UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 396

September Term, 2015

KIMBERLEY HUGHES JOHNSON,

Individually and as Parent and

Next Friend of

LORENZO DANTE JOHNSON, a Minor, et al.

v.

UNIVERSITY OF MARYLAND MEDICAL SYSTEM CORPORATION, et al.

Meredith,
Woodward,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: March 21, 2017

On June 29, 2012, one day after Dr. Henry Arakaky discharged Antonio Johnson from the emergency room at Chester River Hospital Center, Inc. ("CRHC"), Antonio died of "hypertensive and atherosclerotic cardiovascular disease." Appellants in the instant appeal are Antonio's wife, Kimberley Hughes Johnson,[1] and Antonio's parents, Margaret Ann Johnson and Edward Carroll, who filed a wrongful death and survival action in the Circuit Court for Baltimore City against the following defendants: (1) CRHC, the employer of Dr. Arakaky; (2) University of Maryland Shore Regional Health, Inc.[2] ("UMSRH"), the sole member of CRHC; and (3) University of Maryland Medical System Corporation ("UMMS"), the sole member of UMSRH.

The circuit court granted a motion for summary judgment in favor of appellees, UMMS and UMSRH, and ordered the case transferred to the Circuit Court for Kent County for appellants to proceed against the remaining defendant, CRHC. On appeal, appellants present us with two questions, which we have rephrased as follows:[3]

[1] Kimberley brought this suit individually, as parent and next of friend to Lorenzo Dante Johnson and Jordyn Lucas-Scott Johnson, minors, and as personal representative of the Estate of Antonio Johnson.

[2] At the time of the alleged negligence, UMSRH was known as Chester River Health System, Inc.

[3] Appellants presented the following questions in their brief:

> I. Did the circuit court err in its decision that there were no genuine issues of material fact and that defendants [UMMS] and [UMSRH] were entitled to judgment as a matter of law?
>
> II. Assuming *arguendo* that the circuit court erred in its

(continued . . .)

> 1. Did the circuit court err in granting appellees' motion for summary judgment?
>
> 2. If the circuit court erred in granting the motion for summary judgment, did the circuit court err in ordering the case transferred to the Circuit Court for Kent County?

For the reasons that follow, we answer the first question in the negative and thus do not reach appellants' second question. Accordingly, we shall affirm the judgment of the circuit court.

BACKGROUND

On June 24, 2012, Antonio arrived by ambulance at Queen Anne's Hospital ("Queen Anne's"), complaining of prolonged chest pain. Antonio informed the emergency room staff that he had "a significant family history of premature coronary artery disease[,] and [he had] a personal history of smoking." Queen Anne's emergency room staff "recommended that [Antonio] be admitted for further evaluation and monitoring[,]" but Antonio elected to be discharged "against medical advice."

Three days later, Antonio began experiencing severe chest pain while driving, which prompted him to stop and call an ambulance. Antonio was transported to CRHC and later examined by Dr. Arakaky. In his examination, Dr. Arakaky consulted the medical records from Antonio's visit to Queen Anne's and conducted several tests, including an EKG test.

(. . . continued)

> decision to enter judgment in favor of [UMMS], was the [appellants]' choice of venue (Baltimore City) still valid based on [Maryland Code (1974, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"),] § 6-201?

On June 28, 2012, Dr. Arakaky discharged Antonio with his "primary impression" being that Antonio had a "[h]iatal hernia[,]" and his "additional impressions" being that Antonio had "atypical chest pain and gerd [gastroesophageal reflux disease]." Dr. Arakaky's also instructed Antonio: "take protonix daily, t[y]lenol for pain as needed[,] follow up with pmd and cardiology referral for further investigation of etiology of pain."

The next morning, Antonio expired at his home in Delaware while attempting to go to sleep in a chair. An autopsy by the Delaware Medical Examiner's Office revealed that Antonio died from "hypertensive and atherosclerotic cardiovascular disease." Indeed, the coroner found that Antonio had significant blockages in several arteries in his heart.[4]

On November 5, 2013, appellants filed suit in the circuit court against UMMS, UMSRH, and CRHC.[5] Appellants alleged, in essence, that competent medical care would have correctly diagnosed Antonio's condition and saved his life.

As the case proceeded through the discovery process, Dr. Raymond Caplan gave the following opinion: "The standard of care was violated by [CRHC], and likewise, its parent entities [, appellees,] were equally responsible for failing to establish proper protocols for the evaluation of cardiac patients in an emergency room setting and for the review of prior records."

