UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1956

September Term, 2012

SHUNDRA BANKS, *ET AL.*

v.

TEREX CORPORATION, *ET AL.*

Meredith,
Kehoe,
Nazarian,

JJ.

Opinion by Nazarian, J.

Filed: November 7, 2014

Michael Banks worked at the Flying Dog Brewery in Frederick, Maryland; he operated a forklift that moved pallets of beer kegs in the brewery's cooler. On March 23, 2009, a co-worker found him in the cooler lying unconscious next to the forklift, and he died a day later. His widow, Shundra Banks, along with his children and estate (collectively "the Family"), filed a complaint in the Circuit Court for Baltimore City alleging negligence and products liability against a number of defendants, including McCall Handling Company ("McCall") and Terex Corporation ("Terex"). The Family claimed that McCall had negligently maintained the forklift and that Terex should be held liable, either directly or as the parent corporation of the forklift's manufacturer.

The court ultimately granted the defendants' motions for summary judgment and the Family appealed. Terex also cross-appealed on two points: *first*, the trial court's previous decision to deny its motion for change of venue, and *second*, the court's interpretation of Maryland's damages cap that would have allowed the Family a higher range of potential damages. Because we agree with the circuit court that the Family failed as a matter of law to connect Terex to the forklift in any way that would permit liability, and because the Family failed to produce evidence that any conduct on the part of McCall caused the forklift to fail, we affirm both summary judgment orders. And as a result, Terex's cross-appeal is moot.

I. BACKGROUND

1. The injury.

Mr. Banks's job required him to pack and move pallets of beer kegs into an unventilated cooler from the manufacturing line, then from the cooler to trucks for shipping.

Both tasks required him to use one of two forklifts in the warehouse. About a month before the incident that is the subject of this litigation, on February 19, 2009, Mr. Banks passed out while using the forklift in the cooler. He underwent several days of testing at Frederick Memorial Hospital and returned to work two or three weeks later.

On March 23, a co-worker again found Mr. Banks lying unconscious next to the forklift. (The parties dispute whether the engine was running when he was found.) He was again taken to Frederick Memorial, where he was "admitted for cardiac arrest, carbon monoxide poisoning." His History and Physical Exam also reflect that Mr. Banks's past medical history included cardiomyopathy, hypertension, diabetes, and left ventricular hypertrophy. He never regained consciousness, and he died the following day. The Maryland State Medical Examiner determined that although the primary cause of death was carbon monoxide poisoning, Mr. Banks suffered from underlying cardiac problems that contributed to his death as well.

2. The forklift.

The forklift Mr. Banks was operating is called a Clark Genesis CGC 25 LPG; its internal combustion engine was fueled by liquid propane. Clark Material Handling Company ("CMHC-KY"), a Kentucky corporation, designed, assembled, manufactured, and sold the forklift, which was shipped from the factory in September 1996 and ultimately made its way to Flying Dog. But as is the case with many corporate histories, a number of changes in ownership complicate the path of potential liability, so we pause to unravel that story.

3. Corporate history relating to Terex.

Before July 1992, Clark Equipment Company ("CEC") owned CMHC-KY, which operated the Clark Forklift Business. On July 31, 1992, CEC—which was not in any way affiliated with Terex at the time—sold CMHC-KY to a subsidiary of Terex, CMH Acquisition Corp., a holding company Terex created specifically to obtain the CMHC-KY stock as part of a May 27, 1992 Stock Purchase Agreement (the "1992 Agreement").

CMHC-KY manufactured standard forklifts between 1992 and 1996. At the time the forklift here was made, CMHC-KY was a wholly-owned subsidiary of CMH Acquisition Corp., which itself was a wholly-owned subsidiary of Terex. That, in turn, meant that Terex was the "grandparent corporation" to CMHC-KY.

Over time, though, the family tree grew more gnarled. On November 9, 1996, Terex, CMH Acquisition Corp., and CMHC-KY sold the Clark Forklift Business to *CMHC* Acquisition Corporation, a Delaware corporation ("CMHC-DE")—a different corporation than, and not to be confused with, *CMH* Acquisition Corporation. Then, on November 22, 1996, CMHC-KY changed its name to *Terex* Material Handling Corp. f/k/a CMHC-KY ("TMHC"), which from that point forward was not involved in the manufacture of Clark forklifts. (As Norman Hargreaves, director of product safety at Terex Corporation, explained, TMHC had no specific purpose thereafter and was dissolved on October 20, 1998.) TMHC gave up the CMHC-KY moniker, evidently to free up the "Clark Material Handling Company" name so that CMHC-DE could carry on the Clark Forklift Business under (and

benefit from the good will of) that name. CMHC-DE assumed the assets and liabilities of CMHC-KY (including the product-related liabilities of the Clark Forklift Business). CMHC-DE also "defended and paid all suits related to the Clark Forklift Business" until CMHC-DE's bankruptcy in 2000. CMHC-DE ultimately became Forklift LP Corporation ("Forklift LP").

4. McCall's involvement.

McCall's involvement with the forklift began only two months before Mr. Banks's death. In January 2009, Flying Dog selected McCall to service its equipment. Flying Dog signed McCall's Value Protection Agreement (the "Agreement"), in which McCall agreed to provide periodic maintenance, including an oil and air filter change, among other items. According to McCall, this service was essentially a "lube, oil and filter" and was not a tune-up, nor did it include checking the level of carbon monoxide emissions.

On January 9, 2009, McCall performed periodic maintenance on the forklift at issue and provided a Periodic Maintenance Service Report that listed eight "Technician Recommendations." (McCall says in its brief that the PMSR listed "seven items in need of *immediate* repair" (emphasis added), but it misses an eighth item to the left of the "Condition of Truck" column. Moreover, contrary to McCall's characterization, we see nothing on the PMSR that specifies any exigency.) The Repair Service Estimate that followed itemized costs for the recommended repairs and stated (not in fine print, exactly, but in a font that couldn't have been more than eight-point): "*The following are recommended repairs that are needed

to keep unit in safe operating condition.*" Kenneth Mason, who in 2009 was a warehouse manager at Flying Dog, said that he would receive any such estimates and forward them to his boss for approval. And an affidavit from a General Service Manager for McCall states that Flying Dog never authorized McCall to perform any of the listed repairs.

According to the Family, McCall serviced the forklift a second time before the incident, on March 20, 2009. The PMSR to which it points bears a serial number one digit different than the January 9 PMSR. Evidently, McCall recommended certain repairs and, again, there is no evidence to suggest that Flying Dog asked McCall to make them. Whether or not the second inspection took place on this forklift or a different one, though, Mr. Banks was found passed out in the cooler and died shortly thereafter.

