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Goldberg v. Boone: Getting Away with "Murder"— an Attempt to Exploit the Arbitrary Limits on Cross-examination Questioning

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GOLDBERG v. BOONE: GETTING AWAY WITH "MURDER"—AN ATTEMPT TO EXPLOIT THE ARBITRARY LIMITS ON CROSS-EXAMINATION QUESTIONING

In *Goldberg v. Boone*,[1] the Court of Appeals of Maryland considered whether inflammatory questions posed to an expert witness on cross-examination warranted a new trial on the issues of damages and liability.[2] The court held that when an improper line of questioning played a minor role in the trial and the trial court sustained an objection that adequately truncated the questioning, its prejudicial impact did not warrant a new trial.[3] In failing to adequately address the standard by which lawyers may question expert witnesses, the court unfairly created a loophole that prejudices defendants by allowing opposing counsel to disparage experts' testimony in previous cases and attribute dishonesty in expert testimony to the current case.[4] Additionally, the court's cursory consideration of the need for an appropriate curative jury instruction was insufficient and sets a precedent that gives attorneys free reign to subtly exploit the jury without fear of a mistrial.[5] A more reasonable standard would demand a new trial on both damages and liability when defendants are prejudiced so severely that they cannot receive a fair trial by all jurors on all issues.[6]

I. The Case

In 1983, Billy Karl Boone underwent a mastoidectomy[7] to remove a cholesteatoma[8] from behind his left ear.[9] The physician performing that procedure erred and accidentally drilled a hole into Boone's skull.[10] In January 2000, a second cholesteatoma forced Boone to un-

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1. 396 Md. 94, 912 A.2d 698 (2006).
2. *Id.* at 99, 912 A.2d at 700.
3. *Id.* at 120, 912 A.2d at 713.
4. *See infra* Part IV.A.
5. *See infra* Part IV.B.
6. *See infra* Part IV.C.
7. A mastoidectomy is a procedure in which an incision is made behind the ear, allowing the mastoid bone to be opened and infected air cells drained. American Medical Association Encyclopedia of Medicine 667–68 (Charles B. Clayman ed., 1989).
8. A cholesteatoma is a rare but serious condition, brought on by a long-term ear infection, which results in the proliferation of skin cells and accumulation of debris in the middle ear. *Id.* at 274.
9. Goldberg v. Boone (*Goldberg II*), 396 Md. 94, 100, 912 A.2d 698, 701 (2006).
10. *Id.*

dergo a revisionary mastoidectomy,[11] which Seth M. Goldberg, M.D. performed.[12] The day after his surgery, Boone began to have difficulty reading and experienced memory loss.[13] Subsequent tests revealed brain hemorrhaging and an opening in Boone's skull.[14]

Later in 2000, Boone filed suit in the Circuit Court for Montgomery County, claiming that Dr. Goldberg[15] acted negligently by: puncturing his brain during surgery, failing to inform him that the procedure was high risk and could result in permanent brain damage, and neglecting to advise him that there were more experienced surgeons in the area who could perform the procedure.[16] At trial, Boone requested that the court give the jury an instruction on informed consent.[17] Dr. Goldberg opposed the informed consent jury instruction and claimed that Boone had failed to show causation because there was no evidence that Boone would have opted out of the procedure even if Dr. Goldberg had disclosed the information about which Boone complained.[18]

During the trial, Dr. Goldberg moved for a mistrial, asserting two reasons why Boone's cross examination of Dr. Goldberg's expert witness, neuropsychologist David Schretlen, was improper, inflammatory, and prejudicial.[19] First, Boone sought to peg Dr. Schretlen as a paid minimizer, or someone who was willing to testify more favorably, regardless of objective facts, for whichever side paid him.[20] Second, while asking Dr. Schretlen about other cases in which he had testified as an expert, Boone referred to Dr. Schretlen's role in the 2002 Washington, D.C. sniper trial.[21] Because the court did not consider that

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11. "A 'revisionary' mastoidectomy is a repeated mastoidectomy." *Id.* at 101 n.6, 912 A.2d at 702 n.6 (citing WEBSTER'S II NEW COLLEGE DICTIONARY 1067 (11th ed. 2005)).

12. *Id.* at 101, 912 A.2d at 701–02.

13. *Id.*, 912 A.2d at 702.

14. *Id.*

15. Boone also brought suit against Dr. Goldberg's corporation, Aesthetic Facial Surgery Center of Rockville, Ltd. Goldberg v. Boone (*Goldberg I*), 167 Md. App. 410, 414 n.1, 893 A.2d 625, 627 n.1 (Ct. Spec. App. 2006). Both parties will be referred to as "Dr. Goldberg."

16. *Goldberg II*, 396 Md. at 101–02, 912 A.2d at 702.

17. *Id.* at 102, 912 A.2d at 702. In particular, Boone desired the informed consent jury instruction on both the high risk and the alternative surgeon issues. *Id.* at 101–02, 912 A.2d at 702.

18. *Id.* at 107, 912 A.2d at 705. Dr. Goldberg argued alternatively that even if Boone had gone to a more experienced surgeon, there was no evidence to prove he would have, more likely than not, attained better results. *Id.*

19. *Id.* at 106, 912 A.2d at 704–05.

20. *Id.* at 105–06, 912 A.2d at 704.

21. *Id.* at 106, 912 A.2d at 704–05. The sniper case to which Boone referred involved Lee Boyd Malvo, one of two men responsible for the Washington, D.C. beltway sniper shootings that took place in October 2002. *Goldberg I*, 167 Md. App. 410, 434 n.9, 893 A.2d

questioning sufficiently prejudicial, it denied Dr. Goldberg's motion for a mistrial.[22] Following a jury trial, the circuit court entered judg-

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625, 639 n.9 (Ct. Spec. App. 2006). In response, Boone's counsel stated that he was simply trying to impeach Dr. Schretlen's credibility by demonstrating that he was a minimizer or maximizer, and his reference to the sniper case occurred only because it was one of Dr. Schretlen's most recent trials. *Goldberg II*, 396 Md. at 106–07, 912 A.2d at 705.

22. *Goldberg II*, 396 Md. at 107, 912 A.2d at 705. Boone's cross-examination of Dr. Schretlen proceeded as follows:

> [COUNSEL FOR MR. BOONE]: Now, other people who have talked with Mr. Boone or talked about Mr. Boone or given therapy to Mr. Boone have talked about him not being aware, not having full insight into the degree of the anger that he has or the anger that he expresses. Wouldn't you agree that is fairly common in these kinds of patients, that they are not fully, they don't have full insight into all of their problems?
> SCHRETLEN: I wouldn't say that. I mean, it happens, but I'm not, (a) I'm not sure that's the case in this case at all, and (b) it certainly is, yeah, it's common, but it's also commonly not the case—
> * * *
> [COUNSEL FOR MR. BOONE]: Okay. I mean, you are hired here basically as a minimizer, aren't you?
> [COUNSEL FOR DR. GOLDBERG]: Objection, Your Honor.
> THE COURT: Overruled.
> * * *
> [COUNSEL FOR MR. BOONE]: Okay. Now, the very last case you testified, you testified against my client, Sharon Burke. You said she had a mild problem, too. Do you remember that?
> * * *
> [COUNSEL FOR MR. BOONE]: She flunked 55 out of 60 tests you gave her and still you called it a "mild" problem. Don't you recall that?
> SCHRETLEN: I recall that I diagnosed her with dementia, [Counsel for Mr. Boone].
> [COUNSEL FOR MR. BOONE]: Sir, don't you remember you used the word "mild" in your courtroom testimony?
> * * *
> SCHRETLEN: I said it was milder than some, as you may recall, but that she had a moderately severe dementia syndrome.
> * * *
> [COUNSEL FOR MR. BOONE]: Now, the case before that, that you testified in court, was a criminal case, right?
> SCHRETLEN: I'm not sure.
> [COUNSEL FOR MR. BOONE]: Okay. Well, you testified [sic] a young man, about 18 years old, and you did a daylong [sic] battery of tests on him and he tested abnormal in one or two tests, right?
> SCHRETLEN: Oh, yes. I know who you are speaking of.
> [COUNSEL FOR MR. BOONE]: Okay. He was only abnormal in one or two tests?
> SCHRETLEN: That's right.
> [COUNSEL FOR MR. BOONE]: Okay. And that young man, you were willing to come into court and testify that he might have been brainwashed into murdering 10 people in the sniper thing, isn't that true?
> [COUNSEL FOR DR. GOLDBERG]: Objection, Your Honor.
> SCHRETLEN: That is absolutely incorrect and outrageous.
> THE COURT: Sustained.