[4] The written report of the autopsy states: "The left anterior descending has focal 50% areas of atheromatous narrowing, the circumflex has progressive narrowing so that the distal aspect of the artery shows up to 95% stenosis, and similarly the right coronary artery shows distal 90% stenosis."

[5] Appellants declined to file suit against Dr. Arakaky or any other emergency room staff at CRHC.

On January 30, 2015, appellees filed a motion for summary judgment and simultaneously filed a separate motion to transfer the case to Kent County, which was joined by CRHC. In their motion for summary judgment, appellees asserted that it was undisputed that the healthcare providers who allegedly rendered negligent treatment to Antonio were employees of CRHC, not appellees, and thus appellants' claim against appellees based on vicarious liability must fail as a matter of law. Appellees also argued that appellants "failed to produce any evidence to establish the essential elements of a medical malpractice claim against [appellees]."

Appellants filed an opposition to appellees' motion for summary judgment, arguing that they had made a *prima facie* case of negligence against appellees, because Dr. Caplan's expert opinion established that appellees breached the standard of care by failing "to establish Emergency Room protocols for patients with cardiac or cardiac like symptoms." Moreover, appellants argued that there was evidence of an agency relationship between appellees and CRHC, because UMMS was the sole member of UMSRH, UMSRH was the sole member of CRHC, and all three had promoted themselves as "part of an integrated and interdependent system." Appellants also filed an opposition to the motion to transfer, and appellees filed a reply to appellants' opposition to appellees' motion for summary judgment.

On March 25, 2015, the circuit court held a hearing on appellees' motions. After raising, *sua sponte*, the issue of apparent agency, the circuit court denied appellees' motion for summary judgment on the ground that Dr. Caplan's opinion, contained in his supplemental certificate, created a dispute of material fact. The court declined to rule on

the motion to transfer and requested memoranda from the parties regarding the court's authority to order a transfer.

After considering both parties' memoranda, the trial court issued a Revised Order and Memorandum Decision on April 3, 2015, changing its initial decision by granting appellees' motion for summary judgment. The court also ordered the case transferred to the Circuit Court for Kent County for appellants to proceed against CRHC, the remaining defendant. After their motion for reconsideration was denied, appellants filed a timely notice of appeal.

Additional facts will be set forth as necessary to the resolution of the questions raised in this appeal.

STANDARD OF REVIEW

The Court of Appeals has explained appellate review of a grant of summary judgment as follows:

> "[I]n reviewing a grant of summary judgment, [the appellate court] review[s] independently the record to determine whether the parties generated a [genuine] dispute of material fact[,] and, if not, whether the moving party was entitled to judgment as a matter of law. [The appellate court] review[s] the record in the light most favorable to the non-moving party[,] and construe[s] any reasonable inferences that may be drawn from the well-plead facts against the moving party."

Rowhouses, Inc. v. Smith, 446 Md. 611, 631 (2016) (alterations in original) (quoting *Hamilton v. Kirson*, 439 Md. 501, 522 (2014)). This Court also has opined:

> On appeal from the entry of summary judgment, we review only the grounds upon which the trial court relied in granting summary judgment. However, if the alternative ground is one upon which the circuit court would have had no discretion to deny summary

> judgment, summary judgment may be granted for a reason not relied on by the trial court. When a motion is based solely upon a pure issue of law that could not properly be submitted to a trier of fact, then we will affirm on an alternative ground.

Washington Mutual Bank v. Homan, 186 Md. App. 372, 388 (2009) (internal quotation marks and citations omitted).

DISCUSSION

Appellants argue that the circuit court erred in granting appellees' motion for summary judgment, because appellants provided sufficient facts to proceed with their case under the theories of "general corporate negligence[] and [ ] apparent agency." We disagree and shall explain.

I. "General Corporate Negligence"

Appellants' first theory is that appellees are liable for the injuries sustained by Antonio, because appellees breached their duty "to put in place emergency room protocols for the evaluation and treatment of persons appearing in the emergency room with cardiac or cardiac-like symptoms." In support of their position, appellants write in their opening brief:

> In Maryland, the law governing the standard for determining the corporate negligence of hospitals was first articulated in *Shilkret v. Annapolis Emergency Hosp. Ass'n*, 276 Md. 187, 349 A.2d 245 (1975) and has since been succinctly expressed in The Maryland Pattern Jury Instructions. Instruction Section 27:5 reads: "A hospital is negligent if it does not use that degree of care and skill that a reasonably competent hospital, acting in similar circumstances, would use." Such liability can develop in a myriad of ways. In Maryland, the decided cases have included, for example, failures to supervise and care of patients, *Smith v. Silver Spring-Wheaton Nursing Home, Inc.*, 243 Md. 186, 200 A.2d 574 (1966); *Fleming v. Prince George's County*, 277 Md. 655, 358 A.2d 892 (1976);

> leaving operating equipment in a patient, *John Hopkins Hosp. v. Genda*, 255 Md. 616, 258 A.2d 595 (1969); condition of medical equipment, *Benson v. Mays*, 245 Md. 632, 227 A.2d 220 (1967); *Suburban Hosp. Ass'n v. Hadary*, 22 Md. App. 186, 322 A.2d 258 (1974); *etc.*
>
> One of the cases cited most often nationally, whose standard fit precisely within MPJI 27:5 is *Thompson v. Nason Hosp.*, 527 Pa. 330, 591 A.2d 703 (Pa. 1991), where **the Supreme Court of Pennsylvania held and specified that under a "corporate liability" theory, a *hospital* owes "a duty to formulate, adopt and enforce adequate rules and policies to ensure quality care for patients."** No known case has successfully challenged the validity of this standard or statement.

(Emphasis added).

Appellants' legal authority supports the existence of a duty on the part of a *hospital* "to ensure the patient's safety and well-being while at the hospital." *Thompson*, 591 A.2d at 707. Such duty, called "corporate negligence" by the Pennsylvania Supreme Court, does not depend upon a showing of negligence of any health care provider. *Id.* In the instant case, CRHC is the hospital, *not* UMSRH or UMMS. It is undisputed that (1) UMMMS, UMSRH, and CRHC are separate corporate entities; (2) UMSRH is the sole member of CRHC, a non-stock corporation; and (3) UMMS is the sole member of UMSRH, a non-stock corporation. In other words, UMSRH is the parent corporation of CRHC, and UMMS is the grandparent corporation of CRHC. Assuming, as appellants argue, that CRHC has the duty as a hospital to establish protocols for the evaluation and treatment of persons appearing in its emergency room with cardiac or cardiac-like symptoms, nothing in the law cited by appellants supports the assumption of that duty by the parent or

grandparent corporation of the hospital. Our own research also has not revealed any such authority.

In *United States v. Best Foods*, 524 U.S. 51, 61-62 (1998), the Supreme Court restated the general principle of corporate law regarding parent-subsidiary corporations:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries. Douglas & Shanks, Insulation from Liability Through Subsidiary Corporations, 39 Yale L.J. 193 (1929) (hereinafter Douglas); *see also, e.g., Buechner v. Farbenfabriken Bayer Aktiengesellschaft,* 38 Del.Ch. 490, 494, 154 A.2d 684, 687 (1959); *Berkey v. Third Ave. R. Co.*, 244 N.Y. 84, 85, 155 N.E. 58 (1926) (Cardozo, J.); 1 W. Fletcher, Cyclopedia of Law of Private Corporations § 33, p. 568 (rev. ed. 1990) ("Neither does the mere fact that there exists a parent-subsidiary relationship between two corporations make the one liable for the torts of its affiliate"); Horton, Liability of Corporation for Torts of Subsidiary, 7 A.L.R.3d 1343, 1349 (1966) ("Ordinarily, a corporation which chooses to facilitate the operation of its business by employment of another corporation as a subsidiary will not be penalized by a judicial determination of liability for the legal obligations of the subsidiary"); *cf. Anderson v. Abbott*, 321 U.S. 349, 362, 64 S.Ct. 531, 537, 88 L.Ed. 793 (1944) ("Limited liability is the rule, not the exception"); *Burnet v. Clark*, 287 U.S. 410, 415, 53 S.Ct. 207, 208, 77 L.Ed. 397 (1932) ("A corporation and its stockholders are generally to be treated as separate entities"). Thus it is hornbook law that "the exercise of the 'control' which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That 'control' includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of stockholders.

In short, a parent corporation is generally insulated from the debts, obligations, and torts of its subsidiaries, absent the piercing of the corporate veil "to prevent fraud or enforce a paramount equity." *E.g., Bart Arconti & Sons, Inc. v. Ames-Ennis, Inc.*, 275 Md. 295, 312 (1975); s*ee also Serio v. Baystate Properties, LLC*, 209 Md. App. 545, 559-60 (2013)

(observing that Maryland has had a consistent and strong interest in limiting shareholder liability).