5. The Complaint.

Mr. Banks was survived by his wife, three (at the time) minor children, Michael Banks, Jr., Melany Brownlow, and Ashanti Davis, and an adult child, D'Marcio Brownlow. The Family filed suit in the circuit court and its complaint, like many product liability complaints, cut a wide swath. The original Complaint named six defendants: Terex, McCall, Forklift LP, Atlantic Lift Truck, Inc ("Atlantic"), Volvo Construction Equipment of North America, Inc. ("Volvo") and Ingersoll-Rand Company ("I-R"). It alleged counts for failure to warn, negligent design, negligent manufacturing, negligent failure to provide adequate instructions, and negligent failure to properly maintain the forklift, along with some corresponding claims in strict liability and breach of implied warranty of merchantability, on

behalf of Mr. Banks's Estate ("the Estate") and the Family as his beneficiaries, with separate claims for the incident in February and the incident in March. All defendants except Forklift LP answered and filed a Joint Motion to Transfer Venue that the circuit court denied, following a hearing, in an Order dated April 29, 2011. The Family filed an Amended Complaint that added Clark Equipment Company, Alliance Material Handling, Inc., and Daniel F. Larkin d/b/a All 1 Lift as additional defendants (no additional claims were made).

Over time various defendants were dismissed: Volvo was dismissed on August 10, 2011; I-R on February 10, 2012; Atlantic on March 23, 2012; and Clark Equipment Company on May 30, 2012. On July 12, 2012, the court entered a default judgment against Forklift LP.

6. Motions for summary judgment.

On June 11, 2012, McCall and Terex both moved for summary judgment in lengthy motions accompanied by a panoply of exhibits (the "McCall MSJ" and the "Terex MSJ," respectively, and the "Summary Judgment Motions" collectively),[1] and the trial court held a hearing on August 13, 2012 ("Hearing I"). Terex argued that the Family could not defeat summary judgment by producing only a press release (which we will discuss later), and that the Family also could not reach Terex by "piercing the corporate veil," *i.e.*, by permitting recovery against Terex instead of CMHC-KY, on the theory that the former was effectively an alter ego of the latter. As part of the veil-piercing argument, Terex took the position that

[1] The two other defendants remaining at that time, Alliance and Larkin, did the same. The trial court granted Larkin's Motion, which the Family does not appeal; Alliance has since settled with the Family.

Maryland law governed the Family's claims and required proof of fraud. Terex argued as well that even if Kentucky law applied, as the Family claimed, it could not reach Terex as a defendant. The Family opposed the Terex MSJ, arguing first that the press release on which it rested its direct liability claim was admissible and constituted an admission that Terex manufactured the forklift. It also claimed that Kentucky law applied and allowed it to pierce the corporate veil to reach Terex, and that a jury should decide whether it had satisfied the standard applied under Kentucky law for piercing the corporate veil.

McCall's defenses revolved primarily around its duty to the Family (or, more precisely, the lack of any duty). It argued at Hearing I that it had no duty to maintain the forklift's carburetor because that was not part of the Agreement. McCall also claimed that it had performed all the Agreement required. The trial court and counsel for the Family then engaged in a lengthy colloquy about causation when the court asked about an idle screw on the forklift. One of the Family's experts had opined that the idle screw had fallen out of adjustment, which might explain why the forklift could have emitted a higher-than-normal amount of carbon monoxide:

> THE COURT: When did it become out of adjustment?
>
> [FAMILY'S COUNSEL]: The expert could not tell us that.
>
> THE COURT: Well, don't they have to, don't you have to establish that? There's a, there was a . . . premises liability case, a food court where something was spilled on the floor of the food court. The company that maintained it or whatever was aware of the spill. Someone was injured and I don't believe the court allowed the issue to go to the jury because they said there

was insufficient time between, or maybe the jury determined there was insufficient time between the time that they were aware of the spill and the time when the injury occurred. Go ahead.

[FAMILY'S COUNSEL]: No one knew it was out of adjustment until after I bought the forklift after the accident.

THE COURT: But you need to—

[FAMILY'S COUNSEL]: Well—

THE COURT : —don't you need to establish for proximate cause? Go ahead. I'm sorry.

[FAMILY'S COUNSEL]: Mr. Leshner was tasked to determine it was out of alignment. In his deposition . . . *he says the reason for the excessive carbon monoxide emissions was either a misadjustment of the idle mixture on the propane carburetor or a malfunction in the propane fuel system or both. The misadjustment or malfunction should have been corrected during periodic maintenance and service to the forklift.* That failing to correct the exhaust emissions was a breach of the standard of care in the industry and . . . the excessive exhaust emissions were the cause of Mr. Banks's demise. There's the breach.

* * *

THE COURT: Let's say there was . . . proof that they did the maintenance and subsequent to their doing the maintenance something happened to that what is it, a switch? It's a—

[FAMILY'S COUNSEL]: A screw.

THE COURT: A screw. Something happened to the screw *after they did their maintenance*. Would they be responsible or liable?

> [FAMILY'S COUNSEL]: Your Honor, I don't have to answer that question because they worked on this, this forklift three days before—
>
> THE COURT: Right.
>
> [FAMILY'S COUNSEL]: The death.

(Emphasis added.) On August 14, 2012, the day after Hearing I, the court granted the McCall MSJ. The Order stated only that it granted the motion "[u]pon consideration" of the McCall MSJ, the Family's Opposition, and McCall's Reply, "as well as arguments of counsel," and stated no further basis for its decision. The court granted the Larkin MSJ in similar fashion, and denied both the Terex MSJ and the Alliance MSJ without elaborating.

Because Terex could not tell why the court had denied its motion for summary judgment (and presumably because a September 10 trial date was looming), it contacted the court in an effort to clarify which state's law would apply on the veil-piercing question—Maryland or Kentucky. The court explained in a written order that it "need not make findings of law if disputed material facts will exist regardless of such findings." The court further explained,

> In the case *sub judice*, should it be found that Terex had design and manufacturing input into the product, it may not be necessary to pierce the corporate veil. Should the corporate veil have to be pierced in order for Terex to be held liable, Maryland law would require clear and convincing evidence of fraud. The existence or absence of fraud would necessitate findings of fact. If Kentucky law is to be applied there is an eleven factor test which will also necessitate factual findings.

In the meantime, the trial was assigned to a different judge, and the day after the letter above issued, the second (trial) judge issued a letter on August 24, 2012 clarifying *his* view on the choice of law issue:

> The parties have sought this Court's ruling with respect to the applicable law (Maryland versus Kentucky) in the above-captioned action. Having reviewed the written arguments of counsel on this issue, the Court concludes that the rule of *lex loci delicti* applies and therefore the substantive and procedural law of the State of Maryland shall govern these proceedings. *Phillip Morris v. Angeletti*, 358 Md. 689, 744-45 (2000); *Hauch v. Connor*, 295 Md. 120, 123-25 (1983); *White v. King*, 244 Md. 348, 352 (1965); *Black v. Leatherwood Motor Coach Corp.*, 92 Md. App. 27, 41, *cert. denied*, 327 Md. 626 (1992); Restatement (First) of Conflict of Laws § 377, Notes 1 and 2, at 455-56 (1934).