ment in favor of Boone, awarding him $943,000 for loss of earning capacity, medical expenses, and non-economic damages.[23] Dr. Goldberg appealed to the Court of Special Appeals of Maryland and argued that the circuit court had erred in submitting an informed consent instruction to the jury and in not granting a mistrial for the inflammatory questions posed to his expert witness.[24]

The Court of Special Appeals analyzed the validity of the informed consent claim and examined the prejudicial effect of the sniper line of questioning on the negligence claim.[25] First, the court found that an informed consent action presents a jury issue only if there is evidence that the doctor failed to explain the benefits and risks of an "affirmative violation of the patient's physical integrity," like surgery, injections, or other treatment.[26] Moreover, the court stated that "treatment," for consent purposes, refers to the type of procedure and manner in which it is performed, rather than to the person performing it.[27] Therefore, the court determined that Dr. Goldberg had not breached his duty to obtain informed consent from Boone by not volunteering the fact that there were more seasoned surgeons available in the area.[28]

Second, the court examined other Maryland cases that pertained to unfair questioning of witnesses and concluded that Dr. Goldberg was improperly prejudiced by questions that tied Dr. Schretlen to Lee Boyd Malvo.[29] The Court of Special Appeals ultimately held that although Dr. Goldberg deserved post-trial relief, he was only entitled to a new trial on damages because the questioning likely affected only the amount of damages awarded and not the liability assessed.[30] Additionally, the court ruled that although Boone's informed consent claim should not have been presented to the jury, the judgment in

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Id. at 103–05, 912 A.2d at 703–04.

23. *Id.* at 109, 912 A.2d at 706–07. Following this decision, Dr. Goldberg filed motions for judgment notwithstanding the verdict (or, alternatively, for a new trial) and for a new trial on the issue of future medical damages (or, alternatively, for appointment of a conservator). *Id.* at 109–10, 912 A.2d at 707. The court denied both motions. *Id.* at 110, 912 A.2d at 707.

24. *Goldberg I*, 167 Md. App. at 416, 893 A.2d at 628 (five additional issues were appealed and considered by the court).

25. *Id.* at 422–38, 893 A.2d at 632–41.

26. *Id.* at 423, 893 A.2d at 632 (citing Arrabal v. Crew-Taylor, 159 Md. App. 668, 683, 862 A.2d 431, 439 (Ct. Spec. App. 2004)).

27. *Id.* at 424, 893 A.2d at 633 (quoting Mitchell v. Kayem, 54 S.W.3d 775, 781 (Tenn. Ct. App. 2001)).

28. *Id.* at 425, 893 A.2d at 633–34.

29. *Id.* at 437, 893 A.2d at 641.

30. *Id.* at 438, 893 A.2d at 641.

favor of Boone on the negligence claim was correct.[31] Therefore, the court vacated the judgment on the negligence claim, reversed the judgment on the informed consent claim, and remanded the case to the circuit court for a new trial on the issue of damages.[32]

The Court of Appeals granted certiorari to decide whether the prejudicial statements made during the cross examination of Dr. Goldberg's expert witness warranted a new trial on solely the issue of damages, and not liability.[33] The court also granted certiorari to determine whether the improper submission of an informed consent instruction to the jury warranted a new trial on the issue of negligence.[34]

II. LEGAL BACKGROUND

The Court of Appeals has established that an expert witness's motives, interests, and prejudices are generally appropriate subjects for questioning.[35] When considering the appropriateness of such questioning, if the trial court makes a decision about a motion for mistrial and the effect of improper questioning, an appellate court will reverse its determinations only in extreme circumstances.[36] Recently, the Court of Appeals has begun to grant motions for mistrial in cases where improper questioning produced prejudice and unfairly influenced the trial.[37] In those cases where the prejudice extends only to an isolated issue, the court may order a partial new trial to address that specific issue.[38]

A. Questions to an Expert Witness About Interests, Motives, Inclinations, and Prejudices Are Appropriate

In Maryland, questions on cross examination may only relate to the subject matter of the direct examination or the credibility of the witness.[39] The court will control the questioning to ensure the truth is ascertained, the court's time is not wasted, and the witness is not

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31. *Id.* at 417, 893 A.2d at 628–29.

32. *Id.*, 893 A.2d at 629.

33. *Goldberg II*, 396 Md. 94, 99–100, 912 A.2d 698, 700–01 (2006).

34. *Id.* This Note will focus solely on the issue of the prejudicial statements made during cross examination, without addressing the court's analysis of the informed consent instruction.

35. *See infra* Part II.A.

36. *See infra* Part II.B.1.

37. *See infra* Part II.B.2.

38. *See infra* Part II.C.

39. MD. R. 5-611(b)(1). The court may allow questioning on other matters at its own discretion. *Id.*

harassed or unduly embarrassed.[40] Nevertheless, a witness's credibility may be challenged on cross-examination to show his bias, prejudice, interest in the trial's outcome, or motive to give inaccurate testimony.[41]

Long before the Maryland Rules of Evidence were adopted,[42] Maryland courts held that queries about an expert witness's interests, preferences, influences, and biases were suitable topics for questioning on cross-examination.[43] In particular, a cross-examiner may ask an expert witness about his employment history and the compensation he earns for testifying, if such questions will show that the witness is biased or has an interest in the outcome of the trial.[44]

For instance, in *Mezzanotte Construction Co. v. Gibons*,[45] the Court of Appeals held that it is appropriate on cross-examination to ask about an expert witness's pay, as such questioning might reveal motivation or bias of the witness and thus impact his credibility.[46] In *Gibons*, an expert witness testified as to the value of a quantity of timber that the defendant had illegally cut from the plaintiff's tract of land.[47] In so doing, the expert witness admitted that he had already been paid for evaluating the removed timber and would be compensated for his testimony, although the exact amount of compensation had yet to be fixed.[48] Because the outcome of the case would not affect the amount of the expert witness's compensation, the court found that the jury could consider the amount of such payment.[49]

Forty years later, in *Wrobleski v. deLara*,[50] the Court of Appeals ruled that an expert witness can be questioned not only about the compensation that he would receive for the current case, but also about the total amount of compensation earned as an expert witness in the previous year.[51] In that case, Linda Wrobleski brought a medi-

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40. *Id.* 5-611(a); *see also id.* 5-102 (stating that Maryland's evidentiary rules are intended "to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the . . . development of the law of evidence [so] that the truth may be ascertained and proceedings justly determined").

41. *Id.* 5-616(a)(4).

42. The current evidentiary rules in Maryland were approved in 1993 and took effect on July 1, 1994. *Id.* T.5.

43. Wise v. Ackerman, 76 Md. 375, 394, 25 A. 424, 427 (1892).

44. Ager v. Balt. Transit Co., 213 Md. 414, 427–28, 132 A.2d 469, 476–77 (1957).

45. 219 Md. 178, 148 A.2d 399 (1959).

46. *Id.* at 181, 148 A.2d at 401–02.

47. *Id.* at 180, 148 A.2d at 401.

48. *Id.* at 181, 148 A.2d at 401.

49. *Id.*, 148 A.2d at 401–02.

50. 353 Md. 509, 727 A.2d 930 (1999).

51. *Id.* at 517, 727 A.2d at 933–34.

cal malpractice suit against Dr. deLara, alleging that her small intestine had been negligently damaged during a procedure.[52] Wrobleski's expert witness stated that he had previously testified for nearly sixty medical malpractice plaintiffs, twenty-five of whom had been clients of Wrobleski's attorney.[53] He further acknowledged that he had earned $30,000 to $50,000 from testifying as an expert in the past year, and that eighty percent of his appearances had been on behalf of plaintiffs.[54]

In reaching its conclusion, the *Wrobleski* court explained several related questions that it considered appropriate to use to reveal an expert witness's bias.[55] Specifically, opposing counsel may ask how much an expert witness will be paid for a given case, how frequently he testifies in similar cases, how much income he earns as an expert witness, and what percentage of his total income is generated through expert witness testimony.[56] Moreover, the court found it permissible to inquire into whether an expert witness is hired frequently by a particular party, firm, or attorney, and whether the expert normally testifies for plaintiffs or defendants.[57]

B. Irrelevant Evidence, Such As Incendiary Comments and Questions, Can Produce a Prejudice So Substantial as to Outweigh the Probative Value of the Evidence

When an inquiry made during cross-examination is appropriate, under the Maryland Rules, such evidence is considered relevant (and thus permissible) if it tends to make the existence of any material fact more or less probable than it would be without the evidence.[58] Even if the evidence is relevant, it may still be excluded by the court if the danger of unfair prejudice resulting from its admission substantially outweighs its probative value.[59]

52. *Id.* at 511, 727 A.2d at 931.
53. *Id.* at 513, 727 A.2d at 931.
54. *Id.*
55. *Id.* at 517–18, 727 A.2d at 933–34.
56. *Id.* at 517, 727 A.2d at 933–34.
57. *Id.*
58. MD. R. 5-401.
59. *Id.* 5-403.

