Survey - Developments in Maryland Law, 1990-91

Follow this and additional works at: http://digitalcommons.law.umaryland.edu/mlr

Part of the Law and Society Commons

Recommended Citation
Available at: http://digitalcommons.law.umaryland.edu/mlr/vol51/iss3/6

This Casenotes and Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.
SURVEY

Developments in Maryland Law, 1990-91

TABLE OF CONTENTS

I. BUSINESS ........................................... 509
   A. The Extension of Creditors' Rights Under RISA ........ 509
   B. The Prudent Investor Rule and the Duty to Invest Idle
      Trust Funds ........................................ 521

II. CONSTITUTIONAL LAW ............................... 538
    A. Keeping the Courtroom Door Open .................... 538
    B. Voter Purge Statutes ................................ 548
    C. Failing to Confront Defendants’ Sixth Amendment Rights 557

III. CONTRACTS .......................................... 571
     A. Duress Defense Expanded in Maryland ................. 571

IV. CORPORATE LAW ...................................... 581
    A. The Successor Liability Rule in a Products Liability Setting 581
    B. Fiduciary Duty and Professional Service Corporations .... 597

V. CRIMINAL LAW ........................................ 612
    A. Reading Mens Rea Into Statutory Offenses ........... 612
    B. Affording Greater Protections for Criminal Defendants in State Law ........................................ 623
    C. Specific Intent Required for Assault With Intent to Maim . 640

VI. CRIMINAL PROCEDURE ................................ 652
    A. The Court of Appeals’ Attempt to Return Fourth Amendment Rights to Defendants ................. 652
    B. Arrest is the Only Justification Needed for the Search of an Arrestee’s Luggage .................... 661
    C. Maryland’s Restrictive Statutory Interpretation Protects Privacy ........................................ 671
VII. Employment .............................................................. 681
   A. Opening the Closed Doors of the Retaliatory Discharge
      Doctrine ........................................................................ 681
   B. Abusive Discharge: A New Outcome ................................ 690

VIII. Evidence ................................................................. 701
   A. Admissibility of Refusal to Submit to a Breathalyzer Test . 701

IX. Family Law ............................................................... 708
   A. Spendthrift Trust Pensions May Be Partitioned to Ex-
      Spouses in Divorce Proceedings .................................... 708
   B. Permissible Reimbursement of Birth Mothers' Expenses in
      Direct Adoptions .......................................................... 716

X. Health Care .............................................................. 726
   A. The Medical Peer Review Privilege: A Misguided Attempt
      to Promote Quality Care ............................................... 726

XI. Insurance ................................................................. 740
   A. Stretching the Limits of Uninsured Motorist Insurance .. 740
   B. Subrogee's Right to Settlement Proceeds ...................... 753

XII. State and Local Government ....................................... 763
   A. State and Police Officer Liability to an Innocent Third
      Party Injured in a High Speed Chase ............................ 763
   B. Limits on the Power of Referendum .............................. 775
   C. A Limit to Immunity for State Troopers ....................... 784
   D. Local Elected Officials Are Not Immunized for
      Electioneering Activities ............................................ 792

XIII. Torts ....................................................................... 804
   A. Assumption of Risk as a Matter of Law ......................... 804
   B. Good Samaritan Statute—Emergency Medical Technicians . 815
   C. Punitive Damages for Torts Arising out of Contracts .... 825
   D. Extension of Witness's Privilege to Make Defamatory
      Statements ..................................................................... 835

Survey Table of Cases .................................................... 847
I. Business

A. The Extension of Creditors' Rights Under RISA

In First Virginia Bank v. Settles, the Court of Appeals defined the extent to which a secured creditor is entitled to prejudgment interest when its debtor defaults on an installment sales contract. Based on its previous decision in Union Trust Co. v. Tyndall, the court denied the creditor the right to recover prejudgment interest at the agreed finance charge rate. Unlike the court in Tyndall, the Settles court distinguished between two types of prejudgment interest. As a result, the court abandoned one of the Tyndall precepts and instructed the trial court to award the creditor prejudgment interest at the legal rate provided in the Maryland Constitution.

The effect Settles may have on creditors' rights and consumer protection law could prove problematic as it appears that the Court of Appeals erred by removing the issue of prejudgment interest from the scope of the Retail Installment Sales Act (RISA). The policy developed by the court in Settles reflects the desire to assist creditors during the current economic recession. This policy indicates a need for the standardization of prejudgment interest via legislative reform. Unlike the approach currently taken by the Maryland judiciary, a mandatory interest statute would create efficiency and consistency in Maryland courts when dealing with the issue of prejudgment interest.

1. The Case.—In February 1988, Angela Settles purchased a used automobile. She made a cash downpayment and agreed to pay both the balance due the dealership, $7,699.00, and a finance charge at an annual rate of 12.9%, in 41 monthly installments. In

2. See id. at 560-66, 588 A.2d at 805-08. For a definition of prejudgment interest, see infra note 27.
4. See Settles, 322 Md. at 562, 588 A.2d at 807.
5. See id. at 566, 588 A.2d at 808. The Maryland Constitution provides that the legal rate of interest shall be six percent. See Md. Const. art. III, § 57.
7. See infra notes 81-84 and accompanying text.
8. See infra notes 42-44 and accompanying text.
9. See infra notes 86-87 and accompanying text.
10. Settles, 322 Md. at 557, 588 A.2d at 804.
11. Id.
September 1988, Settles defaulted on the obligation. In October 1988, First Virginia Bank, to whom the seller assigned the agreement, repossessed the car and sold it at a public auction. After deducting the proceeds of the sale and other items from the balance due by Settles to First Virginia, a deficiency balance of $3,016.41 remained.

Steven and Kimberly Muenze and Carla Royal executed similar installment sales agreements for the purchase of automobiles that were assigned by their respective sellers to First Virginia. Because the Muenzes and Royal defaulted on their payments under the agreements, First Virginia repossessed and resold the automobiles. Like Settles, the Muenzes and Royal faced deficiency balances after the resale of their automobiles.

First Virginia filed complaints against each debtor in the District Court for Prince George’s County seeking to recover the deficiency balances. According to state law, a debtor is required to file a notice of intention to defend. Each of the debtors failed to file a notice. Therefore, in each case, the district court granted judgment on affidavit in favor of First Virginia, allowing recovery of

12. Id.
13. Id.
14. Id. In addition to the proceeds of the sale, a return of finance charges that accrued after the date of repossession until the date of resale and proceeds of an insurance rebate were credited to the balance owed by Settles. Id. Settles was charged with expenses related to the repossession and public auction. Id.
15. Id. at 558-59, 599 A.2d at 805. The Muenzes executed an installment sales agreement to purchase a truck. The agreement required that the balance due on purchase, $13,215.41, and a finance charge at an annual rate of 12.75%, would be paid by the buyers in 60 monthly payments. Id.
16. See id. at 558-59, 599 A.2d at 805.
17. See id. The Muenzes' deficiency balance amounted to $3,463.75 and Royal's deficiency balance amounted to $6,016.41. Id. at 559, 588 A.2d at 804-05.
18. Id. at 557-59, 588 A.2d at 804-05.
19. See Md. R. 3-306(b).
20. Settles, 322 Md. at 557-59, 588 A.2d at 804-05.
21. Maryland Rule 3-306 states that “[t]he affidavit shall be accompanied by supporting documents or statements containing sufficient detail, . . . including the precise amount of the claim and any interest claimed.” Md. R. 3-306(a).

In Settles, the Bank submitted Statements of Account and Interest Worksheets as documents in support of its claims. The Statements of Account showed rebates of finance charges and other applicable adjustments. The Interest Worksheets displayed the amount of interest due on the deficiency balances from the date of the automobiles' resale through the trial dates. Brief of Petitioner at 4, Settles (Nos. 91-73 to -75).
the deficiency balances but denying prejudgment interest.\textsuperscript{22}

First Virginia appealed the portion of each decision relating to prejudgment interest to the Circuit Court for Prince George's County.\textsuperscript{23} That court affirmed the judgments of the respective trial courts.\textsuperscript{24} Because of the confusion regarding the extent to which prejudgment interest may be awarded in civil actions, the Court of Appeals granted certiorari.\textsuperscript{25}

2. \textit{Legal Background.---}

\textbf{a. General Rules of Prejudgment Interest.---}In general, the law allows compensation for a default in the payment of a debt or obligation to include interest because the creditor will have lost the opportunity to invest and earn a return on the amount due.\textsuperscript{26} If creditors are deprived of this interest, they receive incomplete compensation because they have not recovered the cost of the use of their money between the time of breach and the time of judgment.\textsuperscript{27} Thus, the idea behind court-awarded prejudgment interest is to compensate the claimant for the loss of use of his money from the time of breach to the time of judgment.

As the concept of compensation including interest developed, the distinction between liquidated and unliquidated damages became important. Traditionally, courts only held a defendant liable for interest on liquidated damages, or those damages with a reasonably ascertainable market value.\textsuperscript{28} The basis for the distinction between liquidated and unliquidated damages is that the defendant should not have to pay interest on damages that cannot be deter-

\begin{itemize}
\item \textsuperscript{22} See \textit{Settles}, 322 Md. at 557-59, 588 A.2d at 804-05.
\item \textsuperscript{23} \textit{Id.} at 558, 588 A.2d at 804-05.
\item \textsuperscript{24} \textit{Id.} In each case, the circuit court refrained from awarding prejudgment interest based on reasoning different than that of the district courts. In \textit{Settles}, the circuit court found that it could not "substitute its judgment for that of the trial judge and find a clear abuse of discretion." Brief of Petitioner at 5, \textit{Settles} (Nos. 91-73 to -75). In \textit{Muenze} and \textit{Royal}, the circuit court denied prejudgment interest but expressed its confusion regarding the issue of prejudgment interest, stating that "there are a lot of these cases floating around and we are going to need some guidance." \textit{Id.}
\item \textsuperscript{25} \textit{See Settles}, 322 Md. at 560, 588 A.2d at 805. The cases were consolidated for purposes of appeal. \textit{Id.}
\item \textsuperscript{26} See 47 C.J.S. \textit{Interest & Usury} § 27 (1982).
\item \textsuperscript{27} Prejudgment interest is compensation "allowed by law as additional damages for loss of use of the money due as damages, during the lapse of time since the accrual of the claim." \textit{Charles T. McCormick, Damages} § 50, at 205 (1935).
\item \textsuperscript{28} \textit{Id.}
mined by the defendant prior to judgment. Thus, the perspective of the defendant dictates the distinction that has a profound effect on the outcome of civil actions involving a claim for prejudgment interest.

Jurisdictions have approached the award of prejudgment interest in one of three ways; usually the choice depends on the approach taken to liquidated damages. The traditional approach allows for the recovery of prejudgment interest only when parties to a contract have expressly agreed to the provision of interest, or when a legislative act provides for interest under certain circumstances. Under no circumstances, however, may a plaintiff recover interest on an unliquidated damages claim under this approach. A majority of jurisdictions have rejected the strict traditional approach because it does not adequately compensate creditors.

Many state courts use the discretionary approach to prejudgment interest. These states may have statutes in which the power to grant or deny interest lies with the jury or judge. In most cases, however, discretion to grant prejudgment interest lies with the judiciary. Although the discretionary approach clearly recognizes the


30. For an extensive discussion of the three different approaches, see Anthony E. Rothschild, Comment, Prejudgment Interest: Survey and Suggestion, 77 NW. U. L. REV. 192 (1982).

31. Id. at 200. Illinois courts employ this strict standard for awarding prejudgment interest. See, e.g., Spagat v. Schak, 473 N.E.2d 988, 993-94 (III. App. Ct. 1985) (involving a statute providing for prejudgment interest when monies are due on "any bond, bill, promissory note, or other instrument of writing"); Gonzalez v. Danaher, 332 N.E.2d 603, 604-05 (III. App. Ct. 1975) (stating that "[i]nterest is a creature of statutes and is recoverable only by reason of a statute or contract").

32. In traditional approach jurisdictions, even if the statute allows prejudgment interest, the claim must meet a second requirement that the amount due be a fixed or easily ascertainable amount. See Spagat, 473 N.E.2d at 993.

33. Rothschild, supra note 30, at 204.

34. See id.; e.g., General Elec. Supply Co. v. Southern New England Tel. Co., 441 A.2d 581, 592 (Conn. 1981) (terming the allowance of interest an equitable concern within the discretion of the trial court). Some states use a modified discretionary approach to awards of prejudgment interest. A modified discretionary approach allows for the award of prejudgment interest without judge or jury discretion under certain circumstances. In Maryland, the exceptions to the discretionary approach are established in case law. See infra notes 42-44 and accompanying text. In California, the exceptions to the discretionary approach are established by statute. See, e.g., CAL. CIV. CODE § 3289.5 (West 1985) (allowing an award of prejudgment interest at the legal rate on retail installment contracts).

35. See Rothschild, supra note 30, at 204 & n.73 (setting out statutes).

36. Id. Under some circumstances, federal courts in nondiversity cases use the discretionary method to determine awards of prejudgment interest. See Sharp v. Coopers &
claimant's need for compensation between the date of injury and the date of trial, it lacks consistency. While some courts that apply this approach still cling to the distinction between liquidated and unliquidated damages, other courts attempt to disguise interest as some other form of compensation in order to avoid the liquidated-unliquidated distinction. Under this approach, no guidelines limit the judicial exercise of discretion, and, thus, there is no guarantee that a claimant will recover prejudgment interest.

Finally, several jurisdictions have statutes or judicial rules mandating the award of prejudgment interest under certain circumstances. This approach removes the uncertainty inherent in the discretionary approach because it standardizes the method for awarding prejudgment interest, leaving behind the distinction between liquidated and unliquidated damages.


37. See, e.g., Coale v. Dow Chem. Co., 701 P.2d 885, 890 (Colo. App. 1985) (refusing award of prejudgment interest on punitive damages due to unliquidated nature of such damages); Hochman v. American Family Ins. Co., 673 P.2d 1200, 1202-03 (Kan. App. 1984) (awarding prejudgment interest in breach of warranty action in which consequential damages were determinable, and therefore liquidated, at the time of contract). But cf. Crofters, 525 F. Supp. at 1140 (awarding prejudgment interest on securities claim without regard to the liquidation requirement); General Elec. Supply, 441 A.2d at 592 (stating that a claimant’s entitlement to interest is not automatically defeated if the claim is unliquidated).

38. For a discussion of how courts have manipulated the term “interest” in order to award prejudgment interest, see Rothschild, supra note 30, at 205-06.

39. Id. at 208-09.

40. Id. at 208-09 & nn. 97-98 (setting out statutes and rules). New York law automatically awards prejudgment interest on damages arising from breach of contract or deprivation of property as a matter of right, the rate to be determined at the discretion of the trial judge. See N.Y. CIV. PRAC. LAW § 5001(a) (McKinney 1963). There are a number of other states that provide for interest by statute. See, e.g., ALASKA STAT. § 9.30.070 (Supp. 1991); CAL. CIV. CODE § 3289 (West Supp. 1991); COLO. REV. STAT. § 5-12-106 (Supp. 1990); MICH. COMP. LAWS ANN. § 600.6013 (West Supp. 1991); N.H. REV. STAT. ANN. § 524:1-b (1974).

In Busik v. Levine, 307 A.2d 571 (N.J. 1973), the Supreme Court of New Jersey affirmed the validity of N.J. R. 4:42-11(b), which authorizes the judicial award of prejudgment interest in tort actions at a rate of six percent per annum, noting that "the adoption of the rule does not foreclose holders of other unliquidated claims from contending the circumstances which attend their scene are so like the circumstances here involved that interest should also be allowed to them." 307 A.2d at 583.

41. Neither the New York statute nor the New Jersey rule requires the court to consider whether the damages are liquidated or unliquidated. This approach simplifies the determination by the court and allows for adequate compensation to the plaintiff. Rothschild, supra note 30, at 218.

Rothschild’s Comment suggests an alternative approach to the award of prejudgment interest. In order to arrive at the ultimate goal of full compensation to the plaintiff, the author suggests that interest-mandating statutes should allow interest from the
b. Maryland Law.—(1) Prejudgment Interest in General.—Traditionally, Maryland courts have employed a modified discretionary approach when awarding prejudgment interest.\textsuperscript{42} This approach is termed “modified” because certain exceptions entitle creditors to recover interest as a matter of right, without regard to judicial discretion. These exceptions are well established by Maryland case law.\textsuperscript{43} This modified discretionary approach differs from the mandatory interest approach in that the former approach limits the recovery of interest to claims for liquidated damages. Therefore, under Maryland law, a claimant must be able to identify the obligation as a sum certain owed at the time of breach in order to recover prejudgment interest.\textsuperscript{44}

(2) Prejudgment Interest & RISA.—Prior to \textit{Settles}, a secured creditor had no opportunity to collect prejudgment interest on a deficiency balance resulting from the repossession and resale of personal property originally purchased under an installment sales agreement. The Court of Appeals had ruled previously that RISA\textsuperscript{45} prohibited such an award of prejudgment interest.\textsuperscript{46} Although Maryland courts customarily awarded creditors prejudgment interest in actions concerning breach of contract and breach of promise date the cause of action accrues, rather than the date of filing. Such a provision would result in complete compensation to creditors because it would allow them to recover the contract rate of interest they were entitled to before repossession. \textit{Id.} at 218-19. The author also suggests that standardized prejudgment interest rates should be eliminated in favor of rates adjusted according to an index of current economic indicator averages. See \textit{id.} at 220-21.

\textsuperscript{42} See, e.g., David Sloane, Inc. v. Stanley G. House \& Assocs., 311 Md. 36, 53, 532 A.2d 694, 697 (1987); I.W. Berman Properties v. Porter Bros., Inc., 276 Md. 1, 15-20, 344 A.2d 65, 74-77 (1975); Affiliated Distillers Brands Corp. v. R.W.L. Wine and Liquor Co., 213 Md. 509, 516, 132 A.2d 582, 586 (1957) (“The general rule is that interest should be left to the discretion of the jury, or the Court when sitting as a jury.”).

\textsuperscript{43} See \textit{Affiliated Distillers}, 213 Md. at 516, 132 A.2d at 586. Examples of such exceptions are “cases on bonds or on contracts, to pay money on a day certain, and cases where the money has been used.” \textit{Id.} Under these circumstances, interest is recoverable as a matter of right. \textit{Id.} None of these cases, however, had been applied to the terms of sales agreements subject to RISA until the court’s decision in \textit{Settles}.

\textsuperscript{44} \textit{I.W. Berman}, 276 Md. at 15, 344 A.2d at 74. For an overview of Maryland cases concerning what constitutes a sum certain, see \textit{id.} at 15-19, 344 A.2d at 74-76.

\textsuperscript{45} RISA states, in pertinent part, that “the finance charge under an installment sale agreement . . . may be computed . . . on the actual unpaid principal outstanding from time to time.” Md. COM. LAW II CODE ANN. § 12-611 (1990). In addition, § 12-612 states that the buyer has the right to “prepay at any time, without penalty, all or part of the outstanding balance” and that if the buyer pays the balance in full before maturity, “the holder immediately shall refund to him a portion of the finance charge.” \textit{Id.} § 12-612(b), (c).

\textsuperscript{46} See Union Trust Co. v. Tyndall, 290 Md. 102, 103, 428 A.2d 428, 428 (1981).
to pay money on a certain day, the Court of Appeals determined in *Union Trust Co. v. Tyndall* that such interest is inconsistent with the legislative intent behind RISA. Thus, under *Tyndall*, if a buyer under an installment sales agreement defaulted on payment and the creditor resold the property to cover the balance due, the buyer would not be responsible for paying prejudgment interest on any deficiency balance resulting after resale.

In *Tyndall*, the Court of Appeals denied the availability of prejudgment interest to a creditor seeking to recover finance charges under an installment sales agreement. The facts of *Tyndall* are strikingly similar to those in *Settles*. Tyndall had purchased an automobile under an installment sales agreement; he paid a portion of the price as a downpayment and financed the unpaid balance at an annual rate of 15.17% to be paid in 48 monthly installments. After making several consecutive late payments, Tyndall surrendered his rights to the automobile by executing a voluntary repossession agreement. Union Trust, the creditor, sold the automobile at a private sale and subtracted the proceeds of the sale and insurance rebates from the balance owed by Tyndall. Union Trust filed suit to recover the deficiency balance. Tyndall failed to give notice of intent to defend, but appeared in court objecting to the claim. The trial judge refused to award the bank the full amount of the claim because the bank included finance charges in its calculation of the deficiency balance. Upon appeal by the bank, the circuit court affirmed the holding of the trial court. The Court of Appeals granted certiorari to decide whether a creditor is entitled to recover finance charges after termination of the initial installment sales agreement.

Based on its interpretation of RISA, the court determined that a

47. *See, e.g., I.W. Berman, 276 Md. at 21-25, 344 A.2d at 77-79 (awarding prejudgment interest at the legal rate on unpaid balances due a construction contractor); Isle of Thye Land Co. v. Whisman, 262 Md. 682, 708-09, 279 A.2d 484, 498 (1971) (awarding prejudgment interest on a certain sum of money that was to be paid on a specified date to the administratrix of an estate).*
49. *See id.* at 113, 428 A.2d at 433.
50. *See id.* at 102, 428 A.2d at 428.
51. *Id.* at 103, 428 A.2d at 428.
52. *Id.*
53. *Id.* at 103-04, 428 A.2d at 428.
54. *Id.* at 104, 428 A.2d at 428.
55. *Id.*
56. *Id.,* 428 A.2d at 429.
57. *Id.*
58. *See id.*
secured creditor may not include finance charges in a deficiency balance resulting from the repossession and resale of the collateral securing the debt. The Tyndall court focused on the fact that RISA was enacted as a consumer protection statute, commenting that RISA "is a carefully constructed and carefully thought out piece of consumer protection legislation." The court then determined that the resale of repossessed property for the purpose of satisfaction of the debt constituted a prepayment under section 12-620 of RISA. The court concluded:

Given the fact that whether one talks in terms of finance charges or interest one is speaking economically in terms of compensation for the use of capital and the further fact that [RISA] obviously was intended to protect unsophisticated consumers . . . , we hold that when the General Assembly in 1965 changed the statute so as to render buyers . . . potentially liable for a deficiency it could not and did not intend to make such persons responsible for unearned finance charges.

Thus, the Tyndall decision, the sole Maryland precedent directly on point for the Settles court, stands for three important precepts: that debtors are not responsible for payment of finance charges after the resale of property; that finance charges and interest are essentially the same thing—compensation for the use of capital; and

59. See id. at 113, 428 A.2d at 433.
60. See id. at 105, 428 A.2d at 429.
61. Id. at 110, 428 A.2d at 432.
62. See id. at 111-12, 428 A.2d at 432-33.
63. See, e.g., Rothman v. Silver, 245 Md. 292, 226 A.2d 308 (1967). Previous Maryland case law differentiated between the terms by describing finance charges as "amounts payable for the right to purchase goods over a period of time," and interest as paying for "the privilege of borrowing money." Tyndall, 290 Md. at 111, 428 A.2d at 432 (citing Rothman, 245 Md. at 292, 226 A.2d at 308; Falcone v. Palmer Ford, 242 Md. 487, 219 A.2d 808 (1966)).
64. See Tyndall, 290 Md. at 111-12, 428 A.2d at 433.
65. See id. at 112, 428 A.2d at 433. "If a buyer elects to prepay all or any part of the unpaid time balance he is entitled to a readjustment of the finance charge." Id.
66. Id. at 113, 428 A.2d at 433.
that debtors are not responsible for payment of prejudgment interest after the resale of property.\textsuperscript{67}

3. The Court's Reasoning.—The Settles decision differs from Tyndall by allowing the recovery of prejudgment interest on a deficiency balance remaining on an installment sales agreement. Although the Settles court relied solely upon the reasoning employed in Tyndall to conclude that finance charges at the agreement rate were not recoverable under RISA,\textsuperscript{68} the court abandoned the other two precepts established in Tyndall, concluding that the secured creditor may be awarded prejudgment interest at the legal rate of six percent.\textsuperscript{69} In so doing, the court re-established the difference between finance charges and prejudgment interest, a distinction that the court in Tyndall expressly refuted.\textsuperscript{70}

In Settles, the court characterized the recovery of prejudgment interest at the agreed finance charge rate and the finance charges themselves as synonymous.\textsuperscript{71} Based upon the precedent established by Tyndall, the court denied recovery of interest at the contract rate.\textsuperscript{72} The court chose to differentiate between an award of prejudgment interest at the agreed finance charge rate and an award of interest at the legal rate, however, stating that "since RISA is silent on the issue of whether prejudgment interest may be awarded in the suit to recover the deficiency for which the buyer is liable under [section] 12-626(e)(4), we look to the law governing recovery of prejudgment interest generally."\textsuperscript{73}

After examining case law relevant to prejudgment interest but unrelated to RISA,\textsuperscript{74} the court determined that the agreements executed by the buyers in Settles qualified as instances in which "the obligation to pay and the amount due had become certain, definite, and liquidated by a specific date prior to judgment."\textsuperscript{75} Further, be-

\begin{itemize}
\item \textsuperscript{67} See id.
\item \textsuperscript{68} See Settles, 322 Md. at 560-62, 588 A.2d at 806-07.
\item \textsuperscript{69} See id. at 566, 588 A.2d at 808.
\item \textsuperscript{70} See supra text accompanying notes 63-64.
\item \textsuperscript{71} See 322 Md. at 562, 588 A.2d at 807. "The Bank is not entitled to recover finance charges beyond the date of resale of the repossessed goods as prejudgment interest just as it is not entitled to recover such charges . . . pursuant to § 12-626(e)(2)." Id.
\item \textsuperscript{72} See id.
\item \textsuperscript{73} Id. at 563, 588 A.2d at 807. While the statute itself is silent on the subject of prejudgment interest, the precedent established in Tyndall certainly is not. In his dissent in Settles, Judge Eldridge disapproved of the majority's disregard for Tyndall. "The majority's holding today improperly erodes the protection of RISA as interpreted by this Court in Tyndall . . . ." Id. at 567, 588 A.2d at 809 (Eldridge, J., dissenting).
\item \textsuperscript{74} See supra notes 42-44 and accompanying text.
\item \textsuperscript{75} 322 Md. at 564, 588 A.2d at 807. The certain, definite, and liquidated sum owed
cause the award of prejudgment interest at the legal rate was not within the scope of RISA, the court reversed the trial courts' discretionary decisions not to award such interest. Finally, the court determined that any prejudgment interest awarded on remand would be calculated using the date after the resale when the buyer in default was notified of the deficiency balance as the date from which the interest was to accrue.

4. Analysis.—Removing the issue of recovering prejudgment interest from the constraints of RISA enabled the Court of Appeals to validate its decision to award such interest based on cases unrelated to consumer protection law. By awarding interest at the legal rate, the court disregarded the extensive legislative interpretation of RISA and policy arguments established in Tyndall. The Settles court legitimized the removal of claims from the scope of RISA, allowing the lower courts to avoid the precedent established in Tyndall and ensure that creditors are awarded prejudgment interest at the legal rate—even when such an award seems to violate RISA.

Although it did not expressly overrule the precedent established by Tyndall, Settles changes the law by making prejudgment in-
terest available to creditors engaged in retail installment sales agreements.\textsuperscript{81} \textit{Settles} provides creditors with the remedy of prejudgment interest on the deficiency balance as a means of compensating the creditor for the buyer's use of the balance due.\textsuperscript{82}

There is little doubt that the \textit{Settles} opinion was motivated in part by economic policy considerations. \textit{Tyndall} was decided in 1981, a period of economic growth, development, and excess lending by creditors. During the prosperous early and mid-eighties, banks worried little about the long term effects of lending small amounts to consumers because of burgeoning corporate accounts. Moreover, the consumer protection movement gained momentum during the early eighties. The \textit{Tyndall} decision was a product of both the protectionist movement and the prosperous economy.\textsuperscript{83}

One decade and countless lending institution collapses later, the \textit{Settles} decision realigns the interests to be protected, providing creditors with some economic relief from the severe recession. Because the current financial crisis suffered by Maryland's lending institutions detrimentally affects the state's economy, including the individual consumer, the \textit{Settles} opinion appears to be appropriate.

The ramifications of \textit{Settles} should prove favorable to secured creditors such as First Virginia who, under the current standard, will be assured of a six percent return on deficiency balances owed by debtors under installment sales agreements. To some extent, this assurance of compensation will offset costly factors involved in litigation, such as delays in scheduling by courts and delay tactics by defendants.\textsuperscript{84}

Nonetheless, the \textit{Settles} decision will not necessarily stifle the consumer protection movement in Maryland. The decision only holds consumers executing an installment sales agreement responsible for prejudgment interest at the legal rate, because any rate in excess of the legal rate would be viewed as an additional finance charge forbidden under RISA. This six percent cap on prejudgment interest is reasonable when compared to the original finance charge rates that creditors generally charge under sales agreements.\textsuperscript{85} Further, these consumers will only be responsible for prejudgment in-
interest accruing after the collateral is sold and a final notice of the balance due is received.

Defaults in repayment of loans by individuals and corporations, as well as unwise lending practices by financial institutions, may have been contributing causes of the current recession. The decision in *Settles* can be viewed as an attempt by the Court of Appeals to encourage consumers and lenders to exercise better judgment when borrowing and lending. Buyers executing installment sales agreements should be aware of the possibility of being liable for prejudgment interest if they default on payments under such agreements. In addition, lending institutions must adhere to stricter credit standards if they expect to avoid bankruptcy and maintain government trust. The *Settles* decision allows for partial losses to both the consumer and the lender—losses that could have been avoided had each party exercised better judgment.

In the area of installment sales agreements, *Settles* demonstrates a moderate approach to tackling the prejudgment interest problem. On a larger scale, however, the opinion may represent an attempt by the judiciary to influence the legislature to enact a comprehensive mandatory interest statute that requires only that the damages assessed be liquidated. Such a statute would benefit parties to lawsuits and the Maryland judicial system in various ways. First, a mandatory interest statute would justly compensate plaintiffs for the loss of the use of their money during pending litigation. Also, a mandatory interest statute would discourage defendants from postponing settlement negotiations to prolong litigation. This effect would lead to a quicker rate of settlement in an overcrowded judicial system. Finally, enactment of a mandatory statute would eradicate the confusion surrounding the application of prejudgment interest and rid the judicial system of any inconsistencies regarding actions that allow recovery of interest, the liquidation requirement, and awardable rates. Such a statute could produce the conformity in judicial decisions that the current approach lacks.

86. It would be extremely difficult for defendants to assess properly the extent of damages in certain tort actions that encompass compensatory damages for items such as pain and suffering.

87. Thomas F. Londrigan, *Prejudgment Interest: The Case For*, Ill. B.J. 62, 64-65 (Oct. 1983). Such a statute would eliminate the advantage for defendants to prolong litigation in hope of a lower settlement, because they would be charged continuously for the damages amount awarded to the plaintiff from the time of filing the cause of action (or even the time of breach) until settlement or judgment at trial. *Id.*
5. Conclusion.—Settles is more a reflection of the troubled economy than a radical progression in creditors’ rights law. The decision, however, indicates a movement in the Maryland courts toward more favorable compensation for the plaintiff\(^8\) in an area of law previously favoring the defendant. Settles extends the actions allowing prejudgment interest to include situations involving installment sales agreements breached by the debtor. Furthermore, the decision limits the factual discretionary power of the trial courts in these actions through its allowance of appellate review regarding the scope of prejudgment interest under specific circumstances. Finally, the judicial activism in policymaking displayed by the Court of Appeals demonstrates the need for the Maryland Assembly to clarify its position regarding prejudgment interest, specifically under RISA, and generally, through a mandatory interest statute.

B. The Prudent Investor Rule and the Duty to Invest Idle Trust Funds

In *Maryland National Bank v. Cummins*,\(^9\) the Court of Appeals upheld the trial court’s ruling that certain practices used by a bank trustee in administering personal trust assets violated the prudent investor rule.\(^9\) The court held that when a failure to invest trust assets is found to violate the rule, the appropriate measure of damages to award the beneficiary is the lost return on uninvested assets, as opposed to the profits received by the bank from the use of those assets.\(^9\) In addition, the court held that the prejudgment interest awarded should be simple interest computed at the legal rate of six percent per annum.\(^9\) Finally, the court found that an award of a ten percent reduction of the bank trustee’s commissions was not an abuse of discretion.\(^9\)

In *Cummins*, the court adhered to its prior decisions involving bank trustees and the prudent investor rule and also applied well-established common-law trust principles. But *Cummins* also presented issues relating to aspects of banking, trust accounting, and data processing as they existed in the 1970s and early 1980s, for which there is little precedent. Consequently, the *Cummins* decision makes Maryland one of the first states to expand retroactively the

---

88. Full compensation to the plaintiff is a primary goal of civil actions in American jurisprudence. *McCormick*, *supra* note 27, § 5.
90. See *id.* at 580-95, 588 A.2d at 1209-17.
91. See *id.* at 597, 588 A.2d at 1218.
92. See *id.* at 599-600, 588 A.2d at 1219-20.
93. See *id.* at 601, 588 A.2d at 1220.
scope of the traditional prudent investor rule to encompass the duty of a bank trustee to invest temporarily idle trust assets.

Although the court's holding imposes a strict standard on bank trustees, its prospective impact on the trustees will be minimal. Developments in investment technology and short term investment vehicles now allow most bank trustees to keep trust assets fully invested on a daily basis. Moreover, current regulations of the Office of the Comptroller of the Currency (OCC) require that national banks obtain the maximum available return on idle trust assets.

1. The Case.—The plaintiffs were the income beneficiaries of a testamentary trust funded in September 1972 and administered by the trust department of Maryland National Bank (MNB). Prior to hearing the case, the circuit court certified the plaintiffs to represent a class consisting of the life tenants of all personal trusts administered by MNB from September 1, 1972 through July 26, 1982 ("the class period").

During the class period, MNB administered an average of 2000 personal trusts pursuant to specific internal cash management policies. First, MNB deposited all cash receipts directly into a demand deposit account (DDA), which did not earn interest. Second, MNB left income cash received on behalf of the trusts in the DDA until scheduled disbursement to the beneficiaries. Finally, for those trusts having assets in excess of $150,000, MNB invested principal cash only in increments of $1000. Although not recorded until 1976, these policies were in effect throughout the class period.

95. See infra notes 206-208 and accompanying text.
96. Cummins, 322 Md. at 573, 588 A.2d at 1206.
97. Id.
98. Id.
99. Id.
100. Id.
101. Id. at 573-74, 588 A.2d at 1206. For smaller trust accounts, MNB invested assets into collective investment funds (CIFs) in increments of $500. Id. at 574, 588 A.2d at 1206-07; see 12 C.F.R. § 9.18 (1992) (allowing collective investment of common trust funds contributed to by bank as trustee).
102. Cummins, 322 Md. at 574, 588 A.2d at 1207. Throughout the class period, MNB operated an automated trust accounting system that essentially treated the separate trusts as one common trust by using a single DDA for the receipt and disbursement of cash and the purchase and sale of assets. Id. at 576, 588 A.2d at 1208-09.

However, due to the timing differences between the debit and credit of cash in the trust accounts and the receipt of cash, the DDA trailed the trust accounting. Id. at 578,
As a result of its cash management policies, several benefits accrued to MNB. For example, the bank had the advantage of having trust cash available for its commercial lending practice without incurring interest costs.\textsuperscript{103} Further, pursuant to regulations of the OCC, MNB was able to reduce its reserve requirements by classifying a percentage of the uninvested trust cash held in the DDA as time deposits.\textsuperscript{104}

Throughout the class period, MNB furnished each beneficiary with a statement reflecting all trust transactions, as well as any principal or income cash left uninvested.\textsuperscript{105} In addition, MNB made all allocations to the individual trusts necessary for the proper functioning of its accounting system, while also abiding by federal regulations.\textsuperscript{106}

The plaintiffs contended that MNB's cash management practices represented an imprudent failure to invest cash held in trust.\textsuperscript{107} At trial, MNB sought to justify these practices principally on the grounds that further investment would have been prohibitively expensive.\textsuperscript{108} The trial judge was unconvinced and entered judgment against MNB for $3,857,129.69, consisting of lost return on uninvested cash, compounded prejudgment interest, and a ten percent reduction of the bank's commissions earned on the trusts during the class period.\textsuperscript{109} MNB appealed, challenging both liability and the measure of relief fashioned. On its own motion, the Court of Appeals granted certiorari prior to hearing by the Court of Special Appeals.\textsuperscript{110} On appeal, MNB advanced three main reasons that it believed the trial court decision was clearly erroneous: (1) MNB's policy complied with OCC requirements; (2) MNB's policy conformed to the "universal industry practice"; and (3) further invest-
ment of trust cash would have required a prohibitively expensive allocation of income.\footnote{111} The Court of Appeals found that MNB’s evidence was sufficient to support its claims;\footnote{112} however, the evidence did not rise to the level of requiring judgment on behalf of MNB as a matter of law.\footnote{113} Because MNB’s witnesses did not convince the factfinder that MNB was acting as a prudent investor and “the totality of the evidence did not present a question of law,”\footnote{114} the decision of the trial court was affirmed.\footnote{115}

2. Legal Background.—

a. Duty of Loyalty.—The duty of loyalty owed by a trustee to the beneficiary is one of the most fundamental principles of trust law.\footnote{116} Under this duty, a trustee cannot use the property of the beneficiary, or profit at the trustee's expense, unless authorized to do so by the terms of the trust or under permission of a court.\footnote{117} When such self-dealing occurs, the trustee will be liable to the beneficiary for any profits made regardless of whether the activity injures the beneficiary.\footnote{118}

Banks generally operate both a trust department and a com-

\footnote{111. Id. at 582, 588 A.2d at 1211. MNB also asserted, as a fourth justification, that its cash management policies provided significant benefits to the trust beneficiaries. Id. at 583, 588 A.2d at 1211. The court summarily rejected this argument, determining that these benefits resulted from the economics of administering a number of trusts, and not from the failure to pay interest on trust cash. See id. In addition, MNB asserted that free checking and overdraft protection received by the beneficiaries alone justified its policies. Id. The court found, however, that MNB’s audit report of 1976 showed that MNB’s policy was to limit overdrafts on principal and income cash; therefore, the beneficiaries received no benefit. See id. at 583-84, 588 A.2d at 1211. The bank might argue that its ability to profit from “float” results in a net gain to beneficiaries by reducing direct fees. Levmore argues, however, that when a grantor chooses a large bank such as MNB, one of the things that attracts him is the economies of scale that the bank’s size offers. See Levmore, supra note 94, at 833. Thus, it would be “surprising” if large banks could now justify “float” revenues by pointing to lower direct fees. Id.}

\footnote{112. See Cummins, 322 Md. at 583, 588 A.2d at 1211.}

\footnote{113. Id.}

\footnote{114. Id.}

\footnote{115. Id. at 602, 588 A.2d at 1221.}

\footnote{116. Giankos v. Magiros, 238 Md. 178, 185-86, 208 A.2d 718, 722 (1965) (“There is no equitable principle more firmly established in our jurisprudence than that a fiduciary is under a duty of loyalty to his beneficiaries and cannot use the property of a beneficiary for his own purposes.”); see also RESTATEMENT (SECOND) OF TRUSTS § 170 (1959) (stating that the “trustee is under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary”).}

\footnote{117. Giankos, 238 Md. at 186, 208 A.2d at 723 (citing RESTATEMENT (SECOND) OF TRUSTS, § 2 cmt. b); Carey v. Safe Deposit & Trust Co., 168 Md. 501, 514, 178 A. 242, 247 (1935).}

\footnote{118. See Carey, 168 Md. at 514, 178 A. at 247.}
commercial banking operation; when a bank deposits trust funds in its commercial department, an inherent conflict of interest is created because the use of the deposited trust funds clearly benefits the bank. Since its holding in Real Estate Trust Co. v. Union Trust Co., the Court of Appeals has consistently permitted such deposits. In Real Estate Trust Co., the court stated that if a bank trustee "could take money from others on deposit, it surely could open an account with itself when acting as trustee." In Ghingher v. O'Connell, the court reaffirmed the Real Estate Trust Co. holding, noting that when a bank acting as trustee deposits trust cash with itself, the relationship between the bank and the trust becomes one of debtor and creditor. Consequently, the funds represent a loan made by the trust to the bank, a transaction not prohibited by principles of trust law. Although not a per se breach of trust, the fact that such a loan is made without interest accruing to the creditor-trust may violate the prudent investor rule.

119. See Van de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n, 251 Cal. Rptr. 530, 534 (1988); In re Conservatorship of Pelton, 183 Cal. Rptr. 188, 191 (1982); see also Herman, supra note 104, at 107-18. Comments by a respected trust law authority summarize the conflict:

One of the main sources of its income as a bank is the loaning of the balances which are on deposit with it and the resultant receipt of interest. From the point of view of the stockholders of the bank it is desirable to secure the largest possible amount of deposits. As a trustee, on the other hand, the corporation should seek the safest place of deposit and the most advantageous terms . . . . In its desire to maintain its deposits at a high figure, the bank may be tempted to leave trust funds on deposit for an unnecessarily long time or in an unnecessarily large amount, where its duty as trustee would lead to investment of idle balances.


120. See, e.g., supra notes 103-104 and accompanying text.

121. 102 Md. 41, 61 A. 228 (1905).

122. See, e.g., id. at 53-55, 61 A. at 233-34 (finding interest penalty charged to trustee, who kept trust accounts in its own name, inappropriate); Newark Distrib. Terminals Co. v. Hospelhorn, 172 Md. 291, 298, 191 A. 707, 710 (1937) (reaffirming Real Estate Trust Co.); Ghingher v. O'Connell, 165 Md. 267, 273, 167 A. 184, 186 (1933) (determining that self-depositing is permissible so long as there is no breach of trust).

123. 102 Md. at 54, 61 A. at 233.

124. 165 Md. 267, 167 A. 184 (1933).

125. See id. at 272, 167 A. at 186.

126. See Cummins, 322 Md. at 596, 588 A.2d at 1217; see also Newark Distrib. Terminals Co., 172 Md. at 298, 191 A. at 710; Ghingher, 165 Md. at 222, 167 A. at 186.

127. See Cummins, 322 Md. at 590-91, 588 A.2d at 1215; see also Van de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n, 251 Cal. Rptr. 530, 535 (1988) ("[T]he right to self-deposit does not overcome the duty to maximize returns on investment of trust funds."); Newark Distrib. Terminals Co., 172 Md. at 300, 191 A. at 711 ("The mere deposit of the
The majority of states agree with the *Real Estate Trust Co.* decision and statutorily authorize the self-depositing of trust funds by bank trustees.\(^{128}\) In many jurisdictions, statutory guidelines require that sufficient securities first be set aside as collateral for the protection of the deposit.\(^{129}\) Federal banking statutes and regulations also mandate similar restrictions.\(^{130}\) Nevertheless, in Maryland, the acceptance of this form of self-dealing has endured only as a judicial creation that the General Assembly has never altered.\(^{131}\)

### b. Prudent Investor Rule

Under the *Restatement (Second) of Trusts*, the degree of care to be exercised by the trustee in investing the assets of the trust is governed by the prudent investor standard.\(^{132}\) This standard requires that the trustee "exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."\(^{133}\)

In 1830, the prudent investor rule was judicially created in *Harvard College v. Armory*.\(^{134}\) Maryland first embraced the prudent investor rule in 1884 in *McCoy v. Horwitz*,\(^{135}\) when the Court of Ap-

---


\(^{131}\) See *Cummins*, 322 Md. at 597, 588 A.2d at 1218.

\(^{134}\) See *Restatement (Second) of Trusts* § 174 (1959).

\(^{132}\) *Id.* § 174 cmt. a.

\(^{131}\) 26 Mass. 446 (1830). Prior to *Armory*, courts had relied on English law, which was construed as limiting trust investments to government or real property securities. *Bogert & Bogert*, supra note 119, § 613. Due to the lack of equivalent investment vehicles in the United States, courts had difficulty applying the English law. See *Austin Fleming, Prudent Investments: The Varying Standards of Prudence*, 12 *Real Prop. Prob. & Tr. J.*, 243, 243 (1977). Thus, in defining the prudent investor rule, the Massachusetts court provided American trustees with greater flexibility in choosing suitable trust investments. The rule stated in *Armory* is: "All that can be required of a trustee to invest is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs . . . ." 26 Mass. at 461; see *Bogert & Bogert*, supra note 119, § 613; David M. Tralins, *Contemporary Fiduciary Investments: Why Maryland Needs the Prudent Man Rule*, 12 *U. Balt. L. Rev.* 207, 210 (1983); cf. *Restatement (Second) of Trusts*, § 174 (employing the standard of the man of ordinary prudence).

\(^{135}\) 62 Md. 183 (1884).
peals held that the trustee, in making investments on behalf of the trust, should not be held liable for losses that result from an "honest mistake in judgment." The rule was clearly articulated in Gilbert v. Kolb, in which the court held the trustee liable for losses resulting from the trustee's investment in certain mortgages. In holding the trustee liable to the trust for these losses, the court defined a "judicious investment" as one a "prudent man would [have made] in the management of his own affairs."

Although many states have expressly adopted the standard by statute, Maryland has consistently reaffirmed its adherence to the prudent investor rule by judicial decision. The Court of Appeals most recently explained the rule in Shipley v. Crouse, in which the court stated: "A trustee is required to manifest in all his management of the trust the care, skill, prudence, and diligence of an ordinarily prudent man engaged in similar business affairs and with objectives similar to those of the trust in question."

The court later refined the rule in Board of Trustees of Employees' Retirement System v. Mayor of Baltimore City, stating that the trustee's duty "is not necessarily to maximize the return on investments but rather to secure a 'just' or 'reasonable' return." Thus, in Maryland, the prudent investor rule has evolved into a flexible standard, encompassing every aspect of the trustee's activity, yet focusing on the trustee's duty to secure a reasonable return for the beneficiaries.

Implicit in the prudent investor rule is the duty of the trustee to use reasonable care and skill to make the trust property productive. In the case of money, this duty normally requires the trustee to invest it so that it will produce income. However, a trustee may hold funds on deposit for a reasonable time, depending upon

---

136. Id. at 190.
137. 85 Md. 627, 37 A. 423 (1897).
138. See id. at 636, 37 A. at 424.
139. Id.
140. See supra note 128 and accompanying text.
142. 279 Md. 613, 370 A.2d 97 (1977).
143. Id. at 621, 370 A.2d at 103 (quoting GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES, § 541 (2d ed. 1960)).
144. 317 Md. 72, 562 A.2d 720 (1989).
145. Id. at 107, 562 A.2d at 737.
such circumstances as the amount of the deposit, the possibility of finding suitable investments, and the administrative needs of the trust.\footnote{148} Although a bank may legally deposit trust funds into its own commercial operations,\footnote{149} it is questionable whether such deposits must be in interest-bearing accounts. Prior to 1980, banks were prohibited from paying interest on demand deposit accounts.\footnote{150} Thus, the issue arose as to whether the bank trustee could properly place trust funds in such accounts or whether the bank trustee's duties required her to place temporarily idle trust cash in some other, interest-bearing vehicle.\footnote{151} At its most basic level, the issue is whether idle trust funds must bear interest.

Although there is a dearth of case law on point, the issue was indirectly addressed by the California Court of Appeals in Van de Kamp v. Bank of America National Trust & Savings Ass'n,\footnote{152} a class action challenging a bank trustee's use of temporarily idle trust funds for its own profit.\footnote{153} The bank had invested all funds awaiting permanent investment or distribution in passbook savings accounts.\footnote{154} Moreover, beginning in 1976, all principal cash in excess of $100 was "swept" into a fund that invested in money market mutual funds; by 1982, all cash was invested "to the penny."\footnote{155} The trial court held that the bank was entitled to profit from this use of idle trust funds and found the bank's practices to be prudent. The appellate court affirmed.\footnote{156}

3. Analysis.—The Cummins decision represents a case of first impression for the Court of Appeals. As the court noted, several jurisdictions have found self-depositing bank trustees liable for fail-

\footnote{148} See Lynch v. John M. Redfield Found., 88 Cal. Rptr. 86, 89 (1970); see also Braman v. Central Hanover Bank & Trust Co., 47 A.2d 10, 25 (N.J. Ch. 1946) (stating that "periods of three months, six months and one year have been held to be reasonable"); 2A Austin W. Scott & William F. Fratcher, The Law of Trusts § 181, at 542-43 (4th ed. 1987).
\footnote{149} See supra notes 119-131 and accompanying text.
\footnote{151} See generally 2A Scott & Fratcher, supra note 148, § 181, at 546-50. Throughout the class period, this duty was regulated by OCC Regulation 9, which prescribed that "[f]unds held in a fiduciary capacity by a national bank awaiting investment or distribution shall not be held uninvested or undistributed any longer than is reasonable for the proper management of the account." 12 C.F.R. § 9.10(a) (1982).
\footnote{152} 251 Cal. Rptr. 530 (1988).
\footnote{153} See id. at 532.
\footnote{154} Id. at 538.
\footnote{155} Id.
\footnote{156} See id. at 537-39.
ure to invest assets prudently. Further, given that "[r]easonable persons do not, as a matter of policy, continuously leave uninvested sums up to $999," the burden rested on the trustee to persuade the factfinder that a prudent investor would have left the trust cash in the DDA.

a. Breach of Duty.— Notwithstanding the lack of precedent, the court's application of the prudent investor rule in Cummins is consistent with both its earlier decisions and sound trust law principles. When liquid, short-term investments are readily available and practical, prudent management undoubtedly would require the trustee to invest temporarily idle funds. Questions concerning breach of the prudent investor rule necessarily present mixed questions of fact and law that an appellate court should not overturn unless the lower court's determination is clearly erroneous. Accordingly, the Cummins court properly gave considerable weight to the trial court's con-

157. See, e.g., Manchester Band of Pomo Indians, Inc. v. United States, 363 F. Supp. 1238 (N.D. Cal. 1973) (granting summary judgment against United States when it deposited Indian funds in Treasury at four percent interest when short term government bonds were available at higher yields); Blankenship v. Boyle, 329 F. Supp. 1089 (D.D.C. 1971) (holding trustee liable for breach due to an accumulation of funds in checking account without interest for 20 years); In re Orrantia's Estate v. First Nat'l Bank, 285 P. 266 (Ariz. 1930) (holding executor bank liable for four percent interest for self-depositing funds held without interest for six months); New England Trust Co. v. Triggs, 135 N.E.2d 541 (Mass. 1956) (finding bank trustee liable based on self-depositing over $100,000 for over 2 years); In re Doyle's Will, 79 N.Y.S.2d 695 (1948) (finding testamentary trustee properly surcharged for depositing in special interest account earning approximately one-half of that which could have been earned in a savings account); Reid v. Reid, 85 A. 85 (Pa. 1912) (concluding that the bank trustee breached his duty by self-depositing funds without interest, and finding trustee liable at interest rate paid by it to third parties depositing in similar accounts); In re Estate of Lychos, 470 A.2d 136 (Pa. Super. Ct. 1983) (holding bank trustee liable for failure to invest balance of mortgage proceeds held in trust in an interest bearing account). But see Application of Harris, 146 N.Y.S.2d 730 (1955) (finding self-depositing bank trustee not liable for interest in absence of custom among commercial banks to pay interest on similar accounts), aff'd, 143 N.E.2d 505, cert. denied, 355 U.S. 891 (1957).

158. Cummins, 322 Md. at 581, 588 A.2d at 1210.

159. Id. at 581-82, 588 A.2d at 1210.

160. See supra notes 146-148 and accompanying text.

161. See RESTATEMENT (SECOND) OF TRUSTS § 181 cmt. c (1959); 2A SCOTT & FRATCHER, supra note 148, § 181, at 549. This duty has been held to apply to income cash as well as principal cash. See Lynch v. John M. Redfield Found., 88 Cal. Rptr. 86, 90 (1970) (finding no authority making or discussing a distinction between the types of cash). As one commentator suggests, "it [is] hornbook law that cash should not be left unproductive except for overriding liquidity needs." Martin E. Lybecker, Regulation of Bank Trust Department Investment Activities: Seven Gaps, Eight Remedies, 90 BANKING L.J. 912, 929 (1973).

162. See Gosden v. Mercantile-Safe Deposit & Trust Co., 41 Md. App. 519, 531, 398 A.2d 460, 467 (1979); Md. R. 8-131(c).
clusion that MNB had available a number of feasible modes of investment.\(^{163}\) The Cummins court found the bank's arguments—that such investments were not required to be made by law, that industry standards required no such investment, and that it would have been prohibitively expensive to invest the funds further—to be insufficient to override the trial court's determination of liability.\(^{164}\)

(1) Adherence to OCC Policies and Regulations.—Throughout the class period, MNB was subject to an OCC regulation regarding the investment and distribution of trust funds.\(^{165}\) At trial, the former Chief National Trust Examiner of the OCC testified that MNB's retention of principal cash below $1000 in DDAs complied with this regulation.\(^{166}\) Nevertheless, the court rejected the argument that adherence to OCC regulations presumptively indicates that no breach of duty occurred.\(^{167}\)

---

163. The district court found that a master passbook savings account or individual passbook savings accounts could have been utilized for trust cash at a return of five percent. The court also found that as early as 1976, cash in the DDA could have been invested in money market mutual funds. See Cummins, 322 Md. at 582, 588 A.2d at 1211; accord Van de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n, 251 Cal. Rptr. 530, 538 (1988) (finding that a bank trustee who invested idle trust cash in passbook savings accounts until 1976 and thereafter in money market mutual funds acted prudently). In addition, the trial court found that CIFs could have been utilized more fully with lower participation levels. See Cummins, 322 Md. at 582, 588 A.2d at 1211; supra note 101.

