Circuit Court for Baltimore County
Case No. 03-C-18-009564

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2407

September Term, 2019

CHARLES FITZPATRICK, *et al.*

v.

UNIVERSITY OF MARYLAND ST. JOSEPH MEDICAL CENTER, LLC

Graeff,
Kehoe,
Shaw Geter

JJ.

Opinion by Shaw Geter, J.

Filed: May 26, 2021

Appellants, Rebecca Morris and Charles Fitzpatrick are the parents of appellant, Peter Fitzpatrick. In 2018, appellants filed a medical malpractice claim in the Circuit Court for Baltimore County against appellees, University of Maryland St. Joseph Medical Center, LLC, and co-defendants, Capital Women's Care, LLC and Michael Giudice, M.D. for failure to admit Ms. Morris and deliver Peter on August 6, 2015. Appellees' filed a Motion for Summary Judgment, and at the conclusion of a hearing, the court granted appellees' motion.[1] Appellants timely appealed and present the following question for our review:

1. Did Plaintiffs present sufficient evidence to create a jury question on the issue of whether St. Joseph's breach of the standard of care caused Plaintiffs' injuries?

For the reasons set forth below, we reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

In late 2014, Ms. Morris became pregnant with Peter and she began receiving prenatal care at Capital Women's Care, LLC ("Capital") from Michael Giudice, M.D. ("Dr. Giudice"), a treating obstetrician-gynecologist who also has admitting privileges at University of Maryland St. Joseph Medical Center, LLC ("St. Joseph"). At her initial prenatal visit, Ms. Morris' blood pressure was 142/83 and the ultrasound presented positive fetal heart tones and normal findings. Ms. Morris' subsequent prenatal visits with Capital from February 2015 through July 7, 2015, showed normal fetal movement and heart rate.

[1] Appellants stipulated to the dismissal of their claims against Dr. Giudice and Capital Women's Care, LLC without prejudice following the entry of summary judgment in favor of University of Maryland St. Joseph Medical Center, LLC.

At those visits, Ms. Morris' blood pressure was normal, and her urine was negative for protein.

At Ms. Morris' prenatal visit on July 21, 2015, she reported decreased fetal movement. She also had an initial elevated blood pressure of 145/88. A repeated check of her blood pressure showed a normal reading of 107/68. On August 6, 2015, she returned for a routine prenatal visit where she again reported decreased fetal movement. On that date, her pregnancy was "full term" at 37 weeks and 1-day gestation. A nonstress test ("NST") was performed by Monica Buescher, M.D. ("Dr. Buescher"), which was found to be nonreactive with moderate variability and two areas of gradual decelerations in the fetal heart rate. Ms. Morris had an initial elevated blood pressure of 146/94. Her blood pressure was taken again with her laying on her left side, which resulted in a reading of 107/70. A urine dipstick reading indicated 1+ protein in her urine. Due to these findings, Dr. Buescher sent Ms. Morris to St. Joseph for further evaluation, including prolonged fetal heart rate monitoring. Dr. Giudice testified that on August 6, 2015, Ms. Morris "complained of decreased fetal movement" and had "an almost reactive NST which had accelerations but did not meet [the] criteria for a reactive NST which is why she was sent to the hospital."

Ms. Morris arrived at St. Joseph's at approximately 2:00 p.m. on August 6. Her care was assumed by Dr. Giudice and Carol Ator, R.N. ("Nurse Ator"), a labor and delivery nurse employed by St. Joseph. Ms. Morris' blood pressure was taken four times between 2:34 p.m. and 3:49 p.m. Her blood pressure readings were, successively, 137/89, 133/92, 144/96, and 144/100, which indicated that her blood pressure was increasing. In his

deposition, Dr. Giudice testified that the 144/100 reading was not brought to his attention, nor was it "documented with the rest of her vital signs." He also testified that "typically . . . the nurse on labor and delivery" is responsible for documenting blood pressure. Nurse Ator testified that she was aware of the 144/100 blood pressure. Dr. Giudice conducted a urinalysis at 3:43 p.m., which revealed trace protein in Ms. Morris' urine. There are three methods of measuring proteinuria: urine dipstick or urinalysis; 24-hour urine collection; and protein/creatine ratio examination. Dr. Giudice testified that he did not order a 24-hour urine collection, which was available at St. Joseph at the time, and that protein/creatine ratio examination was not available at the hospital then. Nurse Ator testified, in her deposition, that "trace protein on a urine is pretty much not reliable" and that she knew that prior to Ms. Morris' discharge, Dr. Giudice had not ordered a 24-hour urine sample.

Ms. Morris' fetal heart rate was monitored at St. Joseph with results that indicated minimum to moderate variability with no accelerations. Based on these results, Dr. Giudice concluded that Ms. Morris had nonreactive fetal heart rate tracing and ordered a biophysical profile. A biophysical profile measures fetal movement, fetal tone, fetal breathing, and amniotic fluid volume and assigns a score ranging from zero to two to each measurement. Ms. Morris' biophysical profile concluded at 4:35 p.m. and yielded a result of 8/8, which indicated that the fetus was stable "at that moment in time." Ms. Morris' blood pressure was not taken again after her biophysical profile was completed. Dr. Giudice order her to be discharged at 5:24 p.m. Nurse Ator discharged her at 5:39 p.m.

Dr. Giudice testified that he was aware that Ms. Morris' blood pressures qualified for gestational hypertension and preeclampsia. As defined by the Task Force on Hypertension in Pregnancy of the America College of Obstetricians and Gynecologists, the diagnostic criteria for preeclampsia are gestational hypertension with the presence of proteinuria. Gestational hypertension is characterized by new-onset blood pressure elevation (defined as a systolic blood pressure of 140 mm Hg or greater, or a diastolic blood pressure of 90 mm Hg or greater, or both, on two occasions at least four hours apart) after 20 weeks of gestation in the absence of proteinuria. Proteinuria is defined as the excretion of 300 mg or more of protein in a 24-hour urine collection, a urine dipstick reading of 1+, or a protein/creatinine ratio greater than or equal to 0.3.

Ultimately, Dr. Giudice diagnosed Ms. Morris with gestational hypertension. He testified that preeclampsia was on his differential diagnosis at the time of Ms. Morris' discharge. He was "worried that preeclampsia would develop" and "specifically told [Ms. Morris] and discussed with her signs and symptoms of preeclampsia and asked her to call back if she developed any signs or symptoms of preeclampsia."

On August 10, 2015, four days later, Ms. Morris called Capital, complaining of decreased fetal movement. When she reported to Capital for an appointment that day, her blood pressure was 157/99, she had +1 protein in her urine, and a NST showed minimal variability with minimal acceleration. She was then sent to St. Joseph for evaluation, where her fetal heart rate tracing showed minimum variability and, according to Dr. Giudice, "decelerations that were essentially random in nature." Due to these results, Dr. Giudice decided to proceed with delivery and to perform an "urgent" Caesarean section. Peter was

born at 5:13 p.m. on August 10, 2015, with low Apgar scores of 1, 3, and 6 at one, five, and ten minutes, respectively. Later that day, he was transferred to the University of Maryland Medical Center ("UMMC") for brain cooling. An MRI of Peter's head on August 17, 2015 showed findings most consistent with global hypoxic-ischemic encephalopathy ("HIE"), a brain disorder caused by insufficient oxygen or blood flow during birth. Peter was discharged from UMMC on September 9, 2015 with the following diagnoses: full term liveborn male, small for gestational age (birthweight 2330g less than the 5th percentile), perinatal depression, HIE, metabolic acidosis, and seizures.