1. *The Trial Judge's Decision Concerning Admissibility of Evidence and Appropriateness of Relief when Improper Evidence Is Introduced Will Only Be Reversed in Exceptional Cases*

In Maryland, the trial judge decides whether evidence is admissible.[60] Although evidence is typically approved by a judge in a preliminary hearing, inadmissible evidence may still occasionally be introduced at trial.[61] When improper, prejudicial comments are made to witnesses at trial, opposing counsel will customarily object, seek a curative jury instruction,[62] or, in extreme cases, move for a mistrial.[63] The trial judge must then weigh the damage done by the inappropriate questioning and the sufficiency of a remedial instruction that the jury disregard the remark.[64] The court's response to the unfair comments is within the power of the trial judge, whose judgment will only be reversed when there is a clear abuse of discretion.[65]

In *DeMay v. Carper*,[66] the Court of Appeals noted that normally the trial judge remedies counsel's inappropriate comments, statements, or arguments by reproof.[67] Moreover, an appellate court will reverse a trial judge's choice of cure, and her decision as to its effect upon the jury, only in exceptional, blatant cases.[68] Appellate courts defer to trial judges' decisions because they are in the best position to evaluate the level of prejudice at trial.[69]

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60. *Id.* 5-104(a).

61. *See, e.g.*, Lai v. Sagle, 373 Md. 306, 318, 818 A.2d 237, 244 (2003) (finding highly prejudicial remarks blurted out by an attorney during opening argument of trial inadmissible).

62. A curative instruction may include informing the jury that the question was improper, striking the remark, or requiring the jury to disregard it. Wilhelm v. State, 272 Md. 404, 423–24, 326 A.2d 707, 720 (1974).

63. *See Lai*, 373 Md. at 318, 818 A.2d at 244 (noting that when facts introduced as evidence are plainly inadmissible and highly prejudicial a mistrial is one of the primary remedies considered).

64. *See generally* Tierco Md., Inc. v. Williams, 381 Md. 378, 413–14, 849 A.2d 504, 525–26 (2004) (citations omitted) (detailing the need for the trial judge to gauge the level of prejudice and respond with an equivalent cure).

65. *Lai*, 373 Md. at 317, 818 A.2d at 244 (quoting Med. Mut. Liab. Ins. Soc'y of Md. v. Evans, 350 Md. 1, 19, 622 A.2d 103, 112 (1993)).

66. 247 Md. 535, 233 A.2d 765 (1967).

67. *Id.* at 540, 233 A.2d at 768. Usually, the judge is allowed her choice of methods to assure a fair, unprejudiced, and impartial jury. *Id.*

68. *Id.*

69. State v. Hawkins, 326 Md. 270, 278, 604 A.2d 489, 493 (1992). Specifically, the trial judge "has h[er] finger on the pulse of the trial," can observe the demeanor of witnesses, the reactions of jurors, and perceive matters not discernible from the record alone. *Id.*; *see also* Hickman v. State, 76 Md. App. 111, 120, 543 A.2d 870, 875 (Ct. Spec. App. 1988) (holding that when an improper question is posed, appellate courts should defer to the trial court's judgment because the trial court can best evaluate the effect of the question on the jury).

In *Owens-Corning Fiberglas Corp. v. Garrett*,[70] the Court of Appeals considered an appeal of a trial court's denial of a defendant's motion for mistrial in an asbestos case.[71] Counsel for the three plaintiff employees affected by the asbestos analogized the defendants to criminals, villains, and even Nazis, claiming that the defendants' actions afflicted others with mesothelioma, a condition that "stalked" its victims, took them "hostage," and "robbed" them of their lives.[72] In light of the defendants' many objections to such statements, the trial court instructed the jury to disregard the improper comments during deliberations.[73]

The *Garrett* court considered whether a blatant case existed warranting a finding that the trial court abused its discretion in refusing to grant a mistrial.[74] First, the court explained, it had to determine whether, and to what extent, the moving party was prejudiced by the opposing party's questions, statements, or conduct.[75] Second, the court decided whether the curative measures that the trial judge implemented were sufficient to overcome the prejudice, or whether the prejudice was so damaging, in spite of the curative measures, that the moving party was denied a fair trial.[76] Ultimately, the court characterized the question as one of prejudice to the moving party.[77]

In *Garrett*, the court found that the plaintiffs' counsel's remarks were unduly inflammatory and improper.[78] Nevertheless, because the trial judge made two separate curative instructions and the defendants did not request a mistrial at the proper time, the court held that the trial judge had not abused his discretion in failing to grant a mistrial.[79] The court's balancing of the prejudice to the defendants against the curative measure was influenced by the fact that the trial had consumed an enormous amount of resources and lasted four months.[80] However, the court emphasized that applying the same analysis to an unfairly prejudicial argument in a different case could result in a mistrial in the future.[81]

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70. 343 Md. 500, 682 A.2d 1143 (1996).
71. *Id.* at 505, 513, 682 A.2d at 1145, 1149.
72. *Id.* at 515, 682 A.2d at 1150 (internal quotation marks omitted).
73. *Id.* at 516, 682 A.2d at 1150–51.
74. *Id.* at 518, 682 A.2d at 1151.
75. *Id.*
76. *Id.* (quoting ACandS, Inc. v. Godwin, 340 Md. 334, 407, 667 A.2d 116, 151–52 (1995)).
77. *Id.* (citing Rainville v. State, 328 Md. 398, 408, 614 A.2d 949, 953 (1992)).
78. *Id.*, 682 A.2d at 1152.
79. *Id.* at 519, 682 A.2d at 1152.
80. *Id.*
81. *Id.* at 519–20, 682 A.2d at 1152.

2. A Mistrial Is Proper when Inappropriate Questions and Comments Produce a Prejudice So Pervasive that the Trial Can No Longer Be Considered Fair

The Court of Appeals has found that the prejudice caused by objectionable questions or comments can become so extreme as to warrant a mistrial. In *Guesfeird v. State*,[82] the Court of Appeals reviewed a child abuse case in which a child witness referred to a polygraph test while testifying.[83] Because the results of lie detector tests, as well as the fact of taking such a test, are inadmissible, the defense moved for mistrial, fearing that the prejudice of the jury's assumption that the child had passed the polygraph test would outweigh any curative instruction the trial court could give.[84]

The *Guesfeird* court noted several factors that are relevant in determining the prejudicial effect of inadmissible evidence.[85] These factors include: whether counsel made the comment repeatedly or as a single, isolated statement; whether the reference was premeditated or inadvertent; whether the witness questioned was the principal witness upon whose testimony the entire case depended; whether credibility was a crucial issue; and whether the jury could draw an inference from the comment.[86] The court made clear that no single factor would be dispositive in any given case.[87] As such, these factors are not a test, but a non-exhaustive list of elements that can help judges determine the prejudicial impact of improper comments.[88] In *Guesfeird*, even though the comment was a single, isolated statement, because the court found that the credibility of the witness was important and the jury could infer from the polygraph comment that the witness was believable, the prejudice to the defendant was sufficient to warrant a mistrial.[89]

In 1993, in *Medical Mutual Liability Insurance Society of Maryland v. Evans*,[90] a plaintiff's counsel questioned a health insurance claims manager about his bad-faith failure to settle a medical malpractice suit in a previous case.[91] The court found this cross-examination im-

82. 300 Md. 653, 480 A.2d 800 (1984).
83. *Id.* at 656, 480 A.2d at 801–02.
84. *Id.* at 657–58, 480 A.2d at 802–03.
85. *Id.* at 659, 480 A.2d at 803.
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 666–67, 480 A.2d at 807.
90. 330 Md. 1, 622 A.2d 103 (1993).
91. *Id.* at 16–17, 622 A.2d at 110–11. The previous case mentioned involved a doctor who negligently removed the ovaries and uterus of a young woman. *Id.*, 622 A.2d at 110.