At oral argument before this Court, appellants made clear that their theory of liability was not piercing the corporate veil. Appellants did not submit any evidence of corporate mergers between UMMS or UMSRH and CRHC, or evidence of any agreement for UMMS or UMSRH to assume CRHC's existing or future liabilities. Therefore, under the law and undisputed facts in the case *sub judice*, neither UMMC nor UMSRH has any legal responsibility for the alleged "general corporate negligence" of CRHC.

Nevertheless, appellants claim direct "corporate negligence" on the part of appellees by virtue of the opinion of their expert, Dr. Caplan. In his Supplemental Certificate of Qualified Expert, Dr. Caplan states: "The standard of care was violated by [CRHC], and *likewise, its parent entities [, appellees,] were <u>equally</u> responsible* for failing to establish proper protocols for the evaluation of cardiac patients in an emergency room setting and for the review of prior records." (Emphasis added). We are not persuaded.

In its Memorandum Decision, the trial court determined that Dr. Caplan provided no basis to support his statement that CRHC's "parent entities were equally responsible." The court stated:

> If the Supplemental Certificate is read alternatively to mean that UMMS and UMSRH were responsible to establish and implement protocols at [CRHC], the doctor does not disclose a basis for such an opinion. . . . Dr. Caplan has given no reason for an opinion that [appellees] were responsible for the lack of protocol at [CRHC].

Maryland Rule 5-702 sets forth the standard for the admissibility of expert testimony, including that the court shall determine "whether a sufficient factual basis exists

to support the expert testimony." Moreover, the Court of Appeals has "rejected the argument that the adequacy of the basis for the opinion of an expert goes only to the weight to be given to the expert's testimony, and not to its admissibility as evidence." *Beatty v. Trailmaster Products, Inc.*, 330 Md. 726, 741 (1993).

We concur with the trial court's determination that Dr. Caplan provided no facts or reasons for his opinion regarding the standard of care for appellees. Appellants try to fill the gap by pointing to Dr. Caplan's deposition and documents relied upon by him regarding "standard of care protocols for hospital emergency rooms" and "hospital protocols for patients exactly like [Antonio]." However, nothing in Dr. Caplan's deposition or the documents cited by appellants refer to any standard of care for "parent entities" of a hospital.

Apparently realizing the above evidentiary omission, appellants argue that "there is no evidentiary requirement that a physician simultaneously produce . . . documentary support for his knowledge about a given hospital's corporate affiliations," and that "Dr. Caplan was already aware of the relationship between [UMMS] and its affiliate hospitals and of how they interact and represent themselves to the consuming public." Appellants' argument is without merit, because the facts regarding the relationship among UMMS, UMSRH, and CRHC, and Dr. Caplan's knowledge thereof, are critical to the basis for Dr. Caplan's opinion on appellees' standard of care. *See* Md. Rule 5-702. In his deposition and supplemental certificate, Dr. Caplan does not indicate any knowledge of the relationship between UMMS, UMSRH, and CRHC, nor how they interact. Therefore, we conclude that Dr. Caplan's deposition and supplemental certificate are insufficient

admissible evidence to show the standard of care on the part of appellees to establish emergency room protocols at CRHC for persons presenting with cardiac or cardiac-like symptoms.

More importantly, an expert may establish a standard of care and a breach of that standard of care, but an expert *cannot* establish "[t]he existence of a legal duty." *See Doe v. Pharmacia & Upjohn Co.*, 388 Md. 407, 414 (2005) ("The existence of a legal duty is a question of law, to be decided by the court."); *Bd. of Cty. Comm'rs for Cecil Cty. v. Dorman*, 187 Md. App. 443, 454 (2009) ("[W]hether a [legal] duty exists is not legitimately established by calling an expert witness to the stand, no matter how qualified that expert might be."). As Judge Deborah Eyler explained for this Court in *Crise v. Maryland General Hospital, Inc.*, 212 Md. App. 492, 521 (2013), the typical medical malpractice case involving a hospital is premised on the hospital's relationship with a patient being a "health care provider-patient" relationship. "Thus, when a health care provider-patient relationship exists, the "duty of care" issue is not whether any duty exists but the nature and scope of the duty. With few exceptions, the applicable standard of care, *i.e.*, the nature and scope of the duty owed, is proven by expert testimony (as is the issue whether the applicable standard of care was breached)." *Id.* In this case, even if admissible into evidence under Rule 5-702, Dr. Caplan's expert opinion on standard of care, failed to establish preliminarily a legal duty on the part of appellees.