164. See 322 Md. at 602, 588 A.2d at 1221.

165. See supra note 151.

166. Cummins, 322 Md. at 584, 588 A.2d at 1211-12. Although no recent decisions have addressed the issue of federal preemption, the comments of the Supreme Court of Alabama in 1939 in First National Bank v. Basham, 191 So. 873 (Ala. 1939), support MNB's views:

[T]he inference is clear that the examiners were advised of all the matters here complained of, fully disclosed by the records of the Trust Department, and that this course of business was known to and sanctioned by the [C]omptroller [of the Currency]. . . . It is enough to say the General Rule that the administrative construction of the laws by agencies created by law to administer them is to be given much weight. . . . applies with especial force to supervising agencies set up by law to supervise the doings of those engaged in a trust business, matters of so vital concern in a vast business of every day recurrence.

Id. at 880-81. Furthermore, as one commentator noted, the OCC has "long informally prescribed what sound fiduciary principles require." Martin E. Lybecker, Regulation of Bank Trust Department Activities, 82 YALE L.J. 977, 979 (1973).

167. See Cummins, 322 Md. at 584, 588 A.2d at 1212-13. The court relied on a products liability case that held that although a manufacturer's compliance with the Federal Flammable Fabrics Act is evidence of due care, it does not preclude a finding of negligence on part of the manufacturer. See Ellsworth v. Sherne Lingerie, Inc., 305 Md. 581, 602, 495 A.2d 348, 358 (1985), cited in Cummins, 322 Md. at 584, 588 A.2d at 1211-12; see also W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36 (5th ed. 1984). Although products liability cases involve different policy considerations, the court's analogy is helpful.
There is a sound basis for the court's decision: federal regulation of trust departments may afford the beneficiary only limited protection due to the conflicting interests of the OCC. As one commentator has suggested, "[t]he primary goal of the regulators is to protect the solvency of banks by making sure that banks do not leave themselves open to solvency-threatening surcharges. The interest of the regulatory agencies in the fiduciary clients is only an incidental by-product of regulation." Thus, the Cummins court properly dismissed the bank's first argument.

(2) Conformance with Industry Standards.—MNB further argued that it conformed with the universal standards of the industry during the class period. Although there is considerable evidence that during that period most trust departments utilized investment policies similar to MNB's, the court was justified in finding that the practices of "even a majority of commercial banks which operated trust departments" were not controlling. Because a bank receives considerable benefits from the use of idle trust cash in its commercial operations, the temptation to sacrifice trust income for liquidity is great. Therefore, the actions of other banks may re-

169. Id. at 624; see also HERMAN, supra note 104, at 120-21 ("The primary interest of the regulatory authorities is in the solvency of the banks; the function of regulation is often acknowledged to be 'keeping the banks open' by seeing that they do not leave themselves vulnerable to solvency-threatening surcharges." (footnote omitted)).

In June 1990, the OCC proposed an amendment to 12 C.F.R. § 9.10(a) that would clarify the role of state or local law in establishing the standard for the investment of idle trust funds. See 55 Fed. Reg. 26,210 (1990) (to be codified at 12 C.F.R. § 9.10(a)). The proposed amendment would require that funds awaiting investment or distribution be made productive in trust quality investment "[u]nless otherwise provided by specific reference in the governing instrument or by language in local statutory law which specifically refers to the investment of trust funds awaiting investment or distribution." Id. at 26,211. This amendment, which would effectively preempt state judicial decisions, has led commentators to question whether the OCC has such authority, pursuant to 12 U.S.C. § 92a. See John D. Hawke et al., The Authority of National Banks to Invest Trust Assets in Bank-Advised Mutual Funds, 10 ANN. REV. BANKING L. 131, 174-82 (1991).

170. See Cummins, 322 Md. at 584-85, 588 A.2d at 1214.
171. See HERMAN, supra note 104, at 112-14.
172. Cummins, 322 Md. at 586, 588 A.2d at 1213; cf. Levmore, supra note 94, at 830 ("There is no indication that industry practice is sufficient to permit the trustee's profiting from the float.").
173. See Lybecker, supra note 166, at 985. In a 1975 study of trust department practices, Professor Herman found "[m]ost telling . . . the slowness with which banks have developed and improved machinery for keeping trust cash to a minimum," commenting that computerization had made it possible for larger trust banks to keep idle assets to a minimum. HERMAN, supra note 104, at 116. Professor Herman concluded that a "truly
reflect their inability to resist the temptation rather than their prudent investment practices.

In discrediting the bank's second argument, the court also referred to the legitimate practices of the trustee bank in *Van de Kamp v. Bank of American National Trust & Savings Ass'n.* 174 The bank trustee in *Van de Kamp* invested idle trust cash in passbook savings accounts and, beginning in 1976, in money market mutual funds. 175 At trial, the trustee prevailed; the trial court found this practice to be prudent and appropriate, and the appellate court affirmed. 176 Thus, the *Cummins* court refuted MNB's "industry standard" argument by pointing to the contrasting practice the trustee bank in *Van de Kamp* employed during the class period. In fact, this was precisely the practice the lower court found to be a feasible option for MNB, calculating damages using the passbook rate as the lost rate of return on the plaintiffs' funds. 177 By upholding the circuit court, the Court of Appeals demonstrated willingness to accept the practices discussed in *Van de Kamp* as the benchmark for a bank trustee's duty to invest.

(3) Cost-Benefit Analysis.—Finally, MNB asserted that any alternative form of investment of idle trust cash was prohibitively expensive during the class period. 178 MNB essentially argued that, during the class period, its automated trust accounting was not capable of allocating income to the individual trusts if the idle cash was invested, and that prior to "cash sweeping" it could not accurately account for the income earned on such investments. 179 In the

'undivided loyalty'... would have resulted in a more rapid advance in the cash management of personal trust accounts." *Id.*

175. *Id.* at 538. Prior to and during the class period in *Cummins*, several commentators discussed the investment alternatives available for temporarily idle trust cash. *See, e.g., J. Alden Butler, Starting a Short-Term Securities Fund, 109 Trusts & Estates 490 (1970); Hunsicker, supra note 168, at 630; T.H. Schneider, Setting Up a Cash Asset Fund, 110 Trusts & Estates 372 (1971).*

In *Van de Kamp*, however, it was determined that investment in pooled funds of income cash by "cash sweeping" would not have been prudent until mid-1982. *See 251 Cal. Rptr. at 543.*

176. *See Van de Kamp, 251 Cal. Rptr. at 558, 557.*
177. *See Cummins, 322 Md. at 575, 588 A.2d at 1207.* The circuit court directed that, for the years 1972 through 1976, MNB pay five percent on the average DDA balances for those years, "an investment return analogous to passbook savings account interest earnings." *Id.* From 1977 to the end of the class period, the court directed that MNB pay amounts calculated by applying the average rate of return earned by a money market mutual fund in the particular year to the respective average DDA balances. *Id.*
178. *See id.* at 589, 588 A.2d at 1214.
179. *See id.* at 590, 588 A.2d at 1214.
words of MNB, "the game would not have been worth the candle." The Court of Appeals upheld the trial court's finding that, although allocation would have been imprecise, MNB had the ability to invest the trust funds—they simply chose not to do so. Again, the court's reasoning is supported by the practices of the trustee bank in Van de Kamp. Furthermore, the bank put forth no evidence to indicate that available, alternative investments would have been cost prohibitive.

b. Damages.—Although the court imposed a strict standard for the proper care of trust accounts, the impact of the decision is mitigated by the court's partial revision of the damage award. On cross appeal, the plaintiffs argued that the proper damages for MNB's breach of duty should have been the profits realized by MNB—based upon the common-law trust principle that the trustee cannot use the trust assets for his personal gain and must disgorge any profits made from such use. With regard to trustees in general, this analysis is sound; but, as the court noted, it is clearly inconsistent with the court's earlier decisions regarding self-depositing trustees. In Real Estate Trust Co. v. Union Trust Co., the court took the view that the funds in the bank "were to the credit of the trustee, and were not used by the trustee. The trustee, as such, made no profit out of them." Thus, the Cummins court found the trial court's award of lost return rather than profit realized by the bank to be appropriate and consistent with precedent in Maryland, as well as the decisions of a majority of jurisdictions.

180. Reply Brief of Appellant at 21, Cummins (No. 90-36).
181. Cummins, 322 Md. at 595, 588 A.2d at 1217. The court found that despite the requirements of 12 C.F.R. § 9.13(b), any income earned could have been periodically allocated to the trusts in proportion to the trust's share of the total cash in the trust accounting system. Id. at 593-94, 588 A.2d at 1216. "From the standpoint of a trustee's duty to act as a prudent investor, such a system is certainly preferable to paying no interest whatsoever ...." Id. at 593, 588 A.2d at 1217; see Levmore, supra note 94, at 827-28 ("It may be that the best practice would be to utilize ... some inexpensive and (perhaps) rough allocation method so that the float income could be returned to the accounts without prohibitive costs.").
182. 251 Cal. Rptr. 530, 541 (1988).
183. See Cummins, 322 Md. at 595, 588 A.2d at 1217.
184. See id. at 595-97, 588 A.2d at 1217-18.
185. See id. at 595, 588 A.2d at 1217.
187. 102 Md. 41, 61 A. 228 (1905).
188. Id. at 55, 61 A. at 233.
189. See 322 Md. at 596, 588 A.2d at 1218; see also Van de Kamp v. Bank of Am. Nat'l Trust & Sav. Ass'n, 251 Cal. Rptr. 530, 537 (1988); Hayward v. Plant, 119 A. 341, 347-48 (Conn. 1923); In re People's Trust Co., 155 N.Y.S. 639, 640-41 (1915); Stahl v. First
The court also upheld the trial court's decision to award the plaintiffs ten percent of the commissions earned by the bank during the class period.\textsuperscript{190} In so doing, the court relied on an 1831 case\textsuperscript{191} in which a self-dealing trustee was forced to disgorge fifty percent of the commissions he earned during the period of self-dealing.\textsuperscript{192} The court noted that in the \textit{Cummins} case, "although there was no prohibited self-dealing, there was a breach of trust which caused serious loss."\textsuperscript{193} Because there was no reason to distinguish the breaches, an award of returned commissions was entirely appropriate and supported by precedent.\textsuperscript{194}

The trial court's award of prejudgment interest at the rate of ten percent compounded did not withstand the bank's attack on appeal, however. Despite the acknowledgement of circumstances in which compound interest may be appropriate against a self-dealing trustee,\textsuperscript{195} the court found that the compounding of interest against a self-depositing trustee was inconsistent with the rule set out in \textit{Real Estate Trust Co. v. Union Trust Co.}\textsuperscript{196} "Compounding of interest, as a substitute for actual profits realized, is not permitted against the self-depositing bank trustee because . . . the trustee is not considered to have used trust funds for its own purposes."\textsuperscript{197} Thus, the court wisely chose to avoid an inconsistent result by holding that a trustee who has breached his duty by allowing the trust principle to remain idle will be subject only to simple interest.\textsuperscript{198}

Finally, the court modified the prejudgment interest award by imposing the six percent legal rate of interest\textsuperscript{199} rather than the ten

\begin{enumerate}
\item[191.] \textit{See Cummins}, 322 Md. at 601, 588 A.2d at 1220.
\item[192.] \textit{See id.} at 347-48.
\item[193.] 322 Md. at 601, 588 A.2d at 1220.
\item[194.] \textit{See id.} The retroactive reduction in MNB's commissions for the class period was $2,225,426.04, approximately 35% of its before-tax profits from personal trust operations during the period. \textit{Reply Brief of Appellant at 30, Cummins} (No. 90-36). This award represented approximately 58% of the circuit court judgment.
\item[195.] \textit{See Cummins}, 322 Md. at 597-99, 588 A.2d at 1218-19.
\item[196.] \textit{See id.} at 599, 588 A.2d at 1219 (citing \textit{Real Estate Trust Co. v. Union Trust Co.}, 102 Md. 41, 55, 61 A. 228, 233 (1905)).
\item[197.] \textit{Id.}
\item[198.] \textit{See id.}
\end{enumerate}
percent rate set by the trial court. Because there was no applicable statute or contractual stipulation to apply a different rate, "the rate of prejudgment interest may not exceed the legal rate of six percent."

c. Consequences.—The court left little doubt that when trust department investment policies leave idle trust cash uninvested, the burden will rest on the bank to justify its practices. Shifting the burden to the bank in this manner can be justified on two grounds. First, it is presumably the greater technology and expertise of banks that encourages grantors to turn to large banks to act as trustees. When a bank with a large trust department holds itself out as having such expertise in the management and investment of trust assets, it should be held to that higher standard. Second, as in the instant case, when the bank has received considerable benefit from the use of idle trust cash, the courts should undertake a stricter scrutiny of the bank's practices for any signs of self-dealing. Thus, it does not seem unreasonable that a bank trustee should bear the considerable burden of justifying its policies.

Nevertheless, Cummins should have little or no impact on future practices of national bank trustees. In 1982, the OCC amended Regulation 9 to require that "[e]ach national bank exercising fiduciary powers shall adopt and follow written policies and procedures intended to ensure that the maximum rate of return available for trust-quality, short term investments is obtained." The OCC has further taken the position that, unless otherwise provided by law or agreement, principal and income cash should be made productive within one week of receipt by a bank trustee. Furthermore, bank

200. See Cummins, 322 Md. at 599-600, 588 A.2d at 1219.
201. Id. at 600, 588 A.2d at 1219.
202. See id. at 596, 588 A.2d at 1218; see also Goldman v. Rubin, 292 Md. 693, 713, 441 A.2d 713, 724 (1982); Lopez v. Lopez, 250 Md. 491, 501, 243 A.2d 588, 594 (1968) ("[T]he person who challenges the conduct of a trustee, must first allege that the trustee has a duty and has been derelict in the performance of this duty, and offer evidence in support of this allegation. Then, and not until then, does the trustee have the burden of rebutting the allegation.").
203. See Levmore, supra note 94, at 823.
trustees who failed to invest idle funds at less than the maximum rate for trust quality short term investments are obligated to reimburse the trusts for the difference between what was actually received and what should have been received, plus interest. Thus, the OCC has set a requirement for investment that is well within the standard prescribed by the Cummins court. Consequently, future claims against bank trust departments, at least those under federal regulation, for failure to invest trust assets prudently will likely be limited to practices utilized prior to 1982.

Moreover, equitable claims such as those in Cummins should be barred by laches. In Ridgely v. Pfingstag, the court stated that if the beneficiary is aware that the trustee violated the trust, it will apply an equitable or analogous legal statute of limitations. There was uncontroverted evidence that, throughout the Cummins class period, MNB furnished the trust beneficiaries with periodic statements reflecting, among other things, the amount of principal and income cash left uninvested.

Although MNB had raised the defense of laches in its answer, it failed to incorporate the defense into its proposed findings of fact and conclusions of law. Therefore, the circuit court did not address the issue and the Court of Appeals could not, under rule 8-131(a), consider the issue on appeal. Although the court was forced to leave open the question of whether MNB's account statements constituted sufficient notice, equity should not allow the beneficiary to recover for practices of which the beneficiary should have been aware and that occurred more than ten years ago.

208. See id. The OCC also indicated that it intends to sanction those national banks that fail to obtain the maximum prudent rate of return on idle trust assets. See id.

209. 188 Md. 209, 50 A.2d 578 (1946).

210. Id. at 234, 50 A.2d at 590.

211. 322 Md. at 577, 588 A.2d at 1208. In addition, 70% of the trusts involved "shared investment authority," with the majority of the co-trustees being attorneys. Brief of Appellant to the Court of Special Appeals at 30-31, Cummins (No. 90-44). As one commentator suggests:

[u]ninvested cash is ... a highly visible item in a trust customer's monthly statement from the bank. All statement recipients can understand it, whether they are sophisticated corporate treasurers monitoring pension trusts or individuals monitoring grandmother's legacy. Thus, most trust customers can be expected to keep a critical eye on uninvested cash in their account . . .

Lybecker, supra note 161, at 934.

212. Md. R. 8-131(a) provides: "Ordinarily, the appellate court will not decide [an issue other than jurisdiction] unless it plainly appears by the record to have been raised in or decided by the trial court . . ." Id.

213. See Cummins, 322 Md. at 601-02, 588 A.2d at 1220.

214. See id.
4. Conclusion.—In *Cummins*, the Court of Appeals broadened the scope of the prudent investor rule to encompass the duty of bank trustees to make productive idle trust funds awaiting investment or distribution. However, the prospective impact of the court’s decision should be minimal. Due to the development of computerized “sweep” accounts and the increased availability of liquid, short term investments, most bank trust departments should be able to satisfy the prudent investor standard by fully investing idle trust cash on a daily basis. In light of the strict standards set by the OCC amendment, there is considerable incentive for trust departments to utilize these capabilities. Nevertheless, in affirming the decision of the lower court, the Court of Appeals has set a strict standard of prudence for courts to use in the future when evaluating the cash management policies of bank trust departments. As a result, these departments will face a heavy burden in justifying their past practices.

TRACI E. COUGHLAN
WILLIAM V. HEAPHY, IV

---

II. CONSTITUTIONAL LAW

A. Keeping the Courtroom Door Open

In *Baltimore Sun v. Colbert,* the Court of Appeals held that the press and public are entitled to prior notice of a motion to close courtroom proceedings and a reasonable opportunity to procure counsel to oppose the closure in order that they may assert their right of access to criminal proceedings guaranteed by the First Amendment and the Maryland Declaration of Rights. In a unanimous decision that reviews the applicable standards for excluding the press and public from the courtroom, sealing court documents, and conducting hearings on motions for closure, the court vacated an order of the Circuit Court for Howard County that had sealed both a pretrial motion and the transcript of the hearing on that motion. The Court of Appeals directed, however, that the seal on the documents be temporarily continued pending a reconsideration of the necessity of a seal order to avoid prejudice to the defendant’s right to a fair trial.

1. The Case.—Tyrone Michael Colbert was to be tried on December 3, 1990, in the Circuit Court for Howard County on charges of first degree murder, armed robbery, use of a handgun in the commission of a felony, and carrying a concealed weapon. The State had filed a notice of its intention to seek the death penalty, or alternatively, life without the possibility of parole. On November 29, 1990, Colbert filed a “Motion to Enforce Terms of Plea Bargain Agreement or Alternatively to Strike the State’s Notice to Seek the Death Penalty or Life Imprisonment without Parole.” A hearing on the motion was scheduled for the same day. The motion had not been docketed, and was later ordered sealed upon Colbert’s request. After a brief bench conference at the beginning of the hearing, the court announced that Colbert had asked that the public be excluded from the hearing on the motion. The State opposed clo-

2. See id. at 300, 593 A.2d at 229.
3. See id. at 306-07, 593 A.2d at 231-32.
4. See id.
5. Id. at 295, 593 A.2d at 226.
6. Id.
7. Id.
8. Id.
The court stated that it would “evaluate the public’s right to know about the issue against this Defendant’s right to a fair trial.” The court then proceeded to make a broad and conclusory finding that “the rights of the Defendant ultimately to a fair trial mandate that I exclude the public and press from this particular hearing.”

Michael J. Clark, a reporter for The Sun present at the hearing, objected to the closure of the courtroom and announced his immediate intention to procure counsel to oppose the closure. The court replied that it would proceed with the closure of the hearing and would entertain arguments in opposition from The Sun’s counsel when they arrived. The courtroom was cleared of the press and public and the hearing was conducted.

Counsel for The Sun arrived at 4:00 p.m., approximately one hour after being notified of the closed hearing. At 6:00 p.m. counsel was admitted and intervened for the limited purpose of asserting The Sun’s right of access to pretrial criminal proceedings. When asked to articulate its reasons for excluding the press and public from the hearing, the trial court responded that it had balanced the rights of the public against the right of the defendant to a fair trial and had concluded that the defendant’s right to a fair trial outweighed the public’s “right to know.” The Sun moved that the court reveal the subject matter of the hearing and provide its reporter with a tape recording of the closed proceedings. The court denied both motions.

The Sun appealed from the denial of these motions. The Court of Appeals then issued a writ of certiorari before the intermediate appellate court had the opportunity to rule on the issues.

2. Legal Background.

a. Supreme Court Jurisprudence.—The Supreme Court first recognized the right of the press and public to have access to criminal trials in Richmond Newspapers v. Virginia. This presumptive right of
access was based on the First Amendment protection of freedom of the press. In recognizing this right, Chief Justice Burger reasoned that “fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.” Following this line of reasoning, the Court recognized that the right to attend criminal trials that historically have been open to the public is implicit in the First Amendment guarantees of freedom of speech and of the press.

This presumptive right of access was later extended by the Supreme Court to voir dire proceedings in Press-Enterprise Co. v. Superior Court (Press-Enterprise I) and to preliminary hearings before a magistrate in Press-Enterprise Co. v. Superior Court (Press-Enterprise II). In extending the right of access to a preliminary hearing in Press-Enterprise II, the Court outlined a two-part test for evaluating whether a qualified right of access attaches to a particular type of proceeding. The Court considered first “whether the place and process have historically been open to the press and general public,” and second “whether public access plays a significant positive role in the functioning of the particular process in question.” If, after examining the proceeding in question, a court determines that access to the proceeding would “pass[] these tests of experience and logic, a qualified First Amendment right of public access attaches.”

The Press-Enterprise II Court, in evaluating the first prong of the test, discussed the long tradition of public pretrial proceedings, noting the trial of Aaron Burr for treason in 1807 as an example. In that trial, a probable cause hearing was moved from the courtroom

20. Id. at 575-77. The First Amendment to the Constitution provides, in relevant part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. Const. amend. I.


22. See id. at 564-73 (outlining the history of public trials).

23. See id. at 580.


26. See id. at 8.

27. Id.

28. Id. at 9.

to the Hall of the House of Delegates in Virginia in order to accommodate the crowds that were interested in attending the proceedings.\textsuperscript{30} Similarly, in \textit{Richmond Newspapers} and \textit{Press-Enterprise I}, the Court examined, respectively, the long history of open trials in early English history prior to the Norman Conquest\textsuperscript{31} and the development of jury selection as an open and public process.\textsuperscript{32}

In determining that the presence of the public serves a significant purpose in a preliminary hearing (the second prong of the test), the \textit{Press-Enterprise II} Court minimized the fact that an accused could not be tried and convicted in such a proceeding—a factor that weighed heavily in earlier decisions of the Court.\textsuperscript{33} Rather, the Court emphasized that the preliminary hearing is the only proceeding in a large number of criminal cases and may be determinative of the final outcome in the case.\textsuperscript{34} In this sense, a preliminary hearing functions much as an actual trial and the same considerations of openness apply. As stated by Chief Justice Burger:

\begin{quote}
The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that \textit{anyone} is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.\textsuperscript{35}
\end{quote}

The Court recognized, however, that the right of access is not absolute.\textsuperscript{36} The public's right of access must be balanced against the rights of the accused, particularly the accused's right to a fair trial guaranteed by the Sixth Amendment.\textsuperscript{37} In some cases, the

\begin{footnotes}
\item[30] See \textit{Press-Enterprise II}, 478 U.S. at 10. The Court also surveyed state court decisions and found that an overwhelming majority of states had held that a tradition of openness extended to trials and pretrial proceedings or had determined that, although a historical perspective was lacking, the nature of pretrial proceedings mandated that the traditional right of access should apply. \textit{See id.} at 10 n.3.
\item[31] See \textit{Richmond Newspapers}, 448 U.S. at 564-69.
\item[33] See 478 U.S. at 12. \textit{Compare} Gannett Co. v. DePasquale, 443 U.S. 368, 394 (1979) (Burger, C.J., concurring) (rejecting claim of enforceable right of access under Sixth Amendment: "a hearing on a motion before trial to suppress evidence is not a trial") \textit{with} \textit{Richmond Newspapers}, 448 U.S. at 563-64 (upholding right of access to actual criminal trial, distinguishing \textit{Gannett} on that basis).
\item[34] See \textit{Press-Enterprise II}, 478 U.S. at 12.
\item[35] \textit{Press-Enterprise I}, 464 U.S. at 508.
\item[37] \textit{Press-Enterprise II}, 478 U.S. at 14. The Sixth Amendment provides, in relevant
rights of the accused may outweigh the interests of the public and press, mandating closure of the courtroom. The Court in Press-Enterprise I alluded to the procedures necessary to effect closure:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

b. Maryland Jurisprudence.—Maryland courts have also recognized a presumptive right of access to criminal proceedings. In Patuxent Publishing Corp. v. State, the Court of Special Appeals vacated a circuit court order closing the courtroom during a hearing on a motion to close the courtroom throughout the trial. Citing Richmond Newspapers, the court struck down the broad closure order because the lower court failed to tailor the order as narrowly as possible to avoid prejudice. As an alternative, the court suggested that the allegedly prejudicial material be revealed during a brief bench conference or in camera proceeding.

In News American v. State, a criminal defendant attempted to limit the ability of nonparties to assert their right of access by arguing that nonparties lack standing to appeal a gag order. Rejecting that argument, the Court of Appeals ruled that the newspaper had standing and that the appropriate means for the press to assert its First Amendment right of access was intervention into the criminal proceeding for the limited purpose of opposing closure. Because...
an order for closure is tantamount to an adjudication of the only claim, the right of access asserted by the intervenor, the court also held that such an order constitutes a final order with respect to the intervenor and therefore is appealable.47

In *Buzbee v. Journal Newspapers*, the Court of Appeals, applying an analysis similar to that later outlined by the Supreme Court in *Press-Enterprise II*, expanded the First Amendment right of access to all pretrial judicial proceedings in Maryland.49 In *Buzbee*, the defendant, charged with multiple counts of rape, moved for closure of a pretrial suppression hearing, imposition of a “gag order,” and the sealing of all court documents.50 After surveying the case law of various states and examining both the history of public attendance at pretrial hearings and the positive role that such attendance plays, the court concluded that in Maryland all pretrial proceedings should be presumptively open to the public.51 Acknowledging that the right of access is not absolute, the court discussed the requirements for closing a pretrial proceeding. The court held that a trial court must make specific findings “as to the nature and extent of any threatened prejudice” and explore alternatives to closure and their probable efficacy in limiting the alleged prejudice.52 The trial court, upon finding a reasonable probability of prejudice, may then grant the order for closure or sealing of documents, but only to the extent necessary to protect the interest of the defendant.53 The potential dilemma resulting from public disclosure of the purportedly prejudicial information at the hearing on the motion to close may be

---

2. By appearing before the order-entering court in the case in which the order is entered, with further review on direct appeal by the press from an adverse determination in that forum; and

3. By applying to another trial court, or to the order-entering court in a separate civil action, for an injunction or declaratory judgment, with further review by direct appeal.

*Id.* at 41, 447 A.2d at 1270. The court rejected the third alternative as impractical and disruptive to the “entire administration of justice.” *Id.* at 42, 447 A.2d at 1270 (citing *Kardy v. Shook*, 237 Md. 524, 533, 207 A.2d 83, 88 (1965)). After considering cases using both of the remaining methods, the court chose the second alternative based on the advantages inherent in having the trial judge decide the issue, because he is better positioned to “evaluate matters which may be rapidly unfolding before him and in the community in which the criminal case is pending.” *Id.* at 45, 447 A.2d at 1272.

47. See *id.* at 45, 447 A.2d at 1272.
49. See *id.* at 75-80, 465 A.2d at 430-33.
50. *Id.* at 70-71, 465 A.2d at 427-28.
51. See *id.* at 75-80, 465 A.2d at 430-33.
52. *Id.* at 81-82, 465 A.2d at 433-34.
53. *Id.* at 82, 465 A.2d at 434.
avoided by having such information revealed in camera.\textsuperscript{54}

3. The Court’s Reasoning; Analysis.—

a. Prior Notice of Closure.—The Court of Appeals in \textit{Baltimore Sun} focused not on the substantive rights of the press and public guaranteed by the First Amendment to the federal constitution\textsuperscript{55} and Article 40 of the Maryland Declaration of Rights,\textsuperscript{56} but on the courtroom procedures essential to the effective assertion of those substantive rights.\textsuperscript{57} The court began its analysis by tracing the development of the constitutional doctrine recognizing a First Amendment right of access to criminal trials and pretrial proceedings.\textsuperscript{58} The court discussed the recognition of that right in \textit{Richmond Newspapers} as well as Maryland’s recognition of a right of access to pretrial proceedings in \textit{Buzbee}.\textsuperscript{59}

But despite the existence of a well-established and defined legal right, the existence of the means to assert that right is equally crucial.\textsuperscript{60} In the context of the right of access to judicial proceedings, the ability to assert that right necessitates providing a reasonable opportunity to oppose the closure of courtroom proceedings. The court held that prior notice of a motion to close is essential to having that opportunity.\textsuperscript{61}

The requirement of prior notice may be satisfied simply by docketing a motion for closure in advance of the hearing.\textsuperscript{62} In \textit{Baltimore Sun}, the lower court had permitted arguments by \textit{The Sun’s}

\textsuperscript{54} \textit{Id.} at 84, 465 A.2d at 435.
\textsuperscript{55} For the relevant portion of the First Amendment, see supra note 20.
\textsuperscript{56} Article 40 of the Maryland Declaration of Rights provides that “the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege.” \textit{Md. Const. Decl. of Rts.} art. 40.
\textsuperscript{57} \textit{See} 323 Md. at 300-01, 593 A.2d at 229.
\textsuperscript{58} \textit{See id.} at 297-300, 593 A.2d at 227-28.
\textsuperscript{59} \textit{See id.}.
\textsuperscript{60} \textit{Cf.} \textit{News American v. State}, 294 Md. 30, 40-41, 447 A.2d 1264, 1269-70 (1982) (finding that newspaper had standing to appeal a “gag order” based on a violation of its right of access under the First Amendment).
\textsuperscript{61} \textit{See Baltimore Sun}, 323 Md. at 300, 593 A.2d at 229. The issue of the adequacy of the notice provided was not raised by the parties to the action. \textit{See id.} at 301, 593 A.2d at 229. The Court of Appeals ruled on the issue pursuant to its authority under rule 8-131(a), which provides, in part:

Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.
\textit{Md. R.} 8-131(a).
\textsuperscript{62} \textit{See Baltimore Sun}, 323 Md. at 300, 593 A.2d at 229; \textit{see also} \textit{In re Knight Publishing
counsel in opposition to the motion, but only after the motion had already been argued and granted, eviscerating any meaningful exercise of The Sun’s right to oppose closure. Prior notice, in the form of a docketed motion, would have enabled The Sun to obtain counsel in advance, prepare oral and written argument in opposition to closure, and present arguments at the hearing on closure.

The court recognized that providing notice may not always be practicable, in terms of either giving advance notice—in the case of an oral motion, when notice to those in the courtroom may suffice—or providing individual notice to all who may have an interest in opposing closure. Nevertheless, in cases of limited notice, the trial court still may not proceed without affording the opportunity to oppose closure to anyone who might express an interest in doing so.

By recognizing the prior notice requirement in Maryland, the Court of Appeals has adopted the position taken by numerous jurisdictions. The rationale for these decisions is consistent throughout the cases: prior notice of and an opportunity to oppose closure is essential to preserving the substantive rights of the public.

b. Determining Whether to Close the Courtroom.—In the second part of its opinion, the Court of Appeals reviewed the circumstances under which a trial court may close a proceeding and suggested procedures for conducting a hearing on a motion for closure. The court, echoing the language of Press-Enterprise II, required first that the trial court come to a “determination that it is substantially probable that prejudice will result from an open hearing.” Second, the

Co., 743 F.2d 231, 234 (4th Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1168 (9th Cir. 1982); United States v. Criden, 675 F.2d 550, 557-60 (3d Cir. 1982). 63. See 323 Md. at 296, 593 A.2d at 226-27. 64. See id. at 301, 593 A.2d at 229. 65. See id. 66. The need for a requirement of prior notice of a motion for closure has been widely recognized in both federal and state courts. See, e.g., United States v. Haller, 837 F.2d 84, 87 (2d Cir. 1988); Knight Publishing Co., 743 F.2d at 234; Brooklier, 685 F.2d at 1168; State v. Williams, 459 A.2d 641, 658 (N.J. 1983); New York Times Co. v. Demakos, 529 N.Y.S.2d 97, 100 (N.Y. App. Div. 1988); In re Times-World Corp., 373 S.E.2d 474, 481 (Va. 1988). 67. See supra notes 62, 66 and accompanying text. 68. See Baltimore Sun, 323 Md. at 302-05, 593 A.2d at 229-31. 69. See 478 U.S. 1, 14 (1986) (requiring that there be a substantial probability the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and that reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights). 70. Baltimore Sun, 323 Md. at 302, 593 A.2d at 230. In Buzbee v. Journal Newspa-
trial court must make a specific finding that no reasonable alternative to closure exists.\textsuperscript{71} Possible alternatives include "continuance, change of venue, voir dire, voluntary cooperation of the media, and jury instructions."\textsuperscript{72}

The court outlined procedures for trial courts to follow in conducting hearings on motions for closure. In addressing the primary problem in such hearings, the necessity of disclosing the information that allegedly will prejudice the defendant's right to a fair trial, the court acknowledged that a trial court may need to close portions of the hearing to the public and seal portions of the record.\textsuperscript{73} Consequently, the closure and sealing of records must be for no longer than required to protect the defendant's interests, and the hearing must be on the record.\textsuperscript{74}

The extent to which a member of the press who appears in opposition to closure may participate in the hearing presents an additional dilemma because the press might immediately publish anything seen or heard in a courtroom.\textsuperscript{75} To counter this concern, the court suggested a voluntary agreement of nondisclosure for a specified period of time. Barring an agreement, the court sanctioned exclusion of the press during those portions of the hearing at which the prejudicial information will be revealed, and sealing the correlative portion of the record.\textsuperscript{76}

c. Sealing Records.—The final issue addressed briefly in \textit{Baltimore Sun} concerned sealed judicial records and documents, such as the motion sealed by the lower court. In acknowledging the right of the public and press to inspect and copy such records, the court discussed the common-law right to inspect pleadings,\textsuperscript{77} upon which

\begin{footnotesize}
\textsuperscript{71} \textit{Baltimore Sun}, 323 Md. at 303, 593 A.2d at 230; \textit{see also} Richmond Newspapers v. Virginia, 448 U.S. 555, 580-81 (1980) (plurality opinion); Buzbee, 297 Md. at 82, 465 A.2d at 433-34.

\textsuperscript{72} \textit{Baltimore Sun}, 323 Md. at 303, 593 A.2d at 230.

\textsuperscript{73} \textit{Id.}\ at 303-04, 593 A.2d at 230.

\textsuperscript{74} \textit{Id.}\ at 303-05, 593 A.2d at 230-31; \textit{see also In re Knight Publishing Co.}, 743 F.2d 231, 234 (4th Cir. 1984); State v. Williams, 459 A.2d 641, 658 (N.J. 1983).

\textsuperscript{75} \textit{See} Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1977).


\textsuperscript{77} \textit{See} Baltimore Sun, 323 Md. at 305, 593 A.2d at 231.
\end{footnotesize}
the Supreme Court relied in *Nixon v. Warner Communications.* In *Nixon,* several major broadcasting organizations sought permission to copy, broadcast, and sell the tapes of Oval Office conversations made by then President Richard Nixon that had been introduced at the Watergate trial. The Supreme Court held that the common-law right of access did not require release of the tapes, stating that the right to inspect and copy judicial records is "not absolute." Noting that the defendants in the Watergate trial had filed notices of appeal, the Court upheld a determination by the trial court that the right of the press to copies of the tapes did not outweigh the potential prejudice to the defendants.

In *Baltimore Sun,* the court also recognized the qualified nature of this right and held that the procedures applicable to the closure of a courtroom apply equally to the sealing of pleadings. The court held, therefore, that the press and public are entitled to prior notice of and an opportunity to oppose a motion to seal. Although a seal may be granted, it must be narrowly tailored, possibly by redacting the prejudicial material from pleadings or transcripts, and for no longer than is necessary.

4. Conclusion.—The decision in *Baltimore Sun* does not represent either a radical departure from or a broad expansion of the current state of the law in Maryland with regard to the rights of the public to access to criminal proceedings. What the Court of Appeals did provide, however, are practical guidelines for the difficult task of balancing the rights of an accused against the rights of the press and public. The court's establishment of a procedural requirement of prior notice is significant because it enhances the ability of the public and press to assert their substantive rights guaranteed by the First Amendment and Article 40 of the Maryland Declaration of Rights. In dealing with the inherent difficulties in adjudicating a conflict between two rights of constitutional stature, the

79. Id. at 594.
80. Id. at 608.
81. Id. at 598.
82. See id. at 597-608.
83. *Baltimore Sun,* 323 Md. at 305, 593 A.2d at 231 (citing *In re Knight Publishing Co.*, 743 F.2d 231, 235 (4th Cir. 1984)).
84. *Baltimore Sun,* 323 Md. at 305-06, 593 A.2d at 231. Although the Court of Appeals apparently did not feel it was necessary to address the question, at least one court has held that the First Amendment right of access extends to documents filed in connection with judicial proceedings that themselves implicate that right of access. See *In re Washington Post,* 807 F.2d 383, 389-90 (4th Cir. 1986) (en banc).
court correctly recognized that procedural guarantees are crucial to the realization of substantive rights.

B. Voter Purge Statutes

In *Hoffman v. Maryland*, the United States Court of Appeals for the Fourth Circuit held that voter purge statutes do not violate the First Amendment. Voter purge statutes provide that the names of voters who have not exercised their right to vote in a certain number of years shall be removed from the registration rolls. The Maryland voter purge statute that was challenged and upheld in *Hoffman* requires the removal of the names of voters who have not voted in a primary, general, or special election for five consecutive years.

In ruling on the constitutionality of the voter purge statute, the court held that the statute survived a First Amendment challenge because it served a substantial governmental interest and did not preclude other avenues of communicating dissatisfaction with the choice of candidates in an election. The court further held that the voter purge statute does "not violate the constitutional requirement of equal protection of the laws." Thus, the court effectively precluded the use of arguments based upon free speech and equal protection in challenges to voter purge statutes.

1. The Case.—The plaintiffs, Thomas Hoffman and Timothy Ulrich, were registered voters in the State of Maryland but did not vote between November 1984 and April 1990. In accordance with Maryland's voter purge statute, the Baltimore City Board of Supervisors of Elections (City Board) removed the plaintiffs' names.
from the registration rolls. Their names were among the 55,000 names scheduled to be purged in Baltimore City in April 1990 pursuant to the statute. Pursuant to the statute, the City Board mailed notification of pending removals to these individuals at their last known addresses. These notices provided the voters an opportunity to prove that their names should not be removed because they had in fact voted in an election in the previous five years. The voter purge statute does not preclude a voter whose name has been removed from re-registering.

Hoffman and Ulrich filed suit in the United States District Court for the District of Maryland, pursuant to section 1983 of Title 42 of the United States Code. The complaint, which sought declaratory and injunctive relief, alleged that Maryland’s five-year purge statute violated the First and Fourteenth Amendments. The plaintiffs contended that the statute restricted their right to vote and not to vote, violated equal protection principles, and burdened their freedom of speech. They argued that their nonvote, publicly reported by the difference between the number of registered voters and the total number of votes cast, expressed their dissatisfaction with the

92. Hoffman, 928 F.2d at 648.
94. Hoffman, 928 F.2d at 648. Section 3-20(a) provides, in part, "[a] notice of [the removal] and the reason therefore shall be sent to the last known address of the voter." Md. Ann. Code art. 33, § 3-20(a).
95. Hoffman, 928 F.2d at 648. The plaintiffs in Hoffman did not argue that enforcement of the statute violated due process. That argument had already proven to be unsuccessful in another jurisdiction. See Duprey v. Anderson, 518 P.2d 807, 810 (Colo. 1974). The Supreme Court of Colorado stated: "At most, constitutional due process requires that upon purging a name from the registration book, a notification of that fact is sent to that person at the address shown on the registration book." Id.
96. Hoffman, 928 F.2d at 649.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

The plaintiffs initially sought a class action suit pursuant to Fed. R. Civ. P. 23(b)(2). They dropped their request for class certification because the equitable relief that they sought would have benefitted the whole class without such certification. See Hoffman v. Maryland, 736 F. Supp. at 84 n.1.
99. Id.
candidates. Hoffman and Ulrich claimed that any impairment to this form of expression was a violation of the right to free speech.

The district court denied Hoffman and Ulrich's request for relief, stating that the voter purge statute "does not offend the constitutional rights of [the] plaintiffs to vote, or not to vote, or equal protection principles, or the exercise of [the] plaintiffs' right of free speech." The court recognized that Dixon v. Maryland State Administrative Board of Election Laws, a case upon which the plaintiffs' argument relied, alluded to the existence of a right not to vote. Asserting that the right not to vote is a protected right, the district court nevertheless denied relief to Hoffman and Ulrich because the restraints that the statute places on the rights of a registrant are minimal in that voters whose names are purged from the rolls are free to re-register. The court noted that although the right to vote is of constitutional dimension, the "right is subject to the imposition of appropriate state standards." Applying this standard, the court noted that the state's interest in preserving the integrity of election procedures is rationally related to the statute's restriction. Reasoning that the effect of this statute was not a complete bar to the right to vote, the district court rejected the plaintiffs' claim that the strict scrutiny and "compelling" state interest stan-

100. Id.
101. Id.
102. Id. at 89.
103. 878 F.2d 776, 786 (4th Cir. 1989) (holding that a Maryland statute requiring certification of write-in candidates in order to have their vote totals publicly reported violated the First Amendment).
105. See id. The Dixon court stated that "the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable." 878 F.2d at 782, quoted in Hoffman v. Maryland, 736 F. Supp. at 85.
106. See Hoffman v. Maryland, 736 F. Supp. at 85. "The right not to vote—and to have one's nonvote recorded—must be viewed in the same light [as that in Dixon]. In that context, the right to vote includes the right not to vote." Id.
109. Id. at 85. The court stated:

Nevertheless, plaintiffs' . . . equal protection and free speech claims may not prevail because, to the extent that the Maryland statute restricts the rights of a registrant, it does so on a minimal basis and for a purpose which is rationally related to the interests of the State of Maryland in providing appropriate standards to govern election procedures.

Id.
1992] CONSTITUTIONAL LAW 551

dards should be applied to the statute.\textsuperscript{110} Because the lower standard was met, the district court upheld the statute.\textsuperscript{111} The plaintiffs appealed to the Court of Appeals for the Fourth Circuit.\textsuperscript{112} Although the court of appeals affirmed the decision of the district court, it curtailed much of the constitutional analysis put forth by the lower court.\textsuperscript{113}

2. Legal Background.—Previous challenges to the constitutionality of voter purge statutes have not been successful.\textsuperscript{114} In Williams v. Osser,\textsuperscript{115} the United States District Court for the Eastern District of Pennsylvania rejected the plaintiffs' arguments that a two-year purge statute put an unconstitutional burden on the fundamental right to vote and violated equal protection principles.\textsuperscript{116} The key issue was the applicable standard for analyzing the alleged infringement of these rights. With respect to the equal protection argument, the Williams court rejected the compelling state interest standard.\textsuperscript{117} Rather, the court followed the less stringent test requiring that there be a legitimate state interest reasonably and rationally related to the classification.\textsuperscript{118} This test was deemed appropriate for the equal protection argument because the classification of "nonvoter" was not based on race or wealth and there was

\textsuperscript{110} See id. at 86; cf. Hill v. Stone, 421 U.S. 289, 298 (1975) (applying a "stringent" test of justification to a Texas statute that disenfranchised all voters who do not own property); Dunn v. Blumstein, 405 U.S. 330, 337 (1972) (applying a strict scrutiny test, which requires a demonstration of a "compelling" state interest, to a statute designed to deny voting rights to anyone who moved into the state less than one year prior to an election); Muller v. Curran, 889 F.2d 54, 56-57 (4th Cir. 1989) (declaring Maryland statute that allowed block of popular vote by property owners unconstitutional), cert. denied, 110 S. Ct. 1121 (1990).

\textsuperscript{111} See Hoffman v. Maryland, 736 F. Supp. at 89.

\textsuperscript{112} See Hoffman, 928 F.2d 646.

\textsuperscript{113} See id. at 648.

\textsuperscript{114} See, e.g., Citizens' Comm. for the Recall of Jack Williams v. Marston, 507 P.2d 113, 116 (Ariz. 1973) (holding that a statute calling for removal from the rolls of all voters who did not vote in the previous general election did not violate the Fourteenth Amendment); Duprey v. Anderson, 518 P.2d 807, 811 (Colo. 1974) (holding that a biennial purge statute does not result in invidious discrimination of nonvoters).


\textsuperscript{116} Id. at 653 ("[T]he two-year purge bears a rational relationship to a legitimate state end.").

\textsuperscript{117} This standard was outlined in Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that a poll tax is unconstitutional). "[C]lassifications which might invade or restrain [voting rights] must be closely scrutinized and carefully confined." Id. But see Bullock v. Carter, 405 U.S. 134, 143 (1972) ("[N]ot every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.").

\textsuperscript{118} See Williams, 350 F. Supp. at 650.
not an absolute bar to voting. The contention that the voter purge statute violated the right to vote was also analyzed using the same standard and reaching the same conclusion—the purge statute did not violate the Constitution.

The results of a lenient balancing test between state interests and voters' rights accounts for the failure of earlier challenges to voter purge statutes. The burden of re-registering after a name is purged has been considered minimal or incidental, while the governmental interest in preventing voter fraud has been found to be substantial and important. The history of challenges to purge statutes reveals that the courts most often find that states' interests override the burden placed on the voter or nonvoter by the statute. However, until Hoffman, no one had challenged a voter purge statute on the grounds that it violated a First Amendment right.

3. The Court's Reasoning.—On appeal, Hoffman and Ulrich argued that Maryland's voter purge statute violated the principles of free speech and equal protection because it restricted their right not to vote. The United States Court of Appeals for the Fourth Circuit applied the test used by the Supreme Court in Renton v. Playtime

119. Id.; see also McDonald v. Board of Elections, 394 U.S. 802, 807 (1969) (holding that when prisoners awaiting trial were denied absentee ballots, the stringent test did not apply if the discrimination was not based on race or wealth and there was no absolute bar).

120. See Williams, 350 F. Supp. at 653. The court concluded that there was only a minimal burden on the right to vote. See id.

121. For example, in Duprey v. Anderson, 518 P.2d 807 (Colo. 1974), the plaintiffs argued that nonvoters were "unduly impeded in exercising their future right to vote because they must re-register." Id. at 809. The Supreme Court of Colorado replied that "[t]his argument is unacceptable. This impediment or burden which [the plaintiffs] say is so heavy, is not, in our view, more than minimal and incidental." Id. In Williams, the federal district court stated that even a two-year purge statute, which would require more frequent re-registration, especially for the many voters who only vote in presidential elections, is only a "minimal burden . . . justified by the state interest." 350 F. Supp. at 653 n.11.

122. But see Michigan State UAW Community Action Program Council v. Austin, 198 N.W.2d 385, 388 (Mich. 1972) (holding that the two-year purge statute in question was unconstitutional). "Any burden, however small, will not be permitted unless there is demonstrated a compelling state interest" that will justify the infringement on the right to vote. Id. The court defined "compelling" as "necessary and essential and not achievable by less drastic means." Id. at 389. The dissenting opinion of Judge Black, explaining the politics behind the decision, sheds light on this isolated decision. See id. at 392-405 (Black, J., dissenting).

123. See Hoffman v. Maryland, 736 F. Supp. at 87 n.7.

124. Hoffman, 928 F.2d at 647.
Theatres, Inc.\textsuperscript{125} to these claims.\textsuperscript{126} This test requires that the legislation "serve a substantial governmental interest and ... not unreasonably limit alternative avenues of communication."\textsuperscript{127} The Court of Appeals found that this standard was appropriate because the form of expression was conduct, which is partially "non-speech," rather than pure speech. Only the latter requires the higher level of scrutiny.\textsuperscript{128} The court also applied this standard because the voter purge statute was "content-neutral."\textsuperscript{129}

The Fourth Circuit ultimately affirmed the district court's decision and held that Maryland's purge statute does not violate the Constitution.\textsuperscript{130} According to the court, "even if there is a right not to vote of constitutional significance, [that right] is not infringed upon by Maryland's purge statute."\textsuperscript{131} This conclusion was based on the reasoning that there is no violation of the right not to vote, because in order to exercise that right, it is not necessary to be a registered voter.\textsuperscript{132}

In answer to the plaintiffs' argument that the First Amendment

\textsuperscript{125} 475 U.S. 41 (1986).
\textsuperscript{126} See Hoffman, 928 F.2d at 648-49. In Renton, the Supreme Court held that a city ordinance prohibiting "adult" movie theatres from operating within one thousand feet of any residential zone, church, or park, and within one mile of any school, did not violate the First Amendment. See 475 U.S. at 54-55.
\textsuperscript{127} Hoffman, 928 F.2d at 648 (quoting Renton, 475 U.S. at 47).
\textsuperscript{128} See id. This terminology was used by the Supreme Court in United States v. O'Brien, 391 U.S. 367, 376 (1968). In O'Brien, the defendant burned his Selective Service certificate in an act of protest to American involvement in the Vietnam War. See id. at 369. The Court held that the defendant's conviction, pursuant to a federal statute making this act criminal, was not a violation of the First Amendment's guarantee of free speech. Id. at 377. The Court stated that "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." Id. at 376.

The Hoffman court also quoted the four-prong test outlined in O'Brien:

[A] regulation is 'sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.' Hoffman, 928 F.2d at 648 (quoting O'Brien, 391 U.S. at 377).

\textsuperscript{129} See Hoffman, 928 F.2d at 649. The Supreme Court has defined "content-neutral" regulations on speech as those that are "justified without reference to the content of the regulated speech, ... narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984). The plaintiffs did not prove, or even argue, that the purpose of the legislation was to limit the message allegedly expressed by the plaintiffs. See Hoffman, 928 F.2d at 649.

\textsuperscript{130} See Hoffman, 928 F.2d at 649.
\textsuperscript{131} Id. at 648.
\textsuperscript{132} See id.
right of free speech necessarily includes being counted as registered and not voting, the court stated that any alleged infringement of the right was outweighed by the State's valid and important interest in maintaining "accurate, reliable and up-to-date voter registration lists." Furthermore, the Fourth Circuit stressed that the statute does "not unreasonably limit alternative avenues of communication." A voter whose name has been purged but who wishes to be counted as a nonvote need only re-register, not an overly burdensome "price to pay for the prevention of vote fraud."

The court concluded by refuting the plaintiffs' argument that the statute violated equal protection principles. Hoffman and Ulrich did not demonstrate that they were members of a suspect class. Furthermore, there was no need to conduct a separate analysis under equal protection principles when a First Amendment analysis demonstrated that there was no infringement of a constitutional right. Thus, the statute was upheld.

4. Analysis.—The First Amendment challenge to Maryland's voter purge statute was unprecedented because no other plaintiff has challenged such a statute on the grounds that it restricts the right not to vote and thereby violates the right to free speech. By holding that the statute did not violate the plaintiffs' First Amendment right to free speech, the court effectively closed that avenue to plaintiffs who challenge voter purge statutes. Two key elements

133. Id. at 649. "Without removing the names, there exists the very real danger that impostors will claim to be someone on the list and vote in their places. . . . Accordingly, keeping accurate, reliable and up-to-date voter registration lists is an important state interest." Id.; see Rosario v. Rockefeller, 410 U.S. 752, 761 (1973) ("[P]reservation of the integrity of the electoral process is a legitimate and valid state goal."); Burns v. Fortson, 410 U.S. 686, 686-87 (1973); Marston v. Lewis, 410 U.S. 679, 681 (1973); Williams v. Osser, 350 F. Supp. 646, 653 (E.D. Pa. 1972).

134. Hoffman, 928 F.2d at 649.

135. Id.

136. See id.

137. Id.; see Citizens' Comm. for the Recall of Jack Williams v. Marston, 507 P.2d 113, 116 (Ariz. 1973) (holding that even if voter purge statutes discriminate against ethnic minorities who are less economically fortunate and less educated, they do not violate the equal protection clause because "there is a justified need for the legislation").


139. See Hoffman, 928 F.2d at 649.

140. See id.
of the court's decision enabled it to refute the First Amendment argument successfully. First, it did not decide whether a constitutionally protected right not to vote exists. Second, it did not apply a strict scrutiny test to the voter purge statute.

With respect to the first element, the court asserted that even if a protected right not to vote exists, it is not infringed by the voter purge statute. Framing the issue as a hypothetical, the court assumed "for argument that such a First Amendment right exists, a question we do not decide." The court thereby dodged the tedious analysis of the source, nature, and meaning of this elusive right, which a definite conclusion as to its existence or nonexistence would require.

The district court, on the other hand, openly recognized the existence of a protected right not to vote when it stated that "the right to vote includes the right not to vote." This conclusion was drawn from an improper analysis of Dixon, however. In analyzing voters' rights, the Dixon court equated voting for a write-in candidate who is unlikely to win with expressing the opinion that no candidate is acceptable to that voter. The court explained that a vote does not lose its constitutional significance merely because it is cast for a candidate who has little or no chance of winning. Nor do we think it loses this character if cast for a non-existent or fictional person, for surely the right to vote for the candidate of one's choice includes the right to say that no candidate is acceptable.

It is important that the discussion of the right to say that no candidate is acceptable was made in the context of voters exercising the franchise. By contrast, the issue in Hoffman involved nonexercise of

141. See id. at 648. This method of analysis—assuming for the sake of argument that a certain right is protected by the Constitution—was also used by the Supreme Court in Clark v. Community for Creative Nonviolence, 468 U.S. 288, 293 (1984).

142. Hoffman, 928 F.2d at 648.

143. The Hoffman court may have chosen to dodge this question to avoid further expansion of First Amendment rights in the area of "nonspeech." Certain forms of conduct that are not "pure speech" have been held to implicate the protections of free speech in several cases. See, e.g., Texas v. Johnson, 491 U.S. 397, 406 (1989) (burning the United States flag); Spence v. Washington, 418 U.S. 405, 410 (1974) (attaching a peace sign to a United States flag); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503, 514 (1969) (wearing of black arm bands by students and teachers to protest the involvement of the United States in the Vietnam War); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (protesting racial segregation by holding sit-ins).