proper and irrelevant because it was merely meant to harass and embarrass the witness and obscure the real issue at trial.[92] The court held that the prejudice from such cross-examination eclipsed the judge's cautionary instruction[93] to the jurors about being fair and impartial, and that the trial court had therefore abused its discretion by denying the motion for mistrial.[94]

Ten years later, in *Lai v. Sagle*,[95] the court stated that plaintiff's counsel's reference to a defendant's five previous medical malpractice lawsuits was prejudicial because it had no probative value and would only excite and mislead the jury.[96] After comparing the improper comment to the admission of evidence of prior arrests in a criminal case, the court held that because the statement was highly prejudicial and would customarily result in a mistrial in a comparable criminal case, no curative instruction could overcome the harm to the defendant.[97]

Shortly thereafter, in *Tierco Maryland, Inc. v. Williams*,[98] the court found that repeated comments about race and discrimination during a trial in which racial discrimination was not alleged were inappropriate.[99] The court noted that it has universally condemned irrelevant and unjustified statements calculated to arouse racial, national, or religious prejudice.[100] On appeal, the court held that the plaintiff used race to overshadow the material issues and, thus, the defendant's motion for a new trial should have been granted.[101]

Specifically, plaintiff's counsel asked defendant's expert witness claims manager why he valued the removal of the woman's reproductive organs at $23,000 when the jury awarded the woman $1.4 million, or $400,000 in excess of the insurance policy limits. *Id.* at 17, 622 A.2d at 110.

92. *Id.* at 22, 622 A.2d at 113.

93. The trial judge urged jurors to be fair and impartial toward the evidence presented. *Id.* at 18 n.13, 622 A.2d at 111 n.13.

94. *Id.* at 24, 622 A.2d at 114.

95. 373 Md. 306, 818 A.2d 237 (2003).

96. *Id.* at 322, 818 A.2d at 247.

97. *Id.* at 324–25, 818 A.2d at 248–49.

98. 381 Md. 378, 849 A.2d 504 (2004).

99. *Id.* at 409, 849 A.2d at 523 (citing C.R. McCorkle, Annotation, *Statement by Counsel Relating to Race, Nationality, or Religion in Civil Actions as Prejudicial*, 99 A.L.R.2D 1249, 1254 (1965)).

100. *Id.* Some courts have held that an improper reference to hot-button issues like race, nationality, and religion is per se grounds for a mistrial. *See, e.g.*, Tex. Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 866 (Tex. App. 1990) ("We hold that incurable reversible error occurs whenever any attorney suggests, either openly or with subtlety and finesse, that a jury feel solidarity with or animus toward a litigant or a witness because of race or ethnicity.").

101. *Tierco Md.*, 381 Md. at 411, 414, 849 A.2d at 524, 526.

C. *A Partial New Trial Should Be Granted Only when It Is Clear that the Prejudice Did Not Affect All Issues*

Within the past decade, Maryland courts have found that a partial new trial may only be ordered if it is obvious that the effect of the prejudicial error at trial did not extend to all the issues tried.[102] In *Stickley v. Chisholm*,[103] the Court of Special Appeals stated that retrial on a limited issue would be allowed "'if that issue c[ould] be separately tried without such confusion or uncertainty as could amount to a denial of a fair trial.'"[104] However, it was unclear whether an erroneous jury instruction would only adversely affect the deliberation on the issue of causation.[105] Because the negligence and proximate cause issues related to the malpractice were "inextricably intertwined," the court ordered a new trial.[106]

Indeed, if the prejudice or incendiary nature of a comment merely taints the award of damages and not the assessment of liability, courts may respond by ordering a remittitur or a new trial on the issue of damages alone.[107] If, however, there is a reasonable probability that the improper comment influenced both the damages *and* the liability issues, a new trial is granted on both issues.[108]

III. THE COURT'S REASONING

In *Goldberg v. Boone*, the Court of Appeals reversed the judgment of the Court of Special Appeals and iterated two key holdings.[109] First, the court held that the improper questioning about the sniper case did not sufficiently prejudice the case so as to warrant a new trial because: (1) the trial court appropriately curtailed its prejudicial effect by sustaining the objection to it; and (2) the comment played only a minor role in the trial.[110] Second, because the jury instruction on informed consent was a correct exposition of the law and was ap-

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102. Stickley v. Chisholm, 136 Md. App. 305, 317, 765 A.2d 662, 669 (Ct. Spec. App. 2001) (quoting McBride v. Huckins, 81 A. 528, 531–32 (N.H. 1911)).

103. 136 Md. App. 305, 765 A.2d 662 (Ct. Spec. App. 2001).

104. *Id.* at 317, 765 A.2d at 669 (quoting Gyerman v. U.S. Lines Co., 498 P.2d 1043, 1054 (Cal. 1972)).

105. *Id.*

106. *Id.* at 317–18, 765 A.2d at 669–70.

107. *See* Pingatore v. Montgomery Ward & Co., 419 F.2d 1138, 1142–43 (6th Cir. 1969) (ordering a new trial solely on the issue of damages).

108. Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 282–83 (5th Cir. 1975).

109. *Goldberg II*, 396 Md. 94, 120–21, 912 A.2d 698, 713 (2006).

110. *Id.* at 120, 912 A.2d at 713.

plicable given the evidence before the court, the court determined that it was allowable.[111]

Writing for the majority, Judge Battaglia first summarized the law regarding allowable questions for cross examination and explained the doctrine of informed consent.[112] She stated that counsel may question an expert about compensation received for testifying in order to reveal bias.[113] Furthermore, the court noted that to overturn a denial of a motion for mistrial, Boone's conduct or words must have so prejudiced Dr. Goldberg that he could not have received a fair trial despite any curative measures that the trial judge took.[114] Because cross-examination inquiries as to an expert witness's income, motives, interests, and prejudices are allowable, the court determined that the paid minimizer question was appropriate.[115] Additionally, the court stated that the sniper comment, although improper, was not sufficiently prejudicial to warrant a new trial on the issue of liability because Boone's counsel only said it once, the trial judge quickly truncated it, and no party repeated it before the jury.[116]

With regard to the informed consent issue, the court held that, because there was no bright-line rule to determine how much doctor-patient disclosure was required to gain consent to perform a procedure, such an analysis would depend on what each patient considered material in making a decision to undergo treatment.[117] Because each patient would consider various factors material to making a treatment decision, the court determined that whether a reasonable person in Boone's position would have submitted to a mastoidectomy at the hands of Dr. Goldberg was an issue of fact for the jury to decide.[118]

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111. *Id.* at 121, 912 A.2d at 713.

112. *See generally id.* at 114–27, 912 A.2d at 709–17.

113. *Id.* at 116, 912 A.2d at 710.

114. *Id.* at 115, 912 A.2d at 710.

115. *Id.* at 117, 912 A.2d at 711.

116. *Id.* at 120, 912 A.2d at 713. Moreover, the court found the sniper question distinguishable from the cases that involved comments that either were incessantly repeated or alluded to inadmissible evidence. *Id.* at 118–20, 912 A.2d at 712–13 (citing Tierco Md., Inc. v. Williams, 381 Md. 378, 414, 849 A.2d 504, 526 (2004) (holding that reference to race and discrimination to overwhelm the real issues at hand was prejudicial, and finding refusal to grant a new trial an abuse of discretion); Lai v. Sagle, 373 Md. 306, 322, 818 A.2d 237, 247 (2003) (noting that reference to a doctor's five previous malpractice suits had no probative value and was prejudicial); Med. Mut. Liab. Ins. Soc'y of Md. v. Evans, 330 Md. 1, 22, 24, 622 A.2d 103, 113–14 (1993) (stating that questioning about a defendant's irrelevant prior bad acts served only to obscure the real issues and was therefore inadmissible)).

117. *Id.* at 123, 912 A.2d at 714 (quoting Sard v. Hardy, 281 Md. 432, 443–44, 379 A.2d 1014, 1022 (1977)).

118. *Id.* at 126–27, 912 A.2d at 717.