Within a week after the court's letter, Terex renewed its motion for summary judgment (the "Terex MSJ II"), reiterating the grounds it had asserted in the Terex MSJ. The court held a hearing on September 7, 2012 ("Hearing II"). Terex argued again that under Maryland law, the Family could not prove fraud, and thus could not pierce the corporate veil, and that it likewise failed to show any "paramount equity" that justified keeping Terex in the case. The Family argued that a jury could find a "paramount equity," and it placed great weight on the facts that *first*, at one time a CEO of CMHC-KY also served as the President of Terex, and *second*, CMHC-KY received no proceeds from the sale of its assets because the proceeds went straight to Terex. Counsel for Terex replied to this argument in kind:

> Now the sale of assets is a red herring. What [counsel] left out is that [CMHC-KY], the manufacturer was going to dissolve. That's why the asset sale occurred. The parent sold the assets of the subsidiary to the new Clark [*i.e.*, CMHC-DE] and then the

> subsidiary dissolved. There was no remaining corporation to receive and hold the assets.
>
> And then, finally, the assertion that folks with claims against [CMHC-KY] were left without remedies. As part of this sale the new corporation was required to assume the liabilities, and did in fact, purchase insurance and defend those liabilities until it unfortunately went into bankruptcy in 2000.
>
> *So we repeat our assertion that even if you find all facts as they want them to be found and give them all inferences, there is simply no way, especially in light of Maryland case law that they can make out a . . .* prima facie *case of fraud by clear and convincing evidence*. And Terex is entitled to judgment on that claim.

(Emphasis added.) The court then ruled and held that "the corporate veil of [CMHC-KY] will be pierced to reach [Terex] only based upon fraud or proof that it is necessary to enforce paramount equity." The court went on to conclude, citing *Ramlall v. MobilePro Corp.*, 202 Md. App. 20 (2011), that "arguments that have urged piercing of the veil for reasons other than fraud have failed in Maryland courts."

Based on this Court's holding in *Ramlall*, the circuit court determined that the Family had "failed to identify a single fact that would support the veil piercing theory of liability. None are even pled in the [Family's] complaint or amended complaint. None are presented to this Court by way of affidavit or other evidentiary support for its opposition to the motion for summary judgment." This left direct liability as the only remaining basis for liability against Terex—that is, the Family would need to prove that Terex manufactured the forklift itself—and the only evidence even purporting to connect the two was a press release that showed a Genesis Forklift (which Terex doesn't dispute was the same model as the one at

issue here), and a statement by Terex's then-president, Mr. DeFeo, referring to the forklift as "[o]ur new Genesis forklift truck . . . [which] puts Clark back on the offensive in the marketplace. It is just one more indication that the overall turnaround of Terex is well underway."

The court concluded that the press release would be inadmissible:

> This two page document has a headline, Terex's Clark Material Handling Unit Introduces New Genesis Lift Truck to Nationwide Dealer Network. Heavy Order Volume Results in Sellout for First Quarter 1995 Deliveries.
>
> The [Family's] argument notes that there's a Westport, Connecticut tag line at the beginning of the first paragraph. Frankly, the Court interprets that as just meaning that's the location of the—the news worthy item that's being reported upon.
>
> The Court finds most significant on the second page—the article concludes with, it says, contact: The Dilenschneider Group . . . and it has two names, people who apparently work there and [a] phone number. But then under that it says copyright 1994 Business Wire, copyright 1994 Gale Group. All rights reserved. Gale Group is a Thomson Corporation Company. Therefore, the Court concludes that this document was published by—or this article was published by Thomson Corporation. *Thomson Corporation was not an agent of Defendant Terex.*
>
> In all likelihood the Dilenschneider Group released the information or sought publication of the information in the Business Wire, much like a local PR firm in Baltimore would seek to have a press release from a local law firm published in the Baltimore Business Journal. *But that doesn't get [the Family] over that level of hearsay.*
>
> So the Court finds that the document previously referenced by the Court, *the press release published by the Thomson*

> *Corporation in the Business Wire in 1994 is inadmissible hearsay.*

(Emphasis added.) This finding, coupled with the Family's failure to produce any other admissible evidence to support its claim, led the court to grant summary judgment to Terex:

> The centerpiece as it was described of [the Family's] case to establish direct manufacturer liability was the press release that was discussed earlier this afternoon. The Court has concluded that it is inadmissible hearsay.
>
> And therefore, the Court queried as to what additional evidence [the Family] might rely upon to support its position that Terex has direct liability as a manufacturer of the subject forklift truck. The areas identified by [the Family] focus upon the control of the wholly-owned subsidiary by Terex described colloquially as the puppet in the pocket.
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> Furthermore, [the Family] had noted that the proceeds from the sale of the subsidiary went directly to—to Terex.
>
> In order for [the Family] to prevail [it] would need to show or put forth evidence *that a jury could rely upon* to determine that Terex was involved in the sale or in the distributive chain with respect to the forklift truck in question.
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> * * *
>
> [T]he facts and circumstances or the posture of the case has again changed as [the Family] has failed to set forth—or put forth *any viable basis for admitting into evidence* and clearing the hurdle of the hearsay rule for the press release as published by Business Wire.
>
> Therefore, the Court concludes that Terex's motion for summary judgment on the second issue, direct liability, should also be and will be and hereby is granted.

(Emphasis added.)

The court entered a written order granting summary judgment on November 2, 2012, and the Family filed timely Notices of Appeal from that Order and from the August 16, 2012 summary judgment in favor of McCall. Terex cross-appealed the trial court's denial of the Defendants' Joint Motion to Transfer Venue and its interpretation of Maryland's damages cap.

II. DISCUSSION

This is a much simpler case than the complex legal morass it seems at first blush to be. And in all the commotion, the parties have lost the forest for the trees—although the Family[2] and Terex[3] see a novel choice-of-law question driving the Family's ability to pierce

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[2] The Family presents the following issues on appeal:

> A. Should a dispute of material facts prevent the grant of [the McCall MSJ]?
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> B. Does the law of the state of incorporation apply when piercing the corporate veil of an out of state corporation?
>
> C. Is a press release issued by [Terex] admissible as evidence?
>
> D. Should a dispute of material fact prevent the grant of [the Terex MSJ]?

[3] Terex presents the following questions:

> I. Whether the trial Court ruled correctly on a novel choice of law question that Maryland law—which requires the element of fraud which the Banks conceded they could not meet—controls the corporate veil-piercing question in this case given that the Plaintiffs are residents of Maryland (and Mississippi), as was the decedent, the death occurred in Maryland, the product in dispute was sold, owned, and maintained in Maryland, and the issues do not involve the "internal affairs" of the corporations?