146. Id. (emphasis added).
the franchise. Therefore, it was incorrect for the district court to extend Dixon's allusion to the right not to vote to the facts of Hoffman.

The Fourth Circuit implied that it disagreed with the district court's finding that there is a protected right not to vote when it stated that "[w]e need not and do not decide the correctness of the comparison" made by the lower court between the Dixon holding and the right not to vote. In addition to avoiding such a judgment, the court avoided answering the question of whether there is a constitutionally protected right not to vote.

The second element—the choice of a standard less stringent than the requested strict scrutiny—was more crucial to the court's decision that Maryland's voter purge statute is constitutional. The Hoffman court only required that the voter purge statute serve a "substantial governmental interest." This level of scrutiny is significantly less exacting than one that requires a "compelling" state interest. The infringement of the alleged right not to vote is incidental considering the ease of re-registration. It is logical that a less stringent test be applied to such a minimal restriction of a questionable right. In this regard, the Hoffman court was following the lead of the Supreme Court, which said that "[i]t would be odd to insist on a higher standard for limitations aimed at regulable conduct and having only an incidental impact on speech." The Fourth Circuit thus continued the trend of the earlier cases that addressed claims against voter purge statutes.

This consistent application of the less stringent test to voter purge statutes indicates that courts are determined to uphold them. This attitude is evidenced by the holdings in federal and Maryland courts that the burden of registering to vote is not unduly taxing to a citizen. The message conveyed by the Hoffman court is that

147. Hoffman, 928 F.2d at 648.
148. Id.
149. See supra notes 117-122 and accompanying text; see also supra note 110.
150. Clark v. Community for Creative Nonviolence, 468 U.S. 288, 298 n.8 (1984). In Clark, the plaintiffs were demonstrators who wanted to sleep in tents in Lafayette Park and the Mall in the District of Columbia as a means of expressing their sympathy for the plight of the homeless. Id. at 289. National park regulations prohibited this conduct. Id. The Court held that there was no unconstitutional restriction on the campers' First Amendment rights. Id. at 298-99.
151. See supra note 121 and accompanying text.
152. See, e.g., Bradley v. Mandel, 449 F. Supp. 983, 987 (D. Md. 1978); Broadwater v. State, 306 Md. 597, 605, 510 A.2d 583, 586 (1986). "Maryland procedures for registration are sufficiently simple that a person who has not voted within a five-year period can re-register, in effect, with less difficulty and time-consumption than is true with regard to
both the right to vote and the right to express freely one's dissatisfaction with the candidates by not voting are accompanied by the duty to register.

The court's decision was proper in that it prevented extension of the First Amendment's protection of free speech to such preposterous ends. The short opinion written by Judge Widener justified the result by resorting to the traditional array of tests and analyses. In the end, however, a case such as Hoffman, which demands substantial time and resources from the court, "trivializes the First Amendment" and undermines the integrity of the Bill of Rights.

5. Conclusion.—In Hoffman, the Fourth Circuit prevented constitutional challenges to voter purge statutes based on the idea that such statutes infringe upon an alleged right not to vote and voters' First Amendment rights. The court artfully circumvented a discussion of whether the right not to vote exists by proving that, even as a hypothetical right, it is not infringed beyond the limits of the Constitution by the existence of a voter purge statute. The court, in effect, continued the trend set in the 1970s in other jurisdictions of applying a relaxed test to voter purge statutes and favoring the state's interest in the prevention of voter fraud over the small burden on individual voters of re-registering.

C. Failing to Confront Defendants' Sixth Amendment Rights

In Coleman v. State, the Court of Appeals upheld a protective order that precluded criminal defendants in a drug-related murder case from obtaining the names of the State's key witnesses until the day of trial. In addition, the court held that the trial court did not abuse its discretion in limiting the cross-examination of a State's witness. The defense counsel sought to question the witness as to his putative knowledge of the mandatory life sentence that he could have received for an unrelated crime if he had not entered into a favorable plea agreement when he implicated the defendants in the homicide at issue.
The court recharacterized the issues raised on appeal to avoid the problematic constitutional questions concerning the Sixth Amendment right of the accused to face and cross-examine adverse witnesses. Instead, the court focused on its power to protect actual and potential witnesses in drug-related prosecutions.\(^{157}\)

1. The Case.—On April 25, 1988, seventeen year old Gregory Givens fatally shot twenty-four year old Delroy “Pappy” McNeil in the head, chest, and abdomen as the victim sat on the steps of the Old Landmark Baptist Church.\(^{158}\) Police investigation revealed that Givens was an “enforcer” for a local drug ring, and had been dispatched by nineteen year old Anthony Coleman to “take care of” the victim in retaliation for McNeil’s alleged theft of cocaine from the organization’s drug stashes and his subsequent sale of the cocaine for his own profit.\(^{159}\)

Givens and Coleman were convicted in the Circuit Court of Baltimore City of first degree murder, conspiracy to commit murder, and use of a handgun in the commission of a felony.\(^{160}\) Their prosecution and convictions were facilitated by the testimony of two witnesses: one allegedly saw Givens shoot the victim, and another overheard an incriminating conversation between Coleman and Givens.\(^{161}\) The State withheld the identities of these two key witnesses from the defendants’ counsel until two weeks prior to trial, and from the defendants themselves until the day of the trial, pursuant to a protective order issued under Maryland Rule 4-263.\(^{162}\)

At the hearing on the protective order, the State presented the

\(^{157}\) At the outset of its opinion, the court stated that the “reluctance [of potential witnesses] to report to enforcement authorities or to seek their help or to testify in prosecutions is at the heart of the questions presented by this appeal.” \(\textit{Id.}\) at 590, 583 A.2d at 1046.

\(^{158}\) \(\textit{Id.}\) at 590-91, 583 A.2d at 1046.

\(^{159}\) \(\textit{Id.}\) at 594, 583 A.2d at 1047.

\(^{160}\) \(\textit{Id.}\) at 591, 583 A.2d at 1046. Givens and Coleman were each sentenced to life imprisonment on the murder convictions. Givens was sentenced to 20 years, and Coleman to 10, on the handgun conviction, to run consecutively to the murder sentence. Givens was sentenced to 30 years, and Coleman to 20, on the conspiracy conviction, to run concurrently with the murder and handgun sentences. \(\textit{Id.}\) at 591 n.2, 583 A.2d at 1046 n.2.

\(^{161}\) See \(\textit{id.}\) at 595, 583 A.2d at 1048.

\(^{162}\) \(\textit{id.}\) at 597, 583 A.2d at 1049. The Rule requires the State’s Attorney, upon request of the defendant, to “[d]isclose to the defendant the name and address of each person then known whom the state intends to call as a witness at the hearing or trial to prove its case in chief or to rebut alibi testimony,” subject to certain enumerated exceptions to discovery. Md. R. 4-263(b)(1). Further, the Rule provides for the issuance of a protective order “on motion and for good cause shown [such that] . . . specified disclosures may be restricted.” Md. R. 4-263(i).
testimony of two members of the Baltimore City Police Department to show good cause why discovery of the identities of the State’s civilian witnesses should not merely be restricted, but foreclosed to the defendants.163 Both officers drew on their personal experiences to describe the ruthless practices of the drug organization,164 the difficulties inherent in investigating drug-related incidents and obtaining testimony from witnesses,165 and the pervasive fear for personal safety experienced by the inhabitants of drug-infested neighborhoods.166 Looking less to the existence of any specific threats made by the defendants to the State’s witnesses and more to the grim scenario depicted by the officers, the motions judge concluded that the witnesses might be endangered if their names were revealed and that a protective order was appropriate.167

Although the motions judge forbade disclosure of the witnesses’ identity to the defendants until trial, she made three concessions to alleviate the burdens that nondisclosure would place on the defendants. She provided that defense counsel could obtain the witnesses’ names two weeks prior to trial, question the witnesses out of the presence of the State’s Attorney during that time, and request, prior to trial, a reasonable period of time in which to follow up on any information obtained as a result of the interviews.168

Givens and Coleman were tried together before a judge, but not before the motions judge. Although there was no suggestion that the parties had not complied with the order, defense counsel nevertheless objected to the protective order and moved to dismiss the indictments on the grounds that the provisions of the protective

163. *Coleman*, 321 Md. at 592, 583 A.2d at 1046.
164. The court elaborated on this testimony:
The brazen murder of McNeil was not the only illustration the officers gave of the manner in which the organization attempted to preserve its territory and to protect its interests. The murder of one Maurice Ireland was [also] traced to Givens . . . . [Ireland] forcibly tried to get his money back [owed him by the organization] . . . . and as a result his murder was ordered. *Id.* at 594, 583 A.2d at 1047-48.
165. Detective Keller explained:
[Witnesses] are very candid, usually that they don’t want to be involved because they fear that they will be hurt in retribution for any information that they would give to us . . . . These cases are usually very, very difficult to make an arrest on . . . . because there is a low level of cooperation in the community. *Id.* at 595, 583 A.2d at 1048.
166. “The residents of those neighborhoods are trapped in an anomie and have little chance of escape . . . . They are forced by fear and intimidation to accept an oppressive and onerous way of life.” *Id.* at 593, 583 A.2d at 1047.
167. *See id.* at 597, 583 A.2d at 1049.
168. *Id.* at 597-98, 583 A.2d at 1049.
order had deprived the defendants of their constitutional rights to confrontaton, fundamental fairness, and due process. Counsel for the defendants argued that "the State's whole case is going to rise and fall on the two witnesses who are being protected by this protective order." The trial court balanced the defendants' right to a fair trial against the witnesses' right to personal safety and concluded that the balance tipped in favor of the latter consideration. The court denied the defendants' motion, but provided that once the witnesses had testified, the court would grant a "day or two to track down additional witnesses, or to do further investigation," if necessary.

The trial proceeded and the only other error claimed by the defendants on appeal was the trial judge's refusal to allow defense counsel to cross-examine the State's eyewitness, Louis Wesley Jackson, as to whether Jackson knew at the time he implicated the defendants that he faced life imprisonment without parole. Jackson had been arrested on burglary and other related charges in June 1988, approximately two months after McNeil's murder. Because of his criminal record, the State could have sought life without parole on the burglary charges. As a result of plea negotiations, however, Jackson pled guilty to two of the burglary charges and received two concurrent eighteen month sentences in exchange for his testimony. Defense counsel contended that "the jury is, in all fairness[,] . . . entitled to know how good was the deal this man got." The trial judge was not persuaded, and limited inquiry to whether Jackson knew what the statutory sentence was for the crimes with which he was charged.

The Court of Special Appeals held that there was no abuse of discretion in protecting the identities of the State's key witnesses from disclosure to the defendants until trial. Further, the intermediate appellate court held that the trial judge's limitation on de-

169. See id. at 599, 583 A.2d at 1050.
170. Id.
171. See id. at 600, 583 A.2d at 1050.
172. Id., 583 A.2d at 1050-51.
173. See id. at 608-09, 583 A.2d at 1055.
174. Id. at 608, 583 A.2d at 1054.
175. Id. at 606, 583 A.2d at 1053. The other charges were nol prossed. Id.
176. Id. at 608, 583 A.2d at 1054.
177. See id.
fense counsel’s cross-examination of Jackson was not an abuse of discretion.\textsuperscript{179} The Court of Appeals granted certiorari to review these two issues and, after a lengthy excursus on the inner-city drug problem and a cursory review of the relevant case law, concluded that the convictions were not tainted by any constitutional infirmities.\textsuperscript{180}

2. \textit{Legal Background.}—The right of a criminal defendant to confront adverse witnesses is guaranteed by both the Sixth Amendment to the United States Constitution\textsuperscript{181} and Article 21 of the Maryland Declaration of Rights.\textsuperscript{182} The federal and state provisions have been held to be "coextensive"\textsuperscript{183} and to secure "the same right."\textsuperscript{184} Moreover, in \textit{Pointer v. Texas},\textsuperscript{185} the Supreme Court stated that the Confrontation Clause created a right "made obligatory on the states by the Fourteenth Amendment."\textsuperscript{186}

\begin{itemize}
\item \textit{The Impact of Informers and Reluctant Witnesses on a Defendant's Confrontation Clause Rights.}—The Sixth Amendment ideal announced in \textit{Alford v. United States},\textsuperscript{187} guaranteeing the criminal defendant wide latitude in cross-examination and confrontation, has necessarily been circumscribed by the practical concerns for the safety of witnesses and the accommodation of informers who aid law enforcement officers. The seminal case in this area is \textit{Roviaro v. United States}.\textsuperscript{188} Although the \textit{Roviaro} Court ostensibly declined to create a fixed rule as to disclosure, espousing instead a balancing test,\textsuperscript{189} it nonetheless articulated a fairly liberal standard for determining
\end{itemize}

\begin{enumerate}
\item \textsuperscript{179} See id. at 252, 571 A.2d at 252.
\item \textsuperscript{180} See Coleman, 321 Md. at 684, 583 A.2d at 1052.
\item \textsuperscript{181} The pertinent portion of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. CONST. amend. VI.
\item \textsuperscript{182} The pertinent portion of Article 21 provides: "[I]n all criminal prosecutions, every man hath a right ... to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath . . . ." Md. CONST. DECL. OF RTS. art. 21.
\item \textsuperscript{184} Crawford v. State, 282 Md. 210, 211, 383 A.2d 1097, 1098 (1978).
\item \textsuperscript{185} 380 U.S. 400 (1965).
\item \textsuperscript{186} Id. at 403.
\item \textsuperscript{187} 282 U.S. 687, 691 (1931).
\item \textsuperscript{188} 353 U.S. 53, 55 (1957) (holding that the trial court committed prejudicial error in refusing to disclose to the defendant the identity of an undercover employee and informer who, although not a witness at trial, had played a material part in discovering the accused's alleged illegal conduct).
\item \textsuperscript{189} Id. at 62. This balancing test weighs the public interest in protecting the flow of information against the individual's right to prepare a defense. \textit{Id}.
when the nondisclosure privilege should be lifted. The Court stated that "where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege [not to disclose] must give way."

A series of Maryland cases reiterate and refine Roviaro's standard. In *Drouin v. State*, the prosecution's failure to disclose an informer's identity was held to be reversible error "if the name of the informer is useful evidence to vindicate the innocence of the accused, lessens the risk of false testimony or is essential to a proper disposition of the case." Further, the Court of Appeals has stated that the "general privilege of the State to withhold the identity of an informer must give way to the right of the accused to obtain relevant and competent evidence to his defense." The court has specifically noted that "the cases universally recognize the exception to the non-disclosure privilege where the informer was a participant, accessory, or witness to the crime."

Most recently, the Court of Appeals, in *Brooks v. State*, emphasized the importance of applying the Roviaro balancing test in each case. The court focused less on the role of the informer per se, and more on "the materiality of his testimony to the determination of the accused's guilt or innocence balanced against the State's interest in protecting the identity of the informer." In addition, the *Brooks* court echoed the observation made in Roviaro that the primary purpose of the nondisclosure privilege is to protect the public interest in effective law enforcement, facilitated by the use of informers, and not to protect the informers themselves.

b. The Confrontation Clause and the Right to Cross-Examine Adverse Witnesses.—The broad right to "confront" adverse witnesses has typically been interpreted to encompass two specific functions: (1) to provide the factfinder with the opportunity to observe the demeanor of the testifying witnesses and appraise their credibility accordingly;

190. *Id.* at 60-61.
192. *Id.* at 286, 160 A.2d at 93.
194. *Id.*
196. *See id.* at 525, 578 A.2d at 787.
197. *Id.*, 578 A.2d at 788.
198. *See id.* at 522-24, 578 A.2d at 786-88; *see also* Nutter v. State, 8 Md. App. 635, 641, 262 A.2d 80, 84 (1970) (holding that once an informer testifies for the prosecution, the State's privilege of nondisclosure yields to the defendant's right of confrontation).
and (2) to provide the defendant with the opportunity to cross-examine witnesses. The cross-examination may elicit "matters and facts as are likely to affect [the witness's] credibility, test his memory or knowledge, show his relation to the parties or the cause, his bias or the like." In 1931, the Supreme Court held in Alford v. United States that cross-examination of a witness is a matter of right. Over thirty years later, the Court was no less vehement about the centrality of the Confrontation Clause, declaring in Pointer v. Texas that the clause created "a fundamental right essential to a fair trial in a criminal prosecution." Similarly, the Maryland Court of Appeals has noted that the "primary interest secured by the confrontation clause is the right of cross-examination; an adequate opportunity for cross-examination, therefore, may satisfy the clause in the absence of physical confrontation."

The right to cross-examination is not absolute, however, and is subject to the sound discretion of the trial judge, who has a duty to protect the witness "from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." The application of this discretionary standard has led to disparate results in cases in which the circumstances warrant similar treatment. As a general rule, it seems that early cases emphasize

201. 282 U.S. 687 (1931).
202. See id. at 691.
203. 380 U.S. 400 (1965).
204. Id. at 404.
205. Crawford v. State, 282 Md. 210, 214, 383 A.2d 1097, 1099 (1978) (holding that a transcript of witness testimony elicited at a preliminary hearing was admissible at a subsequent trial, because the defendant had a full opportunity to confront and cross-examine the witness at the hearing).
207. For example, two Supreme Court cases reversed the convictions of the respective defendants, specifically holding that the trial judge impermissibly restricted cross-examination as to the witnesses' addresses. See Smith v. Illinois, 390 U.S. 129, 133 (1968) (holding that the defendant had the right, guaranteed to him under the Sixth and Fourteenth Amendments, to cross-examine an informer who testified under an alias as to his actual name and address); Alford, 282 U.S. at 692 (reversing conviction when government witness was excused from giving his place of residence and holding that prejudice ensues from denial of the right to place a witness in his proper setting). However, two subsequent United States Circuit Court cases upheld the respective lower courts' exercise of discretion in forbidding inquiry into the witnesses' addresses, each court enunciating a somewhat different standard for making the critical discretionary call. Compare Alston v. United States, 460 F.2d 48, 53 (5th Cir. 1972) (stating that it "should be the government that comes forward with an explanation of its objection to the divulging of
the pre-eminence of the cross-examination right, while later cases expand the discretion given to trial judges.

One essential aspect of the right to cross-examination, which is subject to the discretion of the trial judge, is the right to probe the witness to uncover potential bias or an ulterior motive for testifying. In particular, bias resulting from the witness’s desire to obtain leniency for his own crimes or to consummate a plea agreement can alter the weight the jury places on the witness’s testimony or tarnish his credibility. The accused has a right to explore such biases and motivations on cross-examination. The cases illustrate a wide spectrum of judicial attitudes toward cross-examination to expose the bias of a witness who is cooperating with the Government out of self-interest.

In *Delaware v. Van Arsdall*, the Supreme Court held that the trial court violated the defendant’s Sixth Amendment right to confrontation when it barred all cross-examination of a key witness concerning a plea agreement in which drunk driving charges against the witness were dropped in return for his testimony. Despite finding that the defendant’s constitutional rights had been violated, the Court declined to reverse the conviction, opting instead to vacate and remand the case for harmless error analysis.

At the opposite end of the continuum lies *United States v. Bond*, in which the Court of Appeals for the Seventh Circuit upheld the defendant’s conviction, noting that the trial court had fully respected the defendant’s “constitutional right to show the jury that
[the witness] was in deep water and had struck a bargain to save his own neck, a bargain that gave [the witness] a reason to testify falsely.  

The trial court was more than generous in its allowance of cross-examination: it allowed the defendant to show that the witness faced "staggeringly large penalties," allowed defense counsel to add up on a blackboard the statutory maxima of the penalties the witness had negotiated away, and did not intercede until defense counsel began to pose hypothetical crimes with which the witness could have been charged.

Between these two extremes is *Hoover v. Maryland,* in which the Court of Appeals for the Fourth Circuit observed that "[t]he vital question, which the defendant is constitutionally entitled to explore by cross-examination, is what the witness understands he or she will receive in exchange for the testimony, for it is this understanding which is of probative value on the issue of bias." The Fourth Circuit position therefore appears to be that a defendant is entitled to cross-examination inquiry into a witness's subjective understanding of what benefit will inure to him by virtue of his testimony. Although the Fourth Circuit's subjective test is not always congruent with approaches taken by the Supreme Court or other circuits, it is consistent with the rule in Maryland as explicated in *Brown v. State.*

In *Brown,* the Court of Special Appeals reversed a robbery conviction on the ground that the trial court erred in disallowing cross-examination inquiry of the prosecution's sole witness into unrelated criminal charges against her that had been nol prossed prior to the defendant's trial. Despite the lack of an actual nexus between the leniency afforded the witness and her testimony in aid of the prosecution, the court found the denial of cross-examination to be reversible error because the witness's subjective, albeit erroneous, belief

---

216. *Id.* at 1240.
217. *Id.
218. *Id.* An interesting subset of the plea bargain bias cases consists of those cases in which the trial court ruled on the appropriateness of eliciting from the witness the maximum sentence he would have faced absent his plea bargain. See, e.g., United States v. Rahme, 813 F.2d 31, 37 (2d Cir. 1987) (upholding trial court's refusal to permit such a question); United States v. Dorta, 783 F.2d 1179, 1182 (4th Cir. 1986).
219. *Bond,* 847 F.2d at 1240.
220. 714 F.2d 301 (4th Cir. 1983).
221. *Id.* at 305. But see *Dorta,* 783 F.2d at 1182 (holding that when the cross-examination on possible bias arising from plea agreement had been exhaustive, the defense was not entitled to question the witness on his subjective beliefs regarding his plea bargain).
223. See *id.* at 421-22, 538 A.2d at 321.
that the State's Attorney had been lenient on her in return for her testimony was determinative of potential bias.224

3. The Court's Reasoning; Analysis.—Many of the issues that have shaped the Confrontation Clause cases since Alford coalesce in Coleman: the use of a balancing test to weigh the defendant's constitutional right to a fair trial against concerns for the safety of witnesses; the impact of informers and witnesses on defendants' Confrontation Clause rights; the appropriate scope of the trial judge's discretion to limit cross-examination designed to elicit the potential bias of witnesses testifying against the accused pursuant to a plea bargain agreement; and the extent to which such agreements should be revealed to the jury.

a. The Balancing Test.—Part of the difficulty in analyzing the constitutional issues presented in Coleman comes from the fact that the court made so little effort to do so. Faced with weighing the defendants' constitutional rights against concerns for the witnesses' safety, the Coleman court invoked Roviaro's balancing test, as did Maryland courts in the cases from Drouin through Brooks.225 However, the Coleman court departed from these precedents in applying the test. While Roviaro and the Maryland cases focused on whether the defendant could have obtained a fair trial absent disclosure of the witnesses' identities, the Coleman court focused on whether the inevitable prejudice inuring to the defendants as a result of the protective order could have been lessened.226 The court placed much emphasis on the special provisions made by the hearing judge in the protective order227 and the additional investigatory time allowed by the trial judge,228 concluding that the defendants were not left "hanging to twist in the wind."229 Although these special provisions were intended to lessen the impact of nondisclosure on the defend-

---

224. See id. at 421, 583 A.2d at 320; see also Fletcher v. State, 50 Md. App. 349, 359, 437 A.2d 901, 905 (1981) (holding that "what is essential to the preservation of the right to cross-examine is that the interrogator be permitted to probe into whether the witness is acting under a hope or belief of leniency or reward").

225. See Coleman, 321 Md. at 602-03, 583 A.2d at 1051-52; see supra notes 188-198 and accompanying text.

226. The court admitted that "without the testimony of the [two protected] witnesses, the charges against Givens and Coleman simply could not be proved." Coleman, 321 Md. at 603, 583 A.2d at 1052.

227. See supra text accompanying note 168.

228. See supra text accompanying note 172.

229. Coleman, 321 Md. at 603, 583 A.2d at 1052.
ants, they appear to be paltry concessions in the face of the injustice worked by the denial of confrontation.

As is generally the case with balancing tests, no bright-line rules can be established to address the disclosure issue in Coleman.\textsuperscript{230} Rather, a more flexible balancing test is necessary to meet the exigencies of each individual case. However, because of the important constitutional issues presented in such cases, such as the confrontation and fair trial rights, courts should give careful and thoughtful consideration to the balancing.

Unfortunately, the Coleman court scarcely mentioned the constitutional rights of the accused, concluding at one point that "we see no constitutional violation in the circumstances."\textsuperscript{231} Instead, the court concentrated on the evils of the drug war and decided the major issues not against the defendants in particular, but against what they represented: the underworld of drugs and drug-related crime. In fact the court failed to give due consideration to the threshold question of whether the witnesses' lives were actually in danger. At the hearing on the State's motion for a protective order, the police officers' testimony was most convincing when it was general and speculative. When questioned as to whether the witnesses had actually been threatened, Officer Keller admitted that they had not.\textsuperscript{232}

\textsuperscript{230} In Grandison v. State, 305 Md. 685, 506 A.2d 580 (1986), the defendant claimed that the trial court's refusal to allow him to interview personally a potential defense witness rendered the trial inherently unfair. \textit{Id.} at 740, 506 A.2d at 607. The Court of Appeals refused to reverse the defendant's conviction, reasoning that "the circumstances under which a defendant can conduct a pretrial interview of a prospective witness are a matter [sic] best left to the trial court's discretion," \textit{Id.}, 506 A.2d at 608, a view with which Coleman is apparently in accord. Yet the Grandison court, in holding that there was no abuse of discretion, further noted that the defendant "was not compelled to prepare his defense without prior knowledge of the potential significance and thrust of [the witness's] testimony." \textit{Id.} Thus, if Grandison were applied as a "rule," it appears that the actions of the trial court in Coleman would amount to an abuse of discretion.

\textsuperscript{231} 321 Md. at 604, 583 A.2d at 1052.

\textsuperscript{232} The colloquy between the defendants' attorney and officer Keller was as follows:

\begin{quote}
Defense Counsel: You testified that Mr. Coleman has sent emissaries from the Baltimore City Jail to intimidate witnesses, is that correct, yes or no?
Officer: No.
Q: He has not. Has anyone in regards to State's witnesses in this case been intimidated?
A: No.
Q: So, therefore, you are telling Her Honor, based on everything that you know, you cannot say that Mr. Anthony Coleman has intimidated anyone since April 25, 1988 [the date of the murder] up until today or sent anyone to intimidate anyone in this case, is that correct?
A: That is correct.
\end{quote}

Transcript of Hearing on State's Motion for a Protective Order at 36-37, Coleman (No. 90-54). This excerpt of the pretrial hearing on the State's Motion for a Protective Order
Thus, the *Coleman* court applied a scattered and biased balancing test, ignoring the tremendous constitutional and factual issues presented.

What is particularly disturbing about *Coleman*, then, is not the end, but the means. Instead of confronting the important constitutional issues, the court hid behind rhetoric about the horrors of the drug war. In place of fixed constitutional guarantees, the court substituted the expansive discretion of a trial judge.

b. **Determining the Proper Scope of Cross-Examination.**—Also entrusted to the trial judge's discretion is the proper scope of cross-examination designed to discredit a witness or reveal a potential bias arising out of the witness's desire to procure leniency for the witness’s own wrongdoings. Cases that address the proper scope of cross-examination are difficult to reconcile, chiefly because “the sound discretion of the trial judge” is such an individualized, imprecise standard.

In *Coleman*, the Court of Appeals upheld the trial court's disallowance of a cross-examination question as to the witness's personal understanding of his plea bargain. This ruling contradicts the intelligent and coherent standard espoused in previous Maryland cases, which stand for the proposition that it is the witness's *subjective* understanding of the leniency or plea bargain agreement that is probative of bias and therefore a proper subject for exploration on cross-examination. Moreover, even if the generalized standard for cross-examination enunciated in *Alford v. United States* were applied to the *Coleman* facts, there was no showing that the question posed to Mr. Jackson was in any way intended to harass, annoy, or humiliate him. The court provided no satisfactory reason for disallowing this question, and the holding departs from the Maryland standard that encourages the precise line of inquiry that was foreclosed to the defendant in *Coleman*.

illustrates the lack of a rational basis for granting the protective order and, coupled with the police officers' and motion judge's statements, see *supra* notes 164-166 and accompanying text, the alarmist nature of the whole proceeding.

233. See 321 Md. at 611, 583 A.2d at 1056.
236. See *supra* text accompanying note 173.
237. See *supra* notes 220-224 and accompanying text (explaining that Maryland courts have allowed cross-examination questions as to the subjective belief of the witness regarding his or her potential sentence).
c. Protecting and Expanding Defendants' Right to Confrontation.— One issue not explicitly raised in Coleman is nonetheless suggested by a careful consideration of its holding: namely, the possibility or desirability of expanding the right of confrontation to pretrial or other critical proceedings that affect the outcome of the trial. Several recent Supreme Court cases have sought to expand defendants' confrontation rights, or at least protect them from further contraction. In Coy v. Iowa, the Supreme Court held that the use of a one-way screening device to spare a child victim the trauma of facing her alleged abuser violated the defendant's Sixth Amendment right to confrontation. In Kentucky v. Stincer, the Court held that the defendant has a right to be present at any stage of the "criminal proceeding that is critical to its outcome if her presence would contribute to the fairness of the proceeding." And, although the Supreme Court recently held in Pennsylvania v. Ritchie that the right to confrontation is exclusively a trial right, the dissent by Justice Brennan, joined by Justice Marshall, presents a convincing argument that the bright-line distinction between pretrial and trial is somewhat facile: "[The plurality's] interpretation ignores the fact that the right of cross-examination also may be significantly infringed by events occurring outside the trial itself, such as the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial."

In Ritchie, the defendant was denied access to information contained in the state's child abuse agency files, which were protected from disclosure by a state confidentiality statute. The pretrial denial of access to this crucial information, analogous in effect to the pretrial protective order in Coleman, significantly impaired the effectiveness of cross-examination at trial. In his concurrence, Justice Blackmun opined that "a state [cannot] avoid Confrontation Clause problems simply by deciding to hinder the defendant's right to effective cross-examination . . . at the pretrial, rather than at the trial,

239. Id. at 1020. But see Maryland v. Craig, 110 S. Ct. 3157, 3170 (1990) (holding that if an adequate showing of necessity is made, the State may permit children to testify via videotape in child abuse cases).
241. Id. at 745.
243. Id. at 52-53 (holding that the right to confrontation is exclusively a trial right and, as such, "does not include the power to require pretrial disclosure of any and all information that might be useful in contradicting unfavorable testimony").
244. Id. at 66 (Brennan, J., dissenting).
245. Id. at 44.
stage."246 Under this analysis, it is plausible that denying Coleman and Givens access to the identities of their accusers, on whose testimony "the State's whole case [was to] rise and fall,"247 was an unjustifiable denial of their constitutional right to confrontation.

4. Conclusion.—In Coleman, justice required that the defendants be convicted; one would be hard-pressed to say that the case was decided incorrectly. Yet there lingers a nagging sense that Coleman and Givens were presumed guilty long before their trial began—a presumption that does violence to the Sixth Amendment rights held by all, even the most morally reprehensible. Coleman adheres to a narrow standard for evaluating a defendant's confrontation rights and expands the discretion granted to trial judges to balance these important rights against collateral concerns that are often inimical to a fair trial.

Alan W. Adamson
Susan S. Quarngesser
Edith F. Webster

246. Id. at 65 (Blackmun, J., concurring).
247. Coleman, 321 Md. at 599, 583 A.2d at 1050.
III. Contracts

A. Duress Defense Expanded in Maryland

_United States ex rel. Trane v. Bond_¹ presented an issue of first impression to the Court of Appeals regarding the duress defense as a means of avoiding a contractual obligation.² The United States District Court for the District of Columbia certified to the court the following question:³ May a party to a contract, alleging coercion by a third party, assert the defense of duress against another party to the contract?⁴ In _Bond_, the Court of Appeals held that a coerced party may raise the duress defense based on alleged coercion by a third party, even if the party against whom the defense is asserted was not aware of the coercion.⁵ The court further determined that physical injury is not a prerequisite to a third party duress defense. Rather, mere threats may amount to duress, depending on the action threatened and the circumstances surrounding the threats.⁶ The court’s holding expands the duress defense, departing from the general rule that protects innocent third parties from duress defenses.

Although the result reached in _Bond_ appears to be just in light of the compelling facts of the case, the new rule could undermine confidence in certain contracts executed in Maryland. _Bond_ should therefore be interpreted narrowly, and its rule applied only in extraordinary circumstances.

1. The Case.—Mech-Con Corporation contracted with the United States government to perform mechanical work at a government facility located in Maryland.⁷ The parties signed the contract in Maryland.⁸ Mech-Con, as principal, and Albert and Lorna Bond, as cosureties, executed a payment bond to cover project expenses.⁹ Both Mech-Con and Albert Bond subsequently declared bank-

---

2. See id. at 171, 586 A.2d at 734.
4. _Bond_, 322 Md. at 171, 586 A.2d at 734.
5. See id. at 182-83, 586 A.2d at 740.
6. See id.
7. Id. at 171, 586 A.2d at 734.
8. Id.
9. Id. at 171-72, 586 A.2d at 734; see infra note 65 and accompanying text.
After Mech-Con failed to meet its contractual obligations, the United States sued Lorna Bond to recover on the payment bond.

Lorna Bond raised the defense of duress, alleging that her husband had "physically threatened . . . and abused her to coerce her to sign" the payment bond. She contended that the threats rendered the contract void. Such a finding would make the contract unenforceable, even by parties unaware of the coercion.

The United States moved for summary judgment, contending that Albert Bond's threats rendered the contract voidable, but not void. Further, the Government argued that as a voidable contract, the payment bond could not be enforced by Mr. Bond, as the party who exerted the duress, but could be enforced by the United States—an innocent party who gave value. Thus, the issue presented was whether duress, under Maryland law, renders a contract void or merely voidable.

2. Legal Background.—

a. General Rules.—Traditional contract law recognizes two types of duress: duress by threats and duress by physical compulsion. In the former case, one party threatens the victim into as-

10. Bond, 322 Md. at 172, 586 A.2d at 734.
11. Id., 586 A.2d at 734-35.
12. Id., 586 A.2d at 735.
13. Id.
14. See Restatement (Second) of Contracts § 174 (1979); 13 Samuel Williston, A Treatise on the Law of Contracts § 1622A (Walter H.E. Jaeger ed., 3d ed. 1957). A contract will be void if there is no assent by one of the parties. To this end, the Restatement provides:

If conduct that appears to be a manifestation of assent by a party who does not intend to engage in that conduct is physically compelled by duress, the conduct is not effective as a manifestation of assent.

Restatement (Second) of Contracts § 174 (1979).
15. Bond, 322 Md. at 172-73, 586 A.2d at 735.
16. Id.; see Restatement (Second) of Contracts § 175; 13 Williston, supra note 14, § 1622A. The Restatement provides:

(1) If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.

(2) If a party's manifestation of assent is induced by one who is not a party to the transaction, the contract is voidable by the victim unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.

Restatement (Second) of Contracts § 175.
17. See Bond, 322 Md. at 171, 586 A.2d at 734.
18. See Restatement (Second) of Contracts §§ 174-175.
senting to a contract. The means used to induce assent are improper; nevertheless, assent is obtained and a contract is formed. The law acknowledges the existence of such a contract, but makes that contract voidable. Because the duress defense is always allowed against the party who exerted the coercion, the coercing party is prevented from profiting from his wrongful actions. The victim of the threats, however, may still be contractually bound to third parties who lack knowledge of the duress.

Instead of using threats, a party might physically compel another into indicating assent, without ever coercing the victim into actually assenting. For example, one could forcibly move another's hand across a page, causing a signature to be written. In such cases, the element of assent is lacking, and the contract is not merely voidable, but void. Such a contract imposes no obligation on the victim, and cannot be enforced by anyone.

Though the two scenarios just described are both termed duress, they are fundamentally different. Accordingly, the Restatement separates them into two sections, with different rules applicable to each. These different rules produce divergent results when the person responsible for the coercion is not the party seeking to enforce the contract. Because duress by physical compulsion provides a defense against innocent parties, the contract is unenforceable—regardless of the fact that the enforcing party did not coerce the victim and had no knowledge of the compulsion. Duress by threats alone, on the other hand, may be asserted only against the issuer of the threats. Consequently, a third party who relies or gives value may enforce the contract against the victim of duress, as long as the enforcing party had no reason to know that threats had been used.

19. See id. § 175.
20. For example, if a parent agrees to pay a kidnapper to save his child's life, the parent's assent is genuine. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.2, at 338 (3d ed. 1987).
21. See RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. d.
22. Id. § 175.
23. Thus, the kidnapper cannot enforce the parent's ransom agreement. See supra note 20.
24. See RESTATEMENT (SECOND) OF CONTRACTS § 175 & cmt. e. Suppose that instead of demanding cash, a kidnapper, for reasons unknown, instructs a parent to execute a contract with some unrelated and uninvolved third party. That third party may enforce the contract if he relies upon the agreement or gives value without reason to know that coercion was used. See id.
25. Id. § 174 cmt. a.
26. Id. § 174.
27. Compare id. § 174. with id. § 175.
28. See id. § 174 cmt. b.
When a court allows assertion of the duress defense against an innocent third party, the victim's losses are shifted arbitrarily to the innocent party seeking enforcement. This result can be justified only if a contract was never formed—i.e., where there was no true assent by one party.²⁹

b. Maryland Case Law.—Three Maryland cases provide the framework within which the duress defense has developed. In Central Bank v. Copeland,³¹ the defendant, Mrs. Copeland, had mortgaged her real estate to secure her husband's outstanding debts.³² She claimed that she had been terribly ill when her husband, using threats, forced her to sign the mortgage.³³ She argued that the contract should not be enforceable because "she never would have signed [the mortgage], but for her weak, shattered and helpless situation and the threats used."³⁴ The Court of Appeals permitted Mrs. Copeland to assert a duress defense against the mortgagees, her husband's creditors.³⁵

The court viewed the husband as an agent of the mortgagees because of his previous indebtedness to them.³⁶ Once the husband's coercive acts were attributed to the mortgagees, duress was no longer being asserted against an innocent third party. This holding applied the standard rule for cases involving agency: the duress defense does not protect a party to whom the duress is attributable under agency laws.³⁷

First National Bank v. Eccleston³⁸ involved a fact scenario almost identical to that of Copeland. Like Mrs. Copeland, Mrs. Eccleston also had executed a mortgage to secure her husband's pre-existing

²⁹. See id. Commentators have analogized this rule to the rule protecting a good faith purchaser for value from claims by the original owner, when the good faith purchaser bought from one who obtained the property by duress. See Restatement (Second) of Contracts § 175 cmt. e; E. Allan Farnsworth, Contracts § 4.19, n.1 (2d ed. 1990). See generally Ronald A. Anderson, 3 Anderson on the Commercial Code, §§ 2-313 to -509 (1983) (commenting that protecting parties who are unaware of the coercion fosters the free flow of commerce and is consistent with principles of relative fault).
³⁰. According to the Restatement, a physically compelled party does not assent; a threatened party does. See supra notes 18-26 and accompanying text.
³¹. 18 Md. 305 (1862).
³². Id. at 306.
³³. Id.
³⁴. Id. at 306-07.
³⁵. See id. at 317.
³⁶. See id. at 320.
³⁷. See Restatement (Second) of Contracts § 175 cmt. e (1979).
³⁸. 48 Md. 145 (1878).
debts. Mr. Eccleston allegedly had threatened his wife while she was ill, and she was unable to refuse. The court invalidated the mortgage on her property, citing Copeland. Again, the agency rationale supported the duress defense.

In the third case, Whitridge v. Barry, a husband used threats to coerce his wife into signing a blank form authorizing assignment of an insurance policy. He then filled in the blanks, assigning the policy to a creditor to secure his outstanding debt. The court determined that the circumstances surrounding the wife's endorsement "amount[ed] to a controlling duress, . . . which deprived her of that necessary freedom in the exercise of her mental faculties to make the act binding on her." Permitting Mrs. Barry to assert duress and invalidate the assignment, the court noted that Mr. Barry's creditor, as his assignee, was vulnerable to any defenses that might be asserted against Mr. Barry. Thus, the Whitridge court applied a recognized exception to the rule protecting innocent third parties: assignees are generally subject to any defenses that would be effective against the assignor.

3. The Court's Reasoning.—The Bond court based its holding on the three nineteenth century cases outlined above. The court examined the cases, focusing on the severity of the threats rather than the agency and assignment analyses employed by the previous courts. In addition, the court relied on a Supreme Court opinion, Brown v. Pierce, which held that a conveyance was void and unenforceable by an innocent third party because of the threats of death or violence made against the party who conveyed the land. The

39. Id. at 153.
40. Id. at 154.
41. See id. at 159 (citing Central Bank v. Copeland, 18 Md. 305 (1862)).
42. 42 Md. 140 (1875).
43. Id. at 150-52.
44. Id.
45. See id. at 141.
46. See id. at 153.
47. See id. at 151.
48. See id.; Restatement (Second) of Contracts § 336(1) (1979) ("By an assignment the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor; and if the right of the assignor would be voidable by the obligor . . . the right of the assignee is subject to the infirmity."); Farnsworth, supra note 29, § 11.8 (stating that an assignee acquires no better rights than the assignor).
49. See Bond, 322 Md. at 174-77, 586 A.2d at 735-37.
50. 74 U.S. (7 Wall.) 205 (1869).
51. Id. at 216; see Bond, 322 Md. at 177-78, 586 A.2d at 737-38.
Court refused to enforce the contract despite the innocent party’s good faith and value given, stating:

Actual violence is not necessary to constitute duress, even at common law, . . . because consent is the very essence of a contract, and, if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, . . . is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.\(^5^2\)

The Bond court observed that the Brown Court had cited Copeland, and had specifically noted that the type of injury threatened in Copeland met the standards of duress.\(^5^3\)

Although the Bond court acknowledged the differing opinions of other courts and commentators,\(^5^4\) the court adhered to its interpretation of the rule of Copeland and its progeny. Explaining this rule, the court stated:

Nothing in Copeland or Eccleston adopted the principle that mere threats, if succumbed to by the victim, rendered a contract void . . . . Rather, these early cases, without distinguishing between physical compulsion and threats of violence, turned on the Court’s view of the intensity of the duress exerted upon the victim as it impacted on the victim’s will to resist.\(^5^5\)

Thus, according to the court, the focus in Maryland is not on the acts taken upon the victim’s body; rather, the focus is on the nature of the threatened harm and the impact that the threats have on the victim.\(^5^6\)

The Bond court therefore established the Maryland rule that a victim may assert the duress defense against an innocent third party in a situation involving only threats, and not any physical compulsion, as long as the threats meet certain criteria.\(^5^7\) In Maryland, duress can now render a contract void if it involves the threat of

---

52. Brown, 74 U.S. (7 Wall.) at 214. As in Whitridge v. Barry, 42 Md. 140 (1875), the Brown court dealt with a duress defense asserted against the coercer’s assignee; thus, the doctrine that an assignee stands in the shoes of the assignor applied. The Bond court failed to recognize the existence of the assignee-assignor theory of recovery present in the Brown case.

53. See Bond, 322 Md. at 178, 586 A.2d at 738.
54. See id. at 178-79, 586 A.2d at 738-39.
55. Id. at 182, 586 A.2d at 740.
56. See id.
57. See id. at 182-83, 586 A.2d at 740.
"immediate physical force sufficient to place a person in . . . reasonable[] and imminent fear of death, serious personal injury, or actual imprisonment."\textsuperscript{58} The new rule implies that severe threats can cause a person to indicate assent without actually assenting.\textsuperscript{59} This ruling represents an expansion of the duress defense, and a significant departure from traditional contract law.\textsuperscript{60}

4. Analysis.—

a. Application of the Rule to the Bond Facts.—The facts in \textit{Bond} do not include the essential elements that formed the bases for the holdings in \textit{Copeland}, Eccleston, and Whitridge. Albert Bond was not previously indebted to the United States government and could not be considered its agent;\textsuperscript{61} nor did \textit{Bond} involve an assignment, because Lorna Bond contracted directly with the United States as a surety.\textsuperscript{62} The \textit{Bond} court, therefore, adopted a rule that is both new to Maryland law and contrary to the rule applied by other states.\textsuperscript{63}

Lorna Bond can be perceived as a spousal abuse victim and a person of limited means, being pursued by the United States government for a debt incurred by her husband's business. When the defendant is described in these terms, the result reached in \textit{Bond} appears to be just. The \textit{Bond} rule might, however, affect future cases in less desirable ways. In a future case, the expanded duress defense could be asserted against an innocent party who lacks the

\textsuperscript{58} Id.
\textsuperscript{59} See id. at 183, 586 A.2d at 740.
\textsuperscript{61} \textit{Bond}, 322 Md. at 171, 686 A.2d at 734.
\textsuperscript{62} Id.
\textsuperscript{63} See supra note 60 (listing cases outside of Maryland following the contrary approach of the \textit{Restatement}). The court stated that its holding is consistent with the common-law rule of duress enunciated by Blackstone. See \textit{Bond}, 322 Md. at 182, 586 A.2d at 740. Blackstone suggested that threats to life or limb should provide a stronger basis for a duress defense than other, less serious threats. See 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 131 (William D. Lewis ed., 1922). Blackstone's treatise, however, did not address the issue presented in \textit{Bond}—whether duress may be asserted against a nonthreatening party regardless of the seriousness of the threats involved. See id. At least one commentator recalls an early common-law rule allowing the duress defense against innocent third parties, but clearly recognizes that such a rule has not been the law in modern times. See 13 WILLISTON, supra note 16, § 1622A.
means to bear any resulting losses. One who gives value or relies on a contractual bond in good faith can no longer be certain of the legal status afforded the contract. If applied broadly, the new rule will to some extent erode confidence in the security of many contracts executed in Maryland.

b. A More Limited Expansion.—The result in Bond could have been achieved by a more limited expansion of the duress defense. In addition to the sympathetic posture of the defendant in Bond, the record contains other significant facts supporting the court’s expansion of the duress defense in this case. According to the Restatement, if the United States had reason to know of the duress inflicted on Lorna Bond, the Government could not claim to be protected from the defendant’s claims of duress as an innocent third party. The facts of Bond suggest that the United States had notice of at least the possibility that Lorna Bond’s execution of the surety was coerced.

The Miller Act requires a government contractor to execute a payment bond before a contract for construction or repair will be awarded by the United States. Sureties of the bond must be satisfactory to the officer awarding the contract. Consequently, Albert Bond, to assure the sufficiency of the bond, needed his wife’s signature to use marital property as collateral for the bond. The United States therefore knew that it was important to Albert Bond to include his wife’s name on the surety bond. These circumstances may have given the Government sufficient reason to know of the duress alleged by Lorna Bond, subjecting the United States to Lorna Bond’s duress defense.

The mere fact that the cosureties in Bond were married to each other probably does not provide the “reason to know of the duress” contemplated by the Restatement, however. Yet Albert Bond’s circumstances and his relationship to Lorna Bond do weaken the United States’ contention that it had absolutely no reason for suspicion. That is, the United States might be said to have assumed the risk of being subject to a duress defense. These facts help to qualify the types of cases in which the new Maryland rule might be appropriate. Bond should be limited to cases in which unique factors pro-

64. A party may enforce a voidable contract only if that party has given value or relied materially “without reason to know of the duress.” Restatement (Second) of Contracts § 175(2) (1979).
66. Id.
67. See supra note 64.
vided constructive notice of a likelihood of coercion. When the plaintiff is a paradigmatic innocent third party, the defendant should not be allowed to raise a duress defense based upon threats alone, regardless of the severity of the threats. An expansion of the duress defense so limited is more consistent with the spirit of the Restatement, with its emphasis on whether the third party had an opportunity to learn that coercion was used.  

Limiting Bond in the manner just described has the disadvantage of potentially incapacitating some individuals' ability to contract. Procurement officials, for example, might decline to accept a contractor's spouse as a surety, fearing vulnerability to a potential claim of duress. Any attempt to protect a certain class of individuals will inevitably disadvantage that class in some way. One certainly hopes that the scenario presented in Bond is rare enough not to induce widespread reluctance to accept a contractor's spouse as a surety. In any event, an exception for narrowly defined circumstances is superior to Bond's broad expansion of the duress defense.

5. Conclusion.—The rule announced in Bond significantly departs from widely accepted contract principles. After Bond, any party to a contract executed in Maryland cannot enforce the obligation if the other party proves that serious threats induced assent. As long as the threats were severe enough, the contract is void even though the enforcing party is unaware that threats were made.

The relationship between the coercing party and his victim, combined with the surrounding circumstances of Bond, justify the result in this case. When this issue arises in the future, however, the court should expressly limit the Bond holding to its significant facts. In this way, the court can lessen the adverse consequences that its

68. See Restatement (Second) of Contracts § 175(2). The suggested approach also has practical merit. Ordinarily, a victim unrelated to the coercing party would be able to alert the other contracting party promptly after the contract is executed. Only when the victim and coercing party are intimately related, as in Bond, is the victim usually incapable of coming forward before the other party relies upon the contract. Note that, like Lorna Bond, all three parties claiming duress in Copeland, Eccleston, and Whitridge were alleged to be victims of abusive husbands.

69. Reluctance to accept contractors' spouses as sureties might already be the practical effect caused by Bond. By refusing to contract with spouses, one may avoid the situation in which a third party duress claim is most likely to arise. See supra note 68.
departure from the *Restatement* will have on the sanctity of ordinary contractual relationships.

DAVID L. LITTLETON
IV. CORPORATE LAW

A. The Successor Liability Rule in a Products Liability Setting

In Nissen Corp. v. Miller, the Court of Appeals held that in products liability cases, Maryland follows the general corporate rule of successor liability with its four well-recognized exceptions; the court refused to adopt the minority fifth exception for "continuity of enterprise." When a corporation acquires the assets of another corporation for cash, the traditional corporate rule states that the successor does not acquire the liabilities and debts of the predecessor absent one of the following situations: There is an agreement to assume the liabilities; the transaction is essentially a consolidation or merger; the successor entity is a reincarnation of the predecessor; or the transaction was fraudulent, made without good faith, or lacked sufficient consideration.

Because the facts in Nissen did not give rise to any of the enumerated exceptions, the initial plaintiff and the cross-claim plaintiff urged the Court of Appeals to adopt a fifth exception for the "continuity of enterprise," which would permit suit against a successor.

2. See id. at 632, 594 A.2d at 573.
3. There are three general types of corporate acquisitions: (1) statutory merger or consolidation; (2) acquisition through stock purchase; and (3) acquisition of assets for cash.

Mergers or consolidations are generally effectuated pursuant to specific state laws. In a statutory merger the acquiring corporation purchases the assets of the target corporation in exchange for shares of the acquiring corporation. The acquiring corporation survives while the merged (target) corporation ceases to exist. In a consolidation, however, the two corporations unite in an entirely new corporate entity, and both prior corporations cease to exist. Robert J. Yamin, The Achilles Heel of the Takeover: Nature and Scope of Successor Corporation Products Liability in Asset Acquisitions, 7 HARV. J. L. & PUB. POL'Y 185, 213-14 (1984); see also MD. CORPS. & ASS'NS CODE ANN. § 3-105 (1985) (outlining the statutory procedure for mergers and consolidations in Maryland).

A stock acquisition occurs when one corporation sells all its stock to another corporation in return for "stock, cash, or other property." Yamin, supra, at 213. The corporations do not have to comply with any statutes in order to complete this transaction. Id. at 214. After sale, "the selling corporation . . . remains a fully functioning enterprise as a subsidiary of the purchaser." Id. (footnote omitted).

A corporation may also acquire the assets of another corporation for cash without the need for statutory compliance. Generally, an asset purchase is the preferred form of acquisition because it "provides the maximum insulation from successor liability." Id. The Maryland Code defines "assets" as "any tangible, intangible, real, or personal property or other assets, including goodwill and franchises." Md. CORPS. & ASS'NS CODE ANN. § 1-101(d).

corporation based on injuries caused by its predecessor's defective products. Judge Chasanow, writing for the majority, rejected the "continuity of enterprise" exception, finding the liberal minority approach incompatible with Maryland case law and policy.

1. The Case.—In October 1986, Frederick Brandt injured his finger while attempting to adjust a treadmill that he had purchased from Atlantic Fitness (Atlantic) in January of 1981. The treadmill was designed, manufactured, and sold by American Tredex Corporation (American Tredex). In July of 1981, six months after Brandt had purchased the treadmill, Nissen Corporation (Nissen) acquired all of American Tredex's assets, including trade name, goodwill, patents, and inventory. Pursuant to the cash purchase agreement, Nissen assumed some of American Tredex's contractual obligations; an express provision in the agreement stated, however, that Nissen would not be liable for any personal injuries caused by an American Tredex product sold prior to the acquisition. The agreement also provided that American Tredex would continue to operate for the next five years under the name AT Corporation.

After the asset acquisition, Nissen relocated the inventory and manufacturing equipment and notified American Tredex's dealers of the asset purchase. Nissen also hired some American Tredex employees, provided replacement parts for American Tredex prod-

5. 323 Md. at 619, 594 A.2d at 566. Under the "continuity of enterprise" exception, a successor corporation may be held liable if it is found that "[t]here was basic continuity of the enterprise of the seller corporation, including . . . retention of key personnel, assets, general business operations, and even . . . name." Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 883-84 (Mich. 1976). This exception differs from the "mere continuation" exception, which focuses only on continuity of ownership. Nissen, 323 Md. at 620, 594 A.2d at 567.

6. See Nissen, 323 Md. at 633, 594 A.2d at 574; see also infra note 25 (listing some jurisdictions which have adopted the minority approach).


8. Nissen, 323 Md. at 615, 594 A.2d at 565.

9. Id.

10. Id. For a discussion of disclaimer of liabilities in successor purchase agreements, see 1 American Law of Products Liability 3d, supra note 4, § 7.3, at 14-15.