In her dissent, Judge Raker, joined by Chief Judge Bell and Judge Greene, argued that the decision of the circuit court should have been reversed and that Dr. Goldberg should have been allowed a new trial on both liability and damages.[119] Judge Raker found it impermissible to question an expert witness about his opinion in cases unrelated to the litigation.[120] As further support for her conclusion, she contended that when a cross-examiner tries to show that an expert has minimized injury, there is no way for the party calling the expert to show otherwise, except to have a burdensome "trial within a trial."[121] Because Boone's questioning sought to expose Dr. Schretlen's past minimizing testimony, Judge Raker asserted that the resultant unfair prejudice warranted a new trial on both liability and damages.[122]

IV. ANALYSIS

In *Goldberg v. Boone*, the Court of Appeals held that although the plaintiff's questioning of the defendant's expert witness was improper, it did not warrant a new trial on the issue of liability because its prejudicial effect was curtailed by the trial court, and the comment did not play a major role in the trial.[123] In so holding, the court failed to sufficiently analyze the extent of the impropriety of questions posed to Dr. Schretlen about his status as an expert witness.[124] The court also gave insufficient attention to the trial court's inadequate effort to cure the prejudice that the questioning caused.[125] In cases involving such a blatant use of inflammatory comments, public policy and fairness considerations demand that the court grant a motion for a new trial on the issues of both damages and liability.[126]

A. *The* Goldberg *Court Failed to Properly Apply Precedent that Proscribes the Asking of Any Question Meant to Harass an Expert Witness or Prejudicially Excite the Jury*

The *Goldberg* court erred in failing to distinguish a question about compensation for expert witness testimony, which intends to show bias, from a question that expressly alleges that the expert witness is a

119. *Id.* at 130, 912 A.2d at 719 (Raker, J., dissenting).
120. *Id.* at 131–32, 912 A.2d at 719–20.
121. *See id.* at 132, 912 A.2d at 720 (citing Pappas v. Fronczak, 618 N.E.2d 878, 884 (Ill. App. Ct. 1993) ("[S]ubtrials on issues remote from the subject of the lawsuit should be avoided . . . .")).
122. *Id.* at 132–33, 912 A.2d at 720.
123. *Id.* at 120, 912 A.2d at 713 (majority opinion).
124. *See infra* Part IV.A.
125. *See infra* Part IV.B.
126. *See infra* Part IV.C.

paid minimizer, which intends to show wrongdoing.[127] During the questioning of an expert witness, it is a common and acceptable practice for a cross-examiner to attempt to demonstrate that the witness's testimony is biased because he is a professional expert witness, or a "hired gun."[128] Indeed, under past precedent,[129] the *Goldberg* court properly decided that counsel for Boone could inquire as to Dr. Schretlen's compensation in this case and in previous cases.[130]

However, by allowing Boone to insinuate that Dr. Schretlen was more than a simple "hired gun," the court improperly allowed Dr. Schretlen to be harassed and put Dr. Goldberg's case at an extreme disadvantage.[131] Although Boone intended to suggest that Dr. Schretlen was biased because he would testify for the side that paid him, which would have been appropriate,[132] his question was actually phrased to show that Dr. Schretlen was a habitual minimizer.[133] Such a question allowed the jury to infer that Dr. Schretlen's actions and testimony were consistently biased, improper, and motivated by

127. *Goldberg II*, 396 Md. at 130–31, 912 A.2d at 719 (Raker, J., dissenting).

128. *See* Wrobleski v. deLara, 353 Md. 509, 517–18, 727 A.2d 930, 934 (1999) (defining a "hired gun" as a professional who earns a large portion of his livelihood from testifying and has an economic incentive to produce favorable results for his employer, rather than evaluate the issues and testify with complete impartiality); *see also* MD. R. 5-616(a)(4) ("The credibility of a witness may be attacked through questions . . . that . . . [p]rov[e] that the witness is biased [or] interested in the outcome of the proceeding, or has a motive to testify falsely."); *id.* 5-611(b)(1) (stating that matters affecting credibility of a witness are proper subjects of inquiry on cross-examination).

129. *See Wrobleski*, 353 Md. at 517, 727 A.2d at 933–34 (stating that counsel may seek to show an expert's bias by examining his current pay, his typical compensation for testifying in a case, and the percentage of his annual income attributable to expert witness work); Ager v. Balt. Transit Co., 213 Md. 414, 427–28, 132 A.2d 469, 476–77 (1957) (showing that an expert witness's employment history may be examined to show bias); *see also* Mezzanotte Constr. Co. v. Gibons, 219 Md. 178, 181, 148 A.2d 399, 401 (1959) (explaining that counsel may ask about an expert's compensation, past or prospective).

130. *See Goldberg II*, 396 Md. at 116–17, 912 A.2d at 710–11.

131. *See* Med. Mut. Liab. Ins. Soc'y of Md. v. Evans, 330 Md. 1, 22, 622 A.2d 103, 113 (1993) (suggesting that the primary purpose of witness questioning should not be to harass or unduly embarrass); *see also* MD. R. 5-611(a) (same).

132. *See* Wise v. Ackerman, 76 Md. 375, 394, 25 A. 424, 427 (1892) (noting that cross-examination may include questions pertaining to the witness's relationship with each party). According to the Maryland Rules of Evidence, such a question would surely be considered "relevant." *See* MD. R. 5-401 ("Relevant evidence . . . tend[s] to make the existence of a[ ] [material] fact . . . more probable than it would be without the evidence." (internal quotation marks omitted)). However, even though it would be relevant, the court could still exclude such evidence if the prejudice from its admission substantially outweighed its probative value. *Id.* 5-403; *see id.* 5-104(a) (stating that admissibility of evidence shall be determined by the trial court).

133. *Goldberg II*, 396 Md. at 131–32, 912 A.2d at 719–20 (Raker, J., dissenting). In other words, Boone intended to have jurors infer that because Dr. Schretlen was willing in the past to testify favorably for whichever party paid him, his testimony was so influenced by the paying party's interests in the instant case.

money. Specifically, the jury could have inferred that if Dr. Schretlen minimized injuries in previous cases, he would not hesitate to minimize injuries, perhaps wrongly, in this case.[134]

At that point, if the jury had drawn certain negative conclusions about Dr. Schretlen and, consequently, about Dr. Goldberg, the defense could not have offered rebuttal without introducing purely collateral evidence and staging a "trial within a trial."[135] Unquestionably, immense problems and increased cost would result from injecting other collateral issues into the trial.[136] Because the court could not afford the time or expense of litigating collateral issues, Boone's counsel felt able to dance around the penumbra of allowable questions until an objection was raised. Thus, when combined with Boone's sniper comment, which indicated that Dr. Schretlen had testified as an expert witness during the defense of a convicted murderer in a highly publicized case, the paid minimizer question pushed the limit of allowable impeachment questioning and was unfairly prejudicial to Dr. Goldberg's case.[137]

Not only was the questioning inflammatory and patently unfair to Dr. Goldberg's case, but the majority also failed to mention that Boone's counsel, for two reasons, appeared to have deliberately planned to use information relating to Lee Boyd Malvo and the sniper shootings.[138] First, there was no need for Boone's counsel to mention the word "sniper" once Dr. Schretlen acknowledged that he knew to

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134. *Id.* at 132, 912 A.2d at 720.

135. *Id.*

136. *See, e.g.*, Pappas v. Fronczak, 618 N.E.2d 878, 884 (Ill. App. Ct. 1993) (finding no abuse of discretion when the trial court stated that inquiry into an expert's past testimonial appearances on behalf of a certain doctor would unnecessarily lengthen the already drawn-out proceedings and interject unrelated issues into the present case). Undoubtedly, courts have limited resources and seek to efficiently and expeditiously resolve legal disputes. *See* MD. R. 5-102 (detailing that the purpose of the Maryland Rules of Evidence is to eliminate unjustifiable expense and delay and resolve disputes with fairness). However, the court's rigid insistence upon efficiency came at a cost of fairness. Not only was Dr. Goldberg's motion for mistrial denied following Boone's prejudicial comments, but he was not allowed to defend himself, his relationship to Dr. Schretlen, or Dr. Schretlen's testimonial history as an expert witness because it would have interjected additional issues into the case, thereby creating a "trial within a trial." *See Goldberg II*, 396 Md. at 132, 912 A.2d at 720 (Raker, J., dissenting).

137. *See* Lai v. Sagle, 373 Md. 306, 322, 818 A.2d 237, 247 (2003) (finding unfair prejudice sufficient to warrant a mistrial because comments were made only to excite and mislead the jury); *see also Goldberg II*, 396 Md. at 131–32, 912 A.2d at 719–20 (Raker, J., dissenting) (arguing that paid minimizer questions are fundamentally different from simple questions to expose bias, aimed only at eliciting unfair prejudice in the minds of the jurors, and are, therefore, not allowable).