(continued...)

corporate veils to get to Terex, we see the case differently, and more simply. The choices here, the parties agree, are Maryland law or Kentucky law.[4] The Family concedes that if we apply Maryland law, it loses: Maryland requires it to prove fraud as a prerequisite to veil-piercing, a burden it cannot satisfy. It argues that Kentucky law would permit it to recover from Terex based on CMHC-KY's (allegedly) tortious conduct.[5] But we disagree on the

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[3](...continued)

II. Whether, even if Kentucky law controls the corporate veil-piercing question, the decision of the trial Court should nonetheless be affirmed because these are no fact disputes and the Banks failed as a matter of law to prove the elements of a veil-piercing claim?

III. Whether the trial Court ruled correctly that an Internet obtained press release—upon which the Banks solely based a claim that Terex was the "manufacturer by admission"—was unauthenticated hearsay not within any Maryland exception?

IV. Whether the trial Court erred in its ruling that the Banks are entitled to two separate applications of Maryland's statutory cap on non-economic damages for one continuous event as opposed to separate events in February and March of 2009?

V. Whether the trial Court abused its discretion when it declined to transfer the case from Baltimore City to Frederick County given the virtual absence of any contacts with Baltimore City, and abundant contacts with Frederick County?

[4] At oral argument, we asked counsel about whether Connecticut law might apply, as the law of the state where Terex was incorporated, or whether Delaware law might apply, as the law of the state where CMHC-DE was incorporated. But neither side agreed with either approach, nor has anyone suggested that the outcome would be different if we applied either Connecticut or Delaware law instead.

[5] Counsel for the Family conceded at Hearing I that the warranty claims, as opposed to the tort claims, were time-barred.

answer to both questions, and we resolve the issue by *assuming* Kentucky law applies. Even under that more permissive standard, we hold, the Family failed to allege sufficient facts about Terex's corporate governance and involvement in CMHC-KY's affairs that could justify piercing the corporate veil. We then explain how, at Hearing II, the trial court also got it right when it concluded that there was no basis upon which Terex could be found *directly* liable based on the press release. With respect to McCall,[6] we agree too that the Family failed to produce any evidence that could establish causation and that would permit it to proceed to trial.

We review the trial court's summary judgment rulings against Maryland Rule 2-501, which provides that "[t]he trial court shall enter judgment in favor of or against the moving party if the motion and response show that 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." Md. Rule 2-501(f). We review the summary judgment decision itself *de novo*, applying a non-deferential standard in determining "'whether the trial court's legal conclusions were legally correct.'" *D'Aoust v. Diamond*, 424 Md. 549, 574 (2012) (quoting *Messing v. Bank of Am., N.A.*, 373 Md. 672, 684 (2003) (citations omitted)). We do not make factual

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[6] McCall presents the following issues on appeal:

I. Did McCall Handling Company Have a Duty to Test for Emissions Levels on the Subject Forklift?

II. Was There Evidence That McCall Handling Company's Conduct was a Proximate Cause of either the February or March 2009 Incidents?

determinations or resolve factual disputes. *Hartford Ins. Co. v. Manor Inn of Bethesda, Inc.*, 335 Md. 135, 144 (1994). Instead, "[w]e review the record in the light most favorable to the non-moving party and [we] construe any reasonable inferences that may be drawn from the well-pled facts against the moving party." *Muskin v. State Dep't. of Assess. & Tax.*, 422 Md. 544, 554-55 (2011) (citation omitted); *Beatty v. Trailmaster Prods., Inc.*, 330 Md. 726, 739 (1993). If there is no material fact in dispute, we determine whether the trial court correctly granted summary judgment as a matter of law, "without deference to the lower courts' assessment of the law." *Deutsche Bank Nat'l Trust Co. v. Brock*, 430 Md. 714, 727 (2013) (citing *Rhoads v. Sommer*, 401 Md. 131, 148 (2007)).

A. The Trial Court Properly Granted Summary Judgment To Terex.

The trial court ultimately premised its decision to grant summary judgment to Terex on its prior decision that Maryland law applied. We don't have the benefit of the court's reasoning in that regard—the court's clarifying order of August 24, 2012 concluded (correctly) that Maryland substantive law applied,[7] but did not explain how it reached that decision with respect to the Family's efforts to pierce the corporate veil. Appellate courts generally affirm a grant of summary judgment on the specific grounds on which the trial

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[7] The parties do not dispute that Maryland law applies to the substantive issues of tort law. *See Philip Morris Inc. v. Angeletti*, 358 Md. 689, 744 (2000) ("Maryland adheres to the *lex loci delicti* rule in analyzing choice of law problems with respect to *causes of action sounding in torts*." (emphasis added) (citing, among others, *Farwell v. Un*, 902 F.2d 282, 286 (4th Cir. 1990) (in which the Fourth Circuit noted that "Maryland, against what may be the general trend of latter times toward 'significant relationships' analysis, appears rather steadfastly to have adhered to *lex loci* as the ordering principle in tort cases"))).

court relied, *Lovelace v. Anderson*, 366 Md. 690, 695 (2001); however, when "two grounds are so interrelated that they cannot be properly considered as separate and distinct, the appellate court is not so constrained." *Ross v. State Bd. of Elections*, 387 Md. 649, 659 (2005) (citation omitted). Similarly, if there is a basis in law that the trial court could not have ignored that mandated summary judgment, then we may affirm on that basis. *Geisz v. Greater Bal. Med. Ctr.*, 313 Md. 301, 314 n.5 (1988).

1. Conflicts of law and veil-piercing.

For better or worse, Maryland has adhered consistently to § 377 to the Restatement (First) of Conflict of Laws (1933), the Old School principle of *lex loci delicti.* In suits filed here, Maryland courts apply the substantive state laws of the state where the incident at issue took place. *See Black v. Leatherwood*, 92 Md. App. 27, 41 (1992) (noting that while the First Restatement is of "merely historical interest elsewhere," it still provides useful substantive guidance in Maryland). The Family, however, argues that we should follow the "significant contacts" test set forth in § 145(1) to the Restatement (Second) of Conflict of Laws (1971) instead. Under that test, the court applies the law of the state that has the most significant relationship to the occurrence and the parties and, in the Family's view, would compel us to apply the law of the Commonwealth of Kentucky, where CMHC-KY was incorporated, to determine whether the Family can pierce its corporate veil to reach Terex. Terex concedes that Maryland appellate courts have not yet decided "what choice of law rule will apply for

corporate veil-piercing actions in Maryland," but counters that it would prevail even under Kentucky's more lenient test.