11. Nissen, 323 Md. at 615, 594 A.2d at 565. The Court of Appeals found the asset acquisition to be an "arms length transaction." Id. Under the agreement, Nissen was required to advance American Tredex $600,000. Id. Nissen also agreed to pay AT Corporation 4% of the net sales of any treadmills sold that were offered or under development by American Tredex at the time of acquisition or that were merely modified afterwards. This clause provided AT Corporation a minimum of $100,000 to a maximum of $1,000,000 annually. Id.

12. Id. at 616, 594 A.2d at 565.
ucts, honored existing ninety-day warranties, and serviced old customer accounts. In December 1987, five years after the acquisition, AT Corporation was administratively dissolved.

In December 1987, five years after the AT Corporation’s dissolution and almost two years after Brandt was injured, he and his wife brought suit against American Tredex, AT Corporation, Nissen, and Atlantic, alleging negligence, breach of express and implied warranties, strict liability, and loss of consortium. Atlantic filed a cross-claim against Nissen for indemnity and contribution. Nissen moved for summary judgment, arguing that under the asset purchase agreement, it was not responsible for any injuries caused by an American Tredex product sold prior to the acquisition.

The trial court granted Nissen’s motion for summary judgment. The Court of Special Appeals reversed, holding that Nissen could be sued under “an expanded interpretation of the third exception” to the traditional rule of corporate successor liability. This new “continuity of enterprise” exception “would only apply where the predecessor corporation is functionally extinct at the time the action is filed.” The Court of Appeals granted certiorari to decide whether to adopt the “continuity of enterprise” exception and whether consequently Nissen could be held accountable for Brandt’s injuries.


14. Nissen, 323 Md. at 616, 594 A.2d at 565. The record does not reveal the grounds on which AT Corporation was dissolved; however, AT Corporation’s five year period of duration, as provided by the 1981 asset purchase agreement, had expired. See supra text accompanying note 11. See generally REVISED MODEL BUSINESS CORP. ACT § 14.20 (1984) (listing grounds for administrative dissolution).

15. Nissen, 323 Md. at 616, 594 A.2d at 565.

16. Id.


18. Id. at 452, 575 A.2d at 760.

19. Id. at 456, 575 A.2d at 762.

20. Id.

2. Legal Background.—

a. Origins of the "Continuity of Enterprise" Theory.—The traditional successor nonliability rule was created to protect creditors’ rights by preventing a corporation from rearranging its assets in order to escape liability. The rule also serves to "protect the successor from unknown or contingent liability" and to "promote predictability in corporate transactions, free availability and transferability of capital, and mobility in the business and economic world in general." The "continuity of enterprise" exception, however, was created in response to a concern that the general rule was inadequate to protect the rights of products liability plaintiffs.

One of the first cases to deviate from the traditional rule was Baltimore Luggage Co. v. Holtzman, 80 Md. App. 282, 297, 562 A.2d 1286, 1293 (1989). The Court of Special Appeals stated that "[t]he 'mere continuation' exception reinforces this policy by allowing a creditor to recover from the successor corporation whenever the successor is substantially the same as the predecessor." Id.; see also Turner v. Bituminous Casualty Co., 244 N.W.2d 873, 877-78 (Mich. 1976) (discussing how the general rule developed, and its inapplicability to products liability cases); George L. Lenard, Note, Products Liability of Successor Corporations: A Policy Analysis, 58 IND. L.J. 677, 683 (1983) (discussing the creditor-protection rationale behind the general rule).

22. Murphy, supra note 14, at 821.

23. Murphy, supra note 14, at 821.

24. Yamin, supra note 3, at 207; see also Polius v. Clark Equip. Co., 802 F.2d 75, 78 (3d Cir. 1986) (examining how the general rule promotes "free alienability of business assets").

Many commentators have analogized the traditional corporate rule to the rule protecting bona fide purchasers. See Yamin, supra note 3, at 207-08; Lenard, supra note 22, at 684-87; Murphy, supra note 14, at 821-22. This doctrine, applicable to property and commercial law, states that an individual who purchases property in good faith and for adequate consideration will not be held liable for any "prior or contingent" claims or liabilities. Murphy, supra note 14, at 821. The rationale follows that of the general corporate rule: A successor corporation that acquires a predecessor’s assets in good faith, for adequate consideration, and without knowledge of any prior claims and liabilities against the predecessor, is not held accountable. Yamin, supra note 3, at 207. One commentator explained that the rationale for the traditional rule is "an extension of the policy underlying the theory of incorporation itself: the fundamental public policy of promoting economic activity through the granting to shareholders of insulation from personal liability." Id. at 208.

Cyr v. B. Offen & Co., in which the United States Court of Appeals for the First Circuit expanded the "mere continuation" exception and held a successor corporation strictly liable despite the finding that the facts did not give rise to any of the traditional exceptions. The court found that the corporate policies that underlie the general rule of nonliability, such as protecting creditors' rights and promoting free alienability of corporate assets, are misplaced in the torts context. The corporate policies are inapplicable in a products liability case, according to the court, when a successor "assumes all [the] benefits and liabilities of its predecessor, holds itself out to the world as the same enterprise, without notifying known customers, [and] continues to function in the same manner . . . with the same key employees, producing the same product." The First Circuit imposed liability on the successor, justifying its holding based on policies underlying strict liability:

The manufacturer's successor . . . is . . . in a better position than the consumer to gauge the risks and the costs of [production]. The successor knows the product, is as able to calculate the risk of defects as the predecessor, is in position to insure therefor and reflect such cost in sale negotiations, and is the only entity capable of improving the quality of the product.

In 1976, the Supreme Court of Michigan also departed from the traditional rule and created the "continuity of enterprise" exception in Turner v. Bituminous Casualty Co. The Turner court found the general corporate rule and its four well-recognized exceptions inapplicable in the torts context, because the rule had been designed to protect creditors and shareholders, not products liabil-

27. Id. at 1154. In Cyr, one individual was seriously injured and another died while attempting to clean a printing press designed and manufactured by B. Offen Company ("B. Offen I"), a sole proprietorship. Id. at 1147-48, 1151. When the sole proprietor died, a group of B. Offen I employees formed B. Offen & Co., Inc. ("B. Offen II") to purchase B. Offen I for cash. Id. at 1151. The contract called for the continuation of the old business in substantially the same manner as it had been conducted before the proprietor's death, and customers were not given notice of the formation of a new or different business. Id.
28. See id. at 1153.
29. Id.
30. Id. at 1154.
The problems arising in products liability were recognized as "substantially different" from those associated with creditors and shareholders. The Turner court therefore disregarded the traditional analysis, which focused on the form of the corporate acquisition, and created a new test to determine whether a successor continued the enterprise of its predecessor.

b. Maryland Case Law.—Prior to Nissen, the issue of corporate successor liability in a products liability context had not been decided by the Court of Appeals. In 1988, however, this issue was addressed in two cases before the United States District Court for the District of Maryland. Both district court judges agreed that the general corporate rule of successor liability with its four traditional exceptions was the law in Maryland; however, the judges disagreed on whether Maryland would adopt the "continuity of

32. See id. at 877-78. In Turner, the plaintiff had both his hands amputated by a defective power press manufactured by "Old Sheridan." Id. at 875. Prior to the accident, "Old Sheridan" sold its "entire business, good will, name and assets" to "New Sheridan" for cash. Id. at 875-76. Four days after the asset acquisition, "Old Sheridan" was dissolved. Id.

33. See id. at 878.

34. See id. at 880-81.

35. Id. at 879, 883-84. Three prongs of the Turner four-part test were adopted from Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974), as follows:

"(1) There is a continuation of the enterprise of the seller corporation, so that there is a continuity of management, personnel, physical location, assets, and general business operations.

[(2)] The seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible.

[(3)] The purchasing corporation assumes those liabilities and obligations of the seller ordinarily necessary for the uninterrupted continuation of normal business operations of the seller corporation."

Turner, 244 N.W.2d at 879 (quoting Shannon, 379 F. Supp. at 801) (emphasis added). The fourth prong of the Turner test is that "the purchasing corporation [holds] itself out to the world as the effective continuation of the seller corporation." Id. at 884.

36. See 323 Md. at 622, 594 A.2d at 568.


The federal district court judges had to predict how the state's highest court would have ruled on the issue because Maryland case law was silent on the matter. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938). In general, the area of corporate law is a state function and is largely governed by statute. Absent a controlling statute, a state's highest court is the authority on corporate law issues. The Court of Appeals, therefore, may reject the federal district court's interpretation of Maryland law. See Navistar, 737 F. Supp. at 1449 (stating that the general rule of successor liability "is the law of Maryland unless and until the Court of Appeals suggests otherwise").
enterprise" exception.\textsuperscript{38}

In \textit{Giraldi v. Sears, Roebuck \& Co.},\textsuperscript{39} Judge Smalkin held that Maryland would follow the well-established majority view that accepts the four exceptions and rejects any additional exceptions.\textsuperscript{40} He believed the Court of Appeals would adopt "the 'pure' version of the traditional rule, because reported Maryland cases recognize limited successor liability in the corporate-matters sphere."\textsuperscript{41} The liberal exceptions to the traditional rule, such as the "continuity of enterprise" and the "product line" theories, were rejected in light of the underlying social and public policies of products liability.\textsuperscript{42} Moreover, Judge Smalkin commented that traditionally Maryland has been very conservative in the field of products liability\textsuperscript{43} and thus, "seemingly would embrace the philosophy of not holding purchasing corporations responsible for unliquidated tort liabilities of the seller."\textsuperscript{44}

In \textit{Smith v. Navistar International Transportation Corp.},\textsuperscript{45} Judge Niemeyer predicted that Maryland would adopt the "continuity of enterprise" exception.\textsuperscript{46} Judge Niemeyer found that the "continuity of enterprise" theory was justified where the successor "step[ped] into the shoes" of the predecessor, because it created the presumption that the successor assumed the liability.\textsuperscript{47} The inability to sue

\textsuperscript{38} See \textit{Giraldi}, 687 F. Supp. at 991 (rejecting the exception); \textit{Navistar}, 737 F. Supp. at 1451 (adopting the "continuity of enterprise" theory).
\textsuperscript{39} 687 F. Supp. 987 (D. Md. 1988).
\textsuperscript{40} See id. at 991. For an exhaustive list of jurisdictions and cases adopting the majority rule, see \textit{1 AMERICAN LAW OF PRODUCTS LIABILITY 3D, supra} note 4, § 7:1, at 11-12. See also infra note 54 (listing jurisdictions and cases in the majority).
\textsuperscript{42} \textit{Giraldi}, 687 F. Supp. at 991.
\textsuperscript{43} See id. at 992; \textit{Phipps v. General Motors Corp.}, 278 Md. 337, 352-53, 363 A.2d 955, 963 (1976) (adopting the theory of strict liability in tort). In \textit{Giraldi}, Judge Smalkin also noted that Maryland law requires a plaintiff to prove that the defect is "unreasonably dangerous," whereas more liberal jurisdictions, such as California, do not. See 687 F. Supp. at 992.
\textsuperscript{44} \textit{Giraldi}, 687 F. Supp. at 991.
\textsuperscript{46} See 737 F. Supp. at 1449-50 (discussing the Turner four-part test for "continuity of enterprise"). Judge Niemeyer relied on the district court decision in \textit{Polius v. Clarke Equip. Co.}, 608 F. Supp. 1541 (D.V.I. 1985), \textit{remanded}, 802 F.2d 75 (3d Cir. 1986), which followed the "continuity of enterprise" exception and found the successor liable. \textit{See Navistar}, 737 F. Supp. at 1150. However, Judge Niemeyer's reliance was flawed because the United States Court of Appeals for the Third Circuit reversed the district court in \textit{Polius}, stating, "we also reject the continuity of enterprise theory because it too proposes an ill-considered extension of liability to an entity having no causal relationship with the harm." \textit{Polius}, 802 F.2d at 82.
\textsuperscript{47} \textit{Navistar}, 737 F. Supp. at 1451.
the predecessor was considered a necessary condition before the new exception would apply.\(^{48}\) The *Navistar* court noted that in the cases applying the "continuity of enterprise" exception, "the predecessor corporation dissolved, went out of business or was no longer available to be sued."\(^{49}\) Because the predecessor in *Navistar* was "viable" and able to be sued, the successor corporation escaped liability despite the court's acceptance of the "continuity of enterprise" exception.\(^{50}\)

3. *The Court's Reasoning.*—The central issue in *Nissen* was whether Maryland should adopt the "continuity of enterprise" exception to the general rule of successor nonliability in a products liability case.\(^{51}\) Judge Chasanow, writing for the majority,\(^{52}\) rejected the theory.\(^{53}\) The *Nissen* court stated that Maryland, like the majority of other states,\(^{54}\) adheres to the traditional corporate rule, which holds that successor corporations are not liable for the debts and liabilities of their predecessors after an asset acquisition, unless: (1) there is a specific agreement to assume the predecessor's liabilities; (2) the asset acquisition is actually a merger or consolidation; (3) the successor is a "mere continuation or reincarnation" of the predecessor's entity; or (4) the transaction was fraudulent, made in bad faith.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) See id. In *Navistar*, the successor only purchased five percent of the predecessor's assets. Id. Thus, the successor in no way "step[ped] into the shoes of [the predecessor] and did not substantially continue its business." Id.

\(^{51}\) 323 Md. at 617, 594 A.2d at 565.

\(^{52}\) *Nissen* was decided by a 4-2 margin. In their dissent, Judges Eldridge and Hinkel commented, without explanation, that in addition to the exceptions provided in the general rule of corporate nonliability, Maryland should adopt the "continuity of enterprise" exception in the context of a products liability case. See id. at 633-34, 594 A.2d at 574 (Eldridge and Hinkel, JJ., dissenting).

\(^{53}\) See id. at 632, 594 A.2d at 573.

or without adequate consideration.\textsuperscript{55}

The \textit{Nissen} court had no trouble adopting the general rule and its four exceptions because the first, second, and fourth exceptions are specifically codified by statute in Maryland.\textsuperscript{56} The third exception is not codified by statute; however, the policies underlying this exception can be found throughout the Corporations and Associations and Commercial Law Articles.\textsuperscript{57} Thus, the \textit{Nissen} court held that the rule of successor nonliability and the four well-recognized exceptions should be adopted in Maryland.\textsuperscript{58}

Because the parties in \textit{Nissen} agreed that the asset acquisition

\begin{footnotesize}
\begin{enumerate}
\item[55.] 323 Md. at 617, 632, 594 A.2d at 565-66, 573.
\item[56.] Id. at 617-18, 594 A.2d at 566. The first exception is reflected in \textsection 3-115(c) of the Corporations and Associations Article, which provides that in a transfer for assets, "[t]he successor is liable for all the debts and obligations of the transferor to the extent provided in the articles of transfer." \textit{MD. CORPS. \\ & ASS'NS CODE ANN.} \textsection 3-115(c) (1985); \textit{see also} Smith \textit{v. Navistar Int'l Transp. Corp.}, 687 F. Supp. 201, 204, \textit{republished as corrected}, 737 F. Supp. 1446, 1449 (D. Md. 1988); Baltimore Luggage Co. \textit{v. Holtzman}, 80 Md. App. 282, 291-92, 562 A.2d 1286, 1290-91 (1989). The second exception is similar to \textsection 3-114(e)(1) of the Corporations and Associations Article, which states that in a consolidation or merger transaction, "[t]he successor is liable for all the debts and obligations of each nonsurviving corporation." \textit{MD. CORPS. \\ & ASS'NS CODE ANN.} \textsection 3-114(e)(1) (Supp. 1991); \textit{see also} Navistar, 737 F. Supp. at 1449; Baltimore Luggage, 80 Md. App. at 291, 562 A.2d at 1290. \textit{See generally 1 AMERICAN LAW OF PRODUCTS LIABILITY 3D, supra note 4, \textsection 7:10, at 26-27 (discussing the second exception).}

The Maryland Uniform Fraudulent Conveyance Act parallels the fourth exception to the extent that it "protects the rights of creditors of a corporation which transfers its assets with an intent to defraud or without fair consideration." \textit{Navistar}, 737 F. Supp. at 1449; \textit{see MD. COM. LAW II CODE ANN.} §§ 15-201 to -214 (1985 & Supp. 1991) (Maryland Fraudulent Conveyance Act). One provision of the Act allows a creditor of a transferor to attach or levy on the property conveyed to the transferee, if the transfer is fraudulent. \textit{See id.} \textsection 15-209(a)(2); \textit{see also} Baltimore Luggage, 80 Md. App. at 290-91, 562 A.2d at 1290 (stating that the Act "implicitly recognizes that a successor corporation may be held liable for the obligations of its predecessor").

\item[57.] \textit{See Nissen}, 323 Md. at 618, 594 A.2d at 566; Baltimore Luggage, 80 Md. App. at 296-97, 562 A.2d at 1293.

The traditional third exception provides that a successor corporation will be held liable if the new entity is a "mere continuation or reincarnation of the predecessor entity." \textit{1 AMERICAN LAW OF PRODUCTS LIABILITY 3D, supra note 4, \textsection 7:1, at 10. The focus is on the continuity of ownership and control rather than on the continuation of the business operations. Id.} \textsection 7:20, at 36. The following factors have been considered in determining whether the "mere continuation" exception is applicable:

[A] common identity of the officers, directors, and stockholders in the selling and purchasing corporations; continuation of the business operations of the predecessor, evidenced by the use of the same name, the same location, and the same employees; and the existence of only one corporation at the conclusion of the transaction, that is, the predecessor corporation must be extinguished.

\textit{Id.} \textsection 7:14, at 30-31; \textit{see also} Baltimore Luggage, 80 Md. App. at 297, 562 A.2d at 1293 (listing factors for "mere continuation" exception).

\item[58.] \textit{See} 323 Md. at 619, 632, 594 A.2d at 566, 573.
\end{enumerate}
\end{footnotesize}
fell outside the scope of the traditional exceptions, the issue was whether the Court of Appeals should expand the "mere continuation" exception and adopt the "continuity of enterprise" theory in a products liability case. The Court of Appeals analogized the "continuity of enterprise" exception to strict liability in tort because the arguments made by the respondents were identical to those traditionally urged for imposing strict liability.

In Maryland, for plaintiffs to recover under strict liability in tort, they must prove that the defendant's product was in a defective condition when it was placed into the stream of commerce and that it was unreasonably dangerous to the consumer. Nissen was neither at fault nor responsible for the defective treadmill manufactured by American Tredex because "[a] corporate successor is not [the] seller and bears no blame in bringing the product and the user together." Responsibility and fault are placed only on those who produce the defective and unreasonably dangerous product and place it in the market.

Following the same line of reasoning, the Court of Appeals found the "continuity of enterprise" exception to be inconsistent with the theory of strict liability because the exception ignores the

59. *Id.* at 619-20, 594 A.2d at 566-67. The *Nissen* court indicated that some jurisdictions have allowed products liability plaintiffs to recover under the "product line" theory. However, the issue was not raised by the respondents and the court felt no need to address it. *See id.* at 620 n.1, 594 A.2d at 567 n.1.

60. *See id.* at 619, 594 A.2d at 566-67.

61. Brandt argued that he "suffered a personal injury for which some entity must be held responsible." *Id.* at 621, 594 A.2d at 567.

62. *See id.* at 619, 594 A.2d at 567. Brandt sued American Tredex, AT Corporation, Nissen, and Atlantic, based on negligence, breach of warranty, and strict liability. Judge Chasanow reasoned that a rejection of the "continuity of enterprise" exception under strict liability would preclude liability under the other counts as well. *Id.*


64. *Nissen*, 323 Md. at 624, 594 A.2d at 569.

65. The *Nissen* court reiterated the policies underlying the adoption of strict products liability in Maryland:

"[T]he theory of strict liability is not a radical departure from traditional tort concepts. Despite the use of the term 'strict liability' the seller is not an insurer, as absolute liability is not imposed on the seller for any injury resulting from the use of his product. Proof of a defect in the product at the time it leaves the control of the seller implies fault on the part of the seller sufficient to justify imposing liability for injuries caused by the product."

*Id.* at 623, 594 A.2d at 568-69 (quoting *Phipps*, 278 Md. at 351-52, 363 A.2d at 963) (citations omitted) (emphasis added).
fundamental concept of causation "between the defendant's acts and the plaintiff's injury." Thus, Judge Chasanow stated that it would be "patently unfair to require [an asset purchaser] to bear the cost of unassumed and unanticipated products liability claims primarily because [the purchaser] is still in business and is perceived as a 'deep pocket.' "

Furthermore, the *Nissen* court dismissed the respondent's argument that Nissen should be held liable because it "enjoyed American Tredex's goodwill and held itself out as the effective continuation of American Tredex." The respondents argued that a corporation should not be allowed to purchase the benefits in an asset acquisition "while denying its attendant liabilities to the consuming public." In rejecting this argument, Judge Chasanow reasoned that any goodwill that Nissen acquired from American Tredex would be diminished if the predecessor's products caused injuries. The court would not penalize Nissen "for retaining a few of American Tredex's employees or for assuming some of American Tredex's commitments." Nissen's actions had important value to society and did not give rise to successor liability.

The *Nissen* court then examined and rejected the two main cases supporting the adoption of the "continuity of enterprise" exception.

66. *Id.* at 627, 594 A.2d at 570 (quoting Polius v. Clark Equip. Co., 802 F.2d 75, 81 (3d Cir. 1986)).

67. *Id.* at 624, 594 A.2d at 569. The court indicated that the plaintiffs may be able to recover if they could prove that the successor corporation knew of the tort liability. Both the fourth exception to the general rule for fraudulent transactions and the "bona fide purchaser" theory would permit such recovery. *Id.* at 624-25 n.2, 594 A.2d at 569-70 n.2; see also infra notes 94-98 and accompanying text (discussing the "bona fide purchaser" rule as a viable theory for holding successor corporations liable for the defective products of their predecessors).

The *Nissen* court also indicated that a corporation may be subject to an independent duty to warn, despite the nature of the transfer, when it has knowledge of defects in a predecessor's products. 323 Md. at 626 n.3, 594 A.2d at 570 n.3. The court did not have to address this issue because neither Brandt nor Atlantic claimed that Nissen knew of any defect or had an independent duty to warn. *Id.*

The *Nissen* court rejected the "deep pocket" theory as a justification for adopting the "continuity of enterprise" exception because liability would not only be imposed on large corporations, "but it would also be imposed upon the small business operation which may not be in a position to spread the risk or insure against it." *Id.* at 625, 594 A.2d at 570.

68. 323 Md. at 621, 594 A.2d at 568. Atlantic pointed to the fact that Nissen sold replacement parts, performed some existing contracts, retained some employees, honored existing 90-day warranties, and serviced existing customer accounts. *Id.*

69. *Id.*, 594 A.2d at 567-68.

70. See *id.* at 625, 594 A.2d at 570.

71. *Id.* at 626, 594 A.2d at 570.
The *Cyr v. B. Offen & Co.* decision was distinguishable—*Cyr* involved a sole proprietorship, rather than a corporation, and the successor owners were a group of employees who had worked for the predecessor. Judge Chasanow noted that the *Cyr* court extended liability upon finding "a nexus between the owners of the successor corporation and those responsible for [the] plaintiffs' injuries—the employees."  

In *Turner v. Bituminous Casualty Co.*, the Supreme Court of Michigan found the general rule of corporate successor nonliability inapplicable to meet the "substantially different problems associated with products liability torts." The *Nissen* court found the *Turner* rationale to be "nebulous" and did not believe that the general rule of successor liability should be disregarded as an "impediment" in products liability cases. Thus, the enterprise theory was rejected, and the Court of Appeals adhered to the traditional successor nonliability rule, with only its four well-recognized exceptions.

4. **Analysis.**—One of the major criticisms of the general rule of successor nonliability is that it is based on corporate law and is therefore inapplicable in a products liability setting. Courts that have adopted the "continuity of enterprise" exception have used the policies underlying strict products liability to justify their decisions. The *Nissen* court analyzed the "continuity of enterprise" issue within the framework of strict liability and concluded that because the theory of strict liability abandons any concept of fault,

---

72. 501 F.2d 1145 (1st Cir. 1974).
73. Id. at 1151; *Nissen*, 323 Md. at 628, 594 A.2d at 571; see supra notes 26-30 and accompanying text (giving the facts and reasoning in *Cyr*).
74. *Nissen*, 323 Md. at 628, 594 A.2d at 571.
75. 244 N.W.2d 873 (Mich. 1976).
76. Id. at 878; see supra notes 31-35 and accompanying text (discussing the *Turner* case and its rationale).
77. See *Nissen*, 323 Md. at 629, 594 A.2d at 572.
78. See id. at 632, 594 A.2d at 573. The other cases cited by the respondent were held to be equally unpersuasive. See id. at 630-32, 594 A.2d at 572-73; e.g., *Mozingo v. Correct Mfg. Corp.*, 752 F.2d 168, 176 (5th Cir. 1985) (finding successor liability because the successor purchased stock from the predecessor and because a substantial amount of the stockholders were the same); Holloway v. John E. Smith's Sons Co., 432 F. Supp. 454, 456 (D.S.C. 1977) (following *Cyr*); Andrews v. John E. Smith's Sons Co., 369 So. 2d 781, 786 (Ala. 1979) (following *Turner*). The *Nissen* court found no reason to extend liability under the "continuity of enterprise" theory expressed in *Mozingo*, because the situation was covered by the traditional "mere continuation" exception. *Nissen*, 323 Md. at 630, 501 A.2d at 572.
79. See *Cyr v. B. Offen & Co.*, 501 F.2d 1145, 1153 (1st Cir. 1974); *Turner*, 244 N.W.2d at 878.
80. See, e.g., *Cyr*, 501 F.2d at 1154; *Turner*, 244 N.W.2d at 881-82.
the policies of strict liability fail to support the extension of liability in the successor corporation context.  

a. **Strict Products Liability Policies.**—Because the "continuity of enterprise" exception was created in the context of strict products liability cases, it is important to consider the underlying tort policies in order to determine the exception's validity. In *Phipps v. General Motors Corp.*, the Court of Appeals identified four major policy rationales to justify adopting strict liability. First, the "proof of a defect rendering a product unreasonably dangerous is a sufficient showing of fault on the part of the seller to impose liability without placing an often impossible burden on the plaintiff of proving specific acts of negligence." Second, when manufacturers put products into the market there is an implied representation of safety upon which consumers reasonably rely. Third, imposition of liability will cause manufacturers to remedy the defective products and improve their safety. Finally, the manufacturer is in the best position to spread the cost of the plaintiff's injury through pricing or liability insurance or both.

The *Nissen* court made it clear that the main factor underlying strict products liability in Maryland is the concept of fault; a manufacturer who places an unreasonably dangerous and defective product into the stream of commerce should be held responsible for that product. In advocating the "continuity of enterprise" exception,

---

81. *See supra* notes 61-67 and accompanying text.  
82. 278 Md. 337, 363 A.2d 955 (1976).  
83. *See id.* at 352, 363 A.2d at 963; *see also* Lenard, *supra* note 22, at 688-95 (discussing the four main policy rationales behind strict liability).  
84. *Phipps*, 278 Md. at 343, 363 A.2d at 958.  
85. *See id.* at 352, 363 A.2d at 963. The Court of Appeals stated: "[B]y marketing his product for use and consumption, [the seller] has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it; . . . the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods."

*Id.* (quoting *Restatement (Second) of Torts* § 402A, cmt. c (1965)).  
86. *See id.* at 352-53, 363 A.2d at 963 ("[T]he seller of that product is in a better position to take precautions and protect against the defect."); Lenard, *supra* note 22, at 691-92 (referring to this policy as the "deterrence" rationale).  
87. *See Phipps*, 278 Md. at 352, 363 A.2d at 963. The *Phipps* court stated "[t]hat public policy demands that the burden of accidental injuries . . . be placed upon those who market [the harmful products], and be treated as a cost of production against which liability insurance can be obtained." *Id.* (quoting *Restatement (Second) of Torts* § 402A, cmt. c (1965)).  
88. *See* 323 Md. at 624, 594 A.2d at 569. Other states weigh the policies underlying strict liability differently than Maryland. For example, in California, products liability
the respondents in Nissen and the courts in Cyr and Turner failed to address the causation requirement or any concept of fault. Successor corporations neither manufacture the defective products nor place them into the market, and so do not implicitly represent to the public any guarantee of safety or quality. As the Nissen court noted, "[a] corporate successor is not a seller and bears no blame in bringing the product and the user together." 89

Without some nexus between the successor corporation and the injured consumer, it is reasonable to conclude that no duty of care is assumed by the successor. Under the "continuity of enterprise" theory, the nexus between the successor corporation and the injured consumer is based on "continuity of management, personnel, physical location, assets, and general business operations." 90 This connection is insufficient to impose a duty, however, because without continuity of ownership, the successor and the predecessor corporations are two completely separate entities. 91 Because the successor and predecessor are both autonomous and independent corporations, it would be improper to hold one liable for the unrelated acts of the other. 92 Thus, the Nissen court properly rejected the "continuity of enterprise" theory as inconsistent with the law of strict products liability in Maryland.

b. "Bona Fide Purchaser" and "Duty to Warn" Theories.—Although the Court of Appeals was reluctant to extend liability under the enterprise theory, dicta in the decision left open the opportunity for products liability plaintiffs to go beyond the traditional exceptions of the general rule and sue successor corporations based on an in-
dependent "duty to warn" or a "bona fide purchaser" theory. Both theories are consistent with the policies underlying strict products liability.

(1) "Bona Fide Purchaser" Theory.—Under the "bona fide purchaser" theory, a successor corporation may be held liable for the "defective products of its predecessor only if it knew or should have known of those defective products." This theory is in accord with the rationales underlying strict products liability. Although the successor corporation did not manufacture the defective product or place it in the stream of commerce, the successor may be at fault if it "knowingly or negligently contributed causally to the plaintiff's inability to recover from the predecessor." The successor corporation may know that the predecessor is planning to dissolve soon after the asset acquisition, thereby preventing injured plaintiffs from recovering. Although the Nissen court noted that a successor's knowledge of a predecessor's defective products and potential tort claims may fall under the fourth exception to the general rule, which covers fraudulent transactions, it found the "bona fide purchaser" rule to be "an interesting alternative to the continuity of enterprise theory." Because the respondents had not alleged that Nissen had knowledge of any defect, the "interesting alternative" was inapplicable in Nissen.

(2) "Duty to Warn" Theory.—A successor corporation's knowledge of a predecessor's defective products may also give rise to lia-

93. See Nissen, 323 Md. at 624-26 & nn.2-3, 594 A.2d at 569-70 & nn.2-3.
94. Murphy, supra note 14, at 848.
95. Lenard, supra note 22, at 705. Lenard also notes that the "bona fide purchaser" theory is consistent with the "deterrence" rationale because liability under this rule would discourage a successor corporation from entering into transactions when it knows of the predecessor's defective products and potential tort claims. Id.; see also Murphy, supra note 14, at 849 ("[U]nder the ["bona fide purchaser"] theory the deterrence is the prevention of the manipulation of the structure of an asset acquisition for the sole purpose of avoiding products liability claims.").
96. See Murphy, supra note 14, at 849. While the causal connection between the successor's actions and the plaintiffs' inability to recover for their injuries does not fit the traditional notion of causation in tort law, "it is not that much of a departure . . . in light of the fact that . . . tort law often imposes liability on distributors and retailers even though they had no reason to know that products . . . were defective." Id.
97. See 323 Md. at 624 n.2, 594 A.2d at 569 n.2. The fourth exception states that a successor may be held liable if the asset acquisition was made fraudulently, in bad faith, or without adequate consideration. Id. at 617, 594 A.2d at 566.
98. Id. at 624 n.2, 594 A.2d at 569 n.2.
99. See id.
bility based on an “independent duty to warn.” A successor has a duty to warn owners of its predecessor’s defective products if: “(1) the successor knows or should know of defects . . . and (2) some type of special relationship exists between the successor corporation and the owners of products manufactured by the successor’s predecessor.” If successor corporations have knowledge of a defect and have some special relationship with the consumers who own the product, they will be in a position to repair the defective product or notify the owners of the defect. Failure to warn owners of a known defect or remedy the condition may give rise to successor liability. The “duty to warn” theory is compatible with strict liability policies because liability stems directly from a successor’s “breach of its own duty of care, rather than for its predecessor’s breach of a duty.”

The Court of Appeals did not have to address the duty to warn issue in Nissen because it was not raised by the parties. Liability based on an “independent duty to warn,” however, may be a viable tool for products liability claims falling outside the scope of the traditional rule of successor nonliability.

5. Conclusion.—In Nissen, the Court of Appeals adopted the majority rule of successor nonliability and its four well-recognized exceptions in a products liability case in which a successor corporation purchased the assets of its predecessor. Expansion of successor liability under the “continuity of enterprise” exception was rejected because it was found to be incompatible with the policies underlying strict products liability in Maryland. The fatal defect in the enterprise theory is that it abandons any concept of fault and imposes liability on a successor corporation because it is perceived as the party best able to spread the cost of the injuries. While the

100. See id. at 626 n.3, 594 A.2d at 570 n.3.
101. Murphy, supra note 14, at 846. In determining whether a successor knew or should have known of the defects, courts consider the following factors: “sufficient contact between successor corporation and purchasers of the predecessor’s goods; remoteness in time between the predecessor-manufacturer and the defendant-successor; and geographical remoteness between the predecessor and successor.” Id. at 830-31 (footnotes omitted). To determine whether a special relationship exists, courts focus on the continuity between the successor and predecessor corporations. Id. at 831. Courts also consider whether a successor serviced any of the predecessor’s service contracts, performed maintenance or remedial service on any of the predecessor’s products, or knew the identity and location of consumers who purchased the predecessor’s products. Id.
102. Id. at 847.
103. Id.
104. See 323 Md. at 632, 594 A.2d at 573.
105. See supra notes 61-67 and accompanying text.
Enterprise theory was rejected, dicta in the Court of Appeals' decision indicates that products liability plaintiffs may be able to hold a successor corporation liable under a "bona fide purchaser" theory or an "independent duty to warn." Neither theory has yet been tested, however, by the Maryland appellate courts.

B. Fiduciary Duty and Professional Service Corporations

In Marr, P.C. v. Langhoff, the Court of Appeals held that an oral contract concerning the allocation of cases between a professional service corporation and a departing shareholder terminated the relationship between the parties as well as the fiduciary duty derived from that relationship. The allocated cases became "new business" of the new entities. The central legal issue of the case was whether the participants owed the association the fiduciary duty of partners or the lesser fiduciary duty of corporate employees. The court did not specify whether the corporate or partnership analysis should apply, but stated that the result would be the same in either case.

At the heart of the Marr case is Maryland's law on the fiduciary duty owed by a departing corporate shareholder or a partner during the dissolution of the corporation or partnership. The Marr decision limits the fiduciary duty of the partners or shareholders in these circumstances by allowing for the contractual termination of that duty.

106. See supra notes 94-103 and accompanying text.
108. See id. at 672-73, 589 A.2d at 477.
109. See id. at 671, 589 A.2d at 477. The court appeared to be particularly influenced by a similar ruling in a Massachusetts court, Meehan v. Shaughnessy, 535 N.E.2d 1255 (Mass. 1989). The Meehan court held that "[t]he two entities surviving after the dissolution possess 'new business' unconnected with that of the old firm, and the former partners no longer have a continuing fiduciary obligation." Id. at 1262.
110. See Marr, 322 Md. at 672, 589 A.2d at 477.
111. See id. at 673, 589 A.2d at 477 (stating that the "contract substituted for the fiduciary duty").
112. " 'Professional corporation' means a corporation which: (1) Is organized under [the Code] for the exclusive purpose of performing professional service; and (2) Has as stockholders only individuals licensed in the State to perform the same professional service as the corporation." MD. CORPS & ASS'NS CODE ANN. § 5-101(d) (1985). "Incorporated partnerships" is a term referring to a small corporation in which the stock is closely held and the distribution of stock is such that the shareholders share control; they are simply partnerships that have incorporated in order to take advantage of the corporate tax structure and to limit personal liability of participants. See generally Kelvin
tions in regard to the dissolution of the partnership and the fiduciary duty owed between participants.

1. The Case.—In the middle of 1981, Stephen Langhoff, Esquire, approached the law firm of Marr and Bennett, P.A., with the proposition of consolidating his practice with that of the firm. Michael Marr and Richard Bennett, partners in Marr and Bennett, P.A., agreed to consolidate their practices, and the firm changed its name to Marr, Langhoff, and Bennett, P.A. (ML&B). Langhoff moved into the offices occupied by Marr and Bennett, and the three attorneys agreed on October 19, 1981, that the fees collected after that date, including fees resulting from work previously done, would be assets of ML&B. On November 4, 1981, the State Department of Assessments and Taxation approved the Articles of Amendment and Restatement, and ML&B formally came into existence.

Joseph Evans, an associate attorney with Marr & Bennett, P.A., continued as an associate at ML&B. Prior to the merger, Evans had been representing Marguerite Cook and three others in an abusive discharge action against their employer, Rite Aid. With the formation of ML&B, it was decided that Langhoff would work with Evans on the case.

In December 1981, Evans left ML&B to join the Maryland Attorney General’s Office. Unable to proceed in the Cook action, Evans made arrangements to have his wife, Nedda Pray, an experienced litigator, work with Langhoff on the Cook case as an independent contractor.

During the fall of 1981, Marr and Langhoff began to disagree about the financial management of ML&B. On December 29, 1981, after only ten weeks in practice together, Langhoff and Marr


113. Marr, 322 Md. at 660, 589 A.2d at 471.
114. Id.
115. Id. The court noted that there were two exceptions to the fee agreement that were not material to the case. See id.
117. Marr, 322 Md. at 660, 589 A.2d at 471.
118. Id.
119. Id.
120. Id. at 661, 589 A.2d at 471. As an Assistant Attorney General, Evans was not permitted to engage in the private practice of law. Id.
121. Id., 589 A.2d at 471-72.
122. Id., 589 A.2d at 472.
agreed that ML&B would be dissolved and that Langhoff's last day with the firm would be January 1, 1982. At some point near Langhoff's last day with the firm, Langhoff and Bennett agreed that Langhoff would keep the cases that belonged to him and that Marr and Bennett would likewise retain their cases.

Langhoff subsequently moved out of the office, taking the Cook file with him. When Bennett, who considered the Cook case the property of Marr & Bennett, P.A., discovered that the case was missing, he called Langhoff. Admitting that he had the file, Langhoff stated that he would let the clients decide who they wanted to represent them. Langhoff and Bennett thereafter spoke with Evans, who stated that the Cook clients should be represented by Langhoff and Pray. Evans arranged a meeting with the clients at which they agreed, upon Evans's suggestion, to be represented by Langhoff and Pray.

In January 1986, after judgment in favor of the Cook plaintiffs was affirmed, Langhoff and Pray each received a portion of their share of the contingency fee. The action was thereafter commenced by Michael E. Marr, P.C.

---

123. Id.
124. Id. The court referred to the agreement as the "Langhoff-Bennett" contract. Bennett testified, "I broached the topic, whatever is yours is yours, and whatever is ours is ours." Id. Langhoff gave a similar version of the conversation. "[W]e had a specific discussion regarding [an unrelated matter] but other than that . . . we were . . . going to go our separate ways and continue on . . . basically as we were before [the merger of the practices]." Id. at 661-62, 589 A.2d at 472. Marr did not challenge Bennett's authority to contract for the corporation. Id. at 667 n.3, 589 A.2d at 475 n.3.
125. Id. at 662, 589 A.2d at 472.
126. Id. After Langhoff's departure, the professional service corporation was renamed Marr & Bennett, P.A. Id. It is noteworthy that the Court of Special Appeals commented that "[i]t is clear from the record that the work contribution of Marr to the success of the [Cook] case was infinitesimal when compared with that of Langhoff and Pray." Langhoff v. Marr, P.C., 81 Md. App. at 662, 568 A.2d at 846.
127. Marr, 322 Md. at 662, 589 A.2d at 472.
128. Id.
129. Id.
130. Id. at 663, 589 A.2d at 472-73. Langhoff and Pray received the remainder of the fee in the summer of 1986. Id. The Cook case is reported as Moniodis v. Cook, 64 Md. App. 1, 494 A.2d 212, cert. denied, 304 Md. 631, 500 A.2d 649 (1985).
131. Marr, 322 Md. at 663, 589 A.2d at 473. Michael E. Marr, P.C. is the successor to Marr and Bennett, P.A., which was the successor of ML&B. Id. at 662, 589 A.2d at 472.

The original complaint was filed against Langhoff, Pray, and Evans and contained four counts:

(I) tortious interference with the contracts of representation between Marr P.C. and the Cook plaintiffs; (II) conspiracy among the defendants to induce the breach of those contracts; (III) breach of fiduciary duty owed to Marr P.C.; and (IV) a count, labeled "assumpsit," which alleged that the defendants "have re-
The sole theory of recovery presented at trial by Marr was that Langhoff had breached the fiduciary duty he owed to ML&B.132 Marr argued that the legal relationship between Marr, Langhoff, and Bennett was that of partners, and because partners owe each other a fiduciary duty during the winding up of business, there was a viable cause of action for breach of fiduciary duty against Langhoff.133

The trial court agreed that partnership law should apply to the professional service corporation when determining the nature and extent of the fiduciary duty owed by Langhoff during dissolution. The trial court, finding that Langhoff breached the fiduciary duty owed by partners, ruled in favor of Marr.134 The Court of Special Appeals vacated the trial court's decision, however, finding that the trial court had erred in applying partnership law to the ML&B corporation. Because the court determined that corporate laws applied, the case was remanded for a new trial in which corporate law would govern.135

The Court of Appeals granted cross petitions for certiorari.136 The court determined that the Bennett-Langhoff agreement terminated the fiduciary duty owed under either partnership or corporate law, and therefore there was no basis for a breach of fiduciary duty claim.137 Because the contract theory disposed of the case, the court did not reach the question of whether partnership or corporate law applied.138

ceived money which is rightfully that of [Marr P.C.] and should not be allowed to retain it.”
Id. at 663, 589 A.2d at 473 (brackets in original). The claim against Pray was later dropped. Id. Evans filed a counterclaim “alleging defamation and seeking a promised bonus”; however, a settlement agreement was reached by Marr and Evans. Id. As part of that settlement, counts I, II, and IV were dismissed with prejudice as to both Evans and Langhoff. Id. 132. Id. at 664, 589 A.2d at 473.
133. Id. Marr relied on the Restatement (Second) of Torts to support the existence of this cause of action. Id. “One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.” Restatement (Second) of Torts § 874 (1977).
134. Marr, 322 Md. at 664, 589 A.2d at 473. The trial judge agreed with the legal argument presented by Marr, concluding that Langhoff was liable as a matter of law. Judgment was entered for Marr, and the trial court denied Langhoff’s request to credit his 37.5% share of ML&B profits against the judgment. Id. at 664-65, 589 A.2d at 473-74. The main reason for rejecting Langhoff’s request was that the lower court had determined that the Cook case belonged to Marr and Bennett, P.A. under the Bennett-Langhoff contract. Id. at 665, 589 A.2d at 474.
137. Marr, 322 Md. at 667, 589 A.2d at 474.
138. See id.
2. Legal Background.—

a. Fiduciary Duty Owed by a Departing Participant of a Corporation.—A participant in a professional service corporation is generally a shareholder and an officer or employee of the corporation. By virtue of that relationship to the firm, an active participant owes a fiduciary duty that may limit the participant’s opportunity to depart and compete with the corporation.

Although the Maryland courts have not discussed the fiduciary duty owed by a departing shareholder, there are Maryland cases dealing with the fiduciary duty owed by departing corporate employees. In C-E-I-R, Inc. v. Computer Dynamics Corp., the Court of Appeals determined whether there had been a breach of fiduciary duty by balancing the departing employee’s duty of loyalty against the public policy of preserving free competition and the right of an individual to become an entrepreneur. The defendant-employees had planned to start their own business and solicited business from the corporate employer’s clients. The employees had also gathered information from the employer’s records in order to bid on a government contract after departure. The C-E-I-R court reviewed the established principles of fiduciary duty, stating that “the employment relationship is one of confidence and trust and places upon the employee a duty to use his best efforts on behalf of his employer.” The court stated further that the agent owes a duty of “‘loyalty to the interest of the principal and . . . [must] avoid any conflict between that interest and his own self interest.’” Finally, the court noted that although an employee may engage in preparatory acts during the employment, and competition is permissible following employment, an employee may not solicit his employer’s clients during the employment.

139. There is no requirement, however, that a participant be an employee or active participant. See Md. CORPS. & Ass’ns Code Ann. § 5-106 (1985).
141. 229 Md. 357, 183 A.2d 374 (1962).
142. See id. at 366, 183 A.2d at 379.
143. Id. at 360-65, 183 A.2d at 376-78.
144. Id. at 366, 183 A.2d at 379.
145. Id. (quoting Maryland Credit Fin. Co. v. Hagerty, 216 Md. 83, 90, 139 A.2d 230, 233 (1958)).
146. See id. at 366-67, 183 A.2d at 374; see also Becker v. Bailey, 268 Md. 93, 102, 299 A.2d 835, 840 (1973) (holding a postemployment noncompetition agreement unreasonable).
Maryland Metals, Inc. v. Metzner\textsuperscript{147} expounded on the fiduciary duty owed by a corporate officer or upper management employee. The Court of Appeals restated the general rule that a corporate officer owes "an undivided and unselfish loyalty to the corporation."\textsuperscript{148} Based on this general rule and the C-E-I-R rule on departing employees, the court concluded that an officer cannot compete with the corporation or solicit the corporation's customers during her tenure as officer.\textsuperscript{149} However, the court in Maryland Metals acknowledged the policy of enhancing free competition by recognizing a privilege in favor of departing officers that "enables them to prepare or make arrangements to compete with [the corporation] prior to leaving the employ of their prospective rivals without fear of incurring liability for breach of fiduciary duty of loyalty."\textsuperscript{150}

In Dworkin, D.D.S., P.A. v. Blumenthal,\textsuperscript{151} the trial court applied the departing corporate employee principles to a professional association of dentists. The departing employees had compiled a patient list from the association's files prior to departure, and the association sued them for breach of fiduciary duty.\textsuperscript{152} The Court of Special Appeals held that the trial court's decision, which was based on corporate law and concluded that the employees did not breach their fiduciary duty, was not clearly erroneous.\textsuperscript{153} Significantly, the case applied Maryland corporate law concerning fiduciary duty to a professional service corporation.\textsuperscript{154}

The Maryland Professional Service Corporation Act addresses

\begin{itemize}
\item \textsuperscript{147} 282 Md. 31, 382 A.2d 564 (1978).
\item \textsuperscript{148} Id. at 38, 382 A.2d at 568.
\item \textsuperscript{149} See id.
\item \textsuperscript{150} Id. at 39, 382 A.2d at 569. The court noted that the privilege is not absolute, and does not "immunize employees from liability where the employee has committed some fraudulent, unfair or wrongful act," id. at 40-41, 382 A.2d at 569, such as misappropriation of trade secrets, misuse of confidential information, solicitation of customers prior to departure, conspiracy leading to mass resignation, or usurpation of the employer's business opportunity. See id. The court held that the defendant-employees' acts in Maryland Metals fell "within the mere preparation privilege." Id. at 48, 382 A.2d at 573.
\item \textsuperscript{151} 77 Md. App. 744, 551 A.2d 947 (1989).
\item \textsuperscript{152} Id. at 779-80, 551 A.2d at 949.
\item \textsuperscript{153} Id. at 780, 551 A.2d at 949. The court reviewed whether the patient list constituted a trade secret as a matter of law. If so, the misappropriation of the list would have constituted a breach of duty and limited the former employees' rights to compete. Id. at 781, 551 A.2d at 950 (citing Operations Research, Inc. v. Davidson & Talbird, Inc., 241 Md. 550, 556, 217 A.2d 375, 378-79 (1966)). The Dworkin court held that the "appellant's patient list did not constitute a trade secret." Id. at 782, 551 A.2d at 951.
\item \textsuperscript{154} The terms "professional association" and "professional corporation" both identify a professional service corporation. See Md. Corps. & Ass'ns Code Ann. § 5-109 (1985).
\end{itemize}
the operations of professional service corporations. Although the Act does not specifically address the fiduciary duty owed by a departing participant, it does state that dissolution does not occur upon the departure of one of the participants and must take place in accordance with the Maryland General Corporation Law.

Likewise, the Maryland General Corporation Law does not specifically address the fiduciary duty owed by shareholders or officers during dissolution. It is clear, however, that during the dissolution phase, shareholders and officers are not relieved of their obligations, including their fiduciary obligation.

b. Fiduciary Duty Owed During the Winding Up of Partnerships. Partnerships are governed by the Maryland Uniform Partnership Act. Subtitle 6 of the Act states that when a partnership is dissolved, "the partnership is not terminated but continues until the winding up of partnership affairs." One of the basic characteristics of partnerships is the fiduciary duty that the partners owe to one another and to the partnership entity. The leading case in Maryland on the fiduciary duty owed during dissolution of a partnership is Resnick v. Kaplan. In Resnick, a partner who handled many of the partnership's cases after the

---

156. Md. Corps. & Ass'ns Code Ann. § 5-107. This section provides: "A professional corporation has perpetual existence until dissolved in accordance with [the Maryland General Corporation Law] . . . ." Id.; see also id. § 1-103.
157. Id. § 3-419(a). "The voluntary or involuntary dissolution of a corporation does not relieve its stockholders, directors, or officers from any obligation or liability imposed on them by law." Id.
159. Md. Corps. & Ass'ns Code Ann. § 9-601. The Act defines dissolution as "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Id. § 9-101(e).
160. See id. § 9-404 (holding the "partner accountable as a fiduciary"); see also Herring v. Offutt, 266 Md. 593, 597, 295 A.2d 876, 879 (1972) (stating that the "partnership relation is of a fiduciary character which carries with it the requirement of utmost good faith and loyalty and the obligation of each member to make full disclosure"). See generally Alan R. Bromberg & Larry E. Ribstein, 2 Bromberg and Ribstein on Partnership § 7.08 (1988); Harold G. Reuschlien & William A. Gregory, Handbook on the Law of Agency and Partnership § 188 (1979); Tamar Frankel, Fiduciary Law, 71 Cal. L. Rev. 795 (1983).
dissolution failed to provide an accounting to his ex-partner. Applying the Maryland Uniform Partnership Act, the Court of Special Appeals reiterated that "after [its] dissolution . . . [the partnership] was not terminated but continued until the winding up of its affairs was complete." Further, because the partners had a duty, based on their contractual and professional obligations, to complete the unfinished work of the dissolving partnership, the fiduciary duty owed by the partners continued during the winding up process. Therefore, a partner had no right, beyond the partnership agreement, to compensation for completing the unfinished work, and the fees collected had to be distributed in accord with the agreement.

In contrast to the corporate fiduciary duty, the duty owed by a partner is more expansive and continues beyond the termination of employment.

3. *The Court's Reasoning; Analysis.—* In Marr, the Court of Appeals declined to decide whether dissolution of a professional service corporation and the related fiduciary duties should be governed by partnership or corporation law. The court held that the oral contract entered into by Langhoff and Bennett allocated the unfinished business between the parties and therefore extinguished any continuing duty of loyalty, regardless of which law applied.

The court first addressed the oral contract, noting that the parties did not dispute the existence or objective manifestations underlying the contract; rather, their dispute centered around the legal interpretation and consequences of the agreement. As stated by the court, when the facts surrounding the execution and content of

162. 49 Md. App. at 501-05, 434 A.2d at 584-86.
163. *Id.* at 506-07, 434 A.2d at 587; see Md. CORPS. & ASS'NS CODE ANN. § 9-601.
165. *Id.* (citing Md. CORPS. & ASS'NS CODE ANN. § 9-404; Herring v. Offutt, 266 Md. 593, 295 A.2d 876 (1972)).
166. *Id.* In Berkson v. Berryman, 62 Md. App. 79, 488 A.2d 504, cert. denied, 303 Md. 295, 493 A.2d 349 (1985), the court rejected the appellant's request to distinguish a similar case on the grounds that the majority of the clients in Berkson belonged to the appellants prior to entering into a short-lived partnership. *Id.* at 93, 488 A.2d at 512. The argument failed. *Id.* at 94, 488 A.2d at 512.
167. See 322 Md. at 667, 589 A.2d at 474.
168. *See id.* The Court of Appeals first noted that it assumed, without deciding, that the Court of Special Appeals decided correctly that the dismissal with prejudice of the assumpsit count would not preclude or bar the tort action of breach of fiduciary duty. *See id.* at 666, 589 A.2d at 474. This approach is questionable, however, because, in the words of the Court of Special Appeals, the assumpsit issue "could render the other . . . issues moot." Langhoff v. Marr, P.C., 81 Md. App. at 444, 568 A.2d at 847.
169. Marr, 322 Md. at 667, 589 A.2d at 475.
a contract are undisputed, the interpretation of the contract rests with the court. In Maryland, under the objective law of contracts, a court, in construing an agreement, must first determine from the language of the agreement itself, what a reasonable person in the position of the parties would have meant at the time it was effectuated.

Under the partnership theory, the court interpreted the contract to end immediately the winding up of ML&B. Under the corporate theory, the contract was interpreted to extinguish any fiduciary duty owed by the departing shareholder, Langhoff. The court only developed the analysis of the partnership model, however, suggesting that it is more appropriate to apply principles of partnership law to the dissolution of professional service corporations.

The court summarized the fiduciary duty owed by a partner upon dissolution of the partnership:

Work in progress at the time of dissolution is an asset of the dissolved firm and the partners of the dissolved firm have an obligation to complete the work in progress. The compensation of the partners for completing work in progress during the winding up of the dissolved partnership is determined, absent special agreement, by the partner's interest in the profits of the dissolved partnership.

The court noted that upon completion of the winding up, the mutual fiduciary duties are extinguished. Therefore, if the partners agree to settle their accounts at the same time they agree to dissolution, and a new entity continues the business, " 'unfinished business loses its character as partnership property, and the outgoing partner severs the fiduciary association that binds him to the post-dissolution entity.' 