138. *See infra* notes 139–141 and accompanying text.

whom counsel was referring.[139] The questioning was particularly improper because the reference was unrelated to the instant case and Maryland residents on the jury would quickly associate that word with the recent and infamous shootings.[140] Second, although Boone's counsel may have argued that he accidentally misspoke in mentioning the word "sniper" while questioning Dr. Schretlen, the record shows that even after Dr. Goldberg's counsel objected to the sniper question, Boone's counsel attempted to name the young defendant involved—Lee Boyd Malvo—but was prevented by the court.[141] Thus, because Boone's counsel seemed to make the sniper comments in bad faith, the *Goldberg* court should have recognized that these questions compounded the harassing and prejudicial effect of the "paid minimizer" questions, and deemed both inadmissible.

B. The Goldberg *Court Did Not Sufficiently Analyze the Effect or Adequately Remedy the Prejudice Caused by Counsel's Blatantly Improper Statement*

Instead of analyzing the extent to which the sniper question prejudiced Dr. Goldberg in the eyes of the jury, the court inappropriately dismissed the issue because the question was asked only once and the trial court sustained the objection.[142] The majority stated that Boone's sniper question "*could* have created an atmosphere of disgust on the part of the jury" and "*could* be construed as nothing more than an appeal to the jurors' passions and prejudices."[143] Yet, the majority approved of the trial court's refusal to grant a new trial.[144] Although a mistrial is often appropriate when counsel makes repeated inflammatory statements,[145] the court refused to acknowledge that it is also

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139. *See Goldberg II*, 396 Md. at 104, 912 A.2d at 704 (reflecting Dr. Schretlen's assent to Mr. Boone's counsel's question regarding the sniper case).

140. *See* Katherine Shaver, *Judge Rejects Media Bid to Open Hearing for Juvenile Sniper Suspect*, WASH. POST, Nov. 2, 2002, at A1 (noting that public interest in the Washington, D.C. area sniper case was "enormous"); *cf.* Tierco Md., Inc. v. Williams, 381 Md. 378, 410, 849 A.2d 504, 523 (2004) (finding that an irrelevant and unrelated statement made to incite the jury is improper).

141. *Goldberg II*, 396 Md. at 105, 912 A.2d at 704.

142. *Id.* at 120, 912 A.2d at 713.

143. *Id.* (emphasis added).

144. *See id.* (summarily upholding the trial judge's decision with little analysis in support of a finding of no prejudice).

145. *See Tierco Md.*, 381 Md. at 384, 414, 849 A.2d at 508, 526 (stating that a new trial should have been granted when counsel spoke of race and discrimination sixty-three different times without cause).

sometimes appropriate when counsel makes only one unprovoked, incendiary comment.[146]

1. Although It Correctly Held that Counsel's Comments Prejudiced Dr. Goldberg, the Court Did Not Adequately Consider the Extent of the Prejudicial Impact to Dr. Goldberg's Case, Nor Fully Weigh That Impact Against Any Curative Action Taken by the Trial Court

The high court recognized the settled principle that the trial court's decision merited deference; however, as a result, the court failed to make any examination of whether the sniper comment, under *DeMay v. Carper*, raised the trial to the level of a blatant, exceptional case warranting reversal of the trial judge's decision.[147] To determine whether this was a blatant, exceptional case indicative of an abuse of discretion, the court should have explicitly utilized the two-step *Garrett* test.[148] Following the first step of the test, the court properly concluded that Boone's improper questions prejudiced Dr. Goldberg.[149] However, the court failed to adequately analyze the extent of the prejudice and its impact on the jury, as is required before the second step of the *Garrett* test—the balancing analysis—can take place.[150]

Given its recent decisions in *Evans*, *Lai*, and *Tierco, Md.*, the court failed to adequately utilize one of its key tools, the *Guesfeird* factors, for examining the prejudicial effect of the sniper comment, as required by the first step of *Garrett*. Even though *Guesfeird* made clear that no one factor was dispositive,[151] the majority dismissed the prejudicial im-

146. *See* Lai v. Sagle, 373 Md. 306, 324–25, 818 A.2d 237, 248–49 (2003) (finding that one reference during an opening statement regarding prior malpractice suits filed against a doctor was sufficient to prejudice the proceedings so that no curative instruction made by the court could undo the taint).

147. *Goldberg II*, 396 Md. at 120, 912 A.2d at 713 (failing to measure the extent of prejudice towards Dr. Goldberg and instead merely stating that the sniper comment *could have* disgusted jurors).

148. The *Garrett* test is appropriate for courts to use when determining abuse of discretion in denying a motion for mistrial. *See* Owens-Corning Fiberglas Corp. v. Garrett, 343 Md. 500, 518, 682 A.2d 1143, 1151 (1996) (articulating a two-step test to determine whether denial of a motion for mistrial is appropriate, asking (1) whether, and to what extent, the moving party was prejudiced, and (2) whether the curative measures implemented by the trial judge were sufficient to overcome that prejudice).

149. *See Goldberg II*, 396 Md. at 120, 912 A.2d at 713 ("[T]he line of questioning about the sniper case . . . [was] improper . . . and . . . prejudicial . . . .").

150. *See Garrett*, 343 Md. at 518, 582 A.2d at 1151.

151. *See* Guesfeird v. State, 300 Md. 653, 659, 480 A.2d 800, 803 (1984) (articulating factors relevant to analysis of prejudicial effect and emphasizing that no one factor is dispositive).

pact of the sniper comment altogether for *one* single reason—because Boone's counsel made only one reference to the sniper trial and did not repeat it.[152] Ignoring precedent, the court opened the floodgates for attorneys to carefully craft inflammatory, prejudicial comments to be used—only once—at the most advantageous time at trial.

Instead, as per the *Guesfeird* factors, the court should have paid close attention to the purpose of the statement, the person who made the statement, whether it was intentional or inadvertent, and whether an inference could be drawn from it.[153] Application of the factors to these facts demonstrates that the sniper trial was not mistakenly mentioned by an unknowing witness, but rather Boone's counsel referred to it in a calculated attack on Dr. Schretlen.[154] Indeed, although the comment was only made once, Boone's counsel demonstrated bad faith by attempting, in clear view of the jurors, to name Lee Boyd Malvo and emphasize that Dr. Goldberg was linked to him.[155] Furthermore, the jurors may have drawn further negative inferences as to Dr. Goldberg and Dr. Schretlen after viewing their vehement objections to the minimizer and sniper comments.[156] When all of these factors are taken together, even though Dr. Schretlen was not the

152. *Goldberg II*, 396 Md. at 120, 912 A.2d at 713 ("[A]lthough the reference to one [of] the 'snipers' in Mr. Boone's counsel's question clearly could have created an atmosphere of disgust on the part of the jury for Dr. Schretlen's willingness to testify thusly in the sniper case, it was asked only once of the expert and was never mentioned again."). The majority ignored the fact that, if he was ready and willing to name Lee Boyd Malvo as the young man in the sniper trial, Boone's counsel probably would have made other references to the sniper case had it not been for the sustaining of the objection. *See id.* at 105, 912 A.2d at 704.

153. *Guesfeird*, 300 Md. at 659, 480 A.2d at 803.

154. *Compare Goldberg II*, 396 Md. at 105, 912 A.2d at 704 (inflammatory comment improperly made by plaintiff's counsel while *questioning* an expert witness), *with Guesfeird*, 300 Md. at 656–57, 480 A.2d at 801–02 (inadmissible statement made by teenage rape victim while *being questioned* on the witness stand).

Although this case did not explicitly involve sensitive issues like race, nationality, or religion, some courts would consider an attorney's mention of a recent regional killing spree to be enough of a hot-button issue to be per se grounds for granting a motion for mistrial. *See* Tex. Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 866 (Tex. App. 1990) (finding incurable error exists when counsel suggests that a jury feel animus toward a witness because of a sensitive societal issue).

155. *See supra* note 141 and accompanying text (discussing Boone's counsel's deliberate attempt to impeach Dr. Schretlen through inadmissible means).