Rather than determining which state's law applies, we will look first at whether the difference matters, and thus whether there is a conflict of laws at all—if the outcome is the same either way, we need not choose one state's law over the other. *See* 15A C.J.S. Conflict of Laws § 30 ("In determining what rule governs, the first step is usually to determine whether there is an actual conflict. A conflict exists if the choice of one forum's law over the other will determine the outcome of the case."); *Am. Nat. Bank v. Medved*, 801 N.W.2d 230, 238 (Neb. 2011) (noting that "before entangling itself in messy issues of conflict of laws, a court ought to satisfy itself that there actually is a difference between the relevant laws of the different states" (footnote omitted)). Because there is no question that the laws of Maryland would not have permitted the Family to pierce CMHC-KY's veil to get to Terex (the Family's counsel conceded at oral argument that Maryland law would require proof of fraud that it cannot produce), we really only need in the first instance to determine whether the Family is right that the Kentucky standard compelled a different summary judgment result. And because, as we explain, the ultimate outcome is the same under Kentucky law,[8] there is

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[8] We offer a brief nod to the "hard way," since the question of whether Maryland law or Kentucky law in fact applies is an interesting one (although academic here). The law review article on which Terex's counsel conceded that he so heavily relied, *see* Gregory Scott Crespi*, Choice of Law in Veil-Piercing Litigation: Why Courts Should Discard the Internal Affairs Rule and Embrace General Choice of Law Principles*, 64 N.Y.U. Surv. Am. L. 85 (2008), counsels in favor of looking to general choice of law principles, which here would (continued...)

no conflict to resolve. *See Am. Motorists Ins. Co. v. ARTRA Grp., Inc.*, 338 Md. 560, 577 (1995); *Henry v. Gateway, Inc.*, 187 Md. App. 647, 664 n.17 (2009) ("A conflict of law inquiry is necessary only if there are two relevant forums with divergent laws." (quoting *Accu–Tech Corp. v. Jackson,* 352 F.Supp.2d 831, 835 n. 5 (E.D. Mich. 2005))).

In 2012, the Kentucky Supreme Court undertook a comprehensive review of the issue and formulated a two-part test for determining when a court could pierce a corporate veil and impose liability on shareholders. *Inter-Tel Technologies v. Linn Station Properties, LLC*, 360 S.W.3d 152 (Ky. 2012). At the threshold, it held that a court may disregard the limited liability of a corporation's shareholders "against those who have exercised dominion over the corporation to the point that it has no real separate existence." *Id*. In addition, a court may pierce the veil *only* if there also exist "circumstances under which continued recognition of the corporation would *sanction fraud or promote injustice*." *Id.* (emphasis added). The

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[8](...continued)
point to Maryland law. But we also see the benefit of looking to the state of incorporation for laws relating to the treatment of corporations. Corporations are, after all, creatures of the law of a particular state, and part of the reason for creating corporations as separate entities is to shield individual shareholders (under normal circumstances) from liability for the conduct of the corporation. We can, therefore, imagine policy and practical reasons for questions about the liability of shareholders for the actions (in this case, the alleged tortious conduct) of the corporation to be determined by the law of the state of incorporation, including predictability and fairness to shareholders. And that departure from the general conflict of laws rules could be justified as *depecage*, the principle that more than one state's laws can apply to different issues, without altering the general application of *lex loci delicti* to the underlying tort. *See Erie Insurance Exchange v. Heffernan*, 399 Md. 598, 613-15 (2007) (allowing for the application of Maryland law in construing an auto insurance contract made in Maryland, but then applying the substantive law of Delaware where the plaintiff's injuries were caused by a car accident that took place there).

Court concluded that the first question—whether there was a loss of "corporate separateness" because of the parent's domination of the corporation—should be answered by looking at a number of factors, primarily "'grossly inadequate capitalization, egregious failure to observe legal formalities and disregard of distinctions between parent and subsidiary, and a high degree of control by the parent over the subsidiary's operations and decisions, *particularly those of a day-to-day nature*.'" *Id.* at 164 (emphasis added) (quoting 1 Phillip I. Blumberg, et al., *Blumberg on Corporate Groups* § 11.03[A] (2d ed. 2012)). The court ultimately endorsed an eleven-point "checklist" that broke these questions down even further.

The Family contends that under the *Inter-Tel* test, the circuit court here should have pierced CHMC-KY's corporate veil to reach Terex. We disagree, and we walk through the individual *Inter-Tel* factors and the"injustice" component of the test to explain why.[9]

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[9] Although Terex doesn't raise this issue, we feel compelled to address the Family's confusion about the family tree connecting CMHC-KY to Terex. Terex is ostensibly the *grandparent* corporation to CMHC-KY, not its parent. But the Family complicates matters by referring to CMH Acquisition Corp. as the (middle) parent when the company that ultimately acquired CMHC-KY was *not* CMH Acquisition Corp., but CMHC-DE. (CMH Acquisition Corp. merged with Terex as part of the November 22, 1996 Agreement.) We don't see how the Family can go through CMHC-DE to get to Terex when *that* corporation—which assumed CMHC-KY's liabilities—was not owned by Terex, nor did it have any relationship with Terex at all after the transactions in November 1996. Terex stated in its Answers to Interrogatories that when CMHC-KY was dissolved in 1998 (known by then as TMHC), "all product liabilities related to forklifts were the responsibility of [CMHC-DE], which had assumed these liabilities. These product liabilities had been with [CMHC-DE] since November of 1996, when [CMHC-DE] purchased assets and liabilities associated with the production of Clark Material Handling forklifts prior to 1996. [*CMHC-DE*] *handled all claims after 1996 and Terex was not affiliated with* [*CMHC-DE*]," (emphasis added) and the record contains no evidence to the contrary.

(continued...)

2. The *Inter-Tel* checklist.

a) Does the parent own all or most of the stock of the subsidiary?

Terex does not dispute that it owns 100% of the stock in CMHC-KY.

b) Do the parent and subsidiary corporations have common directors or officers?

The Family claims that "[i]t is not simply a fact that there were some common directors and officers, at the time relative to the development of the forklift at issue, the directors were identical and were also officers of Terex and [*CMH Acquisition Corp.*]." (Emphasis added.) It cites, however, only to deposition testimony from Mr. Rosenberg, who addresses the officers and directors of those two companies and says nothing about the leadership of *CMHC-KY*, the company at issue here.

At the time this forklift was manufactured, CMHC-KY was solely responsible for the entirety of the forklift business. According to Mr. Rosenberg, who retired as Terex's general counsel at the end of 1997, Terex had nothing to do with the operations of the business. Gary

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[9](...continued)

If this is the case, there is no way the Family can reach Terex via Kentucky law. Whenever the forklift was manufactured, CMHC-KY was no longer directly liable for any incidents arising from use of its forklifts after November 9, 1996, when CMHC-DE assumed its liabilities (for *any* incident, whatever the date). But if CMHC-DE assumed the liabilities, and it was not owned by Terex, then the Family also cannot get to Terex through CMHC-DE (assuming that there was no fraudulent conduct associated with the transactions, which the Family has not alleged). Because Terex didn't raise this argument below, though, we assume without deciding that the Family could properly establish a corporate relationship that would allow it to reach Terex through CMHC-KY.