To support its assertion that the oral contract terminated the partners' fiduciary duties, the court cited a Massachusetts case,
Meehan v. Shaughnessy. In that case, the partnership agreement at issue had a clause providing for the winding up of the firm upon the occurrence of certain events. The Meehan court held that the agreement had the effect of winding up the firm immediately upon the occurrence of the stated conditions, and therefore no unfinished business remained and no fiduciary duty was owed by the partners departing after the dissolution. Likewise, the Marr court held that the Langhoff-Bennett contract effected a winding up of ML&B, leaving no unfinished business and terminating Langhoff's fiduciary duty. Therefore, the claim based on breach of fiduciary duty failed as a matter of law.

Unlike the agreement in Meehan, the agreement in Marr did not specifically state that it was completing the winding up of the firm, yet the Court of Appeals found that to be the objectively reasonable effect of the contract. Therefore, it appears likely that Maryland courts will construe agreements made by departing partners or shareholders broadly so as to terminate any continuing relationship, and in the case of partnerships, to end the winding up period. Clauses in partnership agreements relating to the allocation of work during the winding up period will likely be interpreted as immediately ending the winding up process.

After its discourse on partnership law, the court, without discussion, held that the result would have been the same under the corporate model. The court may have declined to examine the corporate model because of the Court of Special Appeals' careful analysis using corporate law. Interestingly, however, the Court of Special Appeals did not decide whether Langhoff owed a duty under corporate law; rather, the case was remanded to the trial court for further proceedings on that issue. The Court of Appeals found that remand was unnecessary, however, because even if Langhoff

179. See Meehan, 535 N.E.2d at 1261.
180. Id. at 1262 (“[T]he former partners no longer have a continuing fiduciary obligation to wind-up for the benefit of each other the business they shared in their former partnership.”); see also supra note 109.
181. See 322 Md. at 671, 589 A.2d at 477.
182. Id. at 672-73, 589 A.2d at 477.
183. See id. at 672, 589 A.2d at 477. Marr unsuccessfully argued “that it was not the intent of the parties to the Langhoff-Bennett contract to waive fiduciary duties.” Id.
184. See id.
185. See Langhoff v. Marr, P.C., 81 Md. App. at 462, 568 A.2d at 855-56. The Court of Special Appeals was unclear as to whether Marr’s complaint asserted the claim for breach of fiduciary duty based on Langhoff’s position as an officer, director, or shareholder of the corporation. Id.
had owed a fiduciary duty under corporate law, the contract extin-
guished the duty.  

In its conclusion, the court noted that “Langhoff may well have
breached the Langhoff-Bennett contract by physically taking the
Cook file, but Marr, P.C. has not sued on that express contract.”
Therefore, it appears that it was Marr’s inadequate pleading that ul-
timately caused the loss.

Finally, the court added a note of warning to those law partner-
ships that may try to protect themselves from a predicament like
that of Marr by providing a covenant not to compete after dissolu-
tion in their partnership agreements.  

4. The Unanswered Question.—The larger question, which the
court did not answer, is whether professional service corporations
or incorporated partnerships should be subject to partnership or
corporate laws. Although the court did not decide whether partner-
ship or corporate law controlled, the court did intimate that, at least
as to fiduciary duty issues, partnership law is applicable to profes-
sional service corporations.  

a. Public Policy.—Underlying the question of whether partner-
ship fiduciary duties should be applied to members of professional
service corporations is the question of whether lawyers should be
held to a higher level of fiduciary duty than other corporate partici-
pants. Public policy concerns, such as the need for civility among
“professionals” and the need to ensure that the clients’ interests are
protected, present a strong argument that lawyers should be held to
a higher standard.

Partnership law requires a high level of loyalty and honesty be-
tween partners.  

186. See Marr, 322 Md. at 667, 589 A.2d at 474-75.
187. Id. at 673, 589 A.2d at 477-78.
188. See id., 589 A.2d at 478 (quoting Maryland Rules of Professional Conduct
Rule 5.6(a) (1991)).
189. The Rule prohibits an attorney from entering into a “partnership or employ-
ment agreement that restricts the rights of a lawyer to practice after termination of the rela-
tionship.”  

MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 5.6(a) (1991).
190. See supra text accompanying note 174.
191. Judge Cardozo, comparing joint venture participants to partners, wrote:

[Partners] owe to one another . . . the duty of the finest loyalty. Many forms of
corporations from the fiduciary duties of partnership creates a dual system in which attorneys practicing within a professional association will be held to a lower standard than those practicing in traditional partnerships. If held to the corporate standard, the fiduciary duty of an attorney in an incorporated partnership would be reduced to that of a corporate employee.

In deciding to apply partnership law, the trial court in Marr found the reasoning of a California case, Fox v. Abrams, to be persuasive. In Fox, the California Court of Appeals, citing the strong policy concerns of client autonomy and lawyer integrity, held that state law covering dissolution of partnerships applied to professional service corporations practicing law. The Fox court concluded that the fees in question resulted from cases that were the unfinished business of the professional corporation. The California court then applied the holding of Jewel v. Boxer, a partnership case ruling that, due to the fiduciary duty owed by the partners during the winding up phase, the net income generated by the unfinished business should be distributed in accordance with the partnership agreement. The Fox court found that the Jewel holding was not based simply on partnership law but also on "sound public policy reasons"; therefore, the rule proposed in Jewel leads to a civilized ending of legal affairs and protects the clients from high pressure solicitation. The Fox court did not go so far as to

conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions . . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.


193. See Marr, 322 Md. at 670, 589 A.2d at 476.
194. 210 Cal. Rptr. at 265-66. "There is no reason to hold that when lawyers decide to practice together in corporate form rather than partnership, they are relieved of fiduciary obligations toward each other with respect to the corporation's business." Id.
195. See id. at 263.
197. Jewel, 203 Cal. Rptr. at 19, cited in Fox, 210 Cal. Rptr. at 263.
198. Fox, 210 Cal. Rptr. at 263.
199. Id. The Fox court noted that
state that it was applying partnership law, but instead declared that
the duty owed by attorneys in a professional corporation is "very
similar" to the duty of partners, and there is no reason to apply dif-
fferent principles for dissolution.200

b. Statutory Interpretation.—The Court of Special Appeals in
Marr supported its decision to apply corporate law with a Wisconsin
Court of Appeals case, Melby v. Omelia.201 The Melby court held that
corporate law applied to professional corporations because the pro-
fessional service corporation statute clearly articulated that the stat-
utes governing the privileges and duties of corporations also gov-
erned professional corporations.202

An underlying premise of the decision to apply general corpo-
rate principles is the issue of legislative intent. The Professional
Service Corporations Act specifically covers dissolution and requires
that dissolution take place according to general corporation law.203
To hold that the dissolution of professional service corporations
should be governed by partnership law would therefore seem to
contradict legislative intent.

The issue centers around the interpretation of section 5-120(b)
of the Maryland Professional Service Corporation Act, which ex-
empts from the Act certain issues that are to be covered by pre-
existing laws.204 In Marr, the Court of Special Appeals interpreted

"[T]he rule prevents partners from competing for the most remunerative cases
during the life of the partnership in anticipation that they might retain those
cases should the partnership dissolve. It also discourages former partners from
scrambling to take physical possession of files and seeking personal gain by
soliciting a firm's existing clients upon dissolution."
Id. at 265 (quoting Jewel, 203 Cal. Rptr. at 18).
200. Id. at 266; see Lawrence E. Mitchell, The Death of Fiduciary Duty in Close Corporations,
138 U. Pa. L. Rev. 1675, 1724-30 (1990) (advocating application of a higher standard of
fiduciary duty to close corporations); cf. Donahue v. Rodd Electrotype Co., 328 N.E.2d
505, 516 (Mass. 1975) (finding a higher level of fiduciary duty owed between members
of a close corporation) (later qualified by Wilkes v. Springside Nursing Home, 353
N.E.2d 657 (Mass. 1976)). See generally Dickinson, supra note 112, at 559 (encouraging
judicial recognition of incorporated partnerships as a unique form of business
association).
201. 286 N.W.2d 373 (Wis. 1979), cited in Langhoff v. Marr, P.C., 81 Md. App. at 460-
61, 568 A.2d at 855.
202. 286 N.W.2d at 374 ("[C]orporate standards should apply when a shareholder
withdraws from a service corporation.").
204. Id. § 5-120(b). This section provides:
This subtitle does not alter any law of the State applicable to:
(1) The professional relationship and liabilities between a person performing
the professional service and a person receiving it; or
(2) The standards for professional conduct.
this savings clause as ensuring that professional corporations are "held to the same standards for professional conduct that prevail regardless of corporate structure." Then, without explanation, the court concluded that corporate law applied unless there was "some other law of [Maryland] in conflict with the Professional Service Corporation Act." The Court of Special Appeals' interpretation of section 5-120(b) of the Professional Service Corporation Act is questionable. Because the main purpose of the savings clause was undoubtedly to preserve the common-law liabilities of partners, it would follow that the legislature wanted to preserve the common-law standards for professional conduct as well. The plain meaning of the section is that the Professional Service Corporation Act does not alter any existing law of the state, including the common law, with respect to liability or professional standards of conduct. It can be argued that the fiduciary duty owed between partners is an element of professional conduct and therefore was not intended to be altered by the statute.

Because the public policy analysis and the Court of Special Appeals' opinion contradict the statutory interpretation analysis as applied by the Court of Appeals, the Marr court should have answered the "unanswered question." Unfortunately, the lack of guidance will cause litigation and confusion until the court or the General Assembly confronts the issue of whether partnership law or corporate law applies to the fiduciary duty among participants in professional service corporations.

206. Id.
207. Id.
208. Some insight into the legislative intent of the Maryland Professional Service Corporation Act was provided in a recent article co-authored by a sponsor of the bill that became the Act. See Melvin A. Steinberg et al., Liability in a Professional Service Corporation, 23 Md. B.J., Mar.-Apr. 1990, at 33. According to the authors, the legislature's intent was simply to afford professionals the same benefits enjoyed by corporate officers. Id. at 35. The legislature's intent was not to alter the liability provisions relating to professionals depending upon which form of entity they choose, but merely to provide tax parity. There was a serious concern in the legislature that the Act in its original form would enable professionals to relieve themselves from personal liability to their clients or patients by practicing in the form of a corporation.

Id. Based on this article, however, it appears that the legislature focused only on maintaining the relationship between the professionals and their clients and not on the relationship among the professionals.
5. Conclusion.—The holding in Marr permits a shareholder in a professional corporation to terminate his fiduciary duty to the corporation by contractually allocating the unfinished work of the corporation between the shareholders. The Court of Appeals used a standard of objective reasonableness to give the Langhoff-Bennett contract broad ramifications affecting the separation of the parties. Because the contract specifically governed the allocation of work in progress, the Court of Appeals interpreted the contract as finalizing the winding up of ML&B and extinguishing any fiduciary duty owed by Langhoff.

Although the trial court and the Court of Special Appeals split on the issue of whether corporate or partnership law applied to the professional corporation of ML&B, the Court of Appeals did not resolve the issue. Rather, the contract analysis disposed of the case. The Court of Appeals' inaction may have implicitly deferred the issue to the legislature, which should consider clarifying the law governing the dissolution of professional service corporations.

Jonathan P. Kagan
Christopher C. O'Hara
V. CRIMINAL LAW

A. Reading Mens Rea Into Statutory Offenses

The Court of Appeals granted certiorari in State v. McCallum to consider whether mens rea is an element of the statutory crime of driving with a suspended license. The court held that in order to convict a defendant of driving with a suspended license, the State must prove that the defendant knowingly violated the relevant statute. With the court's ruling that scienter is required for a conviction of driving with a suspended license, Maryland joins a number of states that require knowledge or criminal intent for conviction when the statute prohibiting driving with a suspended license is silent as to the mens rea element.

Additionally, McCallum follows a trend in Maryland away from imposing strict liability for offenses punishable with incarceration when the statute providing the penalty does not specify a mens rea element. Although the court read into the statute a legislative intent to require actual knowledge, it did not address the question of whether a showing that a defendant had constructive knowledge of the license suspension would satisfy the State's burden. If actual knowledge

2. See id. at 452, 583 A.2d at 250. Md. Transp. Code Ann. § 16-303(h) (Supp. 1991) provides that "[a] person may not drive a motor vehicle on any highway or on any [other specified] property . . . while his license or privilege to drive is suspended." Id.
3. See McCallum, 321 Md. at 457, 583 A.2d at 253.
5. Compare Jenkins v. State, 215 Md. 70, 75-77, 137 A.2d 115, 117-18 (1957) (holding that knowledge need not be proven to convict for drug possession, absent express statutory language) and Ford v. State, 85 Md. 465, 475-76, 37 A. 172, 174 (1897) (upholding a statute that provided for incarceration upon conviction of possessing a lottery ticket, without requiring proof of actual knowledge) and Carroll v. State, 63 Md. 551, 557, 3 A. 29, 32 (1885) (holding principal liable when agent sold alcohol to a minor, despite principal's ignorance of the sale) with Dawkins v. State, 313 Md. 638, 649, 547 A.2d 1041, 1046 (1988) (interpreting a statute that does not mention mens rea but imposes incarceration for drug possession to include a knowledge element) and Comstock v. State, 82 Md. App. 744, 755-56, 573 A.2d 117, 123 (1990) (construing a statute that required an individual involved in an automobile accident to stop and assist injured parties as requiring knowledge that an accident had occurred in order to sustain conviction).
7. If one by exercise of reasonable care would have known a fact, he is deemed to have had constructive knowledge of that fact. Black's Law Dictionary 284 (5th ed. 1979).
knowledge must be shown, McCallum creates an incentive for defendants to avoid notification,\(^8\) thereby defeating the purpose of provisions specifically designed to notify drivers of license suspension.\(^9\) Yet, the decision leaves unclear whether mere constructive knowledge satisfies the mens rea requirement. Further, if actual knowledge is required, it is unclear whether the State may shift the burden of disproving actual knowledge to the defendant once constructive knowledge is proven; thus, the lower courts may have problems applying the McCallum decision.\(^10\)

1. The Case.—On October 12, 1987, Malcolm McCallum was involved in an automobile accident.\(^11\) McCallum failed to produce his driver’s license upon the request of the investigating officer, who subsequently determined that McCallum’s license had been suspended.\(^12\) McCallum later explained at trial that his license was suspended because he had failed to pay a traffic fine.\(^13\) He further explained that he had paid the fine prior to the accident and was on his way to pick up his reinstated license when the accident

\(^8\) See id. at 464-65, 583 A.2d at 256 (McAuliffe, J., dissenting). The notice provision states, in relevant part:

(a) Compliance required.—A person shall comply with the notice to appear contained:

(1) In a traffic citation issued to the person under this subtitle;

(c) Action by District Court on failure to comply.—If a person fails to comply with the notice to appear, the District Court or a circuit court may:

(2) After 5 days, notify the Administration of the person’s noncompliance.

(d) Suspension of driving privileges.—On receipt of a notice of noncompliance from the District Court or a circuit court, the Administration shall notify the person that the person’s driving privileges shall be suspended unless, by the end of the 15th day after the date on which the notice is mailed, the person:

(1) Pays the fine on the original charge as provided for in the original citations; or

(2) Posts bond or a penalty deposit and requests a new trial date.

(e) Failure to comply with subsection (d).—If a person fails to pay the fine or post the bond or penalty deposit under subsection (d) of this section, the Administration may suspend the driving privileges of the person.

\(^9\) See id. at 467, 583 A.2d at 258 (McAuliffe, J., dissenting).

\(^10\) See id. at 464-65, 583 A.2d at 256 (McAuliffe, J., dissenting). The notice provision states, in relevant part:

\(^11\) 321 Md. at 458, 583 A.2d at 253 (Chasanow, J., concurring). Judge Chasanow wrote a concurring opinion because of the court’s failure to address what type of knowledge and evidence is required for a conviction. See id.

\(^12\) Id.

\(^13\) Id.
McCallum was charged with driving with a suspended license, in addition to several other motor vehicle violations. At trial, he stated that at the time of the accident he was not aware that his license had been suspended; he believed that once the fine had been paid, the suspension was lifted. McCallum further alleged that he never personally received a mailed notice of suspension from the Motor Vehicle Administration (MVA). Apparently McCallum had been in jail when the suspension notice arrived at the address listed in his MVA records as his residence, and his landlord had thrown away all his mail.

The judge denied the defense request to instruct the jury that in order to convict McCallum of any of the violations, they had to be convinced that he committed the crimes knowingly. The jury found McCallum guilty and convicted him of several traffic violations. On the charge of driving with a suspended license, McCallum was sentenced to one year imprisonment with all but ninety days of the sentence suspended.

McCallum asserted on appeal that the trial judge erred by failing to give the requested defense instruction requiring mens rea as an element of the offense of driving with a suspended license. The

14. Id. at 407-08, 567 A.2d at 969. Apparently, McCallum did not have his license because at some earlier point another police officer had confiscated it. Id. at 408 n.1, 567 A.2d at 969 n.1. Despite the fact that the license had been confiscated, McCallum testified at trial that he had not been notified by the MVA, and had no knowledge of the suspension. Id.

15. McCallum, 321 Md. at 452, 583 A.2d at 250.

16. Id. at 454, 583 A.2d at 251.

17. Id.

18. Id. In fact, the State's Attorney told the jury in his closing argument that "the reason the court did not instruct you as to intent is that intent is not required." Id. at 453, 583 A.2d at 251.

19. McCallum v. State, 81 Md. App. at 406-07, 567 A.2d at 968-69. The violations included: driving a motor vehicle with a suspended license, driving an unregistered vehicle, unauthorized use of a registration card, unauthorized use of a license plate, failure to display a registration card to a police officer upon request, and failure to display a driver's license to a police officer upon request. Id.

20. Id. at 407, 567 A.2d at 969.

21. Id. McCallum also raised two other issues on his initial appeal. First, McCallum contended that the charges should have been dismissed because he was not tried within the 180-day period as required by rule 4-271, which provides, in pertinent part:

The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall not be later than 180 days after the earlier of those events. Md. R. 4-271. McCallum contended that by failing to transport him from a county detention center to a scheduled preliminary hearing on March 28, 1988, the state deprived
Court of Special Appeals reversed the conviction, stating that "[t]he overall statutory scheme leads us to hold that mens rea is an element of the crime of driving while a license is suspended." The court considered the notice provisions evidence that the legislature intended conviction to be predicated on actual knowledge of the offense. The Court of Appeals granted certiorari and affirmed.

2. Legal Background.—The traditional common-law concept of a crime couples a culpable state of mind—the mens rea—with a prohibited act—the actus reus. Because all people are presumed to know the law, the mental element may be satisfied if it can be shown that the actor had some degree of awareness of the nature of the proscribed conduct. The conventionally immoral or unethical nature of the act itself serves to put the actor on notice that it is

him of the right to have his preliminary hearing on the original date. McCallum v. State, 81 Md. App. at 408-09, 567 A.2d at 969-70. Because it was the state's fault that the preliminary hearing was postponed, McCallum argued that the 180-day period started to run on the day the hearing was scheduled. Id. at 409, 567 A.2d at 970. Reading the Rule literally, the Court of Special Appeals rejected this argument. Id. at 409-10, 567 A.2d at 970. The court discussed the state's constitutional obligation to produce an incarcerated individual for a speedy trial but held that the language of rule 4-271 requires that the period begin running either when the defendant actually appears in court or when his counsel enters an appearance in the circuit court clerk's office, whichever is earlier. See id. at 409, 567 A.2d at 970. Regardless of whether the state erred in not bringing McCallum to court for the preliminary hearing, he had not appeared before the court. The appropriate date from which to measure the 180 days was the date that counsel entered his appearance. Given that initial date, the 180-day limit had not been exceeded. Id. at 409-10, 583 A.2d at 970.

McCallum's second argument in the initial appeal was that the trial judge erred in allowing the jury to have his entire driving record available for use during their deliberations. Id. at 407, 567 A.2d at 969. The intermediate appellate court held that under rule 4-323(a), McCallum had properly preserved his objection to the introduction of his entire driving record. See id. at 419, 567 A.2d at 975. The court further held that admitting the record was prejudicial error such that reversal and remand were required. See id. Although not discussing the issue thoroughly, the Court of Appeals agreed with this determination, noting that on remand, the trial court should redact all portions of the MVA record "not relevant to the charge at issue." McCallum, 321 Md. at 453, 583 A.2d at 251.

23. For the text of the notice provision, see supra note 9.
25. McCallum, 321 Md. at 457, 583 A.2d at 253.
28. Id. at 39.
illegal.\textsuperscript{29}

Strict liability offenses, on the other hand, not only presume that the actor knew the law, but also are punishable regardless of whether the actor was aware that the act was prohibited.\textsuperscript{30} Strict liability offenses arose in the nineteenth century, when the onset of mass industrialization resulted in increased risks of harm to the public.\textsuperscript{31} Legislatures felt that public welfare and safety would best be served by punishing violations of the regulations governing certain activities, regardless of whether the offenders had any awareness that their conduct violated the regulatory statute.\textsuperscript{32} The abolition of mens rea was based on a rationale of deterrence: punishing conduct without requiring that the prosecution show a culpable state of mind was thought to make people more careful.\textsuperscript{33} A second rationale was based on notions of efficiency: lessening the State's burden of proof by eliminating one element of the offense made conviction more certain.\textsuperscript{34}

As a result of public welfare legislation, those who engaged in certain potentially hazardous activities were deemed to have assumed the risk of being held strictly liable.\textsuperscript{35} The overall benefits to

\textsuperscript{29} Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 1.6(b), at 32 & n.21 (2d ed. 1986). LaFave and Scott make a distinction between "crimes \textit{mala in se} (wrong in themselves; inherently evil) and crimes \textit{mala prohibita} (not inherently evil; wrong only because prohibited by legislation)." \textit{Id.}

\textsuperscript{30} \textit{Id.} § 3.8, at 242.

\textsuperscript{31} See Morissette v. United States, 342 U.S. 246, 254 (1952) (reciting a brief history of the factors that compelled legislatures to abolish mens rea for some statutory offenses). Strict liability was also recognized at common law. For example, it was irrelevant that one charged with bigamy reasonably and honestly believed that her first husband was dead when she remarried. \textit{See, e.g.,} Commonwealth v. Mash, 48 Mass. (7 Met.) 472, 474 (1844).

\textsuperscript{32} Morissette, 342 U.S. at 254-56.

\textsuperscript{33} In People v. Roby, 18 N.W. 365 (Mich. 1884), the court stated that as a rule there can be no crime without a criminal intent, but this is not by any means a universal rule . . . . Many statutes which are in the nature of police regulations . . . . impose criminal penalties irrespective of any intent to violate them, the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible. \textit{Id.} at 366.

\textsuperscript{34} See LaFave & Scott, supra note 29, § 3.8(a), at 245; Francis B. Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 58-59 (1933).

\textsuperscript{35} See Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57, 70 (1910) (finding that a statute prohibiting the cutting of timber was constitutional under the Fourteenth Amendment's Due Process Clause based on the state's police powers). The Shevlin-Carpenter Court noted that [t]he Supreme Court of the State . . . decided that the legislation was in effect an exercise of the police power, and cited a number of cases to sustain the proposition that public policy may require that in the prohibition or punishment of particular acts it may be provided that he who shall do them shall do
public health, welfare, and safety inuring from strict liability were thought to outweigh the injustice of punishing an individual who either did not know the nature of the act or who acted without knowledge that a crime was committed.\textsuperscript{36}

Traffic offenses are a classic example of statutory public welfare offenses.\textsuperscript{37} The hazards associated with motor vehicle travel and the sheer number of vehicles on the road make it impossible to prosecute traffic offenses in the same manner as other crimes.\textsuperscript{38} Offenses such as speeding and parking violations are routine matters generally adjudicated without benefit of counsel or a jury.\textsuperscript{39} In Maryland, failure to pay the fine assessed by a traffic ticket may result in the stiffer penalty of license suspension.\textsuperscript{40} Driving with a suspended license escalates the possible punishment to a large fine and imprisonment.\textsuperscript{41}

Suspension of an individual's driver's license in Maryland must be preceded by a notice of suspension.\textsuperscript{42} When an individual fails to pay a fine or to comply with an order to appear in court, the district court is required to mail a notice of noncompliance to the MVA.\textsuperscript{43} The MVA, in turn, is required to notify the individual that driving privileges will be suspended unless the individual takes action to cure the delinquency within fifteen days from the date the notice was mailed.\textsuperscript{44} The purpose of the notification requirement is to ensure that drivers have an opportunity to be heard, which avoids pe-

\textsuperscript{36} Sayre, supra note 34, at 68; cf. Morissette, 342 U.S. at 254 (viewing the violation of public welfare statutes as disruptive of social controls).

\textsuperscript{37} Sayre, supra note 34, at 73.

\textsuperscript{38} McCallum v. State, 81 Md. App. at 411-12, 567 A.2d at 971.

\textsuperscript{39} Maryland, for example, permits a driver who has been cited for a traffic violation to pay a fine in lieu of appearing in court. See Md. Transp. Code Ann. § 26-204(b) (1987 & Supp. 1991).

\textsuperscript{40} See id. § 26-204(e). For the pertinent text of this section, see supra note 9.

\textsuperscript{41} See Md. Transp. Code Ann. § 27-101(h). This section states in relevant part:

Any person who is convicted of a violation of any of the provisions of . . . § 16-303 . . . ("Driving while license is canceled, suspended, refused, or revoked")

. . . is subject to:

(1) For a first offense, a fine of not more than $1,000, or imprisonment for not more than 1 year, or both; and

(2) For any subsequent offense, a fine of not more than $1,000, or imprisonment for not more than 2 years, or both.

\textsuperscript{42} Id. § 26-204.

\textsuperscript{43} Id.

\textsuperscript{44} Id.
nalizing drivers because of mistake or inadvertence in failing to comply with traffic citations. Noncompliant drivers who should be on constructive notice of suspension by their failure to pay their fines are thereby further alerted by the MVA notification.

Without mentioning a scienter requirement, section 16-303(h) of the Transportation Article prohibits an individual from driving with a suspended license. Section 27-101(h) imposes a fine and the possibility of imprisonment for violation of section 16-303(h). Courts in other states with similar statutes are split over whether their legislatures intended to include a knowledge requirement when drafting the suspension provisions. Courts that have found a scienter requirement regard the notice provisions as an indication of legislative intent to require knowledge.

Punishing defendants who act without adequate notice of the criminality of their actions raises constitutional due process concerns. Although the Supreme Court has upheld the constitutionality of criminal liability without notice, the Court has noted its dislike for strict liability offenses. In Liparota v. California, the

---

46. For the text of this provision, see supra note 2.
47. For the text of § 27-101(h), see supra note 41.
48. For cases in which courts have read a scienter requirement into statutes that punish driving with a suspended or revoked license, see supra note 4. See also McCallum v. State, 81 Md. App. at 416 n.5, 567 A.2d at 973 n.5 (citing cases holding that scienter is not a required element of such offenses).
49. See cases cited supra note 4. Some state statutes contain an explicit knowledge requirement. For example, California’s statute provides that:

[knowledge of the suspension or revocation of the driving privilege shall be presumed if notice has been given by the department to the person and knowledge of restriction of the driving privilege shall be presumed if notice has been given by the court to the person. The presumption established by this subdivision is a presumption affecting the burden of proof.


51. See, e.g., United States v. Balint, 258 U.S. 250, 252 (1922) (holding that punishing one ignorant of the facts that make an act illegal does not violate due process of law).
52. See Lambert v. California, 355 U.S. 225, 229 (1967) (holding unconstitutional a conviction for violation of a city ordinance that required convicted felons to sign a register in order to stay within the city limits, when the defendant had no notice of the ordinance); see also Packer, supra note 50, at 127-37.
Court noted that at common law, mens rea was assumed to be a requirement of all penal offenses.\textsuperscript{54} Further, "the failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal laws."\textsuperscript{55} Therefore, the Court acknowledged that courts may have to infer the scienter requirement in light of legislative silence.\textsuperscript{56}

Likewise, the recent trend in Maryland has gone away from imposing strict liability for statutory offenses.\textsuperscript{57} For example, in 1988, the Court of Appeals held in \textit{Dawkins v. State}\textsuperscript{58} that the State must prove knowledge in order to convict a defendant of possessing controlled substances, even though the possession statute is silent as to a mens rea requirement.\textsuperscript{59} The Court of Special Appeals stated in \textit{McCallum} that it would presume a knowledge requirement absent express statutory language explicitly excluding a mens rea element.\textsuperscript{60} Additionally, the Court of Special Appeals held in \textit{Comstock v. State}\textsuperscript{61} that in order to be convicted under Maryland's "hit-and-run" statute,\textsuperscript{62} the defendant must have either actually known or had reason to know that an accident had occurred.\textsuperscript{63} The court noted that despite the absence of the term "knowingly" in the statute, scienter "is logically and legally necessary for one to be guilty of leaving the scene of a personal injury accident under [the statute]."\textsuperscript{64}

3. The Court's Reasoning; Analysis.—In \textit{McCallum}, the Court of Appeals summarily disposed of the mens rea issue. Rather than exploring the purpose and ramifications of the notice provisions at issue, the majority instead applied the analysis that it had earlier used in construing the drug possession statute in \textit{Dawkins}.\textsuperscript{65} In doing so, the Court of Appeals signalled that a requirement of actual knowl-
edge will be read into statutes that do not expressly require mens rea, despite the true nature of the offense.66

The court first observed that there was no clear consensus among the states about whether driving with a suspended license requires mens rea.67 The court failed to note, however, that the majority of those states that have decided the issue have ruled against reading a scienter requirement into a statute that proscribes driving with a suspended license.68 In those jurisdictions that imply a mens rea requirement, the notification scheme is usually considered an indication that the legislature sought to ensure that any driver whose license was or would be suspended had actual notice of the suspension.69

In McCallum, the court ignored the notice provision and employed a public welfare offense paradigm to discern the legislature’s intent.70 Relying exclusively on three factors set forth in the Dawkins decision,71 the court concluded that the legislature did not intend to make driving with a suspended license a public welfare offense for which McCallum could be held strictly liable.72 First, the court noted that public welfare offenses are generally regulatory rather than punitive in nature.73 The court determined that the main purpose of the suspension scheme was not to ensure public safety, but instead to punish drivers for failing to pay fines.74 Therefore, the statute had only an incidental regulatory effect on the driving population.75 A statute created primarily to punish drivers for failure to comply, in the court’s view, removed it from the realm of public welfare offenses.76

The second factor considered by the court was that public welfare offenses usually carry a penalty which is “so slight that the courts can afford to disregard the individual in protecting the social

66. See id.
67. See id. at 455, 583 A.2d at 252.
69. See, e.g., Jolly v. People, 742 P.2d 891, 894-95 (Colo. 1987).
70. 321 Md. at 456-57, 583 A.2d at 252-53.
71. See id. at 457, 583 A.2d at 253 (citing Dawkins v. State, 313 Md. 638, 547 A.2d 1041 (1988)); see also Sayre, supra note 34, at 70.
72. See McCallum, 321 Md. at 457, 583 A.2d at 252-53.
73. See id.
74. See id., 583 A.2d at 253.
75. Id.
76. See id.
interest." Given that the possible penalties for driving with a suspended license are significant, the court assumed that the legislature did not intend to impose such severe punishment without requiring a culpable state of mind.

Finally, the court noted, as "[p]erhaps the most important consideration," that an individual charged with a regulatory offense is typically in a position to prevent the violation from occurring. However, if McCallum had no knowledge of the suspension, he would have "no reason to avoid driving and no reason to suspect that he was endangering the public by driving . . . ." Therefore, the suspension offense is not a pure public welfare offense and mens rea is an essential element of the crime.

The McCallum opinion leaves open the question of what type of knowledge is required in order to convict the defendant of driving with a suspended license. Although the per curiam opinion suggests that only actual knowledge will satisfy the implied mens rea element of the suspension offense, Judge Chasanow maintained in his concurrence that constructive knowledge should be sufficient.

As Judge Chasanow noted, when a defendant ought to have been aware that his behavior was illegal but instead chose to close his eyes, constructive notice in the form of "deliberate ignorance" should satisfy the knowledge element. A "deliberate ignorance" instruction allows the trier of fact to infer knowledge from a defendant's behavior. Even though it allows for such an inference, the constructive knowledge standard falls short of creating a presumption that notification was received when the State shows that the requisite notice was mailed. Consequently, once a defendant makes a prima facie showing that no notice was received, the State carries the nearly insurmountable burden of adducing evidence that tends to show that the defendant avoided notice because the de-

---

78. See supra note 41 for the relevant text of § 27-101(h), enumerating penalties.
79. McCallum, 321 Md. at 457, 583 A.2d at 253.
80. Id.
81. Id.
82. Id.
83. See id. at 458-62, 583 A.2d at 253-55 (Chasanow, J., concurring). Chief Judge Murphy joined in the concurrence. Id. at 461-62, 583 A.2d at 255 (Chasanow, J., concurring).
84. See Perkins & Boyce, supra note 26, § 4, at 867-68.
85. McCallum, 321 Md. at 458-61, 583 A.2d at 253-55 (Chasanow, J., concurring).
86. Id. at 461, 583 A.2d at 255 (Chasanow, J., concurring).
87. Id. at 464-67, 583 A.2d at 256-58 (McAuliffe, J., dissenting).
fendant had reason to know of the suspension. 88

Rather than simply focusing on the punitive purposes of the statute, the court might have looked at other violations punishable under section 27-101(h) to gauge the legislature's intent. For instance, section 17-107 prohibits an individual from driving a motor vehicle on public roads when the vehicle is not covered by insurance or some other form of security, 89 an offense punishable under section 27-101. 90 The purposes of sections 17-107 and 16-303(h) are analogous in that the statutes proscribe similar types of conduct—failure to meet a required condition for legally operating a motor vehicle on the public highways. However, section 17-107 includes explicit language indicating that knowledge is an element of the offense. 91 Moreover, that section contains a provision stating that the introduction of MVA records showing the lack of required security will be prima facie evidence of knowledge that the vehicle was not covered by the required security. 92 The explicit inclusion of a knowledge requirement in section 17-107 and the inclusion of a provision that allows MVA records to prove knowledge both are evidence that the legislature intentionally omitted the same requirement from section 16-303, an offense of a similar nature, punishable under the same statute, and involving similar MVA records.

By restricting its analysis to the punitive aspects of the suspension provisions, the court essentially stripped the traffic statute of its equally important regulatory purpose. Suspensions result not only from failure to appear in court or failure to pay a fine, but also from repeated convictions for driving while intoxicated or for moving vio-

88. Id.
89. Section 17-107 provides, in pertinent part:
(a) Vehicle not covered by required security.—A person who knows or has reason to know that a motor vehicle is not covered by the required security may not:
   (1) Drive the vehicle; or
   (2) If he is an owner of the vehicle, knowingly permit another person to drive it.
(b) Evidence of violation of subsection (a).—(1) In any prosecution under subsection (a) of this section the introduction of the official records of the Motor Vehicle Administration showing the absence of a record that the vehicle is covered by the security required under § 17-104 of this subtitle shall be prima facie evidence that a person knows or has reason to know that a motor vehicle is not covered by the required security.
90. See id. § 27-101.
91. See id.
92. See id.
lations. The latter offenses demonstrate a disregard for the traffic laws and a threat to the public welfare that the legislature clearly sought to regulate through license suspension, regardless of whether an individual has notice of the suspension.

4. Conclusion.—McCallum reflects the Court of Appeals’ growing disenchantment with the doctrine of strict liability. Although the court sought to ensure that only culpable behavior is punished by incarceration, it may have moved too far from legislative intent by implicitly requiring actual notice.

The ruling in Dawkins left open to speculation the court’s future approach to other statutory violations not explicitly requiring mens rea. But the fact that the court adopted its reasoning from Dawkins, a drug possession case, is strong evidence that absent express language in the statute, the Court of Appeals will not presume a strict liability offense if the statute permits incarceration for a violation.

B. Affording Greater Protections for Criminal Defendants in State Law

In Bowie v. State, the Court of Appeals overturned the death sentence and conviction of Damon Alejandro-Christopher Bowie based on the inadequacy of voir dire questioning and an improper sentencing-phase instruction by the trial judge. Writing for a unanimous court, Judge Bell concluded that the trial court erred in four respects. First, the trial court erred by refusing to propound voir dire questions designed to identify “police preference” in prospective jurors. Second, the failure to probe into the possibility of racially biased jurors also constituted reversible error. Third, the

93. This is the point that Judge McAuliffe makes in his dissent. See McCallum, 321 Md. at 467-68, 583 A.2d at 258 (McAuliffe, J., dissenting). He also criticizes the approach of the concurrence, stating that:

[t]he approach suggested by Judge Chasanow in his concurring opinion would not necessarily change that result, because the State would still have to prove the defendant believed it was probable that his license was suspended and that he deliberately avoided contact with the MVA to evade notice of that fact.

Id.

95. See id. at 5, 595 A.2d at 450.
96. Prospective jurors exhibiting “police preference” are those who would favor the testimony of police officers merely because of their official status. See infra text accompanying notes 129-136.
97. Bowie, 324 Md. at 11, 595 A.2d at 453. The court also discussed this type of preference in regard to lay witnesses testifying for the State, noting that they might be given more credence than defense witnesses merely because of their association with the State. See id. at 10, 595 A.2d at 452.
98. Id. at 15-16, 595 A.2d at 455.
trial court’s inquiry into jurors’ personal views regarding the death penalty was inadequate. 99 Finally, the trial court’s sentencing-phase instruction improperly informed jurors that the Governor of Maryland has the power to commute a death sentence or other sentences. 101

The court in Bowie preserved well-grounded rights in Maryland law that provide a defendant with the opportunity to question jurors on the possibility of police preference and racial bias in order to assure juror impartiality. 102 The trial judge’s refusal to propound the substance of Bowie’s questions was an abuse of discretion requiring a new trial. 103 Relying on several Maryland decisions that had addressed the acknowledgement of parole eligibility during the sentencing phase, the court decided that instructing the jury about the Governor’s commutation powers was also erroneous. 104

Bowie’s greatest impact results from the court’s discussion of the inadequacy of the trial judge’s voir dire questioning of jurors’ death penalty views. Recognizing that appellate courts must give deference to a trial judge’s decision to exclude a juror, 105 the Bowie court emphasized that there should be a thorough record of the basis for making that decision. 106 By emphasizing the need for a complete record, Bowie forces trial judges to conduct more than superficial inquiries into the death penalty views of prospective jurors. 107

---

99. Id. at 23-24, 595 A.2d at 459.
100. Maryland’s death penalty process is bifurcated. See Md. Ann. Code art. 27, § 413 (1992). Once a defendant is convicted of first degree murder, a separate sentencing proceeding is conducted. Id. § 413(a). This proceeding typically occurs in front of the jury that determined the defendant’s guilt. Id. § 413(b). The defendant can waive the jury sentencing proceeding and be sentenced by the court alone. Id. § 413(b)(3). Upon the finding of aggravating circumstances requiring the imposition of a death sentence, the sentencing proceeding provides the defendant the opportunity to introduce mitigating factors in an attempt to show that the death penalty should not be imposed. Id. § 413(g). For example, much of Bowie’s sentencing proceeding focused on the fact that Bowie’s mother underwent a sex change operation when Bowie was a young child. The defense argued that this experience caused Bowie great emotional problems and should mitigate against the imposition of the death penalty. Appellant’s Brief at 6, Bowie (No. 90-132). For further discussion of Maryland’s capital sentencing procedure, see Jones v. State, 310 Md. 569, 599-600, 530 A.2d 743, 758 (1987), vacated, Jones v. Maryland, 486 U.S. 1050 (1988).
101. Bowie, 324 Md. at 30, 595 A.2d at 462.
102. See infra notes 129-147 and accompanying text.
103. Bowie, 324 Md. at 11, 15-16, 595 A.2d at 453, 455.
104. See id. at 27-30, 595 A.2d at 460-62; infra notes 170-174 and accompanying text.
105. Bowie, 324 Md. at 21, 595 A.2d at 457.
106. See id. at 22-24, 595 A.2d at 458-59.
107. See infra text accompanying notes 205-219.
1. **The Case.**—Shortly before midnight on October 11, 1989, Damon Bowie and James Edmonds, armed with handguns, entered Stoney’s Restaurant in Prince George’s County and announced that they were robbing the restaurant. During the robbery, a bartender was forced to go to a back room and give the restaurant’s money to Edmonds. Two other restaurant employees, Kevin Shelley and Arnold Batson, were forced to lie face down on the floor and were fatally shot in the back of the head. The owner of the restaurant was shot in the arm and Robert McDaniels, an off-duty Prince George’s County police officer, was shot in the face. Officer McDaniels identified Bowie as the person who shot him in the face and who held the gun to the back of Batson’s head. With the exception of Batson, an African-American, all of the victims in the robbery were white; Bowie is an African-American.

Bowie was tried by a jury in the Circuit Court for Prince George’s County. The defense submitted several questions to the trial court for inclusion in the *voir dire* of prospective jurors. These questions were designed to identify jurors with a racial bias that would affect their impartiality and jurors who would give more credence to the testimony of police officers or State witnesses merely because of their status. The court not only failed to ask

109. *Bowie*, 324 Md. at 5, 595 A.2d at 450.
110. *Id.* at 6, 595 A.2d at 450.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.* at 11, 595 A.2d at 453.
115. *Id.* at 4, 595 A.2d at 449.
116. *Id.* at 11, 595 A.2d at 453. Bowie requested the following questions designed to identify racial bias:

1. Most of the victims in this case are white and Mr. Bowie and his alleged accomplices are black. Do you feel uncomfortable sitting on a jury where a black man is accused of shooting and robbing several white individuals?
2. Have you or any of your family been a member of any organization with a stated philosophy on race?

*Id.* The court noted that these questions were arguably defective; neither of them asked whether the jurors’ ability fairly to judge the evidence would be affected by racial prejudice. *Id.* Nevertheless, the trial court’s failure to “propound any questions designed to elicit the essence of the information [Bowie] sought [was erroneous].” *Id.* at 11-12, 595 A.2d at 453 (emphasis added); see *infra* notes 142-145 and accompanying text.

117. *Bowie*, 324 Md. at 6, 595 A.2d at 450. Bowie requested the following questions on this point:

1. Many of the State’s witnesses will be police officers. Do you believe that a police officer will tell the truth merely because he or she is a police officer?
2. Would any of you be more or less likely to believe a police officer than a civilian witness, solely because he or she is a police officer?
the requested questions, but also failed to ask any similar question to elicit this information. Bowie's objections were overruled. Further, the trial court's voir dire into the jurors' views on the death penalty was essentially a single question asking jurors to stand if they felt that their views on the death penalty would interfere with their ability to judge the evidence fairly. All those who stood were dismissed for cause. Bowie's objection based on the substance and brevity of the examination was noted and overruled.

The jury convicted Bowie on two counts each of first degree murder, attempted murder, assault with intent to murder, malicious shooting, and robbery with a deadly weapon. Bowie elected to be sentenced by a jury, and a capital sentencing proceeding was

3. Would any of you tend to view the testimony of witnesses called by the Defense with more skepticism than witnesses called by the State, merely because they were called by the Defense?

_Id._

118. _Id._

119. See _id._ at 11-12, 595 A.2d at 453.

120. _Id._ at 6, 11, 595 A.2d at 450, 453.

121. The trial court's entire voir dire on the death penalty views of the venire was:

Ladies and gentleman, the State of Maryland has filed a request before the court that if found guilty, Mr. Damon Bowie be put to death. Is there any member of the prospective jury panel who has any feelings whatsoever about such a request, and I don't care which way you feel about it, that it would interfere with your ability to fairly and truly judge this matter based only on the evidence before the court?

Said another way, is there anybody in this room who has such feelings about the death penalty one way or the other that it would affect you emotionally or to the extent that it would override your ability to judge this matter based only on the evidence brought out in the courtroom and the instructions of the court to you and the application of that evidence to the law? If you have a positive response, please stand in place.

_Id._ at 16, 595 A.2d at 455.

122. _Id._

123. _Id._ at 16-18, 595 A.2d at 455-56. The defense sought a more thorough examination, arguing that

the most likely scenario is that people who have a fear of capital punishment are the people who most likely stand up and say they cannot hear [the case], which are precisely the very people that we would like to have an opportunity to, one, discuss the matter with . . . and, two, attempt to hear an explanation.

_Id._ at 17-18, 595 A.2d at 456. The defense suggested that, given an opportunity to explain their views, such persons might be able to serve on the jury. _Id._ at 17, 595 A.2d at 455.

124. _Id._ at 4, 595 A.2d at 449. Bowie was also convicted of an additional count of robbery with a deadly weapon and four counts of use of a handgun. Appellant's Brief at 2, _Bowie_ (No. 90-132).
Over Bowie’s objections, the trial court instructed the jury concerning the gubernatorial power to commute sentences. The jury imposed two sentences of death and the trial judge imposed additional sentences totalling 120 years. The case came before the Court of Appeals pursuant to Maryland’s automatic review provision for capital cases.

2. Legal Background.—

a. Police Preference.—Over a century ago in Waters v. State, the Court of Appeals enunciated the “fundamental principle underlying the trial by jury, that each juror shall so far as it is possible be entirely impartial and unbiased, in order that he may hear the evidence, and decide the matter in controversy uninfluenced by any extraneous considerations whatever.” More recently, in Casey v. Roman Catholic Archbishop, the Court of Appeals stated that “a party is entitled to a jury free of all disqualifying bias or prejudice without exception, and not merely a jury free of bias or prejudice of a general or abstract nature.”

Relying on these principles in Langley v. State, the Court of Appeals reversed the defendant’s robbery conviction, finding prejudicial error in the trial judge’s failure to ask, during voir dire, whether

125. Bowie, 324 Md. at 4, 595 A.2d at 449. For a description of Maryland’s capital sentencing procedure, see supra note 100.
126. Bowie, 324 Md. at 24, 595 A.2d at 459; see Md. Ann. Code art. 41, § 4-513 (1990) (“The Governor . . . may commute or change any sentence of death into penal confinement for such period as he shall think expedient. [He may also] remit any part of the time for which any person may be sentenced to imprisonment . . . .”).
127. Bowie, 324 Md. at 4, 595 A.2d at 449.
129. 51 Md. 430 (1879).
130. Id. at 436; see Tichnell v. State, 297 Md. 432, 437-38, 468 A.2d 1, 3-4 (1983) (“The jury selection process must, of course, satisfy the essential demands of fairness guaranteed by the fourteenth amendment in order to afford the accused his due process right to an impartial jury. The voir dire examination of prospective jurors protects this right by exposing the existence of grounds for disqualification.” (citations omitted)), cert. denied, 466 U.S. 993 (1984); Bryant v. State, 207 Md. 565, 583, 115 A.2d 502, 510 (1955) (“Any circumstances that may reasonably be regarded as rendering a person unfit for jury service may be made the subject of questions and a challenge for cause.”).
132. Id. at 607, 143 A.2d at 632. In Casey, a parishioner alleged personal injuries from slipping on a church’s waxed floor, a church to which the Roman Catholic Archbishop of Baltimore (in his corporate capacity) held legal title. Id. at 600-01, 143 A.2d at 628. The Court of Appeals held that the trial court committed reversible error by failing to probe adequately into whether the religious affiliation of prospective jurors might prevent them from arriving at a fair and impartial verdict. See id. at 607, 143 A.2d at 692.
any prospective juror "would give more credit to the testimony of a police officer over that of a civilian, merely because of his status as a police officer." 134 _Langley_ was a case of first impression and the Court of Appeals noted that it was "writ[ing] on a clean slate." 135 On this slate, the court wrote: "[W]e hold that in a case such as this, where a principal part of the State's evidence is testimony of a police officer diametrically opposed to that of a defendant, it is prejudicial error to fail to propound a question such as that requested in this case." 136

b. Racial Bias.—Maryland law makes clear that, when requested, _voir dire_ questioning of prospective jurors with respect to possible racial bias is required if racial prejudice may be a factor given the facts of the case. 137 In 1959, the Court of Appeals reversed the conviction and death sentence of an African-American defendant for the murder of a police officer in _Brown v. State_, 138 because of the trial court's refusal to allow _voir dire_ questions designed to uncover racial prejudice.139

134. _Id._ at 338, 378 A.2d at 1338.
135. _Id._ at 347, 378 A.2d at 1343.
136. _Id._ at 349, 378 A.2d at 1344. While citing to _Casey_, the _Langley_ decision also relied upon two federal cases: _Brown v. United States_, 338 F.2d 543 (D.C. Cir. 1964), and _Sellers v. United States_, 271 F.2d 475 (D.C. Cir. 1959). _Brown_ and _Sellers_ found an abuse of discretion when the trial judge failed to inquire into whether any of the jurors would give more weight to a law enforcement officer's testimony than to that of other witnesses solely because of the officer's position. _Brown_, 338 F.2d at 545; _Sellers_, 271 F.2d at 476. _Brown_ did not "read _Sellers_ as having been narrowly decided . . . [but] as establishing that when important testimony is anticipated from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more, or less, inclined to credit their testimony, a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested." _Brown_, 338 F.2d at 545; _see also_ _State v. Rogers_, 497 A.2d 387, 389-90 (Conn. 1985) (concluding that it was vitally important to the defendant to explore whether prospective jurors would credit police officers' testimony merely because they are police officers, when police testimony was crucial in establishing the State's case); _Commonwealth v. Futch_, 366 A.2d 246, 249-50 (Pa. 1976) (finding prejudicial error in the trial court's failure to ask a question designed to determine whether a prospective juror would credit testimony of a prison guard simply because of the guard's official status).


139. _Id._ at 39, 150 A.2d at 900. _Brown_ heavily relied upon a Connecticut case, _State v. Higgs_, 120 A.2d 152 (Conn. 1956), in which an African-American defendant allegedly
A year and a half later, in *Contee v. State*, the Court of Appeals clarified the scope of Brown. In *Contee*, the court reversed an African-American defendant's conviction for the rape of a white woman. Although the questions submitted by the defendant were improperly designed—"none was reasonably calculated to elicit or ascertain such bias or prejudice as would disqualify a prospective juror from rendering a fair and impartial verdict on the law and the evidence"—their purpose was clearly to uncover racial bias that would disqualify a venireperson. The *Contee* court held that when the nature of the defendant's questions as to racial basis is understood by the trial court, the court must ask "a proper question designed to ascertain the existence of cause for disqualification on account of racial bias or prejudice" or allow the defendant to formulate proper *voir dire* questions on the topic.

Recently, in *Holmes v. State*, the Court of Special Appeals reviewed Brown and *Contee* to ascertain the breadth of Maryland law regarding *voir dire* questions on racial bias. The *Holmes* court concluded that "in a criminal case, prejudice may be a factor because of the facts of the case when the complainant and the witnesses for the State are of a different race than the defendant, and the crime involves victimization of another person and the use of violence."