On September 25, 2018, appellants filed a complaint against Capital, Dr. Giudice, and St. Joseph in the Circuit Court for Baltimore County. They alleged Dr. Giudice's failure to admit Ms. Morris for delivery on August 6, 2015, and Nurse Ator's failure to initiate St. Joseph's chain of command policy and advocate for Ms. Morris' admission to the hospital, continued evaluation, and delivery were negligent acts that resulted in injuries to Peter.

St. Joseph's chain of command policy states that its purpose is to:

> provide a formalized mechanism for staff to follow in resolving administrative, clinical or other patient safety or service issues . . . St. Joseph Medical Center is committed to quality patient care and to the resolution of quality of care or safety issues. Medical Staff, Nursing Staff and other care providers are responsible for ensuring patients receive quality care and should implement the chain of command/communication procedures to address issues where the quality of care or safety of a patient is at question.

The policy "applies to St. Joseph Medical Center employees (staff), contract personnel, agency personnel and practitioners with clinical privileges." The policy "may be initiated to present or report an issue of concern and pass it up the lines of authority until a resolution

is reached." Pursuant to the policy, "[s]taff will "discuss identified concerns regarding patient care with the attending provider."

> Employees (staff) should contact a higher level of authority if the first line of authority does not sufficiently resolve the issue or the person contacted does not respond in an appropriate timeframe.

The policy states that an example of when the policy should be initiated is:

> [w]hen a nurse or other practitioner believes within his/her clinical knowledge or judgment that implementing a physician order or plan of care may potentially have an adverse effect on patient safety or condition.

Appellants designated three experts to opine as to the standard of care: an obstetrics and maternal-fetal medicine expert, James Balducci, M.D. ("Dr. Balducci"); a nursing expert, Heidi Shinn, R.N. ("Nurse Shinn"); and a nursing expert, Jessica Stokely, R.N.C.-O.B. ("Nurse Stokely"). Appellants also put forth testimony from an obstetrics and gynecology and maternal fetal medicine expert, Victor Rosenberg, M.D. ("Dr. Rosenberg"), and an obstetrics and gynecology and maternal-fetal medicine expert, Baha M. Sibai, M.D. ("Dr. Sibai").

Nurse Stokely's Deposition Testimony

Nurse Stokely testified that Nurse Ator violated the standard of care by: (1) failing to advise Dr. Giudice to order a 24-hour urine sample; (2) failing to perform additional fetal monitoring to "try to get an acceleration prior to the patient being discharged to home specifically because she came for decreased fetal movement[,]" which "is just a big standard—especially with the blood pressures;" (3) failing "to obtain the appropriate prenatal records for the patient's visit into the hospital," including "any of the information regarding what the patient's blood pressure was or the plus-1 protein" from Capital; (4)

failing to document Ms. Morris' 144/100 blood pressure; and (5) failing to document Ms. Morris' head-to-toe assessment. She testified that the Association of Women's Health, Obstetric and Neonatal Nurses recommends a "24-hour urine protein quantitation rather than by urinalysis or dipstick" because, according to studies, "urine dipstick evaluation is a poor quantifier of protein excretion" and "a finding of negative or trace proteinuria misses significant proteinuria in up to 40 percent of hypertensive women." She opined that Nurse Ator:

> fail[ed] to recognize and recommend based on the trace urine and the blood pressures inpatient management and make sure and discuss with Dr. Giudice prior to being discharged and of course then if he still refused, then that's an activation of the chain of command.

Nurse Shinn's Deposition Testimony

Nurse Shinn testified that Nurse Ator violated the standard of care by: (1) failing to discuss any concerns about discharging Ms. Morris with Dr. Giudice and going up the chain of command if Dr. Giudice refused to keep Ms. Morris for further evaluation; (2) failing to document Ms. Morris' 144/100 blood pressure; (3) failing to obtain additional blood pressures once Ms. Morris returned from the biophysical profile; (4) failing to advise Dr. Giudice to order a 24-hour urine sample; and (5) failing to perform additional fetal monitoring. She opined:

> [t]h[e] physical act [of discharging a patient] is done by the nurse, so that's well within the nurse's scope and within the standard of care for the nurse to keep the patient either on the monitor, keep them in the hospital and not physically discharge them based on all the things that she knows.

* * *

> [I]f she had gone to Dr. Guidice [sic] and said I am uncomfortable, I am keeping [Ms. Morris] on the monitor, I saw some questionable decel[eration]s . . . she has had a nonreactive strip, she is saying the baby is not moving, she is thirty-seven weeks and one day, why aren't we delivering because as [Nurse Ator] said in her deposition she is familiar with the typical treatment and the diagnoses of gestational hypertension, as well as preeclampsia, for all these reasons, Dr. Guidice [sic], I want to keep her here and keep her on the monitor and keep evaluating her. If he had said, no, Nurse Ator, I said she is discharged . . . [then] the standard of care would have required that she go up the chain [of command].

* * *

Additionally, she opined in the report accompanying her Certificate of Qualified expert that:

> The labor and delivery nurse assigned to Ms. Morris as of the time of discharge on August 6, 2015, was Carol Ator, RN. Nurse Ator knew or should have known that the standard of care for a patient such as Ms. Morris was to admit for delivery in the setting of gestational hypertension or mild pre-eclampsia at or beyond 37 weeks gestation, especially in the setting of advanced maternal age, a non-reactive fetal heart tracing with no accelerations and subtle late decelerations, and decreased fetal movement.
>
> Under these circumstances, the nursing standard of care required Nurse Ator to advocate for Ms. Morris's admission and delivery. If Dr. Giudice was not receptive to that plan, the nursing standard of care would have then required that Nurse Ator execute further actions pursuant to St. Joseph Medical Center's chain of command policy.
>
> Nevertheless, Nurse Ator negligently acquiesced to Dr. Guidice's [sic] plan to discharge Ms. Morris and negligently failed to advocate for Ms. Morris's admission, further testing, and/or delivery. In doing so, Nurse Ator breached the nursing standard of care. As a result of this negligence, Ms. Morris was discharged from St. Joseph Medical Center at approximately 5:39 p.m. on August 6, 2015.

* * *

Nurse Shinn testified that Ms. Morris' blood pressure "ha[d] trended upwards . . . [s]o if she continued on that trend, the likelihood is she would have continued up into the

severe range." When asked what the next step would be if fetal tracing continued to be non-reactive, she responded:

> that's additional information that would tell the nurse or help guide the nurse in her advocation. So if she performs fluids, position changes, and oxygen and the fetus still has a nonreactive nonstress test or still is exhibiting these prolonged decelerations, then that would be further information for her to say there is a problem, there is a concern with fetal well-being, the strip isn't getting any better despite those interventions that we know that typically will work to improve the tracing or make the decel[ertation]s go away or elicit an acceleration.