Bello was President and CEO of CMHC-KY before the 1992 transaction and continued to serve in those capacities until 1993. Ron DeFeo replaced Mr. Bello as acting President from mid-1993 through mid-1994, during which time he also served as an officer of Terex. Mr. Rosenberg explained that Mr. DeFeo, who at that time was in charge of Terex's heavy equipment group, served as interim replacement because of Mr. Bello's "sudden" removal. Mr. DeFeo was ultimately replaced by Richard Clemens, who was not employed by or otherwise affiliated with Terex. Other than Mr. DeFeo, the operating officers of CMHC-KY from 1992 were not affiliated with Terex or CMH Acquisition Corp. The sole Director of CMHC-KY and CMH Acquisition Corp. from 1992 through 1996 was either Mr. Rosenberg or Randolph Lenz, who were also both Directors and Officers of Terex through that time period. The Family names no other common officers.

As Terex points out, the overlap that did take place is not particularly surprising and does not weigh in the Family's favor. The United States Supreme Court has articulated the "well-established principle of corporate law that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) (citation omitted). Common sense dictates as well that if one corporation acquires 100 percent ownership in another, it will put some of its own people in the leadership of the newly acquired company. *See Arch v. Am. Tobacco Co.*, 984 F. Supp. 830, 838 (E.D. Pa.

1997). By comparison, in *Inter-Tel*, *all* of the subsidiary's officers were also officers of both its parent *and* its grandparent, which is not the case here. *See Inter-Tel*, 360 S.W.3d at 166.

c) Does the parent corporation finance the subsidiary?

Other than the initial capitalization, the Family does not allege that Terex financed CHMC-KY. Although it attempts to suggest that the capitalization involved a suspiciously significant amount of money, the Family cites to no record evidence or authority for this assertion. Again, the subsidiary in *Inter-Tel* had "no assets or bank accounts of its own, with all revenues going into an account controlled exclusively" by the grandparent. *Id.* at 166. (And while the Family seems to suggest that the initial purchase constitutes a "financing" of the subsidiary, this makes no sense—obviously the parent "finances" by the initial capitalization, or it wouldn't own the subsidiary in the first place.)

d) Did the parent corporation subscribe to all of the capital stock of the subsidiary or otherwise cause its incorporation?

Although we agree with the Family that Terex owns all the stock of CMHC-KY, there would be no wholly-owned subsidiary if it didn't. That said, we do not believe (nor does *Inter-Tel* require us to believe) that mere ownership exposes *every* wholly-owned subsidiary to veil-piercing. Moreover, the subsidiary was at the outset owned by CEC, which was entirely unrelated to Terex.

e) Does the subsidiary have grossly inadequate capital?

The Family does not contend that CMHC-KY was undercapitalized.

f) Does the parent pay the salaries and other expenses or losses of the subsidiary?

The Family likewise has pointed to no facts to suggest that Terex paid any salaries or expenses of CMHC-KY, nor did it cover any losses sustained by CMHC-KY in the relevant time period.

g) Does the subsidiary do no business except with the parent or does the subsidiary have no assets except those conveyed to it by the parent?

The Family reasons here that even though "[CMHC-KY] did business with other entities, . . . [CMH Acquisition Corp.] did nothing but deal with the actions of [CMHC-KY]. In fact, [CMH Acquisition Corp.] did not even do that." According to the Family, "[i]t was Terex that allegedly controlled the action of [CMHC-KY]. The inference from the corporate minutes of Terex indicate this, even if a fact finder needs to conclusively determine the issue."

Terex responds that there is ample (unrefuted) evidence that CMHC-KY operated independently both of its parent (which as we explain above, at n.9, is not CMH Acquisition Corp. but CMHC-DE) and its grandparent, and the Family have offered no facts to refute that:

- CMHC-KY did not sell forklifts to Terex, which was neither a seller nor manufacturer of forklifts.

- CMHC-KY maintained the same plant in Lexington, Kentucky with the same personnel that it used to manufacture forklifts before Terex came on the scene.

- CMHC-KY owned or leased the property where it operated, and owned the equipment and machinery in its plants.

We agree with Terex that there was nothing inappropriate here, and very little if any (grand)parental involvement in the day-to-day operations of CMHC-KY in any case. We note, too, that the Family's assertions don't actually *respond* to this point, and it cites no part of the record to support its claims about the corporate minutes of Terex. We decline to take on the task of mining the record for support for these facts (or, really, the "inferences" the Family seeks to draw from them), *see Pulte Home Corp. v. Parex, Inc.*, 174 Md. App. 681, 760-61 (2007) (declining to comb through an "eight-volume, 3,876-page record extract to ascertain information that [appellant] should have provided"), *aff'd*, 403 Md. 367 (2008), and if anything, this factor weighs in Terex's favor.

> *h) Is the subsidiary described by the parent (in papers or statements) as a department or division of the parent or is the business or financial responsibility of the subsidiary referred to as the parent corporation's own?*

The Family makes two separate claims, each of which is unsupported. *First*, it claims that "[d]uring the whole period of time that Terex owned [CMHC-KY], the Genesis Series forklift was the top selling product and contributed most of the profits of the Terex. [sic]" It provides *no* citation to the record for this claim, and thus it cannot rise to the level of a "disputed fact" that could defeat summary judgment.

Second, the Family claims that Terex wielded power at CMHC-KY:

> Terex would allegedly *hire and fire whom it wanted*. Terex would allegedly *shut down factories and plants*. Terex allegedly had a plan on the intergration [sic] of [CMHC-KY] into Terex. These issues are all alleged and, while they are disputed by Terex, if true the eighth factor weighs in favor of piercing the corporate veil. A remand for fact finding is necessary to resolve these disputes of fact.

(Emphasis added.) But this claim misstates the record and misconstrues the summary judgment standard. Although the Family cites the record for each of the statements above, the documents it cites don't support the claims. An example: the single page of minutes of a Terex Board of Directors meeting that memorializes problems with Mr. Bello and notes in passing a plan involving CMHC-KY's "integration into Terex" suggests neither that Terex would "hire and fire whom it wanted," nor that it acted with iniquity when it planned an ultimate integration of CMHC-KY into its own business. Also, the testimony of Clark Simpson, an engineering manager for internal combustion forklifts at CMHC-KY in the relevant time frame, to the effect that a Danville plant shut down (when he admittedly could only "talk about [the shut-down] sort of like in generalities") hardly constitutes a dispute of fact, or even can be characterized fairly as supporting the Family's claim that Terex "shut down factories and plants." Absent any other citation to evidence in the record to support that claim, we cannot weigh this factor in the Family's favor at all, nor could we find that the Family raised any facts that could preclude summary judgment in Terex's favor.

i) Does the parent use the property of the subsidiary as its own?