---

140. 223 Md. 575, 165 A.2d 889 (1960).
141. See id. at 577-78, 165 A.2d at 891.
142. Id. at 580, 165 A.2d at 892. Likewise, Bowie's questions may have been defective. See supra note 116.
143. See *Contee*, 223 Md. at 580, 165 A.2d at 892-93.
144. Id., 165 A.2d at 893.
145. Id., 165 A.2d at 892-93.
147. Id. at 438-39, 501 A.2d at 81 (footnote omitted). Although prejudice may have been a factor in *Holmes*, the defendant's failure to object to the exclusion of *voir dire* questions on racial bias resulted in a waiver of the error. Id. at 440, 501 A.2d at 81. In *Thornton v. State*, 31 Md. App. 205, 355 A.2d 767 (1976), the Court of Special Appeals also examined *voir dire* inquiries into racial prejudice. Id. at 210-20, 355 A.2d at 770-75. The court enunciated that "absent[ ]... some special circumstance warranting an inquiry as to racial prejudice, such examination is not mandated [by Maryland case law]." Id. at 215, 355 A.2d at 773 (emphasis added). In *Thornton*, the defendant and the only two witnesses who testified on behalf of the State were all African-American; this was not considered a special circumstance requiring inquiry. Id. at 216-17, 355 A.2d at 773-74.
Unlike Maryland courts, the Supreme Court has distinguished between capital and noncapital cases in discussing the propriety of *voir dire* questions designed to identify racially biased jurors. In *Ristaino v. Ross*, the Supreme Court held that *voir dire* examination on racial bias in a noncapital case is not constitutionally mandated by the Sixth Amendment guarantee of an impartial jury simply because the crime victim is white and the defendant is a person of color. In *Turner v. Murray*, however, the Court held that a capital defendant accused of an interracial crime has the right to *voir dire* questions on the issue of racial bias. Even though *Ristaino* did not mandate *voir dire* inquiry into possible racial bias in noncapital cases, the Court did state that "the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." More importantly, the Court noted that states are free to permit or require questions not demanded by the Constitution.

c. *Death Qualification.*—The practice of identifying and excluding venirepersons whose views on the death penalty would prevent them from fulfilling their duty to be fair and impartial in a capital case is generally known as death qualification. In 1964, the Supreme Court, in *Witherspoon v. Illinois*, decided that before jurors could be excused for cause, it must be "unmistakably clear" that their views on the death penalty would cause them automatically to vote against imposing capital punishment or would prevent

149. The Sixth Amendment states, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. The Maryland Declaration of Rights provides, in relevant part: "That in all criminal prosecutions, every man hath a right . . . to a speedy trial by an impartial jury, without whose unanimous consent he ought not be found guilty." Md. Const. Decl. of Rts., art. 21.
150. 424 U.S. at 594-98.
152. See id. at 36-37.
153. 424 U.S. at 597 n.9.
154. Id.
them from applying the law impartially.\textsuperscript{157} Over twenty years later, in \textit{Wainwright v. Witt},\textsuperscript{158} however, the Supreme Court set forth a new standard for excluding prospective jurors for cause based on their views on capital punishment. In \textit{Witt}, the Court held that an excludable venireperson's views must "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."\textsuperscript{159}

Maryland followed the \textit{Witt} standard in \textit{Grandison v. State}.\textsuperscript{160} In \textit{Grandison}, the defendant argued that the beliefs of numerous prospective jurors excused for cause would not have prevented them from rendering an impartial verdict.\textsuperscript{161} After a careful review of a thorough trial record, the Court of Appeals deferred to the trial judge's decision to excuse for cause, satisfied that the \textit{Witt} standard had been met.\textsuperscript{162}

Recently in \textit{Hunt v. State},\textsuperscript{163} the Court of Appeals reiterated the \textit{Witt} holding, stating that "[t]his standard, essentially, is that jury impartiality requires only 'jurors who will conscientiously apply the law and find the facts.'"\textsuperscript{164} Citing \textit{Grandison} for the proposition that a trial judge's decision to excuse for cause should be granted deference, \textit{Hunt} upheld both the judge's decision to excuse one juror and his refusal to excuse five other jurors.\textsuperscript{165}

The Court of Special Appeals, in \textit{Wooten-Bey v. State},\textsuperscript{166} demon-

\textsuperscript{157} See id. at 522 n.21. This case is the source of the term "Witherspoon-excludable." \textsuperscript{158} See Holland v. Illinois, 493 U.S. 474, 483 (1990). \textsuperscript{159} Id. at 424. The \textit{Witt} Court upheld the defendant's death sentence based on the standard articulated in \textit{Adams v. Texas}, 448 U.S. 38 (1980), rather than the prior standard of \textit{Witherspoon v. Illinois}, 391 U.S. 510 (1964). The \textit{Adams} Court, attempting to rearticulate the \textit{Witherspoon} standard, provided that a juror could be excluded for cause when his "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." \textit{Adams}, 448 U.S. at 45. By adopting the \textit{Adams} test, the \textit{Witt} Court clearly favored the prosecution over the defense. See infra notes 217-219 and accompanying text. Under \textit{Witt}, prospective jurors who express problems with the death penalty are more likely to satisfy the substantial impairment standard and be excused for cause, even when it is not "unmistakably clear" that their ability to apply the law would be affected. See 469 U.S. at 424. \textsuperscript{160} 305 Md. 685, 506 A.2d 580, cert. denied, 479 U.S. 873 (1986). \textsuperscript{161} Id. at 724, 506 A.2d at 599. \textsuperscript{162} See id. at 725, 506 A.2d at 599-600. \textsuperscript{163} 321 Md. 387, 583 A.2d 218 (1990). \textsuperscript{164} Id. at 415, 583 A.2d at 231 (quoting \textit{Wainwright v. Witt}, 469 U.S. 412, 423 (1985)). \textsuperscript{165} See id. at 414-21, 583 A.2d at 231-34. \textit{Hunt} involved the "reverse Witherspoon situation"—certain prospective jurors may be so predisposed to vote for the death penalty that they will act impartially, either at the criminal liability phase or the sentencing phase. See id. at 415, 583 A.2d at 231. \textsuperscript{166} 76 Md. App. 603, 547 A.2d 1086 (1988), aff'd, 318 Md. 301, 568 A.2d 16 (1990).
strated the considerable discretion accorded a trial judge’s decision to excuse prospective jurors for cause. In Wooten-Bey, the trial court asked jurors to stand if they had any moral, ethical, religious, political, or other objection to the death penalty that would influence their verdict, or prevent them from following court instructions. Jurors who stood were excused for cause by the trial judge without any further inquiry. The intermediate appellate court approved this extremely limited voir dire examination despite the defense’s argument that such a limited inquiry could not have been “enlightening and fruitful.”

d. Executive Clemency.—In Shoemaker v. State, the Court of Appeals first considered whether a prosecutor’s remark regarding the possibility of parole constituted reversible error. In deciding that a prosecutor’s reference to a defendant’s parole prospects was inappropriate, the court mentioned in dicta that reference to the possibility of executive clemency was also improper. The Shoemaker court worried that the reference to parole “suggested to the jury that it might in part shift its responsibility for a finding of the defendant’s guilt to some other body.” Therefore, the court granted the defendant a new trial. Although Shoemaker was a non-capital case dealing with the criminal liability phase of trial, numerous Maryland cases have followed Shoemaker’s lead with regard to comments on parole, work release, and automatic appellate review during capital sentencing. Until Bowie, the Court of Appeals had

167. Id. at 619, 547 A.2d at 1094.
168. Id. at 619-20, 547 A.2d at 1094.
169. Id. at 620, 547 A.2d at 1094.
170. 228 Md. 462, 180 A.2d 682 (1962).
171. See id. at 468, 180 A.2d at 685.
172. Id. at 469, 180 A.2d at 685.
173. See id. at 474, 180 A.2d at 688.
174. See, e.g., Harris v. State, 312 Md. 225, 249-52, 539 A.2d 637, 649-50 (1988) (finding the possibility of parole to be irrelevant to a capital sentencing decision); Booth v. State, 306 Md. 172, 217, 507 A.2d 1098, 1121 (1986) (holding that testimony about work release and parole was improper); Evans v. State, 304 Md. 487, 529-30, 499 A.2d 1261, 1283-84 (1985) (finding the possibility of parole to be neither an aggravating nor a mitigating circumstance); Poole v. State, 295 Md. 167, 194-97, 453 A.2d 1218, 1232-33 (1983) (concluding that the prosecutor’s arguments to the jury concerning the possibility of parole were “irrelevant and obviously prejudicial”).

In Bowers v. State, 306 Md. 120, 507 A.2d 1072 (1986), the Court of Appeals held that Shoemaker applies to the defense as well as the prosecution, and the fact that a defendant will not be eligible for parole for a long time cannot be introduced to mitigate against the imposition of a death sentence. See id. at 151-53, 507 A.2d at 1087-89. In Doering v. State, 313 Md. 384, 545 A.2d 1281 (1988), however, the court reconsidered whether the ban on introducing the possibility of parole applied equally to the prosecu-
not directly addressed the appropriateness of comments on executive clemency during capital sentencing.

The Supreme Court specifically addressed the propriety of comments on gubernatorial commutation powers in *California v. Ramos*.\(^{175}\) In *Ramos*, the Court held that instructions permitting a capital sentencing jury to consider the Governor’s power to commute a life sentence without the possibility of parole did not offend the Constitution.\(^{176}\) The *Ramos* Court deferred to the state’s decision that the Governor’s power to commute life sentences was a substantive factor that the sentencing jury should be able to consider.\(^{177}\) However, the *Ramos* Court acknowledged “that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.”\(^{178}\)

3. **The Court's Reasoning; Analysis.**—By allowing inquiry into police preference, racial bias, and death penalty views, the court in *Bowie* maintained the integrity of *voir dire* examination as a means of obtaining a fair and impartial jury. Further, by prohibiting instructions on executive clemency, the *Bowie* court prevented a sentencing jury from being influenced by speculative considerations.

a. **Police Preference.**—In *Langley v. State*,\(^ {179}\) the Court of Appeals reversed the defendant’s conviction because the trial judge refused, despite the defendant’s request, to *voir dire* prospective jurors on possible police preference.\(^ {180}\) In *Bowie*, the State attempted to distinguish *Langley* on two grounds.\(^ {181}\) First, the State focused on the
“diametrically opposed” language in Langley’s holding,182 arguing that because Bowie did not testify and the defense offered no other “fact” witnesses, no “diametrically opposed” testimony existed between a police officer and the defendant or defense witnesses.183 Second, the State contended that Bowie’s failure to proffer the relevance of police testimony at the trial level meant that the issue was not properly preserved for appellate review.184 Both of the proposed distinctions were rejected, and the Bowie court concluded that Langley was dispositive.185 Because the error was not harmless,186 the court reversed Bowie’s conviction and death sentence.187

Langley’s underpinning is that jurors who would give more credence to the testimony of police officers than to that of other witnesses have prejudged an issue of credibility in the case and thus cannot serve as fair and impartial jurors.188 Recognizing that the State has the burden to prove its case against the defendant, the Bowie court declared that credibility is at issue regardless of whether the defendant testifies, and that it is improper for a juror to grant police officers a “presumption of credibility” simply because of their official status.189 The Bowie court was concerned by the coercive, burden-shifting element in the State’s argument. The Bowie court commented that according to the State,

to require voir dire into police preference, the defendant must testify, and he or she must do so “diametrically opposed” to that of the police. The State would have a defendant in all cases put on a defense or fail in his or her effort to have the jury questioned concerning the question of police preference.190

By refusing to find error only when a defendant testifies, Bowie requires an examination of the situation as faced by the trial judge prior to the development of evidence rather than a hindsight approach to the issue.

---

appropriate under circumstances such as those present here.” Brief of Appellee at 3-4, Bowie (No. 90-132).

182. See supra text accompanying note 136.
183. Bowie, 324 Md. at 6-7, 595 A.2d at 450-51.
184. Id.
185. See id. at 8, 595 A.2d at 451.
186. Id. at 11, 595 A.2d at 453.
187. Id. at 32, 595 A.2d at 463.
189. See 324 Md. at 10, 595 A.2d at 452. It follows that defense witnesses should not have a presumption of being less credible. This is closer to the essence of the third question proffered by Bowie. See supra note 117.
190. 324 Md. at 10, 595 A.2d at 452.
Furthermore, Bowie's review of Langley found no authority for the State's argument that a proffer of relevance was necessary. The court noted the obvious: "A trial judge trying a criminal case can anticipate that one or more police witnesses will appear and testify." What emerges from the court's analysis in Bowie is the prophylactic rule that, in a criminal case, the failure to propound voir dire questions similar to those submitted by Bowie will always be error.

b. Racial Bias.—The Bowie court accepted the summary by the Court of Special Appeals in Holmes v. State as to when Maryland case law requires inquiry into racial bias. Holmes concluded that inquiry is appropriate "when the complainant and the witnesses for the State are of a different race than the defendant, and the crime involves victimization of another person and the use of violence." Because racial bias can prevent a defendant from having a fair and impartial trial, possible prejudice should be explored when circumstances indicate that racial bias could influence jurors' decision-making.

Following this rationale, the Bowie court found it "patent that the trial court erred in refusing to inquire concerning possible racial prejudice." The court noted that all but one victim and the majority of the State's witnesses were white, Bowie is an African-American, and the crime involved violent victimization. Once Bowie submitted questions designed to discover racial bias, Maryland law required inquiry by the trial court.

Significantly, the Bowie court refused to follow the Supreme Court's decision in Turner v. Murray, relying instead on state precedent. In Turner, the Supreme Court held that the failure to inquire into racial bias only required the vacation of the death

191. See id. at 9, 595 A.2d at 452.
192. Id. at 9 n.5, 595 A.2d at 452 n.5. The court noted that in this case, "one of the proposed voir dire questions contained a proffer of sorts; it advised the court that a number of police witnesses would testify, a fact that the State did not contradict." Id.; see supra note 117 (setting out Bowie's requested voir dire questions).
193. An error can only be harmless if it is harmless beyond a reasonable doubt. Dorsey v. State, 276 Md. 638, 659, 350 A.2d 665, 678 (1976). Bowie suggests that this will be a very difficult hurdle for the State to clear. See 324 Md. at 10-11, 595 A.2d at 452-53.
195. Id. at 438-39, 501 A.2d at 81 (footnote omitted).
196. 324 Md. at 15, 595 A.2d at 455.
197. Id.
198. Id. at 15-16, 595 A.2d at 455; see supra notes 137-147 and accompanying text.
199. 476 U.S. 28 (1986); see supra text accompanying notes 151-152.
sentence to satisfy the Constitution.\textsuperscript{200} Bowie makes clear that regardless of the \textit{Turner} decision, Maryland law also requires a new trial.\textsuperscript{201}

State courts typically rely on Supreme Court interpretations of the Bill of Rights to construe similar provisions in their own constitutions.\textsuperscript{202} Because the significant Maryland decisions addressing racial bias were decided over thirty years ago,\textsuperscript{203} the Court of Appeals easily could have followed \textit{Turner}'s lead by vacating only the death sentence. \textit{Bowie}, however, affirmed the broader scope of these protections in Maryland law, granting Bowie a new trial in addition to overturning his death sentence.\textsuperscript{204}

c. \textit{Death Qualification}.—The Court of Appeals in \textit{Bowie} held that appellate courts need not defer to a trial court's decision to dismiss jurors because of their death penalty views, if the lower court asked jurors "broad questions calling for . . . bottom line conclusions, which [did] not themselves reveal automatically disqualifying biases as to [the venire's] ability fairly and accurately to decide the case, and indeed, which [did] not elucidate the bases for those conclusions."\textsuperscript{205} This holding rejects the superficial type of \textit{voir dire} examination accepted in \textit{Wooten-Bey v. State}.\textsuperscript{206} Bowie's requirement of a thorough record supporting a decision to excuse for cause clearly would have changed \textit{Wooten-Bey}'s outcome.

The \textit{Bowie} court recognized that Maryland law affords trial judges considerable discretion in the manner and extent of the \textit{voir dire} examination of prospective jurors.\textsuperscript{207} In limiting this discretion,
the Bowie court focused on the language in Hunt v. State\(^{208}\) and Grandison v. State,\(^{209}\) which emphasized the thoroughness of the respective trial courts' \textit{voir dire} examinations of prospective jurors' views on the death penalty.\(^{210}\)

In Grandison, the trial judge was "painstakingly thorough" in his questioning of prospective jurors and gave Grandison and his standby attorney "ample opportunity" for \textit{voir dire} examination.\(^{211}\) Again, in Hunt, the trial judge gave counsel "virtually unlimited opportunity" to \textit{voir dire} individual jurors on their personal views regarding the death penalty.\(^{212}\) By approving the extensive questioning in Grandison and Hunt, Bowie rejects general questions to which jurors respond by standing or raising their hands and are thereby dismissed.

\textit{Bowie}'s requirement of a thorough record supporting the trial judge's basis for excluding prospective jurors provides defendants with an important opportunity to challenge the propriety of exclusions for cause, thus removing some of the advantages in death penalty \textit{voir dire} that Wainwright v. Witt\(^{213}\) offered to the State.\(^{214}\) Before Witt, Witherspoon v. Illinois\(^{215}\) required "an unambiguous[ly] stated prediction of certain partiality [as] a prerequisite for disqualification . . . , [placing] the risk of error [in identifying excludable jurors] largely on the State, for 'many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.' "\(^{216}\) Witt's lower standard of substantial impairment, together with the judge's discretion in the manner of conducting \textit{voir dire} examinations,\(^{217}\) and the deference given to the trial

---

\(^{210}\) \textit{See Bowie}, 324 Md. at 21-22, 595 A.2d at 457-58.
\(^{211}\) 305 Md. at 726, 506 A.2d at 600.
\(^{212}\) 321 Md. at 415, 583 A.2d at 232; \textit{see Poole v. State}, 295 Md. 167, 187, 453 A.2d 1218, 1229 (1983) (finding no abuse of discretion when \textit{voir dire} was "extensive and probing").
\(^{214}\) \textit{See supra} notes 158-159 and accompanying text. It remains to be seen whether Bowie will allow defendants a claim of ineffective assistance of counsel when counsel, not the court, conducts a superficial \textit{voir dire} examination as to death penalty views.
\(^{217}\) \textit{See supra} note 207 and accompanying text.
judge’s factual findings,218 made a judge’s decision to exclude a juror virtually impossible to challenge.219

By requiring a thorough factual record, Bowie now forces judges to explore more fully venirepersons’ views before the decision to dismiss a particular juror will be upheld on appeal. To some extent, individual voir dire questioning will be necessary sufficiently to “elucidate the bases” of “jurors’ bottom line conclusions”220 in determining whether they should be excused for cause because of their death penalty views. Bowie’s limitation on a trial judge’s discretion in conducting voir dire examinations waters down the harshness of Witt, making it more likely that jurors will serve on capital sentencing juries when they are personally opposed to the death penalty but could impose it if the case fit into the court’s instructions.

d. Executive Clemency.—The Supreme Court in California v. Ramos221 expressed the belief that instructions regarding a Governor’s commutation power provided relevant and accurate sentencing information to the jury.222 The Court found unpersuasive the argument that such instructions “deflect the jury’s focus from its central task.”223 However, in holding that such comments were inoffensive to the Constitution, the Court did not intend to override contrary state judgments that capital sentencing juries should not consider the Governor’s power to commute a sentence.224

In Bowie, the Court of Appeals recognized that Maryland law supported a judgment contrary to Ramos. Informing the jury about commutation powers is likely to distract the jury from its primary task of determining aggravating and mitigating factors and balancing them against each other before imposing the death penalty.225 Shoemaker v. State226 and its progeny provided clear support for the Bowie court’s decision to afford defendants greater rights grounded

---

218. “[D]eterminations of demeanor and credibility . . . are peculiarly within a trial judge’s province.” Witt, 469 U.S. at 428.
219. See Krauss, supra note 216, at 77-79; Rosenson, supra note 202, at 313.
220. Bowie, 324 Md. at 23, 595 A.2d at 459.
222. See id. at 1009.
223. Id. at 1005.
224. Id. at 1013-14. Upon remand in Ramos, the California Supreme Court held that the instruction was “incompatible with [the state constitution’s] guarantee of ‘fundamental fairness’ both because it is seriously and prejudicially misleading and because it invites the jury to be influenced by speculative and improper considerations.” People v. Ramos, 689 P.2d 430, 438-39 (Cal. 1984).
226. 228 Md. 462, 180 A.2d 682 (1962).
in Maryland law than they would receive under federal law.\textsuperscript{227}

Such instructions "diminish[] the seriousness and finality of the jury's task" by leading jurors to believe that they do not have the last word.\textsuperscript{228} Jurors may be more likely to take the "awesome step" of imposing a death sentence knowing that if they err, the Governor may correct them.\textsuperscript{229} Furthermore, a gubernatorial pardon or commutation is "neither a sentencing option nor a possible mitigating circumstance."\textsuperscript{230}

\textit{Bowie} demonstrates willingness by the Court of Appeals to reject Supreme Court decisions providing a defendant with lesser protections.\textsuperscript{231} The rationale underlying the \textit{Bowie} court's decision prohibiting instructions on executive clemency—that such instructions might cause jury speculation and diminish the seriousness of the jury's task—is clearly more persuasive than the Supreme Court's reasoning that such instructions give the jury an "accurate statement of a potential sentencing alternative."\textsuperscript{232}

4. \textit{Conclusion}.—The court in \textit{Bowie} affirmed the fundamental importance to Maryland's criminal justice system of a fair and impartial jury.\textsuperscript{233} Juries should always decide the case before them "uninfluenced by any extraneous considerations whatever."\textsuperscript{234} Clearly, a juror's impartiality is undermined if undue respect is given to the testimony of police and state witnesses or if racial bias is present.

\textsuperscript{227} See \textit{supra} notes 170-174 and accompanying text.
\textsuperscript{228} \textit{Bowie}, 324 Md. at 26, 595 A.2d at 460 (quoting Appellant's Brief at 41, \textit{Bowie} (No. 90-132)).
\textsuperscript{229} \textit{Id.} (quoting Appellant's Brief at 41, \textit{Bowie} (No. 90-132)).
\textsuperscript{230} \textit{Id.} at 30, 595 A.2d at 462. In \textit{Bruce v. State}, 318 Md. 706, 569 A.2d 1254 (1990), the Court of Appeals held that, when requested by the defendant, the trial court should "instruct[] the jury that a sentence of life imprisonment without the possibility of parole means that a defendant cannot be released on parole at any time during his natural life.
\textit{Id.} at 735, 569 A.2d at 1269. Because life without parole is an alternative sentencing option, see \textit{Md. ANN. CODE} art. 41, § 4-516(b)(3)(i) (1992), which the jury may deem adequate punishment mitigating against imposing the death penalty, the court vacated the defendant's death sentence. \textit{Bruce}, 318 Md. at 735, 569 A.2d at 1269.
\textsuperscript{231} Likewise, the Maryland legislature has afforded criminal defendants greater protections that those constitutionally mandated by the Supreme Court. In \textit{Penry v. Lynaugh}, 109 S.Ct. 2934 (1989), the Supreme Court held that the Eighth Amendment does not per se bar states from executing mentally retarded defendants. However, the Maryland legislature has provided that mentally retarded defendants convicted of first degree murder may not be sentenced to death. \textit{Md. ANN. CODE} art. 27, § 412(f)(1) (1992).
\textsuperscript{233} See \textit{supra} notes 129-132 and accompanying text.
\textsuperscript{234} \textit{Waters v. State}, 51 Md. 430, 436 (1879).
Furthermore, a fair and impartial jury is of the utmost importance in a capital case. A trial court's decision to exclude jurors for cause should only be upheld when there is a sufficient factual basis for that decision, not simply because jurors respond to a general question indicating they may have problems with capital punishment.

Finally, jurors must respect the importance of their decisions. The implication that a jury's decision will be remedied if jurors make a mistake cannot be permitted. When a defendant's life is at issue, any possibility of diminishing the seriousness of the jury's task is intolerable.

By allowing voir dire inquiry into the possibility of racial bias and police preference, by requiring thoroughness in voir dire questioning on the venire's death penalty views, and by prohibiting sentencing-phase instructions on executive clemency, Bowie accounts for all of the above considerations. Bowie signals that Maryland will not blindly follow Supreme Court decisions restricting defendants' rights when greater protections are rooted in state law.

C. Specific Intent Required for Assault With Intent to Maim

In Hammond v. State, the Court of Appeals held that to convict a defendant of assault with intent to maim, the State must prove that the defendant intended to permanently injure the victim. Because the trial judge had instructed the jury that it was "immaterial" whether the injury intended by the defendant was temporary or permanent, the Court of Appeals reversed and remanded for a new trial, interpreting article 27, section 386 to require intent to permanently injure.

235. Justice Brennan viewed the majority's decision in Wainwright v. Witt, 469 U.S. 412 (1985), as indicative of the Supreme Court's disturbing trend respecting constitutional rights:

These trends all reflect the same desolate truth: we have lost our sense of the transcendent importance of the Bill of Rights to our society. We have lost too our sense of our own role as Madisonian "guardians" of these rights. Like the death-qualified juries that the prosecution can now mold to its will to enhance the chances of victory, this Court increasingly acts as the adjunct of the State and its prosecutors in facilitating efficient and expedient conviction and execution irrespective of the Constitution's fundamental guarantees. One can only hope that this day too will soon pass.

Id. at 463 (Brennan, J., dissenting) (citations omitted).


237. See id. at 458-59, 588 A.2d at 348.

238. Id. at 454, 588 A.2d at 346.

239. Id. at 458-59, 588 A.2d at 348.
On its face, *Hammond* appears to stretch the requirements of the statute beyond its language. In light of the common-law and statutory development of mayhem and maiming, however, the *Hammond* decision is logical and appears to be correct. Further, the court’s decision was necessary in light of the legislative silence regarding the permanence of the injury.

1. The Case.—Walter Hammond lived with Peggy McElroy for approximately eighteen months. The couple separated in June of 1985, but McElroy continued to date Hammond. McElroy also started dating David Schoene, who lived with her from January to May of 1989. On July 9, 1989, Schoene visited McElroy at her home. While Schoene was temporarily away from McElroy’s home, however, Hammond telephoned McElroy and asked to see her. Hammond testified at trial that McElroy consented to the visit, but she denied consenting. Later that evening, Schoene returned to McElroy’s home and the two retired for the night in McElroy’s bedroom.

Hammond arrived at McElroy’s home at about 3:00 a.m., but he was unable to enter through the front door because he had a key only to one of two locks on the door. The back entrance was unlocked, however, and Hammond entered the home through that door. In the second floor bedroom he found McElroy and Schoene in bed, both asleep and completely uncovered. According to his testimony, Hammond became confused and upset, thinking that Schoene had taken advantage of McElroy. He wanted to make Schoene leave, but he had been warned in the past by McElroy

240. “Mayhem” and “maim” are interchangeable terms. “‘Maim’ is the modern equivalent of the old word ‘mayhem,’ and some have long been inclined to abandon the earlier word entirely.” PERKINS & BOYCE, supra note 26, at 238.
241. *Hammond*, 322 Md. at 459, 588 A.2d at 349.
242. *Id.* at 459-60, 588 A.2d at 349.
243. *Id.* at 460, 588 A.2d at 349. “The catalyst in the sordid affair, which the trial brought to light, was Peggy McElroy. She was enamored of Hammond and David Schoene, and she bestowed her affections from time to time on each of them.” *Id.* at 459, 588 A.2d at 349.
244. *Id.* at 460, 588 A.2d at 349.
245. *Id.*
246. *Id.*
247. *Id.* Hammond explained his late arrival, stating that his car broke down and he had to wait for a ride from a friend. *Id.*
248. *Id.*
249. *Id.*
250. *Id.*
that Schoene was a "black belt and kick box champion." 251

Hammond left the bedroom in search of something with which to protect himself. 252 Hammond testified that although he could have easily obtained a knife or a rake in McElroy's house, he chose not to because he was afraid that the sharpness of those instruments might cause serious injury to Schoene or himself. 253 After locating a shovel in the basement, Hammond proceeded to the bedroom where McElroy and Schoene were sleeping. 254

Although armed with the shovel, Hammond was still worried that Schoene would resist leaving and attempt to harm him. 255 Therefore, Hammond decided to hit Schoene once with the flat end of the shovel to startle him. 256 Hammond brought the flat end of the shovel's blade down on Schoene's chest and yelled at him to get out of the house. 257 While Schoene got up startled and moved toward the door, Hammond repeatedly hit Schoene with the shovel until Schoene finally fled. 258 Hammond explained at trial that he was afraid that Schoene would retaliate against him throughout the entire episode. 259

Schoene fled in his van and was stopped by police after he went through a red light. The officers testified that Schoene was covered with blood and in obvious pain. 260 Schoene spent a few hours in a hospital and was treated for a variety of lacerations and other injuries. 261 None of the injuries proved to be permanent, with the exception of a few scars. 262

At Hammond's trial, the trial judge instructed the jury that to be convicted of assault with intent to maim, the defendant must

251. Id.
252. Id. at 461, 588 A.2d at 349.
253. Id. Hammond testified that he did not get a knife because "he did not want anybody to get hurt" and that he did not choose the rake because "it had all these points on it," which could put out someone's eye or otherwise seriously injure someone. Id.
254. Id.
255. Id.
256. Id.
257. Id., 588 A.2d at 350.
258. Id. at 462, 588 A.2d at 350. Schoene testified that Hammond struck him with the shovel approximately 20 to 30 times. Id. Photographs produced at trial tracked Schoene's progress from the bedroom door, down the stairs, and out the front door by blood spatterings. Id.
259. Id. Although he did not estimate how many blows he inflicted on Schoene, Hammond "seriously doubted" that it was 20 or 30. Id.
260. Id.
261. Id. at 462-63, 588 A.2d at 350.
262. See id. at 463, 588 A.2d at 350-51.
have had "the specific intent to either disfigure or disable." After some deliberation, the jury sent a written question to the judge questioning whether the disablement had to be permanent or could be temporary. The judge replied in writing: "Whether any disablement is permanent or temporary is immaterial as long as there is a disablement." Defense counsel objected to the judge's response and, following the jury's verdict of guilty, Hammond appealed. The Court of Appeals granted certiorari on its own motion before decision by the Court of Special Appeals.

2. Legal Background.—

a. The Common Law.—Assault with intent to maim originated from common-law mayhem. The elements of the common-law crime were established early in English law. Originally, mayhem was defined as "maliciously depriving another of the use of such of his members as may render him less able, in fighting, either to defend himself or to annoy his adversary." Injuries that met the definition included dismemberment and permanent disablement, because both had the effect of reducing the victim's ability to fight.

The early definition, however, excluded any disfigurement that did not impair the fighting ability of the victim. For instance, cutting or biting off a victim's ears and nose did not constitute mayhem

263. Id. at 454, 588 A.2d at 346. The trial judge instructed the jury in general accord with a pattern jury instruction for assault with intent to maim. Id. at 454 n.2, 588 A.2d at 346 n.2. Although the instruction is suggested by the Maryland State Bar Association, it nevertheless presents a problem. The instruction states in part that "disfigure has its common, ordinary meaning." Id. at 454 & n.2, 588 A.2d at 346 & n.2 (citing Maryland Pattern Jury Instructions-Criminal § 4:21.1 (1987)). However, the central question is whether disfigurement ordinarily means permanent or temporary injury.

264. Hammond, 322 Md. at 454, 588 A.2d at 346.

265. Id.

266. Id. at 454-55, 588 A.2d at 346.

267. Id. at 454, 588 A.2d at 346.


269. LaFave & Scott, supra note 29, § 7.17(a), at 696.

270. Perkins & Boyce, supra note 26, at 239. The punishment of this crime was designed to preserve the King's right to the usefulness of his subjects in battle. LaFave & Scott, supra note 29, § 7.17(a), at 696. Any injury that rendered a subject of the King less valuable in battle was considered an offense against the King. Id. The earliest punishment for this crime was therefore severe; the perpetrator was subjected to the same harm he inflicted upon his victim. Id.

271. LaFave & Scott, supra note 29, § 7.17(a), at 696.

272. Id.
at common law.\textsuperscript{273} This deficiency in the common law was rectified in 1670 by the Coventry Act,\textsuperscript{274} which punished a wider range of conduct including any permanent dismemberment, disablement, or intentional disfigurement of a person.\textsuperscript{275}

\textit{b. Maryland Law.}—Maryland law has followed the course of the English common law.\textsuperscript{276} In 1809, the legislature enacted two statutes\textsuperscript{277} under the heading “Maiming,” which are now codified in article 27, sections 384 and 385. Section 384 furnishes the penalty for common-law mayhem.\textsuperscript{278} Section 385 expanded the common-law crime in language very similar to the Coventry Act of 1670.\textsuperscript{279}

In 1853, the legislature added section 386,\textsuperscript{280} punishing assault with intent to maim.\textsuperscript{281} The courts have interpreted this section as a

\textsuperscript{273} Perkins & Boyce, supra note 26, at 239.
\textsuperscript{274} Id. The English statute was enacted in response to a brutal attack on Sir John Coventry, a member of Parliament. Id. Coventry's nose was slit with a knife, supposedly in retaliation for statements he had made in Parliament. Id. Under common law, even if Coventry's nose had been dismembered, it would not have constituted mayhem. See id. The new statute, however, extended the common law by punishing anyone who maliciously “cut out or disable[d] the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable[d] any limb or member of any subject; with the intention in so doing to maim or disfigure him.” Id. at 240.
\textsuperscript{275} Id. at 240.
\textsuperscript{276} See Gilbert & Moylan, supra note 268, § 3.9, at 57.
\textsuperscript{277} The original acts were passed by Acts of Jan. 6, 1810, ch. 138, 1809 Md. Laws.
\textsuperscript{278} Md. Ann. Code art. 27, § 384 (1987) provides:
Every person, his aiders and abettors, who shall be convicted of the crime of mayhem, or of tarring and feathering, shall be sentenced to the penitentiary for not more than ten years nor less than eighteen months.

Every person, his aiders, abettors and counsellors, who shall be convicted of the crime of cutting out or disabling the tongue, putting out an eye, slit the nose, cutting or biting off the nose, ear or lip, or cutting or biting off or disabling any limb or member of any person, of malice aforethought, with intention in so doing to mark or disfigure such person, shall be guilty of a felony and upon conviction thereof be sentenced to the penitentiary for not less than two nor more than ten years.

\textsuperscript{281} Md. Ann. Code art. 27, § 386 (1987) provides as follows:
If any person shall unlawfully shoot at any person, or shall in any manner unlawfully and maliciously attempt to discharge any kind of loaded arms at any person, or shall unlawfully and maliciously stab, cut or wound any person, or shall assault or beat any person, with intent to maim, disfigure or disable such person, or with intent to prevent the lawful apprehension or detainer of any
statutory extension of the common-law crime of mayhem. In Biggs v. State, the Court of Special Appeals found that the prohibition codified in section 386 "is considerably broader than the crime of mayhem" because it targets a wider range of conduct for punishment. The court further found that assault with intent to maim remained separate and distinct from common-law mayhem because the two offenses were codified in two different sections, namely sections 384 and 386.

The tendency of the Court of Special Appeals to differentiate between the maiming statutes is further demonstrated by Armstrong v. State. In Armstrong, the defendant was convicted and sentenced to two consecutive ten year prison terms for violations of sections 384 and 385. The convictions of common-law mayhem and statutory maiming both stemmed from a single incident during which the defendant threw acid on the victim. Upon conviction, Armstrong appealed on the ground that he was being punished twice for the same crime. The Court of Special Appeals found that the legislature codified common-law mayhem in section 384 of article 27 and that "[s]ection 385 unmistakably is patterned after the 'Act of Coventry.'" The court concluded that Maryland law, like English common law, distinguishes between the offense of maiming and the common-law crime of mayhem. Although the court vacated the conviction of common-law mayhem on other grounds, it concluded that a single act, such as throwing harmful acid on a person, could in some circumstances support a conviction under both section 384 and section 385.

party for any offense for which the said party may be legally apprehended or detained, every such offender, and every person counselling, aiding or abetting such offender shall be guilty of a felony and, upon conviction thereof, be punished by confinement in the penitentiary for a period not less than eighteen months nor more than ten years.

283. Id. at 653, 468 A.2d at 676.
284. See id.
286. Id. at 512, 444 A.2d at 1051.
287. Id.
288. Id.
289. Id.
290. Id. at 514, 444 A.2d at 1052.
291. See id. at 514-15, 444 A.2d at 1052.
292. See id. at 516, 444 A.2d at 1053.
293. See id. at 515, 444 A.2d at 1052. The Armstrong court stated in dicta that [i]f the record were clear as to any specific act of disfigurement and clear that
Biggs and Armstrong indicate that the English common law of mayhem is codified in section 384, with the statutory extension of the Coventry Act codified in section 385. Section 386, therefore, represents a further extension of the common law. In Jenkins v. State, the court discussed section 386 in depth, noting that there was scant caselaw construing the section, and that assault with intent to maim is "proscribed, but not defined, by statute." Ordinarily, when the legislature uses a common-law term of art in a statute, courts look to the common-law meaning of those terms. The Jenkins court pointed out, however, that although "maim, disfigure or disable" might have been included in the common-law definition of mayhem, the court did not believe that those terms were limited to the injuries and disablements proscribed by sections 384 and 385. The court distinguished between assault with intent to murder and assault with intent to maim, stating that "[a]n intent to maim, disfigure, or disable necessarily falls short of, and thus excludes, an intent to kill. The actor's object in such a case is not to end the victim's life, but to have him linger on, either temporarily or permanently, in a disabled or disfigured condition."

Accordingly, the Court of Special Appeals concluded that a conviction for both assault with intent to murder and assault with intent to maim could not stand, and reversed the conviction for assault with intent to murder. The Court of Appeals reversed the
intermediate appellate court in *State v. Jenkins*,³⁰¹ reinstating the conviction of assault with intent to murder and holding that assault with intent to maim was a lesser-included offense that merged with the offense of assault with intent to murder.³⁰² The Court of Appeals did not review the Court of Special Appeals' statement of the law concerning assault with intent to maim, however. Therefore, the intermediate court's interpretation remained the law in Maryland concerning assault with intent to maim.

c. Other Jurisdictions.—In their treatise on criminal law, Professors Perkins and Boyce assert that "[f]or either maim or disfigurement the injury must be permanent in its nature."³⁰³ Several jurisdictions support this interpretation of the common law,³⁰⁴ especially when state statutes are silent as to the nature of the requisite injury. In *Goodman v. Superior Court*,³⁰⁵ the defendant sought a writ of mandamus from the California Court of Appeal on the ground that the evidence to be adduced at trial would be legally insufficient to convict him of mayhem.³⁰⁶ In denying the petition,³⁰⁷ the court made two important observations. First, the court stated that it would presume that the legislature intended to retain the common-law rules and definitions of mayhem when it used common-law terms in its mayhem statute.³⁰⁸ Second, although the California maiming statute, like the Maryland statute, did not explicitly require a resultant permanent injury, the court specifically noted, based on principles of statutory construction, that the statute required proof

³⁰² See id. at 517, 515 A.2d at 473.
³⁰³ PERKINS & BOYCE, supra note 26, at 242; see also LAFAVE & SCOTT, supra note 29, § 7.17(c), at 698 ("It is a requirement for mayhem that the disabling injury be permanent, so that the temporary disablement of a finger, arm, eye, or other member will not do.").
³⁰⁴ The early cases clearly required a permanent injury. In *Lee v. Commonwealth*, 115 S.E. 671 (Va. 1923), the court stated that "[t]he word 'disfigure' in the maiming statute... means a permanent and not merely a temporary and inconsequential disfigurement." *Id.* at 673; see also *State v. Taylor*, 142 S.E. 254, 256 (W. Va. 1928).
³⁰⁶ See id. at 800.
³⁰⁷ See id. at 801.
³⁰⁸ See id. at 800. The court stated:

As required by settled principles of statutory construction, we will presume that in enacting section 203, the Legislature was familiar with the common law concept of mayhem, and that, when it couched its enactment in common law language, it intended to carry over such rules as were part of the common law crime into statutory form.

*Id.*
that the defendant inflicted a permanent injury.309

Likewise, in United States v. Cook,310 the Court of Appeals for the District of Columbia Circuit construed a statute prohibiting disfigurement as requiring, "like common law mayhem, . . . permanence of injury or disfigurement in some appreciable form."311 In its discussion of the origins of mayhem and statutory maiming, the court expressed no doubt as to the permenency element that persisted after codification.312

3. The Court's Reasoning.—The trial judge in Hammond apparently relied upon the Court of Special Appeals' interpretation of assault with intent to maim. In Jenkins, the intermediate appellate court determined that "[a]ny intent to disfigure or disable will suffice" to support a conviction of assault with intent to maim.313 Moreover, the court explained that the aggressor must intend that the victim "linger on" in a disabled or disfigured condition, "either temporarily or permanently."314 Thus, the Court of Special Appeals' Jenkins opinion supported the trial judge's jury instruction in Hammond that it was "immaterial" whether the defendant intended the injury to be temporary or permanent, as long as the jury found that he intended "a disablement."315

The Hammond court correctly noticed, however, that the Jenkins court's interpretation of assault with intent to maim contradicted the prevailing interpretation of the common law, which requires the intent to permanently injure.

There is no disagreement among the scholars that mayhem as it was known in ancient times and as it is known today requires a permanent injury. This is so whether the offense is spoken of in terms of maiming, disfigurement, or disablement and despite the fact that the emphasis in modern times is on the completeness and integrity of the body, rather than its efficacy in battle.316

309. See id. at 801. The court found that "[c]ases decided under the Coventry Act, and statutes like our own which obviously derive from it, have found mayhem for disfigurement alone only where the injury is permanent." Id.
310. 462 F.2d 301 (D.C. Cir. 1972).
311. Id. at 303.
312. Id. The court held, however, that less than total deterioration of a body organ may constitute disfigurement. Id. at 304.
314. Id. at 618, 477 A.2d at 794.
315. Hammond, 322 Md. at 454, 588 A.2d at 346.
316. Id. at 458, 588 A.2d at 348.
Thus, to commit assault with intent to maim, the defendant must intend to cause permanent injury to the victim.

The inquiry made in *Goodman v. Superior Court*\(^\text{317}\) parallels that in *Hammond*. Both courts addressed maiming statutes that were silent on the permanency requirement. Standard principles of statutory construction led both courts to find the requirement of a permanent injury implicit in the codification of the common-law crime of mayhem.\(^\text{318}\)

The *Hammond* court relied on the prevailing interpretation by other jurisdictions, that, despite the lack of explicit language, the legislature intended to require a permanent injury for violations of common-law mayhem and statutory maiming.\(^\text{319}\) The court reasoned that it would be incongruous to interpret the legislature’s silence on the matter to indicate an intent that “maim, disfigurement and disablement” only include temporary injury.\(^\text{320}\) Because maiming requires a permanent injury, a necessary element of the intent to maim offense is the intent to permanently injure the victim.\(^\text{321}\)

Whereas the Court of Special Appeals in *Jenkins* had based its interpretation merely on the facts that section 386 was passed at a different time than sections 384 and 385 and that “disfigure” and “disable” were broader terms than those of sections 384 and 385,\(^\text{322}\) the Court of Appeals in *Hammond* relied on common-law precedent and the legislature’s silence to interpret the three statutes together in accordance with the common law.\(^\text{323}\)

4. Analysis.—The *Hammond* court’s interpretation is supported by Maryland case law. Maryland courts have held that sections 384 and 385 derive directly from the common-law offense of mayhem and the Coventry Act, respectively, and that both offenses require

---

318. In language similar to that in *Goodman*, the Court of Appeals stated in *Hammond*:

   We have no reason to assume that when the Legislature created the offense of assault with intent to maim, disfigure or disable a hundred and thirty-eight years ago and reviewed the statute, twenty-five years ago, it was not fully aware of the requirement at the common law that maiming, disfigurement or disablement be permanent.

322 Md. at 458, 588 A.2d at 348. For a thorough discussion of the *Goodman* case, see *supra* notes 305-309 and accompanying text.
319. See 322 Md. at 458-59, 588 A.2d at 348.
320. *Id.* at 459, 588 A.2d at 348.
321. *Id.*
323. See 322 Md. at 458-59, 588 A.2d at 348.
permanent injuries.\textsuperscript{324} The newest section in the subtitle, section 386, does not, however, define the terms maim, disfigure, or disable.\textsuperscript{325} The Court of Appeals in \textit{Booth v. State}\textsuperscript{326} therefore concluded that "[a]n assault with intent to maim is an assault perpetrated with the intent to inflict one or more of the injuries described in [section] 385."\textsuperscript{327} If section 386 is to be interpreted consistently with section 385, then it must also contain the common-law requirement of a permanent injury, meaning the intent must be to permanently injure the victim.

\textit{Hammond} and \textit{Booth} illustrate a difference in approach between the Court of Appeals and the Court of Special Appeals in interpreting the maiming statutes. The Court of Special Appeals has leaned toward extending the offense of maiming beyond its common-law definition.\textsuperscript{328} The Court of Appeals, on the other hand, has retained the common law as a strong foundation for the interpretation of Maryland statutes.\textsuperscript{329} This may explain why the Court granted certiorari to hear \textit{Hammond} on its own motion, bypassing the Court of Special Appeals.\textsuperscript{330}

Although it is plausible that the legislature intended to broaden the scope of mayhem with section 386, there is simply no extrinsic support for this position. Where statutes employ common-law terms of art, the courts must resort to the common law when the legislature makes no attempt to define those terms.\textsuperscript{331} It is clear that for over three hundred years, the common law has required a permanent injury to support a conviction for mayhem.\textsuperscript{332} Thus to intend to maim, the defendant must intend to permanently injure the victim.

Finally, although it is perhaps not a bad idea to punish temporary maimings as harshly as permanent ones, this decision is one for the legislature and not the courts. It is possible that the Court of

\begin{enumerate}
\item \textit{Id.} at 212, 507 A.2d at 1118.
\item See, e.g., Hammond, 322 Md. at 459, 588 A.2d at 348; Booth, 306 Md. at 212, 507 A.2d at 1118.
\item See 322 Md. at 454, 588 A.2d at 346.
\item \textit{LaFave \& Scott, supra} note 29, § 2.2(d), at 79.
\item See id. § 7.17, at 696.
\end{enumerate}
Appeals considered this as well, because it practiced judicial restraint and refused to change the law when the legislature was silent.

5. Conclusion.—The decision of the Hammond court to interpret section 386 of article 27 as including the common-law requirement of a permanent injury to sustain a conviction of assault with intent to maim is in accord with the majority of jurisdictions and the common law. Hammond is only remarkable because it diverted a trend to broaden the offense, which was developing in the Court of Special Appeals. The decision fills a gap in the law of Maryland. Unless the legislature acts unequivocally in this area, it is now clear that the law requires a permanent injury for conviction under the maiming statutes and an intent to permanently injure for an assault with intent to maim conviction. It remains unclear, however, how this decision may affect other codifications of common-law crimes and whether it will mark the beginning of a retreat to stricter common-law interpretation of crimes.

Louis A. Ambrose
Darrell F. Cook
Van C. Durrer, II
VI. CRIMINAL PROCEDURE

A. The Court of Appeals' Attempt to Return Fourth Amendment Rights to Defendants

In *Owens v. State*, the Court of Appeals held that an individual has a reasonable expectation of privacy as to the interior contents of a bag left at a friend's apartment, even though the individual has no expectation of privacy as to the friend's apartment in general. Specifically, the court ruled that the friend could not validly consent to a search of the bag because the friend lacked common authority over the defendant's bag and its contents. In a four to three decision, the Court of Appeals reversed the Court of Special Appeals' affirmation of the defendant's conviction and remanded for a new trial because the warrantless search of the defendant's bag was unreasonable under the Fourth Amendment.

1. The Case.—On February 1, 1988, Lenard Owens, a resident of Fort Pierce, Florida, arrived in Hagerstown, Maryland. Owens, along with three other men, proceeded to the apartment of a friend, Marla Gardin. Owens had stayed at Gardin's apartment on six or seven previous occasions, and on this particular visit, the four men arrived with three pieces of luggage. Owens and the other men asked Gardin if they could leave their bags in Gardin's apartment while they looked for another place to stay. Gardin permitted them to leave their bags in her apartment. Owens's bag was zippered closed and a tag bearing his name was attached. At no time did

2. See id. at 630, 589 A.2d at 65.
3. See id. at 627, 589 A.2d at 64.
4. See id. at 633, 589 A.2d at 67.
5. See id. at 634, 589 A.2d at 67-68. The Fourth Amendment provides: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.
6. *Owens*, 322 Md. at 619-20, 589 A.2d at 60.
7. *Id.* at 620, 589 A.2d at 60.
8. *Id.* at 619-20, 589 A.2d at 60.
9. *Id.*, 589 A.2d at 61.
10. *Id.*
11. *Id.* at 619, 589 A.2d at 60.
Owens give Gardin permission to open the bag.\textsuperscript{12}

Later that day, police officers appeared at Gardin's apartment and asked Gardin if they could search the apartment. The police indicated to Gardin that they had received information that four men, who had arrived at her apartment the same morning, had left drugs in her apartment.\textsuperscript{13} Although the officers did not have a search warrant, Gardin consented to the search of her apartment,\textsuperscript{14} pointing to the bags in the living room and stating "if there's any drugs it would be in there."\textsuperscript{15} Gardin also informed the officers that Owens had visited her in the past when he came to town to sell crack cocaine, often leaving some of the drugs in her apartment.\textsuperscript{16}

Although Owens's bag was closed and a tag bearing his name and address was attached to the outside of the bag, the officers searched the bag and found $1800 in cash and 973 pieces of crack cocaine valued between $78,000 and $97,000.\textsuperscript{17} Owens was charged in the Circuit Court for Washington County with numerous violations of the controlled dangerous substance laws.\textsuperscript{18}

Owens filed a pretrial motion to suppress the evidence found in his bag;\textsuperscript{19} the motions judge denied the motion at a subsequent hearing.\textsuperscript{20} The case proceeded to trial and a jury convicted Owens

\footnotesize{\textsuperscript{12} \textit{Id.} at 620, 589 A.2d at 61.  
\textsuperscript{13} \textit{Id.}

\textsuperscript{14} There was no dispute over the fact that Gardin had the authority to consent to the search of her own apartment, or that her consent was voluntarily given. \textit{See id.} at 627, 589 A.2d at 64.

\textsuperscript{15} \textit{Id.} at 621, 589 A.2d at 61. This is Detective Sheppard's version of the events that took place on February 1, 1988. Gardin, however, testified that she did not point the bag out to the officers—"[t]hey were setting right there for [the officers] to see them." \textit{Id.} at 620, 589 A.2d at 61. Interestingly, the Court of Appeals did not discuss this discrepancy and, thus, it is unclear whom the trial court actually believed. Apparently, the Court of Appeals considered it unnecessary to address the issue.

\textsuperscript{16} \textit{Id.} at 621, 589 A.2d at 61.

\textsuperscript{17} \textit{Id.} at 619-21, 589 A.2d at 60-61.

\textsuperscript{18} \textit{Id.} at 618, 589 A.2d at 60.

\textsuperscript{19} \textit{Id.}

\textsuperscript{20} \textit{Id.} The judge hearing the motion found that no one but Gardin had a proprietary interest in the apartment, concluding that Gardin gave the officers permission to search the premises and that the consent was voluntarily given. \textit{Id.} at 623, 589 A.2d at 62. The judge likened Owens's leaving the bag in Gardin's apartment to a "gratuitous bailment." \textit{Id.}

A "bailment" is defined as  
[d]elivery of personalty for some particular use, or on mere depository upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it or otherwise dealt with according to his directions, or kept until he reclaims it, as the case may be.
of possession of cocaine with intent to distribute. The Court of Special Appeals affirmed the judgment and the trial court's determination that the search of Owens's bag was valid under the Fourth Amendment. The Court of Appeals granted certiorari to determine whether the trial court erred in holding that Owens did not have a reasonable expectation of privacy in the bag he temporarily left in the possession of a friend.

2. Legal Background.—

a. The Fourth Amendment and the Exclusionary Rule.—Owens's motion to suppress was founded on the Fourth Amendment, which is applicable to the states under the Fourteenth Amendment. The Supreme Court has interpreted the amendment to require that a search of private property by police be performed pursuant to a properly issued search warrant. The mere reasonableness of a search is never a substitute for the Fourth Amendment's

BLACK'S LAW DICTIONARY 129 (5th ed. 1987). Specifically, a "gratuitous bailment" is a bailment made only for the benefit of the bailor (Owens, in this case). Id.

Under the circumstances of the bailment, the judge found that Owens did not exhibit a "reasonable legitimate expectation of privacy" in his bag. Owens, 322 Md. at 624, 589 A.2d at 62. Furthermore, the judge concluded that the police did not violate any personal Fourth Amendment right of Owens because they had Gardin's consent to search her apartment and everything therein. Id., 589 A.2d at 62-63.

21. Owens, 322 Md. at 618, 589 A.2d at 60.

[A] third-party gratuitous bailee of a container may give valid consent to police to search that container where the bailee has exclusive control over the item, where the bailee is in a position to deny the owner of the item physical access to it, and where the bailee is in an inculpatory position as a result of the bailment. Under these circumstances, the owner of the item has relinquished control over the item to a sufficient degree to undermine his or her expectation of privacy in the item. With the expectation of privacy eroded, the owner has no valid Fourth Amendment search and seizure complaint regarding the legality of the search of the item. Id.

23. Owens, 322 Md. at 624, 589 A.2d at 63.
24. See supra note 5 for the text of the Fourth Amendment. Article 26 of the Maryland Declaration of Rights is in pari materia with the Fourth Amendment. Gamble v. State, 318 Md. 120, 123 n.2, 567 A.2d 95, 97 n.2 (1990). Therefore, the defendant's rights under the Maryland Constitution do not differ from his rights under the United States Constitution.


warrant requirement. Consequently, a search of private property ordinarily must be both reasonable and conducted pursuant to a valid search warrant. A search or seizure conducted without the benefit of a warrant is per se unreasonable under the Fourth Amendment, subject to only a few exceptions.

b. The Consent Exception to the Warrant Requirement.—A well-established exception to the warrant requirement is a search based on consent. Moreover, one other than the owner may consent to a search if the third party "possesse[s] common authority over or other sufficient relationship to the premises or effects sought to be inspected." Recently, the Supreme Court expanded the consent exception to include situations in which a third party lacks actual authority to consent, but has apparent authority to consent. Specifically, the Supreme Court held that a warrantless search is valid when based upon consent of a third party whom police reasonably believed at the time of the search to process common authority over the premises, but who in fact lacks the actual authority to consent.

3. The Court’s Reasoning; Analysis.—The Court of Appeals found that Owens had a reasonable expectation of privacy in the bag and specifically concluded that Owens’s friend, a gratuitous bailee, did not have common authority over the bag. Therefore, she could not validly consent to a search of its interior contents.

a. Owens’s Reasonable Expectation of Privacy.—Analyzing the circumstances under which Owens left his bag in Gardin’s apartment, the Court of Appeals likened the situation to a gratuitous bailment. Generally, in a bailment relationship, the bailor retains an expectation of privacy because he places his possessions in a place

27. Id.
28. Id.
33. Id. at 2800-01.
34. Owens, 322 Md. at 663, 589 A.2d at 67.
35. See id. at 630, 589 A.2d at 65-66. For a definition of gratuitous bailment, see supra note 20.
he regards as safe for storage.36

Some courts have held that if the bailor voluntarily puts property under the control of another (the bailee), the property becomes subject to public disclosure on the whim of the bailee.37 Consequently, the bailor is viewed as having relinquished his prior legitimate expectation of privacy with regard to that property.38 On the other hand, a majority of decisions find that the bailor retains an expectation of privacy in the bailed item.39

In the instant case, the controversial search involved a piece of luggage. It is well established that a heightened expectation of privacy attaches to luggage because it is a common repository for one's personal belongings.40 Therefore, Owens likely enjoyed a reasonable expectation of privacy in his bag, which was zippered closed and marked with his name.

The fact that Owens's bag was unlocked may suggest that


37. See, e.g., Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (holding that the defendant, who put his effects in a female companion's purse with her consent and remained in her presence, had no legitimate expectation of privacy in the purse); State v. Jordan, 252 S.E.2d 857, 859 (N.C. App. 1979) (finding no reasonable expectation of privacy by a car's driver as to the pocketbook of a passenger).

38. See Rawlings, 448 U.S. at 104; Jordan, 252 S.E.2d at 859. Rawlings, however, has been sharply criticized. See United States v. Most, 876 F.2d 191, 198 (D.C. Cir. 1989) (urging that Rawlings should not be read as "establish[ing] any general rule that an individual forfeits his reasonable expectation of privacy in his belongings simply by entrusting them to the care of another"). Professor LaFave, in his treatise, discusses the extenuating circumstances surrounding the Rawlings decision. In particular, LaFave notes that the Court likely based the Rawlings decision on the fact that it truly believed Rawlings's companion was, in fact, not a consensual bailee. See 4 LAFAVE, supra note 36, § 11.3(c), at 311.