156. *See Goldberg II*, 396 Md. at 104–05, 912 A.2d at 703–04 (stating that Dr. Goldberg's counsel replied to both questions by saying, "[o]bjection, Your Honor," and that Dr. Schretlen contested the sniper question by ardently stating, "[t]hat is absolutely incorrect and outrageous").

principal witness in the case, the court should have determined that the prejudicial impact of the improper comments was substantial.[157]

Next, for the second step of the *Garrett* test, the court did not sufficiently weigh the prejudicial impact of Dr. Goldberg being linked, albeit indirectly, to an infamous, convicted murderer[158] against the trial judge's curative measure of merely sustaining the objection.[159] Given the recent nature and geographical proximity of the widely publicized sniper shootings,[160] the stigma attached when one is associated with a notorious convicted criminal,[161] and the fact that the court

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157. *See* Med. Mut. Liab. Ins. Soc'y of Md. v. Evans, 330 Md. 1, 15–16, 622 A.2d 103, 110 (1993) (finding counsel's comments to an expert witness sufficiently prejudicial to warrant a mistrial even though the expert was not the principal witness in the case and, in fact, had no direct involvement with the actual claim at issue and testified only after the claims adjuster who worked directly on the claim testified during the first *three days* of trial).

158. Lee Boyd Malvo was sentenced to life in prison without possibility of parole for six murders he committed in October 2002 in Montgomery County, Maryland. *Young Sniper Is Sentenced to 6 Life Terms*, N.Y. TIMES, Nov. 9, 2006, at A28. In addition, Malvo has been sentenced to life in prison in Virginia for shootings there. *Id.* These murders were part of "a three-week series of sniper attacks that terrorized the Washington[, D.C.] area." *Id.*

159. *See* Owens-Corning Fiberglas Corp. v. Garrett, 343 Md. 500, 518, 682 A.2d 1143, 1151 (1996) (quoting ACandS, Inc. v. Godwin, 340 Md. 334, 407, 667 A.2d 116, 151–52 (1995)) (stating that if a motion for mistrial is denied, on appeal the court *must* weigh the prejudice to the defendant against the curative action of the court).

160. Eight of the fourteen sniper attacks occurred in Montgomery County, Maryland, 2002 Area Sniper Shootings, WashingtonPost.com, http://www.washingtonpost.com/wp-srv/metro/daily/oct02/snipershootings.htm (last visited May 5, 2008), the same county in which Dr. Goldberg practiced and the trial occurred. The shootings began on October 2, 2002, and continued until October 22, 2002. *Id.* The two convicted shooters were arrested on October 24, 2002. Tom Jackman & David Snyder, *Va. Will Send Snipers to Md. for Prosecution*, WASH. POST, May 11, 2005, at A1. For more information on the shootings, see The D.C.-Area Sniper Case, Online NewsHour, PBS, http://www.pbs.org/newshour/bb/law/sniper/ (last visited May 5, 2008).

161. Although the jurors would likely have associated Dr. Schretlen with Lee Boyd Malvo, they were not given any explanation as to exactly *how* Dr. Schretlen was tied to Malvo, thus leaving the question open to their own imaginations. If the jurors were able to conclude that Dr. Schretlen had testified as an expert witness for Malvo, which he had, they may have decided that because Dr. Schretlen testified for "the bad guy" in the past, he was probably testifying for "the bad guy" again in Dr. Goldberg's case. *See* Rainville v. State, 328 Md. 398, 407, 614 A.2d 949, 953 (1992) (citing Prout v. State, 311 Md. 348, 364, 535 A.2d 445, 453 (1988)). For example, in *Rainville*, the court stated that a mother's remark that the defendant was "in jail for what he had done to Michael" was particularly prejudicial where defendant had not been convicted of assaulting her son Michael, but was awaiting trial on those charges, and the court also found it highly likely that the jury assumed that "what [the defendant] had done to Michael" was similar to the crime committed against the plaintiff. *Id.*

Furthermore, if the jurors did not know to whom Boone's counsel referred, they were left to wonder who the sniper was, how he was tied to Dr. Schretlen, what that had to do with the instant case, why Dr. Goldberg's counsel would object to such a comment, and why Dr. Goldberg's counsel and Dr. Schretlen reacted so negatively to the comment. Thus, not only did the lack of any curative instruction following the sniper comment prejudice Dr. Goldberg, but the jury was also left in the dark and likely confused.

gave no explanation or curative instruction to the jury regarding the sniper comment beyond sustaining the objection, this could very well have been a blatant, exceptional case, thereby permitting the appellate court to reverse the trial judge's denial of the motion for mistrial.[162] Although the trial judge was in the unique position of being able to observe the reactions of the jurors first-hand,[163] at the very minimum he should have promulgated a strong curative instruction.

Even if, however, a curative instruction could have been issued in an attempt to curtail prejudice toward Dr. Goldberg, such an instruction may still have been inadequate.[164] Furthermore, jurors may have believed that because the trial judge made no curative instruction after sustaining the objection, the disputed comments could still be taken into account in the jury's decision.[165] Thus, even though a curative instruction by the trial judge would have been better than no corrective action at all, the surest recourse to prevent unreasonable prejudice was to grant a mistrial, thereby ensuring that Dr. Goldberg was not denied a fair trial because of a tainted jury.

2. *The* Goldberg *Court Failed to Consider Alternative Remedies to Cure the Prejudice to Dr. Goldberg*

Boone's counsel argued that, because the list of Dr. Schretlen's past testimonial appearances included the Malvo sniper case, Dr. Goldberg's counsel should have filed a motion *in limine* to prevent the introduction of evidence relating to the sniper trial.[166] However, by making this argument, it is evident that Boone's counsel knew, or should have known, that the evidence would be objectionable; never-

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162. *See* DeMay v. Carper, 247 Md. 535, 540, 233 A.2d 765, 768 (1967) (explaining that the trial judge's choice of cure, and decision as to its effect, may be reversed if it is an exceptional, blatant case).

163. *See* State v. Hawkins, 326 Md. 270, 278, 604 A.2d 489, 493 (1992) (observing that the trial judge has the best view of what takes place in his courtroom and is thus best able to evaluate prejudice); Hickman v. State, 76 Md. App. 111, 120, 543 A.2d 870, 875 (Ct. Spec. App. 1988) (same).

164. *See* Bradley v. State, 333 Md. 593, 613, 636 A.2d 999, 1009 (1994) ("[L]imiting instructions are inadequate where the danger of prejudice is great and it is simply unrealistic to believe that the jury would adhere to the refined distinctions demanded by the limiting instruction[s]." (internal quotation marks omitted) (quoting Commonwealth v. Benoit, 586 N.E.2d 19, 23 (Mass. App. Ct. 1992))).

165. *Cf.* Pingatore v. Montgomery Ward & Co., 419 F.2d 1138, 1143 (6th Cir. 1969) (finding that failure to give even a curative instruction as to improper comments made in court could enhance and reinforce the prejudice already drawn by jurors by giving them the impression that the comments could be considered in their verdict).

166. *Goldberg II*, 396 Md. 94, 106–07, 912 A.2d 698, 705 (2006).

theless, he unjustifiably chose to offer it anyway.[167] Boone's counsel could have moved *in limine* to ascertain the admissibility of the evidence, yet instead kept quiet so that he could spring the evidence on the jury when it was most likely to harass Dr. Schretlen, embarrass Dr. Goldberg, and inflame the jury. The majority, therefore, improperly failed to question Boone's counsel's actions and should have rejected a bright-line rule that would require defendants to move *in limine* to block any and all questionable evidence as unwieldy and unfair.[168] Such a rule puts a significant burden on the defendant, when the proponent of the evidence is in a better position to know what the evidence is and how it will be introduced.

Various rules have been proposed to help combat the difficult decision appellate courts face in trying to determine whether to deny or grant a motion for mistrial. Commentators have suggested that states would benefit greatly by having the subject matter of mistrials codified.[169] By establishing clear, rational rules of law for when a mistrial must be granted in both civil and criminal cases, litigators and judges alike would benefit and trials would become more predictable.[170]

In Maryland, when counsel desires to introduce extremely questionable and potentially prejudicial evidence, the only proper procedure is to require the introducing party to file a motion *in limine* and have the evidence approved initially outside the jury's presence.[171]

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167. *Cf.* Med. Mut. Liab. Ins. Soc'y of Md. v. Evans, 330 Md. 1, 24, 622 A.2d 103, 114 (1993) (stating that plaintiff's counsel ought to be reticent to introduce evidence without making a motion *in limine* when they have reason to suspect the evidence might be considered improper, and that even the most dedicated advocate should recognize the likelihood that improper evidence will be inadmissible and potentially cause a mistrial).

168. *See* Lai v. Sagle, 373 Md. 306, 325, 818 A.2d 237, 249 (2003) (indicating that a *proponent* of questionable evidence ought to secure a motion *in limine* outside the presence of the jury).