Finally, appellants apparently seek to establish such legal duty on the part of appellees by claiming that they presented the trial court "with sufficient documentary support for their assertion that [UMMS] and [CRHC] held themselves out as integrated,

with [CRHC] relying on the parent entity so as to allow it to meet *best practices, including in the area of cardiology, clinical management of patients, compliance, etc.*" (Emphasis in original). As properly pointed out by appellees, appellants have cited to no cases, statutes, or rules to support the proposition that appellees had a legal duty regarding the emergency room protocols at CRHC arising out of the "integrated relationship" among UMMS, UMSRH, and CRHC.

Even if such law did exist, the documentary evidence in the instant case is insufficient to impose a legal duty on these appellees. In its Memorandum Decision, the trial court commented on such documentary evidence:

> Plaintiff's point to UMMS' 2012 Consolidated Financial Statement which declares that the corporation "is engaged in providing comprehensive healthcare services through an integrated network of hospitals and other inpatient and outpatient clinical enterprises." However, as also quoted by the Plaintiffs in their Opposition to Motion for Summary Judgment, the Statement further explains "The Corporation *operates* University Hospital . . . [and other Baltimore City entities] collectively referred to as University of Maryland Medical Center . . . *and is the sole member of Shore Health Systems Inc . . . Chester River Health Systems Inc* . . . [and others]," thus drawing a distinction between those entities it "operates" and those (including UMSRH and Chester River Hospital Center of which it is the "sole member."

(Alterations in original).

For the foregoing reasons, we conclude that no genuine dispute of material fact was raised by appellants and that appellees are entitled to a judgment as a matter of law on appellants' claim of "general corporate negligence" against appellees for failing to establish appropriate emergency room protocols at CRHC. Accordingly, the trial court did not err in granting summary judgment on that ground.

II. Apparent Agency

Appellants' second theory is that appellees are liable under the principle of apparent agency. Specifically, appellants contend that "the apparent authority claims against [a]ppellees are based upon the evidence presented to the lower court demonstrating that [a]ppellees portrayed their relationship with [CRHC] as one which gave the public confidence that best practices were now in place for all patients, including those with cardiac conditions." As a result, according to appellants, appellees gave the impression to the public that appellees were principals of CRHC.

The Court of Appeals has explained the requirements for a plaintiff to prove apparent agency as follows:

> As applied by Maryland courts, the doctrine of apparent agency can be expressed in three elements:
>
> 1. Did the apparent principal create, or acquiesce in, the appearance that an agency relationship existed?
>
> 2. Did the plaintiff believe that an agency relationship existed and rely on that belief in seeking the services of the apparent agent?
>
> 3. Were the plaintiff's belief and reliance reasonable?
>
> * * *
>
> As is evident, the doctrine of apparent agency has both subjective and objective elements: a plaintiff must show that the plaintiff subjectively believed that an employment or agency relationship existed between the apparent principal and the apparent agent, and that the plaintiff relied on that belief in seeking medical care from the apparent agent. But the plaintiff must also show that the apparent principal created or contributed to the appearance of the agency relationship and that the plaintiff's subjective belief was "justifiable" or "reasonable" under the circumstances—an objective test.

Bradford v. Jai Med. Sys. Managed Care Orgs., Inc., 439 Md. 2, 18-19 (2014) (citations omitted). In this case, appellants must demonstrate that (1) appellees "made representations that suggested that [CRHC] was its agent[;]" (2) Antonio believed that CRHC was appellees' "agent and relied on that belief in seeking services from [CRHC][;]" and (3) that Antonio's "belief was reasonable under the circumstances." *See id.* at 20.

At oral argument before us, appellants conceded that there was nothing in the record evidencing that Antonio had any awareness of the affiliation between UMMS and CRHC.[6] It follows then that Antonio could not have had any subjective belief that CRHC was an agent of UMMS, and Antonio certainly could not have relied on any belief that CRHC was an agent of UMMS. As to UMSRH, appellants do not direct this Court to anything in the record, and we cannot find anything in the record, that demonstrates that Antonio believed that CRHC was an agent UMSRH. Appellants, therefore, have failed to adduce any evidence of the subjective element of a claim against appellees based on apparent agency. Accordingly, we see no error in the circuit court granting summary judgment in favor of appellees.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.

[6] Appellants also conceded that no member of Antonio's family knew of any relationship between UMMS and CRHC.