Although the Family leans on the fact that Terex retained the proceeds of the asset sale by CMHC-KY, we do not read this factor to relate to the sale itself, but rather whether the parent uses the subsidiary's property on a "day-to-day" basis. From that perspective, CMHC-KY used its own premises, equipment, and machinery, and there is no allegation that Terex used any part of it.

j) Do the directors or executives fail to act independently in the interest of the subsidiary, and do they instead take orders from the parent, and act in the parent's interest?

Again, the Family cites the testimony of Mr. Simpson, which speaks only in generalities. Although the roster of CHMC-KY's officers may have overlapped some with Terex's, there is no evidence that anyone failed to act in the interest of CMHC-KY. The day-to-day functions of CMHC-KY were handled by CMHC-KY, which conducted its own "engineering, advertising, marketing, design, creation of new product lines, [and] manufacture." It had its own controller and CFO, and filed its own state income tax returns. It purchased its own insurance policies. It had its own legal department, which drafted its contracts, and handled its products liability claims independently. The Family has not pointed to any evidence that suggests CMHC-KY acted at Terex's behest in *any* respect.

k) Are the formal legal requirements of the subsidiary not observed?

The Family argues that "Terex acted as if . . . [CMH Acquisition Corp.] did not exist. Terex was making decisions for [CMHC-KY], not [CMH Acquisition Corp.]."[10] Again, this claim goes *entirely* unsupported by facts or citations to the record. Without more, there is no basis on which to dispute that corporate formalities were observed, or that CMHC-KY filed its own annual reports, and had separate documentation and agreements for "all major undertakings."

* * *

All of the "checklist" factors that the *Inter-Tel* Court emphasized most heavily, and indeed the factors overall, weigh in Terex's favor. There is ample evidence that CMHC-KY functioned as its own company, and while Terex might have made certain decisions regarding the company's management, CMHC-KY handled *all* day-to-day operations and decision-making. The *Inter-Tel* Court stressed these practical concerns, and found itself with a compelling case that the subsidiary was, effectively, nothing more than a front or an "alter ego" for the grandparent. Here, on the other hand, the paucity of facts suggests nothing of the sort, and show only a series of acquisitions that forward legitimate business goals. Without more, the Family cannot meet the first part of the *Inter-Tel* test.

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[10] Again, the relevant *parent* company was not CMH Acquisition Corp., but CMHC-DE. *See* n.9 above.

3. Circumstances "sanctioning fraud" or "promoting injustice."

Even if the *Inter-Tel* checklist had favored the Family, it still has failed to identify any facts that could satisfy the second (and required) part of the test: the existence of "circumstances under which continued recognition of the corporation would sanction fraud or promote injustice." *Inter-Tel*, 360 S.W.3d at 155. In *Inter-Tel*, for example, and in addition to the Court's finding that the eleven factors weighed heavily in favor of veil-piercing, the Court found the "required 'injustice'" from an arrangement that caused the subsidiary to accrue rent liability monthly as its parent and grandparent derived "all of the benefits from the operation of the business." *Id.* at 168. The court characterized this as "'an intentional scheme to squirrel assets into liability-free corporations while heaping liabilities upon an asset-free corporation,'" *id.* at 168 (quoting *Sea-Land Servs., Inc. v. Pepper Source*, 941 F.2d 519, 524 (7th Cir. 1991))—a finding that liability under the lease fell entirely on the subsidiary, even as the grandparent "squirreled" its assets in an attempt to protect them from creditors. *Id.* at 168.

The Family claims that factual disputes bear on this analysis and require a trial, but we disagree. Its broad-based allegations are not supported by actual record evidence, and we find nothing to support its insinuations that Terex somehow set up this entire sale as a sham transaction. It is important to point out that our conclusion that the Family fails to satisfy the *Inter-Tel* test comes *not* from a weighing of the factors against it, but from its failure to demonstrate any dispute of material fact that starts it down the path in the first place.

Although the Family continually suggests that there was something sinister in the sale of the various companies, no facts or disputes of fact support that suggestion or, more to the point, defeat summary judgment. The fact that the sale of a forklift business to Terex involved a number of companies (one of which appears to have been established solely to facilitate the sale) does not, in and of itself, justify piercing the corporate veil, even under the broader Kentucky standard.

4. Terex was not directly liable for the manufacture of the forklift.

As an alternative theory of recovery, the Family argued to the trial court that Terex could be held *directly* liable based (entirely) on a two-page printout from a website called "The Free Library." The document purports to be a press release issued by "The Dilenschneider Group," which at one time did public relations work for Terex. The press release appears to have been published in "The Business Wire," and bears the heading "Terex's Clark Material Handing Unit Introduces New Genesis Lift Truck to Nationwide Dealer Network." It quotes Mr. DeFeo as president of Terex talking about "[o]ur new Genesis forklift."

The Family argues that the press release created a dispute of material fact about Terex's manufacturing liability and was admissible through several layers of exceptions to the hearsay rule: (1) the periodical was self-authenticating; (2) the press release published by Terex's press agent was "the admission of the agent of Terex," and (3) Mr. DeFeo's statements within it were "also the statements of Terex." Terex responds that there was no

support for the notion that the publication was self-authenticating, that self-authentication did not guarantee admissibility, and that no hearsay exception directly applies to the press release itself.

The Family has not cited any authority other than Maryland Rule 5-803. It has not explained how the press release is "self-authenticating," beyond, it seems, reasoning that Business Wire is a publication. But the underlying *first* level is actually the website—"The Free Library." And electronically-stored information must be *authentic* in the first instance to be admissible. *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 541 (D. Md. 2007); *see also Griffin v. State*, 419 Md. 343, 354 (2011) (stating that "[t]he potential for fabricating or tampering with electronically stored information . . . poses significant challenges from the standpoint of authentication of printouts of the site"). The attenuated nature of the document may be gleaned too from the fact that it bears what looks like a copy of a post-it randomly covering the text in the right column of the first page, with a hand-drawn picture of a woman in a bikini and the odd phrase we see now far too often on the Internet, "1 Trick of a tiny belly," with additional text next to the picture.

At the next level, the Family also has offered no admissible evidence that the Dilenschneider Group issued the press release at the behest of Terex, so it cannot be considered an admission by a party opponent (even assuming the Family could get over the hurdle that the Dilenschneider Group is not necessarily acting as an agent of Terex, which it would also have to show).