169. *See* Frederick C. Moss, *Rethinking Texas Evidence Rule 103*, 56 BAYLOR L. REV. 503, 564–65 (2004) (advocating a Texas evidence rule requiring that a mistrial be granted in all jury trials in which the verdict has been affected by improper influences).

170. *See generally id.*

171. *Lai*, 373 Md. at 325, 818 A.2d at 249. Although the improper evidence in *Lai* was introduced in an opening statement, the timing of when the evidence is introduced should not be determinative of whether to grant a mistrial. To follow such an approach would allow courts to determine a defendant's fate based on the point in trial at which the plaintiff decides to unleash inappropriate comments or questions. Such a rule would unequivocally deny defendants a fair trial in the name of efficiency and conservation of judicial resources, while the Maryland Rules of Evidence only seek to avoid *unjustifiable* expense. *See* MD. R. 5-102 (stating that the rules of evidence are necessary "to secure fairness in administration, eliminate unjustifiable expense and delay, and promote the growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined").

This approach places the onus on the party proffering the evidence to either secure a positive ruling on a motion *in limine* before making potentially objectionable statements, or to simply use the evidence, regardless of its impropriety, and risk facing a mistrial.[172]

C. *Public Policy and Equitable Considerations Dictate that when the Prejudice Caused by Incendiary Comments Is So Pervasive as to Excite or Mislead the Jury, the Court Should Grant a New Trial on All Issues*

Due to the provocative nature of Boone's counsel's statements and the damaging prejudice inflicted upon Dr. Goldberg's case, a new trial should have been granted, not only on the issue of damages, but on both the issues of damages and liability.[173] If the purpose of a reference is to inflame the passions of the jury, the reference is improper and prejudicial and warrants a mistrial.[174] In considering on appeal whether a mistrial should be granted for both liability and damages, the court must grant a new trial on both issues when a comment is so inflammatory that its prejudicial effect might inflame the passions of even one juror to the point that she cannot fairly weigh the issues.[175] The rationale for this rule is that once a prejudicial comment has affected even one juror in a significant way, it cannot be said

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The *Garrett* court, in denying the defendant's motion for mistrial, emphasized the fact that a *four-month* trial, analysis of hundreds of documents, and hours of closing arguments would be for naught if a mistrial was granted on the basis of a few incendiary remarks by counsel. *See* Owens-Corning Fiberglas Corp. v. Garrett, 343 Md. 500, 519–20, 682 A.2d 1143, 1152 (1996). Even if the amount of resources the court had used was determinative in denying a motion for mistrial, this factor should not have prevented the *Goldberg* court from granting the motion when the inflammatory comments were made on day six of an *eight-day* trial. Brief of Appellee at 11, *Goldberg II*, 396 Md. 94, 912 A.2d 698 (2006) (No. 21), 2006 WL 2471664.

172. *See Lai*, 373 Md. at 317, 818 A.2d at 244 ("[T]he real purpose of a motion *in limine* is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence which may irretrievably infect the fairness of the trial." (internal quotation marks omitted) (quoting Prout v. State, 311 Md. 348, 356, 535 A.2d 445, 449 (1988))).

173. *Goldberg II*, 396 Md. at 132–33, 912 A.2d at 720 (Raker, J., dissenting).

174. Tierco Md., Inc. v. Williams, 381 Md. 378, 410, 849 A.2d 504, 523 (2004). Although it may be difficult, if not impossible, for the trial judge to consistently identify counsel's purpose in making an inflammatory comment, the judge should consider the totality of the circumstances surrounding the comment, including but not limited to: whether the jury could draw an inference from the comment, the point in the trial at which the comment was made, previous arguments made by counsel during the trial, and whether the comment was repeated or expounded upon after it had been deemed inappropriate. *See* Guesfeird v. State, 300 Md. 653, 659, 480 A.2d 800, 803 (1984) (detailing factors the court may consider in determining the prejudicial impact of inappropriate evidence).

175. *See* Stickley v. Chisholm, 136 Md. App. 305, 316, 765 A.2d 662, 669 (Md. Ct. Spec. App. 2001) (quoting M.C. Dransfield, Annotation, *Grant of New Trial on Issue of Liability Alone, Without Retrial of Issue of Damages*, 34 A.L.R.2D 988, 990 (1954)) (stating that a partial

that the defendant will receive a fair trial.[176] For instance, even after a trial judge sustains an objection or issues a curative instruction to disregard an improper comment by counsel, many jurors will have a hard time disregarding what they have already heard.[177] Moreover, once a statement has tainted a juror as to one issue, it is difficult, if not impossible, for the court to be assured that the juror has not been affected as to all issues in a case.[178]

In addition to an agitative comment's detrimental impact on the jury, given the American legal system's emphasis on providing defendants with a fair trial and due process of law,[179] the determination to grant a complete or partial mistrial for improper statements should not turn on how much of the case has already been litigated or the expense of a new trial.[180] Because Dr. Goldberg maintained his innocence as to liability throughout the trial,[181] and Boone's counsel's incendiary statement unfairly prejudiced Dr. Goldberg,[182] a new trial should have been granted on the issues of both liability and damages.[183]

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new trial on some of the issues can be ordered only if there is no confusion, inconvenience, or prejudice to the rights of any party).

176. After all, "[o]nce [a] skunk [i]s tossed into the jury box, the trial need[s] aborting." Ayers Estate v. Hernando County, 706 So. 2d 349, 350 (Fla. Dist. Ct. App. 1998).

177. *See* Dep't of Transp. v. First Bank of Schaumburg, 631 N.E.2d 1145, 1154 (Ill. App. Ct. 1992) ("A party is entitled to a fair trial, free from prejudicial conduct of counsel who undertakes to supply facts or to draw inferences not based upon the evidence in the record, and *prejudice is not necessarily cured* where the trial court has sustained objections to improper questioning." (emphasis added)). In this case, sustaining Dr. Goldberg's objection, but nevertheless failing to give a curative jury instruction, likely did little to reinforce the jury's need to disregard the improper comments. *See* text accompanying note 165.

178. Even though Dr. Goldberg's counsel called Dr. Schretlen as a witness solely as to the damages issue, the court should grant a new trial on all issues if doing so is necessary to bring about a more just result. *See Stickley*, 136 Md. App. at 317, 765 A.2d at 669 ("[A]lthough an error affects one issue only, a new trial on all issues is to be granted where this will best subserve the ends of justice.").

179. *See* MD. R. 5-102 (stating the purpose of the Maryland Rules of Evidence to be the ascertainment of truth and maintenance of fairness in trials).

180. *See supra* note 171.

181. *Cf. Goldberg I*, 167 Md. App. 410, 417, 893 A.2d 625, 628–29 (Ct. Spec. App. 2006) (showing that in his initial appeal Dr. Goldberg sought a new trial on the issue of negligence).

182. *See Goldberg II*, 396 Md. 94, 120, 912 A.2d 698, 713 (2006) (finding prejudicial effects, but not to the level that would require a mistrial).

183. *Id.* at 133, 912 A.2d at 720 (Raker, J., dissenting); *see* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 282–83 (5th Cir. 1975) (holding that if there is a reasonable probability that both issues of liability and damages were influenced by inadmissible evidence, then a new trial should be granted on both issues).

V. CONCLUSION

In *Goldberg v. Boone*, the Court of Appeals properly found that Dr. Goldberg had been prejudiced by opposing counsel's inappropriate questioning.[184] In the name of efficiency and frugality, however, the court did not grant Dr. Goldberg the relief that fairness demanded.[185] The court's cursory analysis of Boone's questioning of Dr. Goldberg's expert witness failed to recognize that, although Boone intended to show Dr. Schretlen's bias, the improper comments by counsel went beyond the allowable scope of impeachment questioning.[186] Moreover, the court should have discussed alternative standards for remedying the prejudice Dr. Goldberg faced, including the use of a motion *in limine*, the grant of an adequate curative instruction, or the codification of the subject matter of mistrials.[187] In the future, when a trial is tainted by a highly improper comment at any point in the proceedings and the court cannot be sure that the jury will be unprejudiced in reaching its verdict on each distinct issue, a new trial should be granted on all issues.[188]

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184. *See Goldberg II*, 396 Md. at 120, 912 A.2d at 713.
185. *See supra* note 136 and accompanying text.
186. *See supra* Part IV.A.
187. *See supra* Part IV.B.
188. *See supra* Part IV.C.