39. See, e.g., United States v. Johns, 707 F.2d 1093, 1099-1100 (9th Cir. 1983), rev'd on other grounds, 469 U.S. 478 (1985). In Johns, the defendant had standing to object to a search of the packages at issue because he shared a bailor-bailee relationship with the possessor. Id. This case was unlike Rawlings because it did "not involve a 'precipitous' bailment to which the bailee had not consented." Id. at 1100; see also In re B.K.C., 413 A.2d 894, 898-902 (D.C. 1980) (holding that the defendant retained an expectation of privacy in his briefcase even though his friend temporarily had custody of the case); State v. Pinegar, 583 S.W.2d 217, 220 (Mo. App. 1979) (holding that the defendant, an adult, had a protected expectation of privacy in an unlocked footlocker in the room he occasionally used in his parents' home).

40. See Arkansas v. Sanders, 442 U.S. 753, 762 (1979), overruled on other grounds by California v. Acevedo, 111 S. Ct. 1982, 1991 (1991); see also United States v. Block, 590 F.2d 535, 541 (4th Cir. 1978) (stating that valises and suitcases are frequently the objects of heightened privacy expectations, and these expectations may well be at their greatest when the objects are temporarily placed under the general control of another). "Luggage" is commonly defined as suitcases, valises, or footlockers. See Sanders, 442 U.S. at 762.
Owens "assumed the risk" that the bailee, Gardin, would look inside his bag or consent to a search of its contents.\(^{41}\) Bailment-of-container cases, however, are not necessarily decided on the single issue of whether the container is locked or otherwise secured.\(^{42}\) "The nature of the bailment, especially whether it was contemplated that the bailee would have occasion to open the container, is important."\(^{43}\) Thus, because Gardin testified that she had not received permission from Owens to open the bag,\(^{44}\) the Court of Appeals found that Owens retained a reasonable expectation of privacy in his unlocked, but closed, bag.\(^{45}\)

b. Gardin's Lack of Actual Authority to Consent to a Search of Owens's Bag.—Clearly, Owens did not give Gardin express authority to consent to a search of his bag.\(^{46}\) Nevertheless, some courts have held that a third party's authority to consent may be implied from the circumstances and need not be express.\(^{47}\) In the instant case, Owens simply left his bag in Gardin's apartment for a brief time period. Without a more substantial understanding between the two parties, it is unlikely that these circumstances warrant a finding that Gardin was impliedly authorized to consent to a search of Owens's bag.

In certain circumstances, a third party who otherwise lacks au-

\(^{41}\) See 3 LAFAVE, supra note 36, § 8.6(a), at 312 ("Of obvious importance is . . . the extent to which the bailor made efforts to secure, even as against the bailee, the privacy of his effects.").
\(^{42}\) Id. § 8.6(a), at 313-14 n.6.
\(^{43}\) Id.; see also United States v. Wilson, 536 F.2d 883, 884-85 (9th Cir. 1976) (holding that consent by the bailee was invalid when the defendants, who had just robbed a bank, left suitcases in the bailee's apartment, apparently intending to return for them after the robbery); United States v. Prescott, 480 F. Supp. 554, 560 (W.D. Pa. 1979) (finding that the YMCA could not lawfully consent to the search of a duffel bag left behind by the defendant, because the defendant "had a justifiable expectation of privacy in his belongings").
\(^{44}\) Owens, 322 Md. at 631, 589 A.2d at 66.
\(^{45}\) See id. It is interesting to note that the dissent in Owens, written by Judge Chasanow, concedes that "current law generally provides one with an expectation of privacy in a bag, like the one in the instant case, even if it is unlocked." Id. at 640, 589 A.2d at 71 (Chasanow, J., dissenting). Judge Chasanow, however, argued that Owens's expectation of privacy was unreasonable based on the totality of the circumstances. Id. at 641-42, 589 A.2d at 71.
\(^{46}\) Id. at 619-20, 589 A.2d at 60-61.
\(^{47}\) See, e.g., United States v. Buettner-Januch, 646 F.2d 759, 765-66 (2d Cir.) (citing United States v. Gradowski, 502 F.2d 563, 564 (2d Cir. 1974)), cert. denied, 454 U.S. 830 (1981); see also Corngold v. United States, 367 F.2d 1, 7 (9th Cir. 1966) (concluding that the owner of personal property may impliedly authorize another to consent to an invasion of his right to privacy by giving the third party unrestricted freedom over the property).
authority to consent may legally consent to a search if his primary motivation is to exculpate himself from suspicion of criminal wrongdoing. Gardin's consent to the search of her apartment and Owens's bag was most likely not motivated by an interest in exculpating herself. Rather, she probably consented to the search simply because the police asked for her consent. Furthermore, there is no indication that she exhibited any fear that she would be implicated in the drug-dealing activities of the defendant. Even if Gardin had permitted the search in order to exculpate herself, it can be argued that her authority to consent was limited to seizure of the bag and its removal from her home. Therefore, Gardin lacked actual authority to consent to a search of Owens's bag under any theory. 

c. The Court's Disregard for the Apparent Authority Doctrine.—Inexplicably, the Owens majority failed to address the issue of apparent authority. In Illinois v. Rodriguez, the Supreme Court held that when the police mistakenly believe that a third party has the authority to consent to a search, the search will nevertheless be upheld if the officers' actions in relying on such authority were reasonable.

49. According to Gardin's testimony, she did not object to the search of her apartment after the police requested her permission. Owens, 322 Md. at 620, 589 A.2d at 61. She also testified that she did not point out Owens's bag to the police; rather, the bag was in plain view and the police noticed it themselves. Id. If Gardin's true motive was to exculpate herself, she would have pointed out the luggage to the police. But see supra note 15 and accompanying text.
50. See Gieffels v. State, 590 P.2d 55, 62 (Alaska 1979). In Gieffels, the defendant's brother, a bailee of the defendant's suitcase, validly consented to a seizure of the suitcase. Id. The court reasoned that when property is seized, the bailee's "right to exculpate" himself outweighs the defendant's right to privacy in the property bailed. Id. The court explicitly declined to address the issue of the bailee's authority to consent to a search.
51. If Gardin privately searched the bag and then brought it to the attention of the police, a third party consensual search based on the right-to-exculpate theory may have been valid. In this hypothetical situation, however, the government would not have violated the defendant's Fourth Amendment rights because a private party search does not constitute governmental intrusion. See United States v. Jacobsen, 466 U.S. 109, 113-14 (1984).
53. Id. at 2800-01. In Rodriguez, a woman consented to a search of the defendant's apartment, with the apparent authority to consent exhibited by her holding a key to the door and referring to the apartment as "our apartment." Id. at 2797. In fact, the woman had no actual authority to consent to the search of the defendant's apartment. The Supreme Court concluded that if the police reasonably believed that the woman had the authority to consent, then the warrantless search was valid, regardless of the woman's true authority. Id. at 2801. Consequently, the Court remanded the case for a determination of whether the police reasonably believed the woman could consent. Id. at 2800-02.
When the Court of Special Appeals decided this case, Rodriguez had not yet been decided. Therefore, the Court of Special Appeals' decision to affirm the trial court's finding was likely erroneous, given existing case law. In contrast, by the time Owens reached the Court of Appeals, the Supreme Court had decided Rodriguez; and the Court of Appeals improperly chose to ignore Rodriguez, reaching what may be an incorrect result.54

The facts in Rodriguez centered on a third party's apparent authority to consent to the search of a home.55 It logically follows that if the apparent authority doctrine applies to the most intrusive of all searches, a search of one's home, then the doctrine certainly applies with equal force to a somewhat less intrusive search of one's bag.56 Consequently, the Owens majority incompletely analyzed the current law by omitting a discussion of Rodriguez. Therefore, it appears that the Court of Appeals should have remanded the case to the lower court to make a factual determination as to whether the police could reasonably have believed that Gardin had authority to consent to a search of Owens's bag.57

However, a recent decision by the Supreme Court, California v. Acevedo,58 may be interpreted as eliminating the necessity of applying the apparent authority doctrine to the specific facts of Owens. In Acevedo, the Supreme Court held that police may conduct a warrantless search of a container within an automobile, even though they

54. Although the Court of Appeals is required to follow Rodriguez, the Supreme Court's decision to adopt the apparent authority doctrine seems flawed, because it ignores the fact that a defendant's Fourth Amendment rights have been violated by the police intrusion. Specifically, Rodriguez fails to perceive that when the police mistakenly rely on a third party's apparent authority to consent, the government nonetheless intrudes on the defendant's Fourth Amendment right to a legitimate expectation of privacy, regardless of reasonableness. See 110 S. Ct. at 2806 (Marshall, J., dissenting). For an excellent discussion of Rodriguez, see Gregory S. Fisher, Search and Seizure, Third-Party Consent: Rethinking Police Conduct and the Fourth Amendment, 66 WASH. L. REV. 189, 198-200 (1990).

55. See 110 S. Ct. at 2081.

56. Rodriguez, however, may be distinguishable from the instant case. In United States v. Whitfield, 939 F.2d 1071 (D.C. Cir. 1991), the court read Rodriguez as applying only to warrantless searches based on reasonable mistakes of fact, as distinguished from mistakes of law. Id. at 1074-75. Therefore, if a court concludes that the police had the facts straight but were mistaken about the law, then according to the Whitfield court's interpretation of Rodriguez, the evidence would have to be suppressed.

57. Under the circumstances as described by the Court of Appeals (i.e., that the police knew the bag belonged to Owens, that Owens had just dropped the bag off the same morning, and that Owens's name tag clearly appeared on the outside of the bag), a trier of fact might conclude that the police could not reasonably believe Gardin had authority to consent.

lack probable cause to search the vehicle as a whole and only believe that the container itself holds contraband or evidence. Because the Court reached the Acevedo decision by applying the "automobile exception" to the warrant requirement, the scope of Acevedo may be limited to vehicle searches. Thus, Acevedo is not explicitly controlling in the case of luggage searches such as the search in Owens.

Nevertheless, if Justice Scalia's concurring opinion in Acevedo is given consideration in the future, then a warrantless search of a bag, based upon probable cause, is valid regardless of the location of the bag. Under Justice Scalia's view, once Gardin consented to a search of her apartment, the police could have searched Owens's bag without a warrant so long as there was probable cause to believe the bag contained narcotics.

Justice Scalia seems to interpret the Warrant Clause of the Fourth Amendment as applying only to the home. This argument was rejected by the Supreme Court, however, in United States v. Chadwick. The majority view in Acevedo appears to be in accord with Chadwick on this point, as the Acevedo majority justified its decision using the automobile exception, rather than Scalia's interpretation that a piece of luggage, as a movable object, may be searched without a warrant anywhere and anytime, if probable cause to search the luggage exists.

59. See id. at 1989-91. By this determination, the Supreme Court, for all intents and purposes, overruled Arkansas v. Sanders, 442 U.S. 753 (1979), as Acevedo eliminates the distinction between probable cause to search an entire vehicle and probable cause to search only a container that has been placed in an vehicle. Under Sanders, if the police have probable cause to search an entire vehicle, they can search any container found within the vehicle. On the other hand, if police have probable cause to search only a container, they can seize only the container because the automobile exception does not apply when a container by chance is located inside the vehicle. Id. at 763-64.

60. See 111 S. Ct. at 1984.

61. See id. at 1994 (Scalia, J., concurring). Of course, such approval of a warrantless search presupposes either proper consent or exigent circumstances.

62. See id. ("[T]he search of a closed container, outside a privately owned building, with probable cause to believe that the container contains contraband and when it in fact does contain contraband, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant." (emphasis added)).

63. 433 U.S. 1, 8 (1977), overruled on other grounds by Acevedo, 111 S. Ct. at 1991. The Chadwick Court stated:

The Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. There is also a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions among "persons, houses, papers, and effects" in safeguarding against unreasonable searches and seizures.

Id. The Acevedo Court overruled distinctions made by the Chadwick and Sanders Courts. See supra note 59.
As evidenced by Rodriguez, the Supreme Court is capable of substantially narrowing the protection provided by the Fourth Amendment. Thus, if the State's petition for certiorari had been granted, Owens may have found himself facing certain conviction if the Court had chosen to extend Acevedo.

4. Conclusion.—In Owens, the Court of Appeals attempted to return Fourth Amendment protection to its former scope. Unfortunately, the Court of Appeals failed to incorporate a recent Supreme Court decision applying the apparent authority doctrine and, thus, erroneously concluded that the evidence must be suppressed. Although the Owens decision adheres to the true principles of the Fourth Amendment, it appears to be incomplete and possibly mistaken.

B. Arrest is the Only Justification Needed for the Search of an Arrestee's Luggage

In Ricks v. State, the Court of Appeals held that a warrantless search of a suitcase conducted "essentially contemporaneously" with a lawful arrest was valid under the Fourth Amendment. The court's holding was predicated on potential threats to both the safety of the arresting officers and the preservation of evidence. However, in the Ricks case, any threat to the safety of the police or the preservation of evidence was negligible, easily averted, and seems to have been constructed in hindsight by the court. Under Ricks, a warrantless search of the area within the immediate control of an arrestee is valid even if no exigent circumstances exist. Further, Ricks suggests that a legitimate expectation of privacy is no bar to a warrantless search under the Fourth Amendment. Ricks affirms Maryland's place in the forefront of jurisdictions that accord more respect to the possible exigencies of police work than to the established protections of the Fourth Amendment.

65. See id. at 195, 586 A.2d at 746.
66. See id. at 191, 586 A.2d at 744.
67. See infra notes 147-152 and accompanying text.
68. This area is commonly called the "Chimel perimeter," referring to the decision in Chimel v. California, 395 U.S. 752 (1969). See infra notes 95-97 and accompanying text.
69. See 322 Md. at 191, 586 A.2d at 744.
70. See id. at 194, 586 A.2d at 746 (noting the Supreme Court's recognition of an expectation of privacy in luggage).
1. The Case.—On October 14, 1988, the Maryland State Police received an anonymous telephone tip that Gilbert Ricks would be traveling that day by bus and carrying crack cocaine for distribution in the Salisbury area. The caller gave a very detailed description of Ricks, including the fact that he would be carrying a soft foldover luggage bag, brownish to maroon in color. The police ran a criminal check on Ricks and found that he had prior convictions, including a controlled dangerous substance violation.

Ricks was stopped by Sergeant Bacon of the Maryland State Police as he alighted from a Trailways bus in Salisbury. After Bacon identified himself to Ricks as a state trooper, Bacon and Ricks realized they were acquainted. Bacon asked Ricks to accompany him to his police car and to put his suitcase on the car’s trunk. Bacon radioed his superior officer, Trooper Aaron, who informed him that he had the right suspect. With Ricks’s consent, Bacon patted him down, finding no weapons. When Trooper Aaron arrived on the scene about a minute and a half later, three officers in addition to Bacon were already there. Ricks was then given Miranda warnings and informed why he had been stopped. An officer asked Ricks for permission to search his suitcase, but Ricks refused. According to Ricks’s testimony, Aaron then informed him that they could bring in a narcotics dog to sniff the bag, and that they were not going to leave until the bag was searched. When the dog arrived, Ricks’s suitcase was taken off the car trunk and placed on the sidewalk. Ricks was still unrestrained. The dog immediately indi-

71. Id. at 186, 586 A.2d at 742.
72. Id.
74. Ricks, 322 Md. at 186, 586 A.2d at 742.
75. Ricks was formerly a custodial worker at the Berlin Barrack, where Bacon had previously been assigned. Bacon testified that he remembered that Ricks had washed his car. Transcript of Motion Hearing at 38-39, Ricks (No. 90-67).
76. Ricks, 322 Md. at 187, 586 A.2d at 742. When asked if he ever pulled his gun or raised his voice to Ricks, Bacon testified, “No. I mean I knew the guy.” Transcript of Motion Hearing at 41, Ricks (No. 90-67). Sergeant Bacon described the conversation that ensued as other officers arrived as “[s]tanding around talking like you are talking to anybody else you meet on the street corner.” Id.
78. Ricks, 322 Md. at 187, 586 A.2d at 742.
79. Transcript of Motion Hearing at 21, Ricks (No. 90-67).
81. Id.
82. Ricks, 322 Md. at 187, 586 A.2d at 742.
83. Id.
cated the presence of drugs in the suitcase, and the officers informed Ricks that the dog's actions established probable cause to search the bag. After the officers searched the bag and found drugs and paraphernalia, they placed Ricks under arrest.

Following an evidentiary hearing, the trial court denied Ricks's motion to suppress the evidence obtained from the search. A bench trial was held on an agreed statement of facts and Ricks was convicted. Ricks contended on appeal that the search was illegal, and that the trial court erred in denying his motion to suppress.

The Court of Special Appeals upheld the trial court's ruling. The Court of Appeals granted certiorari "to determine whether, in the circumstances, a warrantless police search of a piece of luggage, conducted essentially contemporaneously with a valid arrest of the owner of the luggage, violated Fourth Amendment precepts."

2. Legal Background.—

a. Search Incident to Lawful Arrest.—A warrantless search is per se unreasonable under the Fourth Amendment, unless it falls

---

84. Transcript of Motion Hearing at 41, Ricks (No. 90-67).
85. The deputy who accompanied the dog testified that he and the dog were trained in the identification and seizure of drugs, including cocaine and marijuana. Ricks, 322 Md. at 187 n.1, 586 A.2d at 742 n.1. The dog indicated the presence of drugs by a scratching motion and "had never falsely indicated the presence of [drugs]." Id.
86. Id. at 187, 586 A.2d at 742.
87. Ricks v. State, 82 Md. App. at 373, 571 A.2d at 888.
88. Id. at 371, 571 A.2d at 887.
89. Id. Ricks was convicted of possession of marijuana and cocaine, possession with intent to distribute cocaine, and possession of paraphernalia with intent to use the paraphernalia in conjunction with a controlled dangerous substance. Id.
90. See id.
91. Id. at 380, 571 A.2d at 892. The Court of Special Appeals also upheld the trial court's determination that the requisite probable cause existed to stop and arrest Ricks. Id. at 376, 571 A.2d at 890. Maryland uses the Supreme Court's "totality of the circumstances" test to determine whether probable cause exists to arrest. See, e.g., Malcolm v. State, 314 Md. 221, 550 A.2d 670 (1989). Ricks did not appeal the lawfulness of his stop or arrest to the Court of Appeals; the only issue before the court was the lawfulness of the search. See Ricks, 322 Md. at 188, 586 A.2d at 742.
92. Ricks, 322 Md. at 185, 586 A.2d at 741.
93. California v. Acevedo, 111 S. Ct. 1982, 1991 (1991) (citations omitted); Gamble v. State, 318 Md. 120, 123, 567 A.2d 95, 96 (1989). For the text of the Fourth Amendment, see supra note 5. Ricks's appeal was based solely on the Fourth Amendment. Mapp v. Ohio, 367 U.S. 643 (1961), established that the Fourth Amendment is applicable to the states via the Fourteenth Amendment. Id. at 655. The Court of Appeals has "consistently" held that Article 26 of the Maryland Declaration of Rights is in pari materia with the Fourth Amendment, and that decisions of the Supreme Court interpreting the Fourth Amendment are entitled to great respect, even though the state constitutionally
within one of the limited exceptions to the warrant requirement. In *Chimel v. California,* the Supreme Court designated a search incident to a lawful arrest as one of those limited exceptions. *Chimel* defined the "proper extent" of a search incident to arrest as "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." A warrantless search incident to a lawful arrest serves two purposes: Safeguarding the arresting officers' safety, and preserving any suspected or unsuspected evidence of crime from destruction or concealment by the arrestee. For a search incident to arrest to be valid, it must be preceded by a lawful arrest. However, both the Supreme Court and Maryland courts have held that the arrest and search need only be "essentially contemporaneous," so long as the justification, such as probable cause to arrest, exists prior to the arrest and its incident search.

*New York v. Belton,* ostensibly based on the principles of *Chimel,* established a bright-line rule that a search incident to the lawful arrest of an occupant of an automobile may encompass the entire passenger compartment and any containers therein; a search of any container found is not prohibited even if police have exclusive control over the container. The *Belton* Court, however, noted that its "holding . . . does no more . . . than determine the meaning of *Chimel*'s principles in [the] particular and problematic context [of automobile searches]. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.

Two decisions regarding searches incident to arrest, handed down prior to *Ricks,* illustrate Maryland's interpretation of the per-
missible extent of such searches. In *Foster v. State*, the Court of Appeals held that the search of an area beyond an arrestee's person may be permissible even when the arrestee is handcuffed. In *Lee v. State*, police received an anonymous tip that a gun used in a robbery could be found in a blue gym bag carried by one of the robbers. Six police officers went to the suggested location with weapons drawn and ordered the suspects and their three companions to lie face down on the ground. One of the officers located a blue gym bag hanging on a fence a few feet from where the suspects were lying. The officer lifted the bag, which felt heavy, and searched it, finding the gun; the suspects were immediately placed under arrest. The Court of Appeals found the search to be valid as incident to arrest, and upheld the trial court's refusal to exclude the gun as evidence. *Lee* clearly indicates that the court views the permissible scope of a search incident to arrest as elastic and not dependent on the existence of real, or even realistically potential, threats to police safety or to the preservation of evidence at the time of the arrest.

Before *Lee*, the Court of Appeals' interpretation had not been so broad. In 1983, in *Stackhouse v. State*, the Court of Appeals explicitly rejected a broad reading of *Belton*: "[W]e will not apply the generalization concerning the arrestee's reach, that was necessary in *Belton* because of the recurring problem of automobile

---

106. *Id.* at 220, 464 A.2d at 1001. The court explained that *the* fact that the accused was handcuffed necessarily restricted her freedom of movement and, consequently, the area within her reach, but did not necessarily eliminate the possibility of her gaining access to the contents of the nightstand's partially open top drawer ... [It] remained an area of easy access for the accused, particularly if she had been able to break free of restraint.

*Id.*

108. *Id.* at 642, 537 A.2d at 238.
109. *Id.* at 651, 537 A.2d at 239.
110. *Id.*
111. *Id.* at 651-52, 537 A.2d at 234.
112. *See id.* at 645, 537 A.2d at 235.
113. *See id.* at 670, 537 A.2d at 248. *Lee* states that even if the *Belton* bright-line test were confined to analysis of car searches, it "nevertheless demonstrates that *Chimel's* concept of an area of control is quite flexible." *Id.* at 671, 537 A.2d at 249; *see Note, Exclusionary Rule, Developments in Maryland Law, 1987-88, 48 Md. L. Rev. 612, 615 (1989) ("Once probable cause exists *Lee* makes clear that an arrestee and those possessions within his or her control prior to seizure can be searched when an arrest immediately follows."); *see also Gilbert & Moylan, supra* note 97, § 29.3 n.17 (Supp. 1988) (observing that *Lee* gives a very broad reading to the *Chimel* perimeter).
searches, to the dwelling house, which always has been accorded the highest degree of fourth amendment protection."

The court read Chimel to require that the police make "a showing that the exigencies of the situation made the policeman's course of conduct imperative." Exigency was defined as "urgency, immediacy, and compelling need." Further, when the exigent circumstance is the destruction of evidence, "the officers must reasonably believe that . . . the removal or destruction of evidence is imminent." Stackhouse's language is not limiting, but the subsequent holdings in Lee and Ricks indicate that the traditionally favored privacy interest in the home may have heightened the court's demand for demonstrable exigency in the Stackhouse case.

b. Warrantless Search of Luggage.—In United States v. Chadwick, the Supreme Court found unconstitutional the search of a footlocker seized by police from the open trunk of a suspect's car and impounded upon his arrest. The Court held that if no exigency is shown to support the need for an immediate search, a warrant is needed to search property held in the exclusive control of the police even if the issuance of a warrant by a judicial officer is reasonably predictable.

The Court dismissed the Government's argument that the inherent mobility of luggage justifies an exception to the warrant requirement analogous to that for automobile searches. Justice

115. Id. at 211, 468 A.2d at 337. The court also stated that although the Belton rule does not rely on the automobile exception, it is nevertheless limited to the context of automobiles. Id. at 213-14, 468 A.2d at 341.
116. Id. at 214, 468 A.2d at 339.
117. Id. at 212, 468 A.2d at 338.
118. Id. at 214, 468 A.2d at 339 (emphasis added); see also Howell v. State, 271 Md. 378, 318 A.2d 189 (1974). Howell, a pre-Belton decision, interpreted Chimel to require that the State affirmatively establish that the evidence offered for admission was found either on the person of the arrestee or in a place so perilously close . . . that had the discovered item been a weapon it might reasonably be employed by the person in custody to the detriment of the officer or had it been concealable or destructible evidence it would be readily susceptible to being demolished by the arrestee. Id. at 384-85, 318 A.2d at 192 (emphasis added).
121. See id. at 4.
122. See id. at 15.
123. See id. at 13. Carroll v. United States, 267 U.S. 132 (1925), established an exception to the warrant requirement for automobiles based on their mobility and the inherently diminished expectation of privacy one has as to them. Id. at 153. The Chadwick
Brennan stated that "[u]nlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. Respondents' privacy interest in the contents of the footlocker was not eliminated simply because they were under arrest."124 The Court also noted that luggage, unlike automobiles, is easily immobilized, and that seizure is less intrusive than searching.125

*New York v. Belton*126 undercut the applicability of *Chadwick* to containers found during a legitimate auto search by holding that if a container falls within the *Chimel* perimeter as defined in automobile cases (i.e., the passenger area), then the container is no longer protected from a warrantless search.127 Some courts have interpreted *Belton* to enlarge the scope of *Chimel* and allow into evidence the contents of any containers coincidentally encountered during a permissible automobile search.128 On the other hand, *Belton* has been criticized,129 and some state courts have declined to adopt its holding, finding it impermissible under their state constitutions.130

---

124. *Chadwick*, 433 U.S. at 16 n.10 (Brennan, J., concurring) (citations omitted). Before *Chadwick*, some courts justified searches of personal effects by reasoning that a container carried by an arrestee was an extension of the arrestee's person, and therefore subject to search under United States v. Robinson, 414 U.S. 218 (1973), which held that a search of the arrestee's person incident to arrest meets the reasonableness requirement of the Fourth Amendment, id. at 235. *See 2 LAFAVE, supra note 36, § 5.5(a), at 530-34. Even after *Chadwick*, many courts allowed purses and wallets to be searched because those items served a function analogous to pockets. Id. § 5.5(a), at 534 & nn.24-25.

125. *Chadwick*, 433 U.S. at 13 & n.7. *See generally 2 LAFAVE, supra note 36, § 5.5(a), at 532-33 (discussing *Chadwick*'s rationale and subsequent lower court application).

126. 453 U.S. 454 (1981); *see supra* notes 101-104 and accompanying text.


128. *See United States v. Johnson*, 846 F.2d 279, 282 (5th Cir. 1988) ("Belton eradicates any differences between the searches of the person and searches within the arrestee's immediate control."); Commonwealth v. Madera, 521 N.E.2d 738, 739 (Mass. 1988) (stating that most courts since *Belton* have generally found proper the search of any container carried by a lawfully arrested person). *See generally GILBERT & MOYLAN, supra note 97, § 31.3 (discussing the Court's analysis of the "Automobile-Suitcase overlap").

129. *See 2 LAFAVE, supra note 36, § 5.5(a), at 535-36; see also People v. Brosnan*, 298 N.E.2d 78, 86 (N.Y. 1973) (Wachtler, J., dissenting) ("[S]earch and seizure law became uncontrollable when the rubric was adopted and the rationale discarded.").

130. *See People v. Torres*, 543 N.E.2d 61, 64 (N.Y. 1989) (reiterating the New York Court of Appeals' position that the Supreme Court's holding in *Belton* was untenable under New York's constitution and was a "drastic departure from *Chimel*"); *State v. Stroud*, 720 P.2d 436, 441 (Wash. 1986) (holding that a locked compartment in an automobile may not be searched incident to arrest because it evinces a reasonable expecta-
The most recent Supreme Court decision in this area is *California v. Acevedo*,\(^1\) which held that the Fourth Amendment does not require police to obtain a warrant to search a container as to which they have probable cause when they lack probable cause to search the vehicle in which the container is located.\(^2\) Before *Acevedo*, if probable cause extended only to the container, *Chadwick* governed the search, and a warrant was required before the container could be searched.\(^3\)

Justice Scalia's concurrence in *Acevedo* underscores that the majority's holding is limited to automobile searches, and that *Chadwick* remains good law for searches of luggage outside the automobile setting.\(^4\) In his dissent, Justice Stevens noted the paradox inherent in the majority's rationale: "[S]urely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public street yet to permit a search once the owner has placed the briefcase in the locked trunk of his car."\(^5\) He observed that "[i]n either location, if the police have probable cause, they are authorized to seize the luggage and to detain it until they obtain judicial approval for a search."\(^6\) Most lower courts have interpreted

---

1. *Id.* at 1991.

2. *Id.*

3. *See Chadwick*, 433 U.S. at 11-13. After *Chadwick* and before *Acevedo*, the Supreme Court applied *Chadwick* in *Arkansas v. Sanders*, 442 U.S. 753 (1979), *overruled by California v. Acevedo*, 111 S. Ct. 1982 (1991), and *United States v. Ross*, 456 U.S. 708 (1982), to protect luggage from the warrant exception for automobile searches established in *Carroll v. United States*, 267 U.S. 132 (1925). In *Sanders*, the Court held that personal luggage cannot be searched without a warrant merely because it was being transported in a lawfully stopped automobile. *See* 442 U.S. at 766. *Ross* modified *Sanders* by holding that if there is probable cause to search the entire car, any container found within the car may also be searched without a warrant. *See Ross*, 452 U.S. at 825.

4. *Acevedo*, 111 S. Ct. at 1992-94 (Scalia, J., concurring). Justice Scalia noted that "the search of a closed container, outside a privately owned building, with probable cause to believe the container contains contraband, and when it in fact does contain contraband, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant." *Id.* at 1994. Scalia lamented the "confusion" in Fourth Amendment jurisprudence, and pleaded for a return to "reasonableness" as the standard. *Id.* at 1993. In his view, an arcane profusion of law has resulted from the imposition of a categorical warrant requirement, which "does not appear to have any basis in the common law," and the concomitant ineluctable carving out of exceptions to that requirement. *Id.* at 1992-93.


Acevedo as abrogating Chadwick's applicability only as to searches of luggage within automobiles.\footnote{137}

3. Analysis.—The threshold question in analyzing the Ricks decision is why the court granted certiorari. In light of the Court of Special Appeals' statement that "[w]ith both Foster and Lee... as precedent, we have no difficulty holding that at the time appellant Ricks's luggage was searched it remained within the area of his immediate control,"\footnote{138} the Court of Appeals might easily have declined to hear the case. Not surprisingly, the Court of Appeals itself relied extensively on both cases as dispositive precedents for its decision.\footnote{139}

Nevertheless, certiorari may have been granted because finding support for the search of Ricks's bag required the court to stretch the principles of Chimel, even as expanded by Lee and Foster. Although the court pays lip service to the underlying standards of Chimel, the inherent result of the Court of Appeals' decision in Ricks is the establishment of a bright-line rule: any containers within the Chimel perimeter, including locked luggage, may be searched contemporaneously with a warrantless arrest.\footnote{140} Many other state and federal jurisdictions endorse a similarly broad view of the Chimel perimeter,\footnote{141} which the Court of Appeals cites as the prevailing view of the law on searches incident to arrest.\footnote{142}

The Court of Appeals purported to distinguish Chadwick as not based on "an arguably valid search incident to a lawful custodial arrest."\footnote{143} Far from just distinguishing Chadwick, however, Ricks

\footnote{137. See State v. Search, 472 N.W.2d 850, 853 (Minn. 1991) (stating that Chadwick no longer applies to searches of bags in automobiles, even if probable cause extends only to the bag); State v. Demeter, 590 A.2d 1179, 1181 (N.J. 1991) (maintaining that Acevedo eliminated the Sanders warrant requirement for closed containers in automobiles); cf. State v. Lugo, 592 A.2d 1234, 1236 (N.J. Super. 1991) (finding that Chadwick and Sanders no longer apply when police have the right to conduct a warrantless search of an auto).


139. See Ricks, 322 Md. at 190-94, 586 A.2d at 743-46.

140. Id. at 194, 586 A.2d at 746 ("Any container within an arrestee's immediate control at the time of arrest is subject to a contemporaneous search incident to that arrest.").

141. See, e.g., United States v. Tavolacci, 895 F.2d 1423, 1429 (D.C. Cir. 1990) (upholding the search of a locked suitcase in which a dog detected drugs, even though it was obvious that an immediate search was not necessary to assure police safety); United States v. Andersson, 813 F.2d 1450, 1455 (9th Cir. 1987) (permitting the search of a suitcase incident to arrest because containers found within an arrestee's reach can be searched contemporaneously with the arrest); see also supra note 128.

142. See Ricks, 322 Md. at 195, 586 A.2d at 746.

143. Id. at 194, 586 A.2d at 746.
largely eradicates Chadwick's applicability to searches incident to arrest,\textsuperscript{144} at least in arrests not in a dwelling house.\textsuperscript{145} Contrary to Ricks, the Supreme Court in Acevedo maintained the overall viability of Chadwick, except as to automobile searches.\textsuperscript{146}

The Court of Appeals ignored the evidence and weakly hypothesized in hindsight that because the arresting officers were aware that Ricks had prior robbery and drug violations, he posed a conceivable threat to their safety. The evidence given at the motion hearing, however, demonstrated that the officers arresting Ricks were never in danger, nor did they perceive any threat from Ricks.\textsuperscript{147} Ricks and the officer who stopped him were acquaintances, and were chatting amiably.\textsuperscript{148} Even after probable cause to arrest was established by the dog detecting drugs in Ricks's suitcase, the officers never bothered to handcuff Ricks or restrain him in any way.\textsuperscript{149} Disregarding the testimony of two of the arresting officers at the motion hearing and failing to apply any standard of reasonableness required by Stackhouse, the Court of Appeals irrationally justified the search of Ricks's bag by the fact that he was not restrained: "It was possible for Ricks to grab the bag, intending either to destroy evidence or gain access to a weapon."\textsuperscript{150}

The court invoked Lee by noting that "the area of immediate control is determined by potential for harm and not the actual physical control by the arrestee."\textsuperscript{151} Despite all the evidence in the record indicating that the situation unquestionably was safe,\textsuperscript{152} the Court of Appeals, in retrospect, found the potential for harm. Contrary to the demands of Chadwick, the Court of Appeals never con-

\begin{itemize}
  \item \textsuperscript{144} See id.
  \item \textsuperscript{145} See supra note 115 and accompanying text.
  \item \textsuperscript{146} See Acevedo, 111 S. Ct. at 1989-91.
  \item \textsuperscript{147} See supra notes 75-76 and accompanying text.
  \item \textsuperscript{148} Transcript of Motion Hearing at 41, Ricks (No. 90-67).
  \item \textsuperscript{149} See id. at 41-42.
  \item \textsuperscript{150} Ricks, 322 Md. at 191, 586 A.2d at 744. Professor LaFave finds "questionable" this appellate tendency to assume that persons arrested or restrained by police nevertheless have great freedom of movement. 2 LAFAVE, supra note 36, § 5.5(a), at 530. He further states that
    \begin{itemize}
      \item\textsuperscript{[t]his attitude is manifested by a reluctance to give particular consideration to the likelihood that the arrestee would have any opportunity to reach the container and manipulate . . . fastening devices. That is, the courts generally fail to assess these cases in terms of whether the interior of the container is . . . an area from which the arrestee might gain possession of a weapon or destructible evidence.
    \end{itemize}
    Id.
  \item \textsuperscript{151} Ricks, 322 Md. at 192, 586 A.2d at 744-45.
  \item \textsuperscript{152} See supra notes 75-87 and accompanying text.
\end{itemize}
sidered whether the alleged "potential for harm" could have been eliminated by less intrusive means, such as having one of the officers secure the bag somewhere away from Ricks. Nor did the court consider that Ricks was surrounded by five officers and his suitcase was locked, which effectively removed the bag from Ricks's immediate area and gave the police dominion over it. This evisceration of Chadwick leaves no doubt that in searches incident to arrest, Maryland will interpret the scope of the Chimel perimeter according to an expansive reading of Belton.

4. Conclusion.—By its decision in Ricks, the Court of Appeals maintains the construct of the Chimel perimeter without respecting its principled foundations. Ricks does not make "new" law, but rather expands the permissible extent of a search incident to arrest. The court justified this expansion of the search incident exception on the basis of remarkably dubious exigencies. Ricks effectively removes luggage within the Chimel perimeter from Fourth Amendment protection. In light of the Supreme Court's recent consideration of this area in Acevedo, Maryland and like-minded jurisdictions seem to be, at least for now, distinguishably ahead of the Supreme Court in interpreting its decisions to vitiate Fourth Amendment protections in searches incident to arrest.

C. Maryland's Restrictive Statutory Interpretation Protects Privacy

In Mustafa v. State,153 the Court of Appeals held that a recording that fails to comply with the Maryland Wiretapping and Electronic Surveillance Act ("Maryland Act")154 is not admissible in a Maryland court, regardless of whether the recording was permitted under the laws of the jurisdiction in which the calls were recorded.155 The State argued that the incriminating telephone conversations were lawfully intercepted in the District of Columbia, which is governed by Title III of the Omnibus Crime Control and Safe Streets Act ("Title III"),156 and thus were admissible in a Maryland court.157 Writing for the majority, Chief Judge Murphy noted that the Maryland Act is more restrictive than its federal counter-

155. See 323 Md. at 76, 591 A.2d at 486.
157. See Mustafa, 323 Md. at 72, 591 A.2d at 484.
part and that Maryland courts are entitled to control the admissibility of evidence pursuant to Maryland law; therefore, the State’s contention was rejected.

1. The Case.—Corporal John Bartlett of the Prince George’s County Police wanted to set up a drug purchase as a “sting operation.” In April 1989, he recruited Peter Dilliner, a paid informant who lived in the District of Columbia, to help him. Dilliner agreed to set up a purchase of two kilograms of cocaine in Prince George’s County. Dilliner contacted Andarge Asfaw, a known drug dealer, to set up the exchange.

In order to make the necessary arrangements to obtain the cocaine, Dilliner made numerous telephone calls to Asfaw at his business in Prince George’s County. He also spoke with a man known as ‘Maurice,’ whom Dilliner believed to be Mohummed Mustafa. Dilliner also received calls at his home in the District of Columbia from both men. All the telephone conversations from Asfaw and Mustafa originated in Maryland.

On his own initiative, Dilliner recorded each telephone conversation he had with Asfaw and Mustafa. Although Dilliner was never authorized or directed by Corporal Bartlett to make any recordings, he gave the tapes of his conversations to the officer when Asfaw and Mustafa were arrested. The recorded conversations

158. See id. at 69, 591 A.2d at 483. Although the Maryland Act was patterned after Title III, many of the state statute’s provisions are more rigorous. Id.; see infra notes 188-197 and accompanying text.
159. Mustafa, 323 Md. at 75, 591 A.2d at 485.
160. Id. at 76, 591 A.2d at 486. The State’s additional argument that because the statute could not reach beyond the borders of Maryland, the recordings could not violate the Maryland Act, was likewise rejected. Id. at 72, 591 A.2d at 484.
161. Id. at 67, 591 A.2d at 482.
162. Id. An FBI agent introduced Corporal Bartlett to Dilliner. Id.
163. Id. Dilliner received $2500 in exchange for arranging the drug sale. Id.
164. Id. at 68, 591 A.2d at 482. Dilliner did not apprise Asfaw that the police were involved. Id.
165. Id.
166. Id.
167. Id.
168. Id. Although Dilliner taped incoming calls from the defendants and was unsure of the location from which they originated, Corporal Bartlett testified that all the calls were between the District of Columbia and Prince George’s County. Id.
169. Id.
170. Id. Dilliner claimed that he had informed Bartlett that he was making recordings of all his telephone conversations as early as two days after he first spoke to Asfaw. Id. Corporal Bartlett testified that he had no knowledge of Dilliner’s recordings until after Asfaw and Mustafa had been arrested. Id.
were admitted into evidence at the trial of Asfaw and Mustafa, over the objections of both defendants.\textsuperscript{171}

Mustafa was convicted of possession of cocaine with intent to distribute and conspiracy to distribute cocaine.\textsuperscript{172} Asfaw was convicted of conspiracy to distribute cocaine.\textsuperscript{173} Mustafa and Asfaw appealed to the Court of Special Appeals, arguing that the recordings of telephone conversations were made in violation of the Maryland Act, and therefore should not have been introduced at trial.\textsuperscript{174} The Court of Special Appeals certified the question of the admissibility of the conversations to the Court of Appeals.\textsuperscript{175}

2. \textit{Legal Background}.—

\textit{a. The Omnibus Crime Control and Safe Streets Act}.—In 1968 Congress enacted the Omnibus Crime Control and Safe Streets Act\textsuperscript{176} to protect the privacy of individuals engaging in wire communications, while at the same time authorizing the use of electronic surveillance as a weapon against organized crime.\textsuperscript{177} Title III of the Act was “designed to provide a uniform minimum national standard governing electronic interception of wire and oral communications.”\textsuperscript{178}

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{171}] \textit{Id.} Asfaw and Mustafa both filed pretrial motions to suppress the telephone recordings, but these motions were denied. \textit{Id.}
\item[\textsuperscript{172}] \textit{Id.} Mustafa was also convicted of simple possession of cocaine; however, this conviction was merged into the conviction for possession with intent to distribute. \textit{Id.}
\item[\textsuperscript{173}] \textit{Id.}
\item[\textsuperscript{174}] \textit{See id.}, 591 A.2d at 483.
\item[\textsuperscript{175}] \textit{See id.} at 67, 591 A.2d at 481. The case was certified to the Court of Appeals pursuant to Maryland Rule 8-304(a). Under this Rule, the Court of Special Appeals “may certify questions of law or the entire action to the Court of Appeals.” Md. R. 8-304(a).
\item[\textsuperscript{177}] See United States v. Kahn, 415 U.S. 143, 150 (1974); see also Ricks v. State, 312 Md. 11, 13, 537 A.2d 612, 613 (1988) (“The purpose of the Federal Act was to protect the privacy of the individual while at the same time aiding in the enforcement of the criminal laws.”).
\item[\textsuperscript{178}] Title III permits “wiretapping only in carefully controlled circumstances, predicated upon court orders and on specified preconditions. Congress] deliberately decided to forbid the use of the fruits of illegal wiretaps in law enforcement proceedings.” \textit{In re Grand Jury Proceedings (Katsouros)}, 613 F.2d 1171, 1175 (D.C. Cir. 1979). This exclusionary provision protects the integrity of the court by ensuring that the court does not become a partner to illegal conduct. \textit{See id.} (citing Gelbard v. United States, 408 U.S. 41, 51 (1972)).
\item[\textsuperscript{177}] Messana, supra note 156, at 444. “Title III of the Act prohibits the nonconsensual interception of wire or oral communications by the use of electronic devices except when the law enforcement activity carefully follows the prescribed criteria.” \textit{Id.}
\end{enumerate}
\end{footnotesize}
Title III not only sets forth the required procedure to obtain authorization to use electronic surveillance; it also provides for criminal sanctions when these requirements are not met. Title III does not automatically govern electronic interceptions within a state; rather, each state must adopt its own statute, which, in conjunction with Title III, governs electronic surveillance. A state may impose more restrictions on surveillance than does Title III, but may not lessen the restrictions.

b. The Maryland Wiretapping and Electronic Surveillance Act.—In the early 1970s, the Maryland General Assembly realized the "need for intelligence-gathering activities to protect society." However, the legislature also determined that activities such as electronic surveillance "must be kept strictly within the constraints established by [the state's] constitution and laws, lest . . . the very liberties sought to be protected are themselves trampled in the process." The protection of society and the safeguarding of the individual became the framework within which the legislature passed the Maryland Wiretapping and Electronic Surveillance Act.

The purpose of the Maryland Act, therefore, is twofold: "1) to be a useful tool in crime detection, and 2) to assure that the interception of private communications is limited." Although the Maryland Act closely parallels the provisions of Title III, in some respects it is more restrictive than its federal counterpart.

The Maryland legislature used specific and exacting language to set forth the conditions for wiretapping and electronic surveil-

179. See 18 U.S.C. § 2511. This section specifically provides for a fine of not more than $10,000 or imprisonment of not more than 5 years, or both. Id.
181. Siegel, 266 Md. at 271-72, 292 A.2d at 94.
182. SENATE INVESTIGATING COMMITTEE, REPORT TO THE SENATE OF MARYLAND 1 (1975) [hereinafter SENATE INVESTIGATING COMMITTEE]. The Investigating Committee was organized to investigate the extent of improper electronic surveillance in Maryland and to recommend legislative reform to correct any discovered abuses of surveillance. Id. The special committee believed that "no free society can long hope to survive if it sees only with a blind eye, and hears only with a deaf ear, the insidious plots and schemes of those elements within it who seek to destroy that society and, with it, the freedoms for which it stands." Id.
183. Id. at 2.
184. See id.
187. Id. at 15, 537 A.2d at 614.
In general, the Maryland Act is more restrictive than Title III, providing more protection against abusive surveillance. First, the Maryland Act mandates that a judge who issues an order authorizing a wiretap must require the interceptor to file reports describing the progress of the surveillance and articulating the need for further surveillance. Title III, on the other hand, leaves to the discretion of the trial judge whether to require such reports. The objective of Maryland's more exacting language is to guarantee "to the people of Maryland, insofar as the state, itself, is concerned, greater protection from surreptitious eavesdropping and wiretapping than that afforded the people by the Congress." Further, the definition of "oral communications" in the Maryland Act extends to a broader class of communications than Title III. In addition, communications may not be lawfully intercepted under the Maryland Act unless all parties consent, whereas the Federal Act requires the consent of only one party. Finally, the Maryland courts have demanded strict compliance with the procedures outlined in the statute. Under Section 10-408 of the Maryland Act, an interception will not be authorized unless it can be shown

188. Maddox, 69 Md. App. at 300, 517 A.2d at 372.
189. Id. Although there are many differences between the two Acts, only four distinctions are relevant to this Note. For a more detailed comparison of Title III and the Maryland Act, see Richard P. Gilbert, A Diagnosis, Dissection, and Prognosis of Maryland's New Wiretap and Electronic Surveillance Law, 8 U. BALI. L. REV. 183 (1979).
192. Gilbert, supra note 189, at 221. The court in State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972), dramatically stated that Maryland adopted a stricter statute because allowing conversations to be monitored "without the strictest of controls would utterly destroy the basis of this nation's existence." Id. at 262, 292 A.2d at 89.
193. Gilbert, supra note 189, at 192. The Maryland Act defines an oral communication as "any conversation or words spoken to or by any person in private conversation." MD. CTS. & JUD. PROC. CODE ANN. § 10-401(2)(i). Title III defines oral communications as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510.
194. Gilbert, supra note 189, at 194. The Maryland Act authorizes a law enforcement officer or person acting under the direction and supervision of an officer to intercept communications based on the consent of one party. This use is limited, however, to investigations of several specifically enumerated crimes: "murder, kidnapping, rape, a sexual offense in the first or second degree, child abuse, gambling, robbery, any felony punishable under the 'Arson and Burning' subheading of Article 27, bribery, extortion, or dealing in controlled dangerous substances." MD. CTS. & JUD. PROC. CODE ANN. § 10-402(c)(2). For crimes other than those specified, all parties must give consent prior to the interception. Id. § 10-402.
195. See, e.g., Siegel, 266 Md. at 274, 292 A.2d at 95. The court stated that the requirements of the statute must be followed; it would "not abide any deviation, no matter how slight, from the prescribed path." Id.
that normal investigative procedures have failed or appear unlikely to succeed if attempted.\textsuperscript{196} Some federal courts, however, have required only that applications for authorization "substantially comply" with the statutory mandate.\textsuperscript{197}

3. The Court's Reasoning.—Although Dilliner's interception was lawful under Title III,\textsuperscript{198} it was not a lawful interception under the Maryland Act.\textsuperscript{199} In determining whether Dilliner's tapes were admissible, the \textit{Mustafa} court stated that the question was one to be answered by statutory construction of the Maryland Act.\textsuperscript{200} A cardinal rule of statutory construction is to determine legislative intent.\textsuperscript{201} The court focused on the purpose of and policy behind the Maryland Act in order to determine legislative intent.\textsuperscript{202}

To discover the purpose, aim, and policy of the statute, the court examined the words of the statute "because what the legislature has written in an effort to achieve a goal is a natural ingredient of analysis to determine that goal."\textsuperscript{203} The words are to be given their "ordinary and natural import, since the language of the statute is the primary source for determining the legislative intent."\textsuperscript{204}

The \textit{Mustafa} court found that the clear purpose of the exclu-

\textsuperscript{197} See, e.g., United States v. Steinberg, 525 F.2d 1126, 1130 (2d Cir. 1975) (upholding the use of surveillance even though affidavit of police only "substantially complied" with Title III's requirements), cert. denied, 425 U.S. 971 (1976); \textit{In re Dunn}, 507 F.2d 195, 197 (1st Cir. 1974) (stating that the court will take a "practical and commonsense" approach to determining whether an order permitting electronic surveillance was properly issued); see also Gilbert, supra note 189, at 205-07.
\textsuperscript{198} \textit{Mustafa}, 323 Md. at 71, 591 A.2d at 484; see also 18 U.S.C. § 2511(c),(d) (1988).
\textsuperscript{199} \textit{Mustafa}, 323 Md. at 71-72, 591 A.2d at 484. To be lawful, the interception must be under the direction of a law enforcement officer acting in a criminal investigation, or the interceptor must be a party to the communication in which all the parties to the communication have given prior consent to the interception. Md. Cts. & Jud. Proc. Code Ann. § 10-402(c).
\textsuperscript{200} See 323 Md. at 72-73, 591 A.2d at 484.
\textsuperscript{201} Harford County v. University of Md. Med. Sys. Corp., 318 Md. 525, 529, 569 A.2d 649, 651 (1990); Motor Vehicle Admin. v. Mohler, 318 Md. 219, 225, 567 A.2d 929, 932 (1990) ("When construing a statute, the duty of the reviewing court is to determine the goal of the legislature and to effectuate that objective.").
\textsuperscript{202} See \textit{Mustafa}, 323 Md. at 73, 591 A.2d at 484.
\textsuperscript{203} Kaczorowski v. Mayor of Baltimore, 309 Md. 505, 513, 525 A.2d 628, 632 (1987).
\textsuperscript{204} University of Md. Med. Sys. Corp., 318 Md. at 529, 569 A.2d at 651 (citations omitted). "[A]s a general principle of statutory construction, the words of a statute are to be given their ordinary signification absent a manifest contrary intent on the part of the legislature." Tatum v. Gigliotti, 321 Md. 623, 628, 583 A.2d 1062, 1064 (1991). Thus, "if the words of the legislature are unambiguous, they are to be accorded their natural connotation." Trimble v. State, 321 Md. 248, 265, 582 A.2d 794, 802 (1990).
visionary provision of the Maryland Act was "to prevent 'the unauthorized interception of communications where one of the parties has a reasonable expectation of privacy.'" Further, there was no indication that the legislature intended to provide for any exceptions to the exclusionary rule.

After commenting that the Maryland legislature clearly has the authority to "regulate the admissibility of evidence in its courts," the court concluded that "evidence intercepted pursuant to more lenient statutory enactments of other jurisdictions must comply with Maryland's more restrictive standards before it may be lawfully disclosed in a Maryland court."

4. Analysis.—Two public policy issues were central to the Mustafa court's interpretation of the Maryland Act. First, the court sought to avoid the use of evidence procured in violation of a citizen's constitutional rights. Second, the court recognized the important right to privacy of all persons.

a. Deterrence.—The majority reasoned that the purpose of the exclusionary provision is to deter law enforcement officers from violating constitutional rights by ensuring that the courts will not admit evidence gained from illegal police conduct. The majority concluded that by deterring overreaching police activity, the Maryland Act protects the privacy of communications. The dissent also examined the issue of deterrence. In his dissent, Judge McAuliffe acknowledged that deterrence is a goal of the exclusionary rule, but concluded that this goal was not advanced in Mustafa. Dilliner did not "violate the Maryland Act when he


206. 323 Md. at 74, 591 A.2d at 485 (quoting Benford v. American Broadcasting Cos., 554 F. Supp. 145, 151 (D. Md. 1982)).

207. Id. at 73-74, 591 A.2d at 485. The court found that the language of § 10-405 was not ambiguous. Id. at 73, 591 A.2d at 485.