* * *

Dr. Balducci's Deposition Testimony

Dr. Balducci testified that Nurse Ator's failure to document Ms. Morris' 144/100 blood pressure reading violated the standard of care. He opined that Nurse Ator also violated the standard of care by failing to obtain additional blood pressure from Ms. Morris after she returned from the biophysical profile. He opined "with a reasonable degree of medical certainty or probability that [appellees'] deviations from the applicable standards of care were the direct and proximate cause of Peter Fitzpatrick's permanent hypoxic-ischemic encephalopathy and its sequelae."[2] He opined that Nurse Ator violated the standard of care due to "her failure to advocate for Ms. Morris' admission and delivery." He testified that Nurse Ator's violation of the standard of care "was a direct and proximate cause of Peter's injuries . . . [and] was a major contributor to the baby's outcome." He explained: "[i]f Nurse Ator informed Dr. Giudice that her blood pressure was going up,

[2] Dr. Balducci later explained that sequelae in relation to hypoxic-ischemic encephalopathy refers to the baby's brain and motor function.

and if Nurse Ator had continued to take her blood pressure and showed they were in those ranges, I believe Dr. Giudice would have kept the patient and delivered the patient." He opined that "had [appellees'] complied with the standard of care in admitting [Ms.] Morris for delivery on August 6, 2015, Peter Fitzpatrick would have been delivered . . . prior to suffering any permanent brain damage."

Dr. Rosenberg's Deposition Testimony

Dr. Rosenberg opined, with a reasonable degree of medical certainty, that "if the delivery occurred on August 6, 2015, Peter Morris Fitzpatrick would not have been born with a significant metabolic acidosis and would not have suffered hypoxic ischemic encephalopathy and its sequalae." He testified that "causation stems from" Nurse Ator's "breach[] [of] the standard of care by not questioning Dr. Giudice's decision to discharge Ms. Morris, and by failing to activate the chain of command as necessary." He opined that:

> [I]f the patient meets the criteria for preeclampsia, the standard of care requires one of two things. Either you can move towards delivery, meaning—if the plan at that point was she has preeclampsia, we're going to get the baby delivered, it would have been okay to do a biophysical profile to make sure the baby is okay.
>
> Dr. Giudice testified because of the concern for the fetal tracing. So if they were going to move towards delivery at that point, which the standard of care clearly outlined they should have done, then there is no reason to order a fetal ultrasound.
>
> If the plan was to continue assessing and/or consider sending the patient home, which was clearly Dr. Giudice's decision based on medical records and his testimony, then what the ACOG monograph outlines . . . you need to access the fetal growth.
>
> Because what we know is, clinically, pregnancy is affected by hypertension and preeclampsia. Often times . . . it will also affect fetal

> growth due to placental disfunction or what we call uteroplacental insufficiency.

* * *

On November 20, 2019, appellees filed a Motion for Summary Judgment and appellants filed their respective opposition on December 5, 2019. Appellees' motion was granted after a hearing on January 27, 2020. The court did not articulate its reasoning for its decision. The judge stated: "I am going to grant the motion for summary judgment as to Nurse Ator and St. Joe's. So you guys can collect your belongings. . ." [3] The ruling was followed by an order stating, in relevant part, it is: "hereby, [ordered], that the Motion for Summary Judgment is [granted] and it is further [ordered] that judgment on [appellants'] claim of negligence against [St. Joseph's] is hereby entered in favor of [appellee]."

We shall discuss additional facts as they become relevant to our resolution of the issues.

STANDARD OF REVIEW

Summary judgment is appropriate where "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." Maryland Rule 2-501(f). "Whether summary judgment was granted properly is a question of law. "The standard of review is *de novo* and we are concerned with 'whether the trial court was legally correct.'" *Lightolier, A Division of Genlyte Thomas Group, LLC v. Hoon*, 387 Md. 539, 551 (2005) (citations omitted). "On review of

[3] Earlier in the proceeding, the court mentioned that there was a criminal case following the hearing on the motion for summary judgment.

an order granting summary judgment, our analysis 'begins with the determination [of] whether a genuine dispute of material fact exists; *only in the absence of such a dispute will we review questions of law*.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (quoting *Appiah v. Hall*, 416 Md. 533, 546 (2010)) (emphasis added). "Our review of the trial court's grant of summary judgment is limited ordinarily to the legal grounds *relied upon explicitly* in its disposition." *Baker v. Montgomery County*, 427 Md. 691, 706 (2012) (citing *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 542 (2007)) (emphasis added).

> "In the absence of [a discussion of the trial court's reasoning as to why summary judgment was proper], we must assume that the circuit court carefully considered all of the asserted grounds and determined that all or at least enough of them as to merit the grant of summary judgment were meritorious." *Ross v. Am. Iron Works*, 153 Md. App. 1, 10, 834 A.2d 962 (2003). Under such circumstances, we can affirm the court's judgment if the record indicates that the circuit court did not err.

Piscatelli v. Smith, 197 Md. App. 23, 37 (2011), *aff'd sub nom. Piscatelli v. Van Smith*, 424 Md. 294 (2012). "If the trial court does not state its reasons for granting the motion, we will affirm the judgment so long as the record discloses it was correct in so doing." *Smigelski v. Potomac Ins. Co. of Illinois*, 403 Md. 55, 61 (2008) (citations and internal quotation marks omitted).

"We 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." *Myers v. Kayhoe*, 391 Md. 188, 203 (2006) (citation omitted). "To avoid summary judgment . . . the non-moving party must present more than general allegations; the non-moving party must provide detailed and precise facts that are admissible in evidence." *Appiah v. Hall*, 416 Md. 533, 546 (2010). "If a fair-minded jury could return a verdict for

the opposing party, then the trial court should not grant summary judgment." *Collins v. Li*, 176 Md. App. 502, 591 (2007), *aff'd sub nom. Pittway Corp. v. Collins*, 409 Md. 218 (2009).

DISCUSSION

"[W]e evaluate a circuit court's decision to grant a motion for summary judgment on the grounds on which the decision was made, and if the grounds are not specified, on those advanced." *Middlebrook Tech, LLC v. Moore*, 157 Md. App. 40, 65 (2004).

In *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 708 (2013), we noted the "depth" of the circuit court's oral summary judgment ruling and explained that "even if [the court] had agreed with [the moving party] generally, without specifying which aspects of their position were persuasive, our review could still reach all of [the moving parties'] asserted grounds justifying summary judgment." The court, in *Catler*, in its oral ruling granting summary judgment, stated:

> I'm going to grant the motions largely for the reasons set forth by the defendants, as amplified by my comments . . . but simply by way of additional reasons, these are not my sole reasons, but my additional reasons . . . it is my view that the evidence . . . would require the jury to speculate, engage in surmise and conjecture [ ] I am not persuaded that based on the record, even viewed in the light most favorable to the plaintiffs, that a jury rationally, lawfully, in a non-speculative way, could find cause in fact . . . . I am not persuaded that a rational jury would find, or could legally find, that it is more likely than not that the plaintiffs could have obtained a more favorable result . . . . Absent cause in fact, the case is over. And if I saw it, I would let it go to the jury. If I believed a rational jury, in a legally permissible, non-speculative way, might or could do it, I would let them do it . . . . I'm not weighing credibility. I am not making factual findings. I'm deciding as I turn that globe around, over and over, is there any possibility, reasonably and consistent with the law, that the plaintiffs can prevail on cause in fact, based on the current state of the record. And I have to tell you the evidence is no.

212 Md. App. at 708–09. We agreed, concluding that the plaintiffs "failed to produce evidence that [the defendant's] breaches more likely than not caused their purported damages." *Id.* at 733.

Analogous to *Catler*, in *McGraw v. Loyola Ford, Inc.*, 124 Md. App. 560, 585 (1999), the lower court did not issue a written opinion explaining its ruling. In *McGraw*, we noted that "the transcript of the hearing [did] not precisely elucidate the basis for the court's ruling" as to fraud. *Id.* We concluded, based on the court's comments, that it appeared that the court granted summary judgment as to fraud because the plaintiff was not misled by the defendant. *Id.* We found no error because "the undisputed evidence demonstrated that [the plaintiff] could not have been misled . . . ." *Id.* at 586.

Contrary to *Catler* and *McGraw*, in *Bond v. Nibco*, the lower court's order granting summary judgment, in its entirety, read:

> [h]aving considered the argument of counsel and the pleadings previously filed, it is the ruling of the Court that Defendant's Motion for Summary Judgment (paper # 20) is granted as no factual dispute exists between the parties. Summary judgment is granted in favor of Defendant for costs.

96 Md. App. 127, 132 (1993). We addressed the grounds asserted as the basis for appellee's summary judgment motion, explaining:

> [i]t would certainly be preferable to have before us the basis for the circuit court's order. This would not only give us the benefit of the circuit court's reasoning as to why summary judgment was proper but also make it clear whether the lower court found any of the asserted grounds lacked merit, *i.e.*, did not support the grant of summary judgment. In the absence of any such discussion, we must assume that the circuit court carefully considered all of the asserted grounds and determined that all or at least enough of them as to merit the grant of summary judgment were meritorious.

Id. at 133. We affirmed the circuit court's ruling, concluding that even though the defendant "was not entitled to summary judgment on the breach of implied warranty of merchantability theory . . . [plaintiff] failed to allege any legally recoverable damages resulting from any claim, including the alleged breach of implied warranty of merchantability." *Id.* at 144–145.

In the case *sub judice*, the circuit court granted summary judgment without stating a basis for its decision. In our review of the record, we could not discern the legal grounds relied upon the court, either explicitly or otherwise. *See Baker v. Montgomery County*, 427 Md. 691, 706 (2012). This case is unlike *Catler* and *McGraw*, where the lower court did not issue a written opinion, but we were able to infer some basis for the ruling from the judge's observations on the record. This case is also distinguishable from *Bond* where the circuit court, in granting summary judgment, stated that there were no factual disputes between the parties.

Here, appellees, in their summary judgment motion, argued:

> A. [Appellants] cannot establish causation because they lack admissible expert testimony as to all of their standard of care allegations against St. [Joseph's].
>
> 1. Two of [Appellants'] allegations of negligence fail because there is no expert testimony as to causation to survive summary judgment.
> 2. The remaining allegations of negligence fail because [Appellants'] expert testimony is inadmissible and gutted by the undisputed factual evidence.
>
> a. Dr. Balducci's causation opinion is belied by Dr. [Giudice's] Testimony.
> b. Dr. Rosenberg's causation opinion is belied by Dr. Rossiter's Testimony.
>
> B. [Appellants] cannot establish liability against St. [Joseph's] for the actions and/or inactions of Dr. [Giudice].

I. Admissibility of the Evidence

Appellants argue they established causation through expert testimony regarding the standard of care. They further assert that because the circuit court declined to rule on the expert witness discovery disputes, this Court should also decline to do so. They cite *Troxel v. Iguana Cantina, LLC*, where we stated: "if issues are presented to the trial court, but not decided by the trial judge, the issues generally cannot be raised on appeal." 201 Md. App. 476, 511 (2011). In the alternative, they argue there was no basis for the circuit court to exclude Dr. Rosenberg's and Dr. Balducci's expert testimony.

Appellees counter that appellants failed to establish causation through admissible expert testimony. They argue the Rule 5-702 arguments contained in their motion for summary judgment were a proper basis for the court to grant summary judgment.[4] They concede, however, that the circuit court did not rule on the admissibility of appellants' evidence, rather the judge "openly considered [appellees' Rule 5-702 arguments] at the [m]otions [h]earing." They also argue that Dr. Balducci's and Dr. Rosenberg's causation opinions were "directly contradicted by the undisputed factual record."

Admissibility of evidence is governed by Maryland Rule 5-702. "Expert testimony is admissible if the court determines that the testimony will assist the trier of fact to understand the evidence or determine a fact in issue." *Buxton v. Buxton*, 363 Md. 634, 650 (2001). In making the determination of whether expert testimony is admissible, the court

[4] In addition to their Rule 5-702 arguments, appellees argued that appellants violated discovery in contravention of Rules 2-401, 2-402, and MD Rules Attorneys, Rule 19-303.4.

must determine, *inter alia*, whether a sufficient factual basis exists to support the expert testimony. Rule 5-702. An expert's opinion testimony must "reflect the use of reliable principles and methodology in support of the expert's conclusions." *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 183 (2003) (citation omitted).

> To constitute reliable methodology, "an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data" and must have "an adequate theory or rational explanation of how the factual data led to the expert's conclusion." *CSX Transp., Inc. v. Miller*, 159 Md. App. at 202–03, 858 A.2d at 1071. The explanation must not be conclusory, or constitute a "because I say so" approach. *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 525, 760 A.2d 315, 323 (2000) (concluding that the trial judge had not erred in excluding an expert's opinion where the expert determined that the cause of the plaintiff's injuries was the size and location of the vent holes in an air bag in a motor vehicle, but provided no rational explanation why such information had anything to do with the injuries sustained).

Exxon Mobil Corp. v. Ford, 433 Md. 426, 481–82 (2013), *as supplemented on denial of reconsideration*, 433 Md. 493 (2013). "It is within the sound discretion of the trial judge to determine the admissibility of expert testimony . . . [and] the trial court's action in the area of admission of expert testimony seldom provides a basis for reversal." *In re Adoption/Guardianship No. CCJ14746*, 360 Md. 634, 647 (2000).

"In order to establish a claim based on medical malpractice, a plaintiff must present evidence to establish 'the elements of duty, breach, causation, and harm.'" *Adventist Healthcare, Inc. v. Mattingly*, 244 Md. App. 259, 283 (2020) (quoting *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 480 (2013). "To prove causation, the [plaintiff] ha[s] to establish that but for the negligence of the defendant, the injury would not have occurred." *Adventist*, 244 Md. App. at 283 (quoting *Barnes*, 210 Md. App. at 481) (internal quotation marks omitted). Our inquiry is whether, based on the record, the grant

of summary judgment was proper because a reasonable jury could not have found that appellees' negligence was a proximate cause of Peter's injuries. *See Jacobs v. Flynn*, 131 Md. App. 342, 355 (2000).

"Because of the complex nature of medical malpractice cases, expert testimony is normally required to establish breach of the standard of care and causation." *Barnes*, 210 Md. App. at 481. We have previously stated:

> an expert's testimony to a reasonable degree of probability is not always essential to prove causation; rather, a plaintiff's burden of proof will be satisfied by expert testimony 'with respect to causation as to what is possible if, in conjunction with that testimony, there is additional evidence of causation introduced at trial that allows the finder of fact to determine that issue.'

Jacobs, 131 Md. App. at 355 (quoting *Karl v. Davis*, 100 Md. App. 42, 52, *cert. denied*, 336 Md. 224 (1994)). "Reasonable '[p]robability exists when there is more evidence in favor of a proposition than against it (a greater than 50% chance that a future consequence will occur).'" *Id.* at 355 (quoting *Cooper v. Hartman*, 311 Md. 259, 270 (1987)).

Appellants contend that Dr. Rosenburg's opinion was admissible, although it was based, in part, on Nurse Shinn's expert report. They cite the Court of Appeals in *Rochkind v. Stevenson*, where the Court adopted the Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), as the "single standard by which courts evaluate all expert testimony." 471 Md. 1, 26 (2020), *reconsideration denied* (Sept. 25, 2020). The *Daubert* Court held that "an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." 509 U.S. 579, 592 (1993).

Regarding the disclosure of Dr. Rosenburg's opinion, appellants note that his opinion was provided at his deposition, which occurred five months prior to the beginning of trial and two months prior to the close of discovery. Appellant cite *Maddox v. Stone*, for the proposition that it is an abuse of discretion for a trial court to exclude an expert's testimony for failure to comply with the court's scheduling order where the expert was deposed well in advance of trial and prior to the close of discovery. 174 Md. App. 489, 508 (2007).

Appellees contend that appellants did not designate Dr. Rosenberg to offer any opinions as to Nurse Ator or St. Joseph. They argue that in the expert report accompanying [Appellants'] Certificate of Qualified Expert Report, he did not offer any causation opinions as to the care and treatment provided by Nurse Ator and St. Joseph. They complain that appellants disclosed, for the first time, that Dr. Rosenberg would offer causation opinions against St. Joseph's after five hours of his deposition had concluded. They add that Dr. Rosenberg testified that he reviewed Nurse Ator's, Dr. Giudice's, and Dr. Rossiter's depositions but that he did not review Nurse Shinn's certificate and report until the day of his deposition. Appellees contend that, *assuming arguendo*, Dr. Rosenberg's causation opinion is admissible, it pertains to a single alleged breach: that the failure to activate the chain of command was a breach in the nursing standard of care. They contend that "Dr. Rosenberg's causation 'opinion', *i.e.*, that Dr. Giudice caused an injury by failing to deliver Peter is not transferrable to Nurse Ator. Dr. Rosenberg did not testify as to how it could be applicable to Nurse Ator." They argue that there is no testimony or factual basis for the missing link, that "had Nurse Ator activated the chain of command

Ms. Morris would have been admitted and, more specifically, the baby delivered that day without injury."

Appellees cite the following testimony from Dr. Rosenberg:

[APPELLEES' COUNSEL]: And what are those opinions?

[DR. ROSENBERG]: The same as what's outlined in my report.

[APPELLEES' COUNSEL]: Can you show me where in your report there are any opinions outlined about Nurse Ator or St. Joseph Medical Center as it relates to causation?

[DR. ROSENBERG]: That does not appear in my report.

[APPELLEES' COUNSEL]: Okay. So what are your opinions related to causation as to Nurse Ator and/or St. Joseph Medical Center?

[DR. ROSENBERG]: The issue of causation as to, if—assuming that the patient should have been admitted on August 6, 2015 as outlined in my report, in order to initiate the delivery process. If that is correct, and that failure would have caused the injury in that, if the patient would have been delivered on August 6th instead of August 10th, the fetus would not have suffered the in utero injury that I have outlined.

* * *

[APPELLEES' COUNSEL]: Well, who ordered the discharge in this case, Doctor?

[DR. ROSENBERG]: Dr. Guidice [sic].

[APPELLEES' COUNSEL]: How then could Nurse Ator or St. Joseph Medical Center cause any injuries in this case?

[DR. ROSENBERG]: I don't have an opinion about the standard of care.

* * *

[APPELLEES' COUNSEL]: Doctor you told me you intend to offer causation opinions with regard to Nurse Ator and St. Joseph Medical Center. Could you please tell me what those opinions are?

[DR. ROSENBERG]: My understanding is that there are other experts for the plaintiff who have outlined what they, in their opinion, is a deviation from the standard of care with regard to the decision to send Ms. Morris home on August 6, 2015. From that point, if those were to be correct, then the decision to send her home and not initiate delivery as outlined in the last paragraph of my report would apply to the hospital and Nurse Ator as well.

* * *

[APPELLEES' COUNSEL]: You testified that you have read the report of Nurse Heidi Shinn, correct?

[DR. ROSENBERG]: Yes.

[APPELLEES' COUNSEL]: If Nurse Shinn testified consistent with the opinions expressed in her report
that Nurse Ator breached the standard of care by not questioning Dr. Guidice's [sic] decision to discharge Ms. Morris and by failing to activate the chain of command as necessary, do you have an opinion as to a reasonable degree of medical certainty as to whether such a failure would be a direct and proximate cause of Peter Fitzpatrick's injuries?

[DR. ROSENBERG]: Yes.

[APPELLEES' COUNSEL]: And what is that opinion?

[DR. ROSENBERG]: What we talked about. Again, about the decision to send her home and initiate delivery. If that decision was outside the standard of care, which in my opinion it was, then the causation from that outlined in the last paragraph of my report.

* * *

In *Maddox v. Stone*, we held that "to exclude a key witness . . . for the simple reason that there was only substantial compliance, rather than strict compliance, with the court's scheduling order appears to us to be an instance of allowing the tail to wag the dog." 174 Md. App. 489, 508 (2007). There, the circuit court precluded the testimony of an expert witness because the expert's "specific opinions" were not disclosed until 34 days after the deadline set forth in the scheduling order. *Id.* In reversing the lower court's order, we noted that "there was no evidence of willful or contemptuous behavior on the part of either the plaintiffs or their counsel." *Id.*

In the case at bar, the scheduling order required appellants to designate expert witnesses testifying against St. Joseph by March 4, 2019. Appellants filed their initial expert designation on March 11, 2019, and an amended designation on July 10, 2019. Dr. Rosenberg was deposed on September 3, 2019. Discovery closed two months later, on November 8, 2019. Trial was scheduled to begin five months later, on February 3, 2020. A hearing on appellees' motion for summary judgment was held on January 27, 2020, where the court made no rulings on discovery issues or the admissibility of evidence. At the hearing, the court stated:

THE COURT:	I am disturbed that you didn't tell the defense until the morning of Dr. Rosenberg's deposition that he might have an opinion vis-à-vis [St. Joseph].

* * *

THE COURT:	I am wondering why that happened.
[APPELLANTS' COUNSEL]:	I don't know why that happened.
THE COURT:	You know, it's just not good, is it?
[APPELLANTS' COUNSEL]:	Well, except for this—I would say this, Your Honor. Look, I am not going to dispute to the [c]ourt whether or not it is good or it's not.
THE COURT:	Well, it's not.
[APPELLANTS' COUNSEL]:	Right. But let me say this.
THE COURT:	There are rules in place for a reason.
[APPELLANTS' COUNSEL]:	He didn't say anything different than he said before. What he said was exactly what I am saying to you now. It didn't change the calculus. All he is saying is—
THE COURT:	Well, before he didn't have any opinions. And then he, apparently, had some. That feels like a change.

* * *

Appellees make much of the circuit court's open discussion of the admissibility of evidence. However, we conclude that although the court stated that it was "disturbed" by the disclosure of Dr. Rosenberg's opinion regarding St. Joseph, the court did not rule on the admissibility of his expert testimony or limit his testimony. In our review of the record,

we did not glean any evidence of "willful or contemptuous behavior" from appellants' counsel. In our view, appellants substantially complied with the court's scheduling order, as Dr. Rosenberg was deposed two months prior to the close of discovery. Additionally, we conclude that under *Daubert,* Dr. Rosenberg was permitted to rely in part on the Dr. Shinn's report to form his opinion as his opinion was not limited to his "firsthand knowledge or observation." We, therefore, find that Dr. Rosenburg's testimony was admissible.

Appellants contend that appellees never challenged the admissibility of Dr. Balducci's opinion that Nurse Ator's failure to question Dr. Giudice's discharge order and activate the chain of command caused Peter's injuries. They claim appellees only contested the admissibility of Dr. Balducci's opinion regarding Nurse Ator's failure to inform Dr. Giudice of Ms. Morris' last blood pressure.

Appellees assert Dr. Balducci gave inadmissible *ipse dixit*, "because I say so" testimony. They argue that Dr. Balducci's opinions were "neither based in nor supported by the facts in evidence" and "amount[ed] to nothing more than speculation which is gutted by the actual testimony and evidence before him." They characterize his opinion as "conjecture" and argue that appellants could not "establish causation because they hired an expert to say 'he thinks Dr. Guidice [sic] would do x,y, and z' when Dr. Guidice [sic] himself, a fact witness and party in this case, unequivocally testified otherwise."

Dr. Balducci's testimony as to Nurse Ator's compliance with the standard of care was as follows:

[APPELLEES' COUNSEL]: Dr. Balducci will further opine that Nurse Ator failed to comply with the standard of care by her failure to advocate for Ms. Morris' admission in delivery and to execute actions pursuant to the chain of command. Did I read that correctly?

[DR. BALDUCCI]: Correct

[APPELLEES' COUNSEL]: And is this your opinion?

[DR. BALDUCCI]: Correct. I don't know how much I would have went up the chain of command, but the rest of that sentence and paragraph is fine.

[APPELLEES' COUNSEL]: Okay. And of those opinions, do you hold all those opinions to a reasonable degree of medical probability?

[DR. BALDUCCI]: Yes, sir.

* * *

His testimony as to causation was as follows:

[APPELLEES' COUNSEL]: Lastly, going down to paragraph 5, I guess, here, it says that it's also anticipated that you will offer to a reasonable degree of medical certainty or probability that the defendants' deviations from the applicable standards of care were the direct and proximate cause of Peter Fitzpatrick's permanent hypoxic-ischemic encephalopathy and its sequelae. Did I read that correctly?

[DR. BALDUCCI]: That's true. Yes.

[APPELLEES' COUNSEL]: And is that your opinion?

[DR. BALDUCCI]: Yes, sir.

[APPELLEES' COUNSEL]: And the next sentence is, in that regard, it is expected Dr. Balducci will opine that had defendants complied with the standard of care in admitting Rebecca Morris for delivery on August 6, 2015, Peter Fitzpatrick would have been delivered most likely by Caesarean section after failed induction and prior to suffering any permanent brain damage. Did I read that correctly?

[DR. BALDUCCI]: Yes.

[APPELLEES' COUNSEL]: And is that your opinion?

[DR. BALDUCCI]: No. And the reason why is, I don't see any reason why not—she could not have been induced and obtained a normal vaginal birth on the 6th.

[APPELLEES' COUNSEL]: So with the—with the exception of the—being delivered by Caesarean, is the rest of that sentence your opinion?

[DR. BALDUCCI]: Yes.

* * *

We note that appellees did in fact challenge the admissibility of Dr. Balducci's opinion in their summary judgment motion. Specifically, appellees argued that based on "undisputed factual evidence" . . . "Dr. Balducci's causation opinion is belied by Dr. [Giudice's] Testimony.

In medical malpractice cases,

> there is a legal distinction between a defendant physician who testifies based solely on what she did and what she observed in her actual treatment of the patient (a fact witness), and a physician who gives opinions based upon facts and/or materials furnished to him during the course of litigation (an expert witness).

Little v. Schneider, 434 Md. 150, 153 (2013) (citations omitted). "It is well established that fact witnesses must have *personal knowledge* of the matters to which they testify. *Id.* at 169 (emphasis added). In a medical malpractice case, "when a defendant physician testifies as a fact witness, *the physician's testimony must be limited to a recitation of what he observed and what he did on the occasion of [the patient's] visit*." *Id.* (citation and internal quotation marks omitted) (emphasis added). "When a defendant physician testifies as a fact witness, the defense must limit the witness accreditation and substantive testimony to that of a fact witness." *Id.* at 170. It is well within a trial judge's discretion to prohibit a defendant physician from testifying about matters that go outside the realm of the defendant physician's personal knowledge regarding what they did and observed in the treatment of the patient at issue. *Id.*

Here, Dr. Giudice was a treating physician for Ms. Morris on August 6 and his admissible testimony would have been limited to what he observed or did on that date. Thus, his testimony that if he had been informed of Ms. Morris' last blood pressure, he would not have changed his discharge order was not fact witness testimony. Likewise, Dr. Rossiter's testimony regarding what she would have done had the chain of command been activated was inadmissible as she did not provide care or make decisions concerning Ms. Morris' care during her August 6 visit.[5] Dr. Rossiter lacked the requisite personal knowledge and her testimony should have been limited to what she observed or did on

[5] Judith Rossiter, M.D., was the Chief of Obstetrics and Gynecology at St. Joseph's at the time of the care in question.

August 6. Appellees' contention that it is "undisputed" that adhering to the chain of command policy would have yielded the same result is premised on testimony from their fact witnesses, Dr. Giudice and Dr. Rossiter. However, conflicts such as these must be viewed in a light most favorable to the non-moving party, in this case, appellants. *See Puppolo v. Adventist Healthcare, Inc.*, 215 Md. App. 517, 533 (2013) (citation and internal quotation marks omitted) ("When the facts are susceptible to more than one inference, the court must view the inferences in the light most favorable to the non-moving party."). The circuit court, in discussing Dr. Rossiter's testimony as to what she would have done had the chain of command been activated, stated, in relevant part: "my experience to date has always been that hypotheticals are asked of experts. . . So how does a fact witness get to answer a hypothetical?". The circuit court did not, however, provide a ruling as to the admissibility of Dr. Rossiter's or Dr. Giudice's testimony. In our view, Dr. Balducci provided a rational explanation as to how he reached his expert opinion. The mere fact that his opinion contrasted with Dr. Giudice's testimony does not reduce his opinion to "because I say so" testimony. We, therefore, conclude that Dr. Balducci's testimony was admissible.

Appellees, in their motion for summary judgment, argued: "[appellants] cannot establish liability against St. [Joseph] for the actions and/or inactions of Dr. [Giudice]." They claimed that St. Joseph could not be held vicariously liable for the actions or inactions of Dr. Giudice. However, appellants did not argue that in the court below, and do not argue

now that St. Joseph can be deemed vicariously liable for Dr. Giudice's actions or inactions.[6] As appellants did not assert that Dr. Giudice could be held vicariously liable in the court below or on appeal, we decline to further address this claim.

Appellants also contend the circuit court erred in granting summary judgment, against St. Joseph because they adduced sufficient evidence to establish that Nurse Ator violated the standard of care and that the standard of care required that Peter be delivered on August 6, 2015. They contend the court's ruling was based on its misapplication of the summary judgment standard. They point to the circuit court stating: "You have to show that had she gone up the chain of command, something different would have happened."

They argue St. Joseph's chain of command policy gave Nurse Ator the duty to apply "her [own] clinical knowledge or judgment" and question Dr. Giudice's discharge order. If Dr. Giudice disagreed, the duty required Nurse Ator to then go up the chain of command, because she knew or should have known that the discharge order "may potentially have an adverse effect on [Ms. Morris'] safety or condition." They argue that Nurse Ator breached the duty created by the chain of command policy as she was aware that:

> (1) Ms. Morris had gestational hypertension; (2) gestational hypertension could quickly and unpredictably progress to preeclampsia; (3) she had multiple risk factors for preeclampsia; (4) prompt treatment of gestational hypertension and preeclampsia was necessary to reduce maternal morbidity and mortality; (5) she was full term; (6) she had complained of decreased fetal movement; (7) she had a nonreactive fetal heart rate tracing; (8) her blood pressures had consistently increased during the August 6 evaluation, with the last one measuring 144/100; (9) a health care provider should do the

[6] In their memorandum in opposition to appellees' motion for summary judgement, appellants specifically argued "[appellants] have established prima facie case against [St. Joseph's] through the negligent acts of Carol Ator, R.N." Their motion contained no such arguments related to Dr. Giudice.

> necessary tests to confirm a diagnosis or gestational hypertension or preeclampsia prior to discharging a patient; and (10) Dr. Giudice had not ordered a 24-hour urine collection to complete the preeclampsia evaluation.

Appellants appear to contend that appellees conceded that Nurse Ator violated the standard of care. They point to appellees' statement at the hearing on the motion for summary judgment that their argument "assumes [appellants] can establish that there was a breach in the standard of care by Nurse Ator failing to activate the chain of command."

Appellants argue that Nurse Shinn's and Dr. Balducci's opinions clearly established that Nurse Ator violated the standard of care by failing to activate the chain of command. They cite *Adventist Healthcare, Inc. v. Mattingly*, 244 Md. App. 259, 283–85 (2020), and *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 482–84 (2013) for the argument that when expert testimony establishes the requirements under the standard of care and that the injury would have been prevented if the standard of care had not been violated, the evidence is sufficient for a jury to determine causation.

Conversely, appellees allege that "Dr. Balducci testified Nurse Ator's failure to activate the chain of command was not a breach in the standard of care." They argue that appellants' case was limited to Nurse Ator's alleged negligence, but appellants failed to "fix the causation gap in their case against [St. Joseph]." They assert that appellants' entire theory against St. Joseph is premised on the speculative hypothesis that had Nurse Ator activated the chain of command, the reviewing provider would have reversed Dr. Giudice's discharge order. They contend the evidence showed that even if Nurse Ator adhered to the chain of command policy, the outcome would have been the same. In their motion for summary judgment, they argued that appellants failed to establish the requisite causal link

to maintain their medical malpractice action against St. Joseph. They contend that although appellants' nursing experts, Nurse Stokely and Nurse Shinn testified to multiple breaches in the standard of care, appellants only produced expert causation opinions as to two of the alleged breaches.

Appellees assert that, contrary to appellants' arguments, *Adventist* and *Barnes* are factually distinguishable from the case at bar and support the circuit court's ruling. The difference they highlight, in *Barnes*, is that the plaintiff's expert was familiar with the hospital's admitting procedure in that case, whereas they allege, in the case at bar, appellants' experts did not testify specifically to St. Joseph's chain of command policy. They contend that appellants' experts "presented vague and general testimony of the concept of chain of command through their nursing experts but nothing specific to [St. Joseph]." Likewise, they contend that this case is unlike *Adventist*, where the healthcare providers made admissions of fault and "there was no need to speculate about what have occurred had the nurse activated the chain of command." They argue it is undisputed that activating the chain of command would not have prevented Peter's injuries because Dr. Giudice and Dr. Rossiter testified that they would not have ordered his delivery on August 6.

In *Adventist*, we held that the plaintiff's expert testimony was "more than sufficient to establish the element of causation and permit the claim against [the hospital] to go to the jury." 244 Md. at 285 (citing *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 180 (2003) (quotations and citations omitted) ("[A]n expert's testimony to a reasonable degree of probability is not always essential to prove causation; rather a plaintiff's burden of proof

will be satisfied by expert testimony with respect to causation as to what is possible if, in conjunction with that testimony, there is additional evidence of causation introduced at trial that allows the finder of fact to determine that issue."). There, the plaintiff filed wrongful death and survival claims, alleging that a physician breached the standard of care by failing to diagnose and treat a bowel leak after surgery, which ultimately resulted in the death of the plaintiff's son. *Id.* at 262. She also alleged that a nurse was negligent for failing to escalate the matter, pursuant to the hospital's chain of command policy, when the son started to become more ill. *Id.* at 263. The hospital's policy required that the rapid response team "respond to situations of 'medical emergencies,' which are defined as 'life-threatening issue[s]' that require 'immediate intervention.'" *Id.* at 284. The plaintiff's expert testified that the nurse breached the standard of care by failing to act pursuant to the hospital's chain of command policy and call the rapid response team due to the patients "shortness of breath, abdominal pain, sweating, and 'extremely concerning' vital signs." *Id.* at 272. The plaintiff also presented evidence to support her claim that the nurse's breach of the standard of care caused her son's death. *Id.* at 284. We concluded that the jury could reasonably infer, based on plaintiff's expert testimony, that calling the rapid response team sooner would have resulted in the patient being taken for surgery within a timeframe in compliance with the standard of care. *Id.* at 285.

In *Barnes*, we reversed the circuit court's ruling in granting the defendants' motion for judgment notwithstanding the verdict and reinstated the jury verdict after concluding that the plaintiffs' expert "provided sufficient evidence to create a jury question on whether [the patient] would have been admitted to the hospital and received the appropriate tests if

[the physician] and [n]urse . . . had complied with the standard of care." *Barnes v. Greater Baltimore Med. Ctr., Inc.*, 210 Md. App. 457, 484 (2013). There the plaintiffs alleged that breaches of the standard of care by a physician and a nurse resulted in a preventable stroke. *Id.* at 481–82. Mr. Barnes went to the hospital complaining of "a weak right grip, tingling in the right hand, and a numb right side" and was diagnosed with carpal tunnel syndrome and sent home. *Id.* at 462. The plaintiffs presented expert testimony that a nurse breached the standard of care when she ignored a physician's note (which stated that the patient was suffering from a mini-stroke and required a full stroke work up) and downgraded the patient's priority so that he was transferred to urgent care rather than the emergency department. *Id.* at 481. They also presented testimony that a physician violated the standard of care when he, likewise, failed to read the note and then failed to independently diagnose a mini-stroke. *Id.* They presented testimony that, if the patient had been admitted, his stroke would have been prevented for multiple reasons. *Id.* at 482. The jury found in favor of the plaintiffs, but the court granted the defendants' motion for judgment notwithstanding the verdict upon finding that the plaintiffs did not provide legally sufficient evidence of causation. *Id.* at 461. We noted that "[i]n a jury trial, the amount of legally sufficient evidence needed to create a jury question is slight." *Id.* at 480 (citing *Hoffman v. Stamper*, 385 Md. 1, 16 (2005)). We reversed, finding that the plaintiffs produced sufficient evidence of the hospital's breach of the standard of care and causation. *Id.* at 484.

In the case at hand, the court's discussion of causation was as follows:

THE COURT: I am stuck on the causation part of it.

[APPELLANTS' COUNSEL]: But the causation is everything that happens from a violation of the standard of care. The causation is exactly the same.

THE COURT: You have to show that had she gone up the chain of command, something different would have happened.

[APPELLANTS' COUNSEL]: That's because—

THE COURT: Don't you?

[APPELLANTS' COUNSEL]: Yes. And the something different would be that doctors are required—any doctor. It doesn't matter if it's St. [Joseph's] or anywhere else.

THE COURT: Well, then you a making a claim against Rossiter—

[APPELLANTS' COUNSEL]: Excuse me?

THE COURT: —you just didn't tell anybody.

[APPELLANTS' COUNSEL]: No, that's not true. Dr. Rossiter never—Dr. Rossiter entered—Dr. Rossiter formed an opinion about treatment she never rendered. Dr. Rossiter is not a treater in this case. She is not a treater as it relates to August 6th.

THE COURT: But I am just saying for you to—look, we are not even talking about Dr. Giudice. For you to service this motion for summary judgment, you have to put on some evidence of the breach of the standard of care which you have and of causation.

What I would be familiar with causation is, oh, if Nurse Ator had done as she should have done, this wouldn't have

happened. And that's what I think you are missing.

[APPELLANTS' COUNSEL]: I am not missing that. Because what would have happened is a doctor would have reviewed this. And what the jury can decide is a doctor must operate within the standard of care. So the jury decide what the standard of care is, and that is what the chain of command should have resulted in.

THE COURT: And the logical conclusion of that is that you are proving a case about somebody that you never named as a defendant.

[APPELLANTS' COUNSEL]: That's not true.

THE COURT: Isn't it?

[APPELLANTS' COUNSEL]: No. We are not saying that. We are not saying any—the chain of command was never instituted. So there is nobody else.

THE COURT: You—

[APPELLANTS' COUNSEL]: There is nobody else. It was never instituted. So there is nobody else. What the [appellees] have come in and done is say—and brought in witnesses to say we would have never done that. And somehow it's gotten to being twisted that he have to prove that they would have. No.

THE COURT: You have to prove your case.

* * *

We find both *Adventist* and *Barnes* instructive in this case. We conclude that here, as in *Adventist*, appellants presented evidence of the standard of care and but for causation,

creating a jury question as to whether Peter's injures would have been prevented if the chain of command policy were followed. As previously stated, St. Joseph's chain of command policy was to be initiated "[w]hen a nurse or other practitioner believes within his/her clinical knowledge or judgment that implementing a physician order or plan of care may potentially have an adverse effect on patient safety or condition."

Appellants' expert, Nurse Shinn, testified that "Nurse Ator knew or should have known that the standard of care for a patient such as Ms. Morris was to admit for delivery in the setting of gestational hypertension or mild pre-eclampsia." She testified that Nurse Ator violated the standard of care by negligently failing to act pursuant to St. Joseph's chain of command policy and advocate for Ms. Morris' admission and delivery with Dr. Giudice, then going up the chain if he disagreed. Notably, when asked "would [she] ever question a physician's choice of treatment or management[,]" Nurse Ator testified that she "would not question a physician's management and treatment." Also, when asked whether she "ask[s] question about a physician's management" when she "think[s] they're doing something wrong[,]" she responded that she "doesn't question [a physician's] management of the patient."

Appellant's expert, Dr. Sibai, testified that appellees deviated from the standard of care by failing to admit Ms. Morris and deliver on August 6 because "a reasonable physician [would] go ahead and move for delivery because there is really no advantage whatsoever to continue [the] pregnancy because it is very well-known that this condition is going to progress and could change suddenly." Moreover, Dr. Balducci testified that "[appellees'] deviations from the applicable standards of care were the direct and

proximate cause of Peter Fitzpatrick's permanent hypoxic-ischemic encephalopathy and its sequelae." Likewise, Dr. Rosenberg opined that "if the delivery occurred on August 6, 2015, Peter Morris Fitzpatrick would not have been born with a significant metabolic acidosis and would not have suffered hypoxic ischemic encephalopathy and its sequalae." He also testified that "causation stems from" Nurse Ator's "breach[] [of] the standard of care by not questioning Dr. Giudice's decision to discharge Ms. Morris, and by failing to activate the chain of command as necessary." As appellees stated in their brief, the Court of Appeals, in *Marcantonio v. Moen* explained: "*[p]roximate cause involves a determination of causation in fact*, which is 'concerned with the . . . fundamental . . . inquiry of whether a defendant's conduct actually produced an injury.'" 406 Md. 395, 414–15 (2008) (citation omitted) (emphasis added).

Viewing the evidence in the light most favorable to appellants, we conclude that appellants adequately presented evidence regarding a violation of the standard of care, causation and harm resulting therefrom. Whether to credit that a violation of the standard had occurred and causation was a question reserved for the jury. *Catler v. Arent Fox, LLP*, 212 Md. App. 685, 722 (2013) (citing *Havens v. Schaffer*, 217 Md. 323, 327 (1958)).

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED, AND THE CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE PAID BY APPELLEE.