 21. The Court explained:

> It cannot be denied that the House of Refuge is an institution holding property contributed solely for benevolent purposes . . . . Funds are contributed by individuals impelled by philanthropic motives, and donations are obtained from the municipal and State treasuries. These are the funds of the institution, controlled by the managers not for their own profit or

> benefit, but solely for the charitable purposes designated by its organic law.[2] This, then, is an institution resting on an eleemosynary foundation.

Id. at 26. In other words, the Court reasoned that, because the assets of the House of Refuge were held for the charitable purposes set out in the corporation's charter—its "organic law"—using those funds for other purposes would be inconsistent with the donors' intent and the terms of the charter. In *James*, 288 Md. at 336-37, the Court of Appeals stated that "only when the assets of the charitable organization are held in trust, either expressly or *by implication*, and when the corporation has no liability insurance covering the complained of act, does the charitable immunity doctrine apply." (emphasis added).

Assets are "expressly" held in trust when they are held subject to a trust indenture that restricts their use to charitable purposes. Assets are held in trust by implication when the articles of incorporation restrict the use of corporate assets to charitable purposes. Under either scenario, the uses of the assets are restricted to charitable purposes. *See From the Heart Church Ministries, Inc. v. African Methodist Episcopal Zion Church*, 370 Md. 152, 183-84 (2002) ("Under Maryland law, the property of a charitable or religious

[2] The phrase "organic law" refers to the articles of incorporation. The House of Refuge was established by Chapter 64 of the Acts of 1830, titled "An Act to Establish a House of Refuge for Juvenile Delinquents." At that time, all corporations were organized through special acts of the General Assembly. *See* James J. Hanks, Jr. MARYLAND CORPORATION LAW at 2-15 (1990; 2015 Supp.) (recounting the early history of Maryland corporation law.).

nonprofit corporation is held in trust.")[3]; *Inasmuch Gospel Mission v. Mercantile Trust Co. of Baltimore*, 184 Md. 231, 239 (1945) ("It is recognized that when a corporation is organized for charitable purposes, its property is held in trust for the public."). Were we to accept Ms. Ward's contention that assets of a charitable organization must be titled in

[3]Ms. Ward argues that *From the Heart* stands for the opposite conclusion but she misreads the case. At issue in *From the Heart* was title to two parcels of real property held in the name of From the Heart Ministries, a local congregation of the AME Zion Church, a hierarchical congregation. AME Zion's Book of Discipline required that all real property owned by local congregations be explicitly titled in trust for the denomination; the deeds to From the Heart did not contain language that the properties were held in trust for the AME Zion Church. There was evidence that the hierarchy of the AME Zion Church was aware of that fact. Citing its earlier decision in *Mount Olive AME Church of Fruitland v. Board of Incorporators of AME Church, Inc*., 348 Md. 299, 320 (1997), the *From the Heart* Court concluded that the provisions of the Book of Discipline were not determinative because

> "it is clear that the resolution of church property disputes demand an analysis that involves the review of all relevant documents and circumstances. Unless the deed to the property clearly provides for the holding of the property in trust for the parent church, it is not enough to consider simply the form of the church government, the constitution or other authoritative sources pertinent to the parent church's claim to the property, consideration must also be given to the Religious Corporations Law, the relations between the parties, and the local church charter. The latter at the very least provides insight into the relations between the parties and may evidence the local church's consent to the form of government and to be bound by provisions in the parent church's constitution or other authoritative sources pertaining to the ownership and control of its property."

From the Heart, 370 Md. at 174 (quoting *Mount Olive*, 348 Md. at 320).

The issue in *From the Heart* was not *whether* the real estate was subject to a trust for charitable and religious purposes but *which* charitable and religious entity was the owner.

the name of trustees, we would burden charitable organizations with unnecessary and pointless formalities and costs.

The exhibits presented by Rebuilding Together were sufficient to establish that it was a charitable organization. One exhibit is Rebuilding Together's articles of incorporation, which recite that it "is organized *exclusively* for charitable and education purposes," (emphasis in original). *See James,* 288 Md. at 337 (Whether a corporation is charitable can be determined by examining its articles of incorporation). Another exhibit was a certification from the Internal Revenue Service in effect noting that Rebuilding Together was a charitable organization pursuant to § 501(c)(3) of the Internal Revenue Code. Section 501(c)(3) sets out criteria for determining charitable status for federal tax purposes. In legislation conferring immunity from tort claims, the General Assembly has equated § 501(c)(3) certification with charitable status. *See* Maryland Associations, Organizations, and Agents Act, Courts and Judicial Proceedings Article ("CJP") § 5-406(a)(5) ("'Charitable organization' means an organization, institution, association, society, or corporation that is exempt from taxation under § 501(c)(3) of the Internal Revenue Code."); Maryland Volunteer Service Act, CJP § 5-407(a)(4) ("'Charitable organization' means an organization, institution, association, society, or corporation that is exempt from taxation under § 501(c)(3) of the Internal Revenue Code.").

Also supporting Rebuilding Together's motion were the affidavits of White and Bessor averring, among other matters, that Rebuilding Together's assets are held in trust for charitable purposes. Ms. Ward correctly points out that the affidavits do not allude to a specific trust indenture, but this is of no moment. As has been clear in Maryland since 1885, for purposes of deciding whether charitable immunity is available, an organization's assets are deemed to be subject to an implied charitable trust if the charter or other organizational document restricts use of the assets to charitable purposes. Rebuilding Together presented sufficient evidence in its motion for summary judgment to demonstrate that it was a charitable organization and that the uses of its asserts were restricted to charitable purposes. The circuit court did not err in granting summary judgment.

III. Compliance with Rule 2-501(c)

Maryland Rule 2-501(a) states that any motion for summary judgment shall be supported by affidavit if it is "based upon facts not contained in the record." Subsection (c) specifies the form that such affidavits must take. It states:

> An affidavit supporting or opposing a motion for summary judgment shall be made upon personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit.

Ms. Ward contends that the statement concerning Rebuilding Together's assets in the affidavits of White and Bessor, detailed *supra*, would be inadmissible as evidence.

Specifically, she asserts that these statements constituted inadmissible evidence because they were either inadmissible legal conclusions or inadmissible hearsay. Rebuilding Together points out that neither of these contentions were raised in the proceedings before the circuit court and are thus not preserved for appellate review. Rebuilding Together is correct and we will not address Ms. Ward's contentions for the first time on appeal because our ordinarily our review is limited to those issues that "plainly appear[] by the record to have been raised in or decided by the trial court." Md. Rule 8-131(a).[4]

THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY IS AFFIRMED. APPELLANT TO PAY COSTS.

[4]Were we to consider Ms. Ward's contentions, we would find them to be without merit. First, the statements in question were patently not hearsay. *See* Md. Rule 5-801(c), which contains the definition of hearsay. Second, White's and Bessor's affidavits do not contain unsupported legal conclusions because, in contrast to the affidavit at issue in *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 308 (2007), their conclusions that Rebuilding Together was a charitable organization and its assets were used for charitable purposes were supported by the other exhibits, in particular, the articles of incorporation and the by-laws.