208. Id. at 75, 591 A.2d at 485.

209. Id. at 74, 591 A.2d at 485.

210. See id. at 73, 591 A.2d at 485.

211. See id.

212. See id. at 78, 591 A.2d at 487 (McAuliffe, J., dissenting).
made an interception in the District of Columbia."²¹³ Because the interception was lawful, Dilliner could not be prosecuted under the Maryland statute, which provides that a violation of the statute is a felony.²¹⁴ Judge McAuliffe argued that the public policy of deterrence is not served in a situation such as Mustafa, in which the surveillance was lawful when made.²¹⁵ The lower court did not become a "partner in crime" by admitting the tape because no crime was committed; thus the exclusion of the recording was unnecessary.²¹⁶

The dissent's argument is flawed, however, as it relies on cases in which the courts construed exclusionary provisions less restrictive than that in the Maryland Act.²¹⁷ The majority specifically noted that the dissent was unable to find any jurisdiction with a statute with provisions comparable to section 10-407 of the Maryland Act, "which links the admissibility of evidence ... to compliance with the ... Act."²¹⁸

The dissent also failed to contemplate the broader policy behind the Maryland Act. The dissent's analysis of the deterrent function is too narrow because it does not address the privacy rights that deterrence protects. This protection of privacy was at the nucleus of the majority's argument.

b. The Right to Privacy.—The majority's interpretation of the Maryland Act emphasized the important right to privacy. Surveillance equipment is becoming more sophisticated.²¹⁹ The potential for abuse of this technology is continually growing, while the public remains virtually powerless to protect itself.²²⁰ The Senate Investigating Committee felt that there was no question but that the privacy of citizens is directly affected by the collection, maintenance, use and dissemination of personal information especially when one considers that information gathered by intelligence agencies as well as other governmental departments is widely disseminated to local, state and federal agencies. The opportunity for an individual to secure employment, gov-

²¹³. Id. at 77, 591 A.2d 487 (McAuliffe, J., dissenting).
²¹⁴. Id.; see Md. CTS. & JUD. PROC. CODE ANN. § 10-402(b) (1989). Because the interception was made in the District of Columbia, it fell under the jurisdiction of Title III. Mustafa, 323 Md. at 77, 591 A.2d at 484 (McAuliffe, J., dissenting).
²¹⁵. 323 Md. at 77, 591 A.2d at 484 (McAuliffe, J., dissenting).
²¹⁶. See id. at 78-79, 591 A.2d at 487-88 (McAuliffe, J., dissenting).
²¹⁷. See id. at 78, 591 A.2d at 487 (McAuliffe, J., dissenting). The dissent relied on People v. Barrow, 549 N.E.2d 240 (Ill. 1989), cert. denied, 110 S. Ct. 3257 (1990), and Commonwealth v. Bennett, 369 A.2d 493 (Pa. Super. Ct. 1976). Both of these cases, however, permitted the admission of surveillance tapes that were in violation of the statute of the state in which the conversations were recorded, but did not violate the forum state's statute. See Barrow, 549 N.E.2d at 253-54; Bennett, 369 A.2d at 493-95.
²¹⁸. Mustafa, 323 Md. at 75, 591 A.2d at 486.
²¹⁹. SENATE INVESTIGATING COMMITTEE, supra note 182, at 67.
²²⁰. Id. The Senate Investigating Committee felt that there was
gating Committee could not find a "valid reason for the use and possession of eavesdropping equipment by anyone other than law enforcement personnel, employees of common communications carriers, and manufacturers of such devices for sale or distribution to persons authorized to possess this equipment." Thus, if the court were to admit Dilliner's recordings, it would serve to condone both abusive behavior and the potential harm resulting from the improper use of information gathered by surveillance.

The majority of people involved in surveillance work and intelligence gathering are not held directly accountable to the public. For this reason, "it is absolutely essential that intelligence-gathering activities be strictly confined within legal and ethical parameters."

If the court had allowed Dilliner's intercepted conversations to be admitted, it would have set a precedent with potentially dangerous and far-reaching effects. Allowing the admission of the recordings might have indicated that the current, strict guidelines were being relaxed. If the records were admissible, police officers could go to the District of Columbia in order to "lawfully" intercept communications and return to Maryland to prosecute the unaware and nonconsenting party in a Maryland court. Such an interpretation surely would frustrate the purpose of the Maryland Act.

5. Conclusion.—The majority opinion recognized that while Maryland strives to enforce the criminal laws, a more important goal is the protection of the citizens' rights of privacy. Thus, because there was no clear indication that the legislature did not intend an all-encompassing exclusionary rule, the court held that the Maryland Act prohibits the use of intercepted communications that would have been unlawful if made in Maryland.

A court must, of necessity, be careful in determining the intent of the legislature. The recognition of an "otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous concept to the facts of a given case, and that declaration of public policy is normally the function of the legisla-

ermental appointments, insurance, or credit may well be endangered by the dissemination of improper or erroneous personal information. The increasing use of sophisticated computer hardware has magnified the harm which can accrue to an individual.

Id. at 73.
221. Id. at 69.
222. Id. at 2. Those who are involved in this type of work perform out of the public view and thus are not subject to public scrutiny. Id.
223. Id.
tive branch."\textsuperscript{224} In \textit{Mustafa}, the court was subtle in its determination that the state is prioritizing privacy rights. In effect, the majority used this legislative prioritization to support its interpretation of the Maryland Act. Most importantly, the court refused to allow the circumvention of a Maryland statute to facilitate the admission of evidence, even though that evidence was lawfully obtained in another jurisdiction.

\textbf{Jonathan D. Eisner}  
\textbf{Melisa M.C. Moonan}  
\textbf{Jane S. Poland}

VII. Employment

A. Opening the Closed Doors of the Retaliatory Discharge Doctrine

In *Finch v. Holladay-Tyler Printing, Inc.*,' the Court of Appeals unanimously held that an employee may file an action for retaliatory discharge based on state law without first exhausting grievance procedures outlined in the employee's collective bargaining agreement, so long as construction of the agreement is not necessary to resolve the dispute. Further, the court found that even if an employer follows all layoff procedures enumerated in the collective bargaining agreement, an employee may still have a cause of action for retaliatory discharge if the employer followed the procedures with the intent to circumvent Maryland public policy.

The Court of Appeals in *Finch* clarified Maryland law regarding retaliatory discharge tort actions. The decision also makes clear that federal labor law does not preempt a state action for retaliatory discharge when there is no need to construe the collective bargaining agreement to resolve the dispute. *Finch* brings Maryland law in line with the Supreme Court decision of *Lingle v. Norge Division of Magic Chef, Inc.*, which held that "an application of state law is pre-empted by [section] 301 of the Labor Management Relations Act . . . only if such application requires the interpretation of a collective-bargaining agreement."

1. The Case.—From 1976 to 1987, Lorenzo J.D. Finch was an employee of Holladay-Tyler Printing, Inc. (Holladay-Tyler), and was a union member covered under a collective bargaining agreement. Finch had filed claims for various injuries under Maryland's workers' compensation provisions in 1977, 1981, 1984, and

---

2. See id. at 207, 586 A.2d at 1280.
3. Id. The public policy at issue in *Finch* was the protection of workers' rights under the workers' compensation laws of Maryland. Id. at 205-07, 586 A.2d at 1279-80.
4. See id. at 207, 586 A.2d at 1280.
6. Id. at 413 (footnote omitted); see also Labor Management Relations (Taft-Hartley) Act, § 301 (codified at 29 U.S.C. § 185 (1989)).
Because of an injury caused by an on-the-job accident in November of 1986, Finch took a four month leave of absence. When he returned to work on March 30, 1987, his name was on a list of employees marked for layoff at the end of the week.

The layoff provision of the collective bargaining agreement covering Finch’s employment specified that workers should be laid off in “inverse order of seniority.” According to Holladay-Tyler’s own documents, Finch was the most senior worker in the “General Worker” category as of February 9, 1987. Finch alleged that he also was the third most senior worker overall. Shortly after the layoff, Finch learned that workers with less seniority had been retained or rehired by Holladay-Tyler. Although Holladay-Tyler claimed that they had attempted to recall Finch but he had refused re-employment, Finch alleged that the company did not offer him a permanent recall.

Finch filed multiple claims in the Circuit Court for Montgomery County, alleging that he was discharged from Holladay-Tyler in retaliation for filing workers’ compensation claims. The circuit court granted summary judgment in favor of Holladay-Tyler on the ground that Finch had failed to follow all grievance procedures outlined in the collective bargaining agreement. Therefore, according to the circuit court, Finch was barred by federal labor law from

---

10. Finch, 322 Md. at 198, 586 A.2d at 1276.
11. Id.
13. Brief for Petitioner, Finch (No. 90-31) (Seniority List from Holladay-Tyler Printing Co. dated February 9, 1987, submitted during discovery and attached to the brief as Attachment No. 4).
14. Finch, 322 Md. at 198, 586 A.2d at 1276.
15. Id.
16. Id.
17. Id.
18. Finch filed claims for “wrongful discharge, breach of covenant of good faith and fair dealing and civil conspiracy to contravene Maryland public policy, as well as an amended complaint adding claims for intentional infliction of emotional distress, negligent infliction of emotional distress and loss of consortium.” Id. at 199 n.1, 586 A.2d at 1276 n.1. Courts have used the terms “retaliatory discharge,” “abusive discharge,” and “wrongful discharge” interchangeably. See Thomas Bean, Note, NLRA Preemption of State Law Actions for Wrongful Discharge in Violation of Public Policy, 19 U. Mich. J.L. Ref. 441, 441 n.1 (1986). In Finch, the court used the term “retaliatory discharge”; however, the court used the term “abusive discharge” in Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981), and “wrongful discharge” in Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988).
19. Finch, 322 Md. at 199, 586 A.2d at 1276.
20. Id. at 200, 586 A.2d at 1277.
bringing a state claim.\textsuperscript{21} The Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals\textsuperscript{22} solely to address "whether a union employee who charges an employer with retaliatory discharge for filing workers' compensation claims must first exhaust grievance procedures under a Collective Bargaining Agreement before pursuing a state tort action in court."\textsuperscript{23}

2. Legal Background.—

a. History of the Tort.—The doctrine of at-will employment provides that the employment relationship may be terminated by either party at any time for any reason.\textsuperscript{24} Support for the doctrine has slowly eroded, however, and there are now exceptions to the rule in most jurisdictions. These exceptions to the at-will doctrine have been both judicially and legislatively created.\textsuperscript{25}

Federal and state legislatures have enacted laws that restrict the ability of an employer to terminate an employee. Federal legislative enactments such as the Labor Management Relations Act (LMRA)\textsuperscript{26} and Title VII of the Civil Rights Act\textsuperscript{27} specifically prohibit discharge from employment in violation of federal statutes.\textsuperscript{28} Article 49B of the Civil Rights Act of Maryland\textsuperscript{29} is an example of a similar legislative enactment in Maryland.

The judiciary has created exceptions to the at-will rule, primarily to lessen the harsh results that application of the rule causes in some circumstances.\textsuperscript{30} Such exceptions include: "when the termination violated some expressed public policy, when the employer acted in bad faith without justification, or when the employer violated a duty of good faith and fair dealing implied in every at-will employment contract."\textsuperscript{31} Of these, the public policy exception has

\textsuperscript{21} See id.
\textsuperscript{22} Id.
\textsuperscript{23} Id.
\textsuperscript{29} Md. ANN. CODE art. 49B, §§ 7-8 (1991).
\textsuperscript{30} Abramson & Silvestri, supra note 24, at 262.
\textsuperscript{31} Id. (citations omitted).
been employed most often by judges, particularly in Maryland.

The Supreme Court of Indiana produced the seminal opinion holding that an employee has a cause of action for retaliatory discharge on the basis that the discharge violated public policy. In *Frampton v. Central Indiana Gas Co.*, the Indiana court held that an employee who alleges that she has been discharged for exercising a "statutorily conferred right" has a legally cognizable cause of action against her employer. The court explained that this doctrine provides a cause of action to an employee who seeks to bring a suit for retaliatory discharge for exercising her rights under the workers' compensation laws. The Indiana court held that "[r]etaliatory discharge for filing a workmen's compensation claim is a wrongful, unconscionable act and should be actionable in a court of law." The *Frampton* court clearly recognized the provision of workers' compensation as an important public policy covered under the public policy exception to the at-will rule of employment.

b. Retaliatory Discharge under Maryland Law.—In *Adler v. American Standard Corp.*, the Court of Appeals, in response to a certified question, addressed whether Maryland recognized a cause of action for retaliatory discharge. The court noted that some jurisdictions had "flatly refused to recognize a cause of action for wrongful discharge" on any basis, while others had either recognized the action, or indicated a willingness to recognize it in the future. The *Adler* court stated that "[w]ith few exceptions, courts recognizing a cause of action for wrongful discharge have to some extent relied on statutory expressions of public policy as a basis for the employee's

32. Id.
33. See infra notes 40-49 and accompanying text.
34. Abramson & Silvestri, supra note 24, at 263.
36. See id. at 428.
37. See id.
38. Id.
39. See id. The *Frampton* court used the parallel development of retaliatory eviction in landlord and tenant law to support its reasoning. The court wrote: "Retaliatory discharge and retaliatory eviction are clearly analogous. Housing codes are promulgated to improve the quality of housing. The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy." Id.
41. See id. at 31, 432 A.2d at 465.
42. Id. at 36, 432 A.2d at 467. The court mentioned the following jurisdictions: Alabama, Florida, Georgia, Mississippi, Missouri, and North Carolina. See id.
43. Id. The court cited Colorado, Idaho, Kentucky, Montana, Vermont, and Wisconsin. See id.
Although the Adler court found that the particular plaintiff-employee's allegations did not implicate a public policy of the state, the court explicitly stated that an action for abusive discharge will lie when an employer's termination of the employment relationship violates a clear mandate of public policy. The Adler decision was praised for its recognition of the abusive discharge tort but criticized for the ambiguity and vagueness of the meaning of "public policy" in the context of such torts.

In Ewing v. Koppers Co., the Court of Appeals clarified the Adler decision, at least in the context of a retaliatory discharge claim premised on the allegation that the employer fired the employee for filing a workers' compensation claim. The Ewing court held that it was within the public policy exception to recognize a cause of action based on such an allegation. Additionally, the Ewing court indicated that the General Assembly clearly mandated that discharging an employee for filing a workers' compensation claim is repugnant to important public policies.

c. Federal Preemption.—Employers have often argued that the doctrine of federal preemption protected them against state-based wrongful discharge claims. Generally, all applicable arbitration avenues and grievance procedures must be exhausted before an ag-
grieved employee or employer may bring a state tort action. Specifically, the LMRA provides that such avenues and procedures must be exhausted before a dissatisfied employee can seek legal redress in the courts. In interpreting the pertinent provision of the LMRA, the Supreme Court has noted that "it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance."

In *Allis-Chalmers Corp. v. Lueck,* the Supreme Court held that section 301 of the LMRA preempts a state law claim for retaliatory discharge when a term of the collective bargaining agreement is a substantial issue in resolving the state law claim. However, the *Allis-Chalmers* Court made it equally clear that whether a term of a collective bargaining agreement is at issue should be decided on a case-by-case basis. The Supreme Court provided guidance to the lower courts as to how this case-by-case analysis should be done in *Lingle v. Norge Division of Magic Chef, Inc.*

The *Lingle* case presented an opportunity for the Court to resolve whether the LMRA precludes an action for retaliatory discharge by a union employee. The Court held that section 301 of the LMRA did not preempt a state tort action for retaliatory discharge as long as the construction of the collective bargaining agreement was not at issue. The Court clarified its opinion by noting that *Lingle* "should make clear that interpretation of collective-bargaining agreements remains firmly in the arbitral realm." Therefore, the supremacy of federal labor law in other labor disputes was maintained.

*Lingle* also stressed that the "independent" nature of the state law claim is an important consideration in determining the preemption issue. Justice Stevens wrote:

[W]hile there may be instances in which the National Labor

---

51. Korn, *supra* note 50, at 1162-63; see also *Allis-Chalmers v. Lueck*, 471 U.S. 202, 204 (1985) (refusing to allow a cause of action for abusive discharge to proceed because the employee did not exhaust the remedies provided in the collective bargaining agreement).


55. *See id.* at 220.

56. *See id.*


58. *See id.* at 401.

59. *See id.* at 410.

60. *Id.* at 411.

61. *See id.* at 410.
Relations Act pre-empts state law on the basis of the subject matter of the law in question, [section] 301 pre-emption merely ensures that federal law will be the basis for interpreting collective bargaining agreements, and says nothing about the substantive rights a state may provide to workers when adjudication of those rights does not depend upon the interpretation of such agreements. . . . [A]s long as the state-law claim can be resolved without interpreting the agreement itself, the claim is "independent" of the agreement for [section] 301 pre-emption purposes. 62

3. The Court's Reasoning.—The Court of Appeals' decision in Finch rested upon Maryland and federal precedent. Finch combines the reasoning of Adler, Ewing, and Lingle to decide that an employee is not precluded from bringing a cause of action for wrongful discharge against an employer based on an allegation that the discharge was in retaliation for the employee's filing of a workers' compensation claim, as long as disposition of the lawsuit does not require interpretation of the collective bargaining agreement. 63

The Finch court's reasoning rested initially on the Adler holding that a retaliatory discharge action will survive when the motivation for the discharge is a clear violation of public policy. 64 The court relied on Ewing for the proposition that the right to file workers' compensation claims is a strictly protected right as a matter of public policy. 65 The Finch court reasoned that, taken together, Adler and Ewing clearly lead to the conclusion that it is a violation of public policy for "an employer [to] discharge an employee solely in retaliation for filing a workers' compensation claim." 66

The court further held that federal law does not preempt a state law action for retaliatory discharge, as long as resolution of the dispute does not require the court to construe the collective bargaining agreement. 67 This outcome is based almost exclusively on the rea-

62. Id. at 408-10. Several of the circuits have delivered decisions adhering to Lingle. See, e.g., Smolarek v. Chrysler Corp., 879 F.2d 1326 (6th Cir. 1989); Bettis v. Oscar Mayer Foods Corp., 878 F.2d 192 (7th Cir. 1989); Wolfe v. Central Mine Equip. Co., 850 F.2d 469 (8th Cir. 1988).
63. See Finch, 322 Md. at 206-07, 586 A.2d at 1280.
64. See id. at 200, 586 A.2d at 1277 (citing Adler v. American Standard Corp., 291 Md. 31, 432 A.2d 464 (1981)).
65. See id. at 201, 586 A.2d at 1277 (citing Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988)).
66. Id. at 202, 586 A.2d at 1278.
67. See id. at 207, 586 A.2d at 1280.
soning and holding of the Supreme Court in *Lingle*. Applying the *Lingle* rule, the court found that, because Holladay-Tyler’s comportment with Finch’s collective bargaining agreement was not at issue, no preemption problems were presented. Therefore, Finch could maintain a state tort action for retaliatory discharge against his employer, Holladay-Tyler. Further, the court reasoned that even if Holladay-Tyler had followed all layoff procedures outlined in the collective bargaining agreement, it did not follow that the discharge was necessarily not abusive and that Finch’s claim was therefore preempted by federal labor law.

4. *Analysis.*—Because the *Finch* court and courts similarly situated must determine whether a public policy issue is presented, it is important to examine the definition of public policy. Public policy has been classified as a “vague and indefinite concept,” and as:

> [c]ommunity common sense and common conscience, extended and applied throughout the state to matters of public morals, health, safety, welfare, and the like; it is that general and well-settled public opinion relating to man’s plain, palpable duty to his fellowmen, having due regard to all circumstances of each particular relation and situation.

Clearly, there is no precise definition of public policy. This lack of cohesiveness creates problems for courts faced with defining public policy.

Legislatively defined public policy poses no problem for courts. If an employer violates a statute, there is a violation of public policy. Judicially defined public policy, on the other hand, can cause confusion. In *Adler*, the Maryland decision that first recognized a common-law action for retaliatory discharge, the Court of Appeals grappled with the origins of public policy:

> We have always been aware . . . that recognition of an otherwise undeclared public policy as a basis for a judicial decision involves the application of a very nebulous con-

---

68. See supra notes 57-62 and accompanying text.
69. *See Finch*, 322 Md. at 207, 586 A.2d at 1280.
70. *Id.* at 206, 586 A.2d at 1280.
71. 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 56.01 (4th ed. 1972).
73. Abramson & Silvestri, *supra* note 24, at 259; see also *Adler v. American Standard Corp.*, 291 Md. 31, 40, 45, 432 A.2d 464, 469, 472 (1981) (intimating that statutory public policy is the only reliable kind).
74. 291 Md. at 37, 432 A.2d at 473.
cept to the facts of a given case, and that declaration of public policy is normally the function of the legislative branch. 75

The Finch decision does little to eliminate this lack of specificity in defining public policy. Although the Finch court correctly followed the precedent set in Adler, Ewing, and Lingle by holding that Finch's action was legally cognizable and was not preempted by federal law, the court did not seize the opportunity to further define public policy. While the court may have intended to leave the definition of public policy open to case-by-case interpretation as it had in Adler, 76 an open-ended definition of public policy does not help courts that will face similar cases in the future.

Another issue surrounding Finch is the reconciliation of the private rights of the individual with the collective rights of the union. Common situations in which individual and collective rights conflict include the filing of a discrimination suit against the employer based on state law, 77 the filing of an action for wage discrimination under the doctrine of comparable worth, 78 and the filing of an action alleging a workplace condition dangerous to the employee's health. 79 Though all these actions address an individual's rights and provide a remedy, they fail to address the current status of employer action toward all union employees.

The notion of public policy proffered by the court in Finch squares more with individual than collective rights. By leaving the determination of public policy to case-by-case analysis, Finch does not address the tension between collective and individual rights. 80 Protection of individual rights is paramount; however, the protection of the collective bargaining process is also a substantial interest.

75. Id. at 45, 432 A.2d at 472.
76. 291 Md. at 46, 432 A.2d at 472.
77. "The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another." Id. (quoting Patton v. United States, 281 U.S. 276, 306 (1930)) (emphasis added).
78. "Comparable worth" has been defined as "a class of wage discrimination claims based on the employer's use of different criteria in establishing the wage rates for male- and female-dominated jobs. Several states have enacted laws establishing comparable worth policies and processes for implementing pay adjustments for state employees." BLACK'S LAW DICTIONARY 282 (6th ed. 1990).
80. See Korn, supra note 50, at 1153.
Finally, the aims of the collective bargaining process may be thwarted by *Finch* and cases like it. Allowing employees to file state claims despite the existence of a private collective bargaining agreement may hurt union members and employers alike. The policy behind collective bargaining agreements—to protect all parties’ rights and to encourage arbitration rather than traditional lawsuits—is slowly being eroded to the point that no state action will be preempted by federal labor law. As one commentator has stated:

Employees can engage in forum shopping, deciding between arbitration and court, or try the arbitration process and then get a second bite of the apple by filing a tort action. Employers, as a result of *Lingle*, have no reason to agree or cooperate with arbitration procedures if an employee can, at her discretion, sidestep arbitration.

5. Conclusion.—*Finch* succinctly follows the precedent set by the Supreme Court in *Lingle*, providing the last decision in a trio of cases bringing Maryland into line with Supreme Court precedent. The decision confirms the right to file a retaliatory discharge action in Maryland when the discharge is a clear violation of public policy. Further, the court made clear that so long as construction of the collective bargaining agreement is not necessary for resolution of the state claim, no preemption issue is presented. Although the court did not clear up any ambiguities inherent in the "case-by-case" approach, the decision made clear that terminating an employee for filing a workers’ compensation claim violates a clear mandate of public policy.

B. Abusive Discharge: A New Outcome

The Court of Appeals granted certiorari in *Watson v. Peoples Security Life Insurance Co.* to decide whether an action for abusive discharge can survive a motion for judgment when the alleged improper motivation for the discharge is retaliation against the employee for filing sexual harassment charges against the employer and one of its employees. Although noting Maryland’s recogni-
tion of the tort of abusive discharge, the court nonetheless held that, absent a statute expressing a clear mandate of public policy, the tort does not lie when an employee is discharged for seeking legal redress against her employer. The court did conclude, however, that an employee can obtain relief under an abusive discharge action if the employee was discharged in retaliation for filing workplace sexual harassment charges against a coworker.

I. The Case.—Patricia Watson was employed as a sales agent at Peoples Security Life Insurance Company (Peoples) in Hagerstown, Maryland. She worked for sales manager Michael Leidhecker. Beginning in November 1985, another sales manager for the company, John Strausser, repeatedly asked Watson to join his staff. Watson repeatedly declined, and Strausser became more insistent and threatening in his request. Strausser then began calling Watson at home, often making sexual suggestions to her. Watson reported these incidents to Leidhecker and to Harold Shoemaker, Strausser’s supervisor. Shoemaker laughed and told her “not to worry about it.”

On the evening of January 29, 1986, Watson went to the office with Leidhecker and found Strausser already there. Strausser approached Watson from behind, placed his hands on her shoulders.


Maryland does recognize a cause of action for abusive discharge by an employer of an at will employee when the motivation for the discharge contravenes some clear mandate of public policy....

Id. at 47, 432 A.2d at 473.

88. Watson, 322 Md. at 478-80, 588 A.2d at 765-66.

89. Id. at 481-83, 588 A.2d at 766-67.

The clear mandate of public policy which Watson’s discharge could be found to have violated was the individual’s interest in preserving bodily integrity and personality, reinforced by the state’s interest in preventing breaches of the peace, and reinforced by statutory policies intended to assure protection from workplace sexual harassment.

Id. at 481, 588 A.2d at 767.

90. Id. at 469, 588 A.2d at 761.

91. Id.

92. Id.

93. Id. Strausser’s threatening statements included the declaration: “You’re going to work for me whether you like it or not.” Id.

94. Id. Strausser asked Watson to come sleep on the floor of his office with him, stating: “You can make a lot of money if you do this.” Id.

95. Id. at 469-70, 588 A.2d at 761.

96. Id. at 470, 588 A.2d at 761.
and "tried to take a bite of [her] breast." 97 Leidhecker reported the incident to Shoemaker, who warned Strausser to stay away from Watson. 98 Strausser ignored the warning, however, and continued to harass Watson both verbally and physically. 99

Consequently, on March 13, 1986, Watson filed a three-count complaint against Peoples and Strausser. 100 The next day, Watson requested a two-week leave of absence, which Leidhecker approved. 101 After learning that a suit had been filed, Robert Williams, a company vice-president, visited the Hagerstown location to gather information concerning Watson's claim. 102 Williams phoned Watson and asked her to come to work to meet with him. Watson refused to speak to Williams without her attorney present and Williams was not willing to speak with the lawyer. 103 Williams then informed Watson that she would be terminated if she did not attend the regular office meeting the next day; Watson did not attend and her employment was terminated. 104 Watson then amended her complaint to include a claim against Peoples for abusive discharge. 105

At the end of the trial, Peoples moved for judgment on the first three counts and the trial court granted the motion. 106 The jury then found Strausser liable for assault and battery and Peoples liable for wrongful discharge. 107 On appeal, the Court of Special Ap-

---

97. Id.
98. Id.
99. Id.
100. Id. at 472, 588 A.2d at 762. Count I asserted a claim against both defendants for the assault and battery that took place on January 29. Count II claimed intentional infliction of emotional distress against both defendants. Count III was only against Peoples, claiming that it had negligently retained or supervised Strausser. Id.
101. Id. at 470-71, 588 A.2d at 761. Watson made this request on the advice of her doctor, whom she had seen that day. Id.
102. Id. at 471, 588 A.2d at 761-62.
103. Id., 588 A.2d at 762.
104. Id. The termination notice sent to Watson stated insubordination and failure to attend the meeting as the bases for the action. Id. At the time, however, Watson was still on her approved two-week leave. Id. at 470-71, 588 A.2d at 761.
105. Id. at 472, 588 A.2d at 762.
106. Id. at 473, 588 A.2d at 763. The trial court found that the workers' compensation laws protected Peoples from liability for the assault and battery. Id. This claim was submitted to the jury with respect to Strausser. Id. The motion was granted as to count II because the emotional distress suffered was not sufficiently severe. Id. Finally, because Watson did not adequately prove that Peoples could have prevented the assault and battery, the motion was granted as to count III. Id.
107. Id. at 475, 588 A.2d at 764. Strausser satisfied the $300 judgment against him. Peoples appealed. Id. at 475 & n.3, 588 A.2d at 764 & n.3.
peals surveyed the law in other jurisdictions and held that no clear mandate of public policy is violated when an employer fires an at-will employee for seeking legal redress for alleged wrongs by the employer. Therefore, the court reversed the judgment of the trial court. The dissenting opinion pointed to the "intensely personal" nature of Watson's original suit, and argued that the public policy against sexual harassment in the workplace was transgressed in this case. The Court of Appeals granted certiorari to consider whether an action for abusive discharge lies when an employer fires an at-will employee in retaliation for the employee suing the employer.

2. Legal Background.—Under the common law, an at-will employment contract could be legally terminated by either party at any time for any reason. The Maryland legislature created the first exception to this rule when it passed the Maryland Fair Employment Practices Act. This Act declares that it is unlawful for an employer to terminate an employee "because of [the employee's] race, color, religion, sex, age, national origin, marital status, or physical or mental handicap [that does not] reasonably preclude the performance of the employment."

In Adler v. American Standard Corp., the Court of Appeals further expanded the deviation from the common-law rule by permitting an action for abusive discharge when the termination of an employee contravenes a clear mandate of public policy. Once the tort was recognized in Maryland, the difficult question became how

---

109. Id. at 431-32, 568 A.2d at 840.
110. Id. at 432, 568 A.2d at 840.
111. See id. at 434, 568 A.2d at 842 (Bishop, J., dissenting).
112. Watson, 322 Md. at 475, 588 A.2d at 764.
116. 291 Md. 31, 432 A.2d 464.
117. See id. at 47, 432 A.2d at 473. Adler's survey of the law in other jurisdictions showed that this judicial exception had already been approved by other states. See id. at 36-42, 432 A.2d at 467-70.
to determine "where the line is to be drawn that separates a wrongful from a legally permissible discharge." The Adler court declared the focal point to be "whether the public policy allegedly violated is sufficiently clear to provide [a] basis . . . for wrongful discharge." The scope of the abusive discharge tort was refined in Makovi v. Sherwin-Williams Co. The Court of Appeals disallowed an abusive discharge action in Makovi because statutory remedies already existed to redress the wrongs claimed by the plaintiff. The court based its finding on what it considered to be the nature of the tort itself, concluding that the tort of abusive discharge provides a remedy only to an employee whose discharge violates a clear mandate of public policy and for whom no alternative course of redress is available.

3. The Court's Reasoning.—In her claim of abusive discharge, Watson asserted that she was dismissed in retaliation for "exercising her right of redress to the courts." According to the Court of Appeals, however, allegations of discharge in violation of such a general and abstract right are insufficient to support a claim of abusive discharge. The court noted that in Adler, "allegations of discharge in retaliation for refusing to conceal 'commercial bribery' and 'falsification of corporate documents' were too general to state a cause of action." Likewise, Watson's allegation that her "right to redress" was violated could not support her claim. "The par-

118. Id. at 42, 432 A.2d at 470.
119. Id., 432 A.2d at 470-71; accord Ewing v. Koppers Co., 312 Md. 45, 537 A.2d 1173 (1988). "The tort action as we have recognized it is not intended to reach every wrongful discharge. It is applicable only where the discharge contravenes some clear mandate of public policy." Id. at 49, 537 A.2d at 1175.
120. 316 Md. 603, 561 A.2d 179 (1989).
121. See id. at 626, 561 A.2d at 190. The plaintiff in Makovi asserted sexual discrimination by her employer as a basis for her claim. Id. at 605-06, 561 A.2d at 180. The Court of Appeals found that the existence of a right and remedy under Title VII and the Fair Employment Practices Act barred a common-law action for abusive discharge. Id. at 626, 561 A.2d at 190.
122. See id. at 626, 561 A.2d at 190.
123. Watson, 322 Md. at 474, 588 A.2d at 763. Specifically, Watson alleged that the discharge was in violation of her rights under the First Amendment to the United States Constitution, the Civil Rights Act, and the Maryland Declaration of Rights. Id. at 472-73, 588 A.2d at 762; see U.S. Const. amend. I; 42 U.S.C. § 1981 (1988); Md. Const. Decl. of RTS. arts. 19, 40.
124. See Watson, 322 Md. at 477, 588 A.2d at 764-65.
126. Id., 588 A.2d at 765.
particular claim asserted which motivates the retaliatory discharge must be considered.” 127 Further, the Court of Special Appeals had noted that Peoples did not and could not impede Watson from proceeding with her claims against it in the courts.128 In fact, Watson pursued her claims to the fullest extent by presenting her case at trial. Therefore, Watson’s right of redress was in no way impeded by the discharge.129

The Court of Appeals did consider the nature of Watson’s suit, which alleged facts amounting to sexual discrimination, as a possible foundation for an abusive discharge action.130 The opinion did no more than mention this possibility, however, before discarding it under the rule set forth in Makovi.131 if a statutory remedy exists, the common-law action cannot be maintained.132 Because Title VII provides a remedy for sexual discrimination claims, an abusive discharge claim premised on sexual discrimination is unnecessary and is inconsistent with the purpose behind recognizing abusive discharge claims.133

127. Id.
128. Peoples Security Life Ins. Co. v. Watson, 81 Md. App. at 429, 568 A.2d at 839; see also Kavanagh v. KLM Royal Dutch Airlines, 566 F. Supp. 242, 244 (N.D. Ill. 1983) (“[A] party does not violate another party’s right to counsel or to free access to the courts by taking measures, even though retaliatory and spiteful in nature, which lawfully are available to him simply because resort to these measures somehow penalizes the other party for suing.”).
130. See Watson, 322 Md. at 469, 588 A.2d at 766; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986) (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminates’ on the basis of sex.”).
131. See Watson, 322 Md. at 480, 588 A.2d at 766.
132. Makovi v. Sherwin-Williams Co., 316 Md. 603, 626, 561 A.2d 179, 190 (1989). Makovi sets forth three justifications for adopting this policy. First, if a statutory remedy exists, “the generally accepted reason for recognizing the tort, that of vindicating an otherwise civilly unremedied public policy violation, does not apply.” Id.; accord Wehr v. Burroughs Corp., 438 F. Supp. 1052, 1055 (E.D. Pa. 1977); Melley v. Gillette Corp., 475 N.E.2d 1227, 1229 (Mass. App. 1985). Second, if a court allows a plaintiff to recover full tort damages “in the name of vindicating the statutory public policy goals,” it will have upset the “balance between right and remedy struck by the Legislature in establishing the very policy relied upon.” Makovi, 316 Md. at 626, 561 A.2d at 190. Finally, the Makovi court pointed out that allowing a plaintiff to recover tort damages based on the public policy set forth in employment discrimination statutes would encourage all employees with possible claims to circumvent those very statutes in search of a larger award. Id. (quoting 1 Lex K. Larsen, Unjust Dismissal § 6.10[6][c] (1989)).
133. See Watson, 322 Md. at 480, 588 A.2d at 766. Title VII’s remedial scheme provides for reinstatement of an employee with or without backpay or any other equitable relief the court deems appropriate. See 42 U.S.C. § 2000e-5(g) (1988). In Vinson, the Supreme Court declared that the “kinds of workplace conduct that may be actionable under Title VII . . . include ‘[u]nwelcome sexual advances, requests for sexual favors,
Finally, the court held that an employer violates a clear mandate of public policy by discharging an employee for filing an action against a coworker for workplace sexual harassment that rises to the level of assault and battery.\textsuperscript{134} The court noted that the torts of assault and battery are premised on the individual's right to bodily integrity and the right to be free from the apprehension of violence.\textsuperscript{135} Further, the assault and battery in the \textit{Watson} case "were a part of a pattern of sexual harassment by Strausser both at the workplace and elsewhere."\textsuperscript{136} Because both Title VII and the Maryland Fair Employment Practices Act\textsuperscript{137} prohibit discharges in retaliation for sexual harassment, there is a clear mandate of public policy that such discharges are improper and actionable.\textsuperscript{138} Thus, although an abusive discharge claim cannot survive if based solely on an allegation that the discharge was in retaliation for filing a claim against the employer, the claim is proper if based on the employer's retaliation for the employee filing a sexual harassment claim against a coworker.\textsuperscript{139} Therefore, the trial court's granting of Peoples' motion for judgment on all counts was improper.\textsuperscript{140}

4. \textit{Analysis: Defining a Clear Mandate of Public Policy.}—The Court of Appeals has adopted the English doctrine as a general guideline for determining the public policy in Maryland:

"Public policy is that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against the public good, which may be termed, as it sometimes has been, the policy of the

\begin{itemize}
\item and other verbal or physical conduct of a sexual nature." 477 U.S. at 65 (quoting 29 C.F.R. 1604.11(a) (1985)). Watson's claims clearly fall under this description and, therefore, Title VII may provide a remedy for Watson.
\item \textsuperscript{134} See \textit{Watson}, 322 Md. at 480-81, 588 A.2d at 766.
\item \textsuperscript{135} See \textit{id.} at 481-82, 588 A.2d at 766-67.
\item \textsuperscript{136} \textit{Id.} at 482, 588 A.2d at 767.
\item \textsuperscript{138} \textit{Watson}, 322 Md. at 483, 588 A.2d at 767. Watson's failure to argue at trial that sexual discrimination violates a clear mandate of public policy did not constitute a waiver of the issue on appeal. \textit{Id.}, 588 A.2d at 768.
\item Further, the court noted that Title VII and the Maryland Fair Employment Practices Act did not preempt the abusive discharge claim premised on the retaliation for filing against a coworker. See \textit{id.} at 485, 588 A.2d at 769. Absent these statutes, a clear public policy against actions like those taken by Strausser would still exist. "The same clear public policy which encourages Watson's legal recourse against one who degradingly assaulted her makes tortious a discharge that retaliates against that recourse." \textit{Id.} at 486, 588 A.2d at 769.
\item \textsuperscript{139} See \textit{id.} at 486, 588 A.2d at 769.
\item \textsuperscript{140} \textit{Id.}
law, or public policy in relation to the administration of the law." ¹⁴₁

This definition suggests that the public policy of the state is formed by guarding against conduct that is contrary to the welfare of the people.¹⁴² In keeping with this broad definition, the Court of Appeals has stated that recognition of the tort of wrongful discharge, a public policy restriction on employers' rights, will "foster the State's interest in deterring particularly reprehensible conduct."¹⁴³

Applying this view of public policy to Watson, it follows that elimination of workplace sexual harassment is a clear policy goal in Maryland.¹⁴⁴ In his dissent in Watson, Judge Eldridge correctly observed that Article 46 of the Maryland Declaration of Rights mandates equality of the sexes in the state.¹⁴⁵ The Watson dissent further noted the Supreme Court's espousal of a policy against sexual discrimination,¹⁴⁶ suggesting that Maryland would certainly concur with this policy.¹⁴⁷

In spite of the personal affront of sexual harassment¹⁴⁸ and the


¹⁴². See generally Townsend v. L.W.M. Management, Inc., 64 Md. App. 55, 61, 494 A.2d 239, 242 (asserting that the primary focus in determining whether a policy may serve as a source of the clear mandate required for success under an abusive discharge theory must be the interests of society), cert. denied, 304 Md. 300, 498 A.2d 1186 (1985).


¹⁴⁵. See 322 Md. at 490, 588 A.2d at 771 (Eldridge, J., concurring in part and dissenting in part). Judge Eldridge concurred with the majority as to the lack of a constitutional issue in the case, and the existence of the abusive discharge tort in the context of Watson's claims against Straussser. He disagreed with the court as to the existence of the abusive discharge claim in the context of Watson's claims against Peoples. See id. at 487, 588 A.2d at 770. The pertinent text of Article 46 provides that "[e]quality of rights under the law shall not be abridged or denied because of sex." MD. CONST. DECL. OF Rts. art. 46.


¹⁴⁷. See 322 Md. at 490, 588 A.2d at 771 (Eldridge, J., concurring in part and dissenting in part).

¹⁴⁸. The United States Court of Appeals for the Fourth Circuit stated that "sexual
state's public policy proscribing it, the *Watson* court deferred to statutory remedies for sexual discrimination.\(^{149}\) The United States Congress has implicitly indicated, however, that because of the high priority of shaping anti-discrimination policy, discrimination claims may be heard in several forums.\(^{150}\) The Fourth Circuit stated that in drafting Title VII, Congress understood that "no single approach to the problem of employment discrimination could be a panacea"; rather, a "battery of remedies" is necessary to counter ingrained discrimination.\(^{151}\) Certainly, this battery of remedies should include common-law relief.\(^{152}\) Further, the court failed to realize that, although relief under Title VII may be adequate for an employee who was merely terminated on the basis of the employee's status, it does not adequately compensate an employee who has endured any type of status-related degradation from the employer.\(^{153}\)

The *Watson* court, however, following *Makovi*, reasoned that allowing a common-law remedy to prevail when a statutory remedy is available would upset the legislative balance between right and remedy.\(^{154}\) The court ignored the fact that the balance struck in the

---

\(^{149}\) See supra note 133 and accompanying text.

\(^{150}\) Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). The Court further explained that the relationship between the several forums that hear discrimination claims is "complimentary" because each works toward promoting the policy goals of the other. *Id.* at 50-51.

\(^{151}\) Keller v. Prince George's County, 827 F.2d 952, 957 (4th Cir. 1987). Although these statements and the Fourth Circuit quote refer to Title VII as it relates to other sections of the Civil Rights Act, the argument they make is similarly applicable to workplace sexual discrimination.

\(^{152}\) See generally Rojo, 801 P.2d at 377 (recognizing the various theories of relief that the state provides for employment discrimination); Holien, 689 P.2d at 1303 (declaring that "[t]here is no inherent inconsistency" in allowing both statutory and common-law remedies). The position is stated more broadly in Johnson v. Railway Express Agency, 421 U.S. 454 (1975): "Despite Title VII's range and its design as a comprehensive solution . . . the aggrieved individual clearly is not deprived of other remedies he possesses and is not limited to Title VII in his search for relief." *Id.* at 459.

\(^{153}\) The term "status-related degradation" is used to refer to any type of personal affront to the employee committed by the employer or coworkers that is based upon the employee's status (i.e., sex, race, religion). The indignity inflicted on an employee in such a case is worthy of tort damages and is not redressed by reinstating the employee. See infra note 157.

\(^{154}\) Watson, 322 Md. at 486, 588 A.2d at 769.
Maryland Fair Employment Practices Act preceded the development of the tort of abusive discharge in Maryland by sixteen years.\(^{155}\) Furthermore, the existence of legislative remedies does not preclude courts from supplementing those remedies with newly created common-law relief.\(^{156}\)

An examination of the public policy of the state and the power of the court to effectuate that policy therefore leads to the conclusion that an employee should have available a tort action against an employer who fires the employee for suing the employer for workplace harassment, particularly when the employer knew of the harassment and did little to stop it.\(^{157}\) Although the Watson court did not adopt this conclusion, it did find a possible policy basis for the tort that does not conflict with any statutory scheme: the employee’s suit against her coworker.\(^{158}\) Thus, if on remand the jury finds that Watson’s discharge was motivated by the institution of this suit, as opposed to the suit against her employer, Peoples will be liable for abusive discharge.\(^{159}\)

4. Conclusion.—In Watson, the Court of Appeals had a chance to expand the tort of abusive discharge by allowing workplace sexual harassment in violation of statutory and constitutional principles to serve as a policy goal for maintenance of the tort action against the employer. Instead, the court relied on the Makovi precedent to limit the application of the tort by noting that statutes provide remedies for people in Watson’s circumstances. By restricting rather than expanding the tort, the court makes vindication of the policy

\(^{155}\) See Recent Case, Court Refuses to Recognize Discrimination-Based Abusive Discharge Claim, 103 HARY. L. REV. 1732, 1735 (1990) (noting that the Fair Employment Practices Act was adopted in 1965, but the tort of abusive discharge was not recognized in Maryland until 1981); see also Holien, 689 P.2d at 1305 (asserting that a legislative body must be aware of the existence of a remedy before it can intend to eliminate it).

\(^{156}\) Changing and developing the common law is the main function of courts. See Recent Case, supra note 155, at 1736. “[C]ourts act with maximum legitimacy within the realm of the common law and have traditionally played the primary role in formulating tort law in general and measures of damages in particular.” Id. The Maryland court has the power to allow an abusive discharge action despite the existence of Title VII and its state counterpart, the Fair Employment Practices Act; moreover, exercise of this power would not be inconsistent with the goals of the legislature to outlaw workplace sexual harassment. See Watson, 322 Md. at 771, 588 A.2d at 490 (Eldridge, J., concurring in part and dissenting in part).

\(^{157}\) Common-law tort suits are filed for the precise reason that the remedial scheme of the civil rights statutes does not effectively carry out its objectives. Reinstatement, with or without back pay, arguably cannot compensate Patricia Watson for having endured unwelcome sexual advances from a company officer for two years.

\(^{158}\) See Watson, 322 Md. at 480-81, 588 A.2d at 766.

\(^{159}\) Id.
against sexual harassment less likely. In view of the clarity of this state policy, it may be time to reevaluate the decision in *Makovi*.

LORA HOLMBERG HESS
LISA J. KAHN
VIII. Evidence

A. Admissibility of Refusal to Submit to a Breathalyzer Test

In Krauss v. State, the Court of Appeals granted certiorari to consider whether a court may admit evidence of a suspected drunk driver's refusal to take a breathalyzer test. A Maryland statute purports to allow the admission of such evidence; nevertheless, after review of the statute, the Krauss court held that the trial judge had committed error by admitting evidence of Krauss's refusal to submit to the test. The court determined that the legislature intended the refusal to be admissible only when it is material and relevant to a matter other than the defendant's guilt or innocence. Thus, the court's holding preserves the admissibility of a refusal, but subjects the admission to a "material and relevant" restriction.

1. The Case.—On September 3, 1988, Frank Leroy Krauss was arrested for driving while intoxicated and failing to drive to the right of the center line. The arrest was based on information given to the police by David Dean, who had witnessed Krauss driving on the wrong side of the road and had had a brief altercation with Krauss after Krauss had forced Dean off the road. Dean testified that Krauss smelled of alcohol and appeared to be drunk. Krauss fled the scene of the altercation but was quickly located by police and brought back to his car. The smell of alcohol permeated the car, which contained empty beer cans and a cooler of beer. Police performed several field sobriety tests and then informed Krauss of his right to take a chemical breath test. Krauss refused to submit to the breathalyzer test.

Before trial on the merits began, "defense counsel moved in

2. See id. at 382, 587 A.2d at 1105.
4. See 322 Md. at 390, 587 A.2d at 1109.
5. See id. at 386, 587 A.2d at 1106.
6. See id. at 386-87, 587 A.2d at 1107.
7. Id. at 382 n.3, 587 A.2d at 1105 n.3.
9. Id. at 3, 569 A.2d at 1285.
10. Id.
limine to prevent the State from introducing any evidence concerning [Krauss's] refusal to submit to the breath test."11 The defense motion was based on relevance grounds.12 Defense counsel first made it clear that Krauss was not contesting the fact that the arresting officer followed the statutory procedures in offering the test.13 Krauss referred to section 10-309 of the Courts and Judicial Proceedings Article,14 which permits admission of a refusal to take the breathalyzer test, but declares that "no inference or presumption concerning either guilt or innocence arises because of the refusal to submit."15 Krauss argued that the legislature placed the "inference or presumption" clause in the statute to limit the State's ability to introduce a refusal to cases in which the state must rebut allegations that the police officer violated part of the statute.16 He argued that because he was not challenging the police procedure, the refusal was not relevant.17 Disagreeing with Krauss's interpretation of the statute, the trial judge allowed the refusal to be entered into evidence.18

A jury found Krauss guilty of driving a motor vehicle while under the influence of alcohol.19 The Court of Special Appeals af-

12. Id.
13. Id. The defense stipulated and agreed that the trooper who arrested Krauss followed all the procedures outlined in the statute; specifically, Krauss was offered an opportunity to take a breath test, and he refused to take the test. Id.
14. Section 10-309(a) of the Courts and Judicial Proceedings Article provides, in relevant part:
   Except as provided in § 16-205.1 of the Transportation Article, a person may not be compelled to submit to a chemical analysis provided for in this subtitle. Evidence of chemical analysis is not admissible in a prosecution for a violation of § 21-902 of the Transportation Article [making it illegal to drive while intoxicated or under the influence of alcohol or drugs] if obtained contrary to its provisions. No inference or presumption concerning either guilt or innocence arises because of refusal to submit. The fact of refusal to submit is admissible in evidence at the trial.
   Md. Cts. & Jud. Proc. Code Ann. § 10-309(a) (1989). This is the statute as it appeared prior to the 1989 and 1990 stylistic changes, see supra note 3, and how it appeared before the Krauss court.
16. Krauss, 322 Md. at 383, 587 A.2d at 1105. Under § 16-205.1 of the Transportation Article, a police officer is required to "request that [an] individual permit a [breathalyzer] test to be taken [and] advise the individual of the . . . penalties . . . imposed for refusal . . . ." Md. Transp. Code Ann. § 16-205.1(b)(2)(ii)-(iii) (1987). If a defendant were to argue that the officer failed to perform these duties, then the State would be allowed to offer evidence of the defendant's refusal to submit to a breathalyzer.
18. Id. at 384, 587 A.2d at 1105.
19. Id. at 382, 587 A.2d at 1105. The jury found Krauss not guilty of driving while
firmed the conviction. The Court of Appeals granted certiorari to consider whether the trial judge erred in admitting Krauss's refusal to take a breathalyzer test.

In concluding that the trial judge committed error, the Court of Appeals examined the relevance of Krauss's refusal in light of the "no inference or presumption" clause of section 10-309(a). The court's ruling has the effect of restricting the permissible use of a defendant's refusal to take a chemical breath test, therefore narrowing the scope of the section.

2. Legal Background.—

a. General.—Because the Federal Rules of Evidence are exhaustive and codified, they provide a good starting point for a general analysis of the law of evidence. It is a fundamental evidentiary principle that only relevant evidence is admissible. Two factors determine whether evidence is relevant: materiality and probative value. Evidence is material if it logically relates to the issues of a case. For evidence to be probative, it must have a natural tendency to establish the proposition for which it is offered; it must affect the probability that a fact is as a party claims it to be. To be deemed probative, however, the evidence need not conclusively prove the proposition, or even make the proposition appear more likely true than not. Under the Federal Rules, evidence that is not material and probative is irrelevant and thus inadmissible.

intoxicated and not guilty of failing to drive to the right of the center of the road. Id. at 382 n.3, 587 A.2d at 1105 n.3.

22. See Krauss, 322 Md. at 382, 587 A.2d at 1105.
23. See id. at 387, 587 A.2d at 1107.
24. See McCormick on Evidence § 184, at 540-41 (Edward W. Cleary ed., 3d ed. 1984). The Federal Rules of Evidence state: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." Fed. R. Evid. 402; see also Dorsey v. State, 276 Md. 638, 643, 350 A.2d 665, 669 (1976) (stating that to be admissible, evidence must be relevant to the issues).
25. McCormick on Evidence, supra note 24, § 185, at 541; see Dorsey, 276 Md. at 643, 350 A.2d at 669.
26. See McCormick on Evidence, supra note 24, § 185, at 541.
27. Id.; see Dorsey, 276 Md. at 643, 350 A.2d at 668.
28. See McCormick on Evidence, supra note 24, § 185, at 542.
29. Id.
30. See Fed. R. Evid. 402; McCormick on Evidence, supra note 24, § 185, at 541.
b. Maryland Law.—Maryland's rules of evidence are not codified; rather, they are found in common-law decisions, legislative enactments, and court rules.\textsuperscript{31} In \textit{Dorsey v. State},\textsuperscript{32} the Court of Appeals clarified the test for the admissibility of evidence.\textsuperscript{33} The \textit{Dorsey} court addressed materiality and probative value in essentially the same manner as the Federal Rules.\textsuperscript{34}

The court reaffirmed the \textit{Dorsey} decision in \textit{State v. Joynes}.\textsuperscript{35} Joynes was charged with battery,\textsuperscript{36} and sought to introduce evidence of the battery conviction of her accuser, Handy, in connection with the same incident.\textsuperscript{37} The trial court held that Handy's earlier battery conviction was irrelevant to Joynes's claim of self-defense against an aggressor.\textsuperscript{38} Relying on the \textit{Dorsey} test, the Court of Appeals upheld the trial court's decision,\textsuperscript{39} finding that the evidence was not probative.\textsuperscript{40} The court concluded that the witness's battery conviction would not assist the jury in determining who the aggressor was in each phase of the altercation.\textsuperscript{41} The \textit{Dorsey} rule stands as the relevancy test for Maryland trial courts to follow.

3. \textit{The Court's Reasoning}.—In Krauss, the Court of Appeals applied the test outlined in \textit{Dorsey} and \textit{Joynes} to restrict the admissibility of a refusal to take a breathalyzer test.\textsuperscript{42} The court first considered section 10-309(a) in light of the principles of statutory interpretation applied in Maryland.\textsuperscript{43}

The primary objective of statutory interpretation is to ascertain the legislative purpose or goal behind a statute.\textsuperscript{44} A court should

\begin{itemize}
\item \textsuperscript{31} See \textsc{Lynn McLain}, \textit{MARYLAND EVIDENCE} § 5, at vii (1st ed. 1987).
\item \textsuperscript{32} 276 Md. 638, 350 A.2d 665 (1976).
\item \textsuperscript{34} See supra text accompanying notes 24-30. According to \textit{Dorsey}, the materiality component to relevant evidence is satisfied by a "'connection of the fact proved with the offense charged.'" 276 Md. at 643, 350 A.2d at 668-69 (quoting \textit{MacEwen v. State}, 194 Md. 492, 501, 71 A.2d 464, 468 (1950); \textit{Pearson v. State}, 182 Md. 1, 13, 31 A.2d 624, 629 (1943)). Evidence has probative value if it tends "either to establish or disprove" the material issues. \textsc{id.} at 643, 350 A.2d at 669.
\item \textsuperscript{35} 314 Md. 113, 119, 549 A.2d 380, 383 (1988).
\item \textsuperscript{36} \textsc{id.} at 115, 549 A.2d at 381.
\item \textsuperscript{37} \textsc{id.} at 117, 549 A.2d at 382.
\item \textsuperscript{38} \textsc{id.} at 118, 549 A.2d at 382.
\item \textsuperscript{39} \textsc{id.} at 120, 549 A.2d at 383.
\item \textsuperscript{40} \textsc{id.} at 119, 549 A.2d at 383.
\item \textsuperscript{41} \textsc{id.} at 120, 549 A.2d at 383.
\item \textsuperscript{42} See 322 Md. at 387, 587 A.2d at 1107.
\item \textsuperscript{43} See \textsc{id.} at 386, 587 A.2d at 1107.
\item \textsuperscript{44} \textit{Kaczorowski v. City of Baltimore}, 309 Md. 505, 513, 525 A.