We note too, that the Family calls this claim an action for "direct liability," but we see no basis to hold Terex liable even if the press release *were* admissible. The parties have shifted their characterizations of what exactly the action would be: in the court below, Terex defended the claim based on an "apparent manufacturer" theory, but the Family went all-out, claiming that the press release demonstrated that Terex was the "actual manufacturer, designer and tester of the forklift." According to the Family, the press release "indicat[es] that Terex is *responsible* for the design and manufacture of the subject forklift." (Emphasis added.) In its brief, Terex calls it a "manufacturer by admission" theory.

Whatever label we attach to this theory of liability, the press release was not admissible, and, even if it had been, it could not form the basis of an action against Terex. The information contained in the press release hardly constitutes an admission that Terex manufactured the forklift. Indeed, all the evidence in the record establishes the converse—that CMHC-KY was the manufacturer—and the Family's efforts to tie Terex to CMHC-KY in the corporate context certainly make that point as well as anything.

B. The Trial Court Properly Granted Summary Judgment In McCall's Favor As Well.

When the trial court granted McCall's motion for summary judgment, it did so in a two-paragraph order following a hearing in which it asked a number of questions to counsel for both sides. The Family claims on appeal that the contract between McCall and Flying Dog impliedly imposed a duty that McCall ensure that the forklift operated without emitting excessive carbon monoxide, that it had a duty to perform the services required in the service

manual, and that it breached these duties. It cites not to any legal authority to establish these duties, but only to the deposition of its expert. It also claims that the excessive levels of carbon monoxide were caused "by *either* a misadjustment or malfunction of the carburetor of the Genesis" (emphasis added), also citing to its expert's deposition testimony. In response, McCall argues that the lower court found no evidence to support the negligence claims, because McCall's periodic maintenance did not include emissions testing. It argues that the Family could produce no evidence to suggest that McCall caused either incident by any negligent conduct.

The circuit court plainly based the grant of summary judgment to McCall on the Family's failure to allege any facts that might establish causation. The court's lengthy questioning of the Family's counsel made clear that it saw no basis to impose liability because the Family could not establish that anything McCall did or did not do to the forklift *caused* the incident, and we agree. (We do not address the preliminary question of whether McCall owed a duty to Mr. Banks as an operator of the forklift because it was not so obviously the basis of the trial court's opinion, but we do not mean to suggest that the Family has satisfied that burden.) We recognize the "basic principle that '[n]egligence is not actionable unless it is a proximate cause of the harm alleged.'" *Pittway Corp. v. Collins*, 409 Md. 218, 243 (2009) (quoting *Stone v. Chicago Title Ins.,* 330 Md. 329, 337 (1993)). As the Court of Appeals explained in *Pittway*, "to be a proximate cause for an injury, 'the negligence must be 1) a cause in fact, and 2) a legally cognizable cause.'" *Id.* (quoting

Hartford Ins. Co. v. Manor Inn, 335 Md. 135, 156–57 (1994)). There must be a "certain relationship" between the conduct and the injury, and we look first to see if a plaintiff can establish causation-in-fact, "to determine who or what caused an action. The second step is a legal analysis to determine who should pay for the harmful consequences of such an action." *Id.* at 244.

Where there are two or more potential causes of an incident, the plaintiff must show that a defendant's conduct was a "substantial factor" in causing his injuries. Although the evidence he produces to support the claim may be circumstantial, it still must be "sufficient to create a genuine issue of material fact as to the *reasonable likelihood or probability*" that the defendant caused the injury. *Hamilton v. Dackman*, 213 Md. App. 589, 617 (2013) (emphasis added), *cert. denied*, 213 Md. 589 (2013). In *Hamilton*, we affirmed summary judgment to a defendant landlord in a lead-paint-poisoning case where the plaintiff had lived in more than one home during the relevant time period, but could not produce any evidence to suggest the presence of lead paint in the interior of the home that was the subject of the lawsuit. As we explained, the plaintiff did not have to eliminate all other possible sources of injury, but did need to be "able to *rule in* the subject property in the first place through an appropriate combination of direct or circumstantial evidence establishing the probability of exposure by that plaintiff in that property." *Id.* at 616-17.

In this case, the Family produced an expert who concluded perfunctorily that McCall not only had a duty to maintain the forklift in ways that were nowhere articulated in writing,

but also that it had breached that duty in an unspecified manner that caused the forklift to malfunction:

> The reason for the excessive carbon monoxide emissions was either a misadjustment of the idle mixture on the propane carburetor or a malfunction in the propane fuel system or both. The misadjustment or malfunction should have been corrected during periodic maintenance and service to the forklift.

This is a rather sweeping assertion, given that the only PMSR that actually bears the same serial number as the forklift at issue was the one from the January 9, 2009 inspection. But whether the inspection was two months before or three days before the second incident, the Family's expert failed altogether to tie the *malfunction*—a misadjustment of the idle mixture, or a malfunction in the propane fuel system—to anything McCall did or didn't do. Counsel's questions at Mr. Leshner's deposition brought out this deficiency—when he asked Mr. Leshner when the malfunction or misadjustment occurred, he could not say. And the court's questions at the summary judgment hearing foreshadowed its conclusion that the inability to connect those dots was fatal:

> THE COURT: When did it become out of adjustment?
>
> [FAMILY'S COUNSEL]: The expert could not tell us that.
>
> THE COURT: Well don't they have to, don't you have to establish that?

The court later reasoned:

> Where do you prove and how do you prove causation if there's no evidence as to, there's no testimony, this would have had to have been an existing condition for three months, four months,

> for an hour, for two hours. Whatever it is, if there's no evidence of that, then how can you say there's a preponderance of the evidence showing that the breach of this duty was in fact the proximate cause or a proximate cause?

No legal principle supports the theory that "the entity responsible for the excessive emissions was the service provider that last touched the forklift." And the Family's claim that the undisputed facts are "susceptible to multiple inferences" as to causation does not have the effect it wishes: the failure to establish causation does not give rise to a *dispute of material fact*, but a *failure to produce any evidence* that justified the grant of summary judgment.

C. Terex's Cross Appeal Is Moot.

Because we affirm the trial court's grant of summary judgment, the case ends. Accordingly there is no need to address Terex's cross-appeal on the issue of the damages cap and the motion to transfer venue, as they are moot. *See Kennedy v. Mobay Corp.,* 84 Md. App. 397, 431 (1990), *aff'd,* 325 Md. 385 (1992) (declining to reach "defensive cross-appeals" when we were affirming judgment in favor of defendants in underlying tort action); *see also Board of Physician Quality Assurance v. Levitsky,* 353 Md. 188, 200 (1999) (noting that "[a] question is moot 'if, at the time it is before the court, there is no longer an existing controversy between the parties, *so that there is no longer any effective remedy which the*

court can provide'") (emphasis added) (quoting *Attorney Gen. v. Anne Arundel Cnty. School Bus Contractors Ass'n*, 286 Md. 324, 327 (1979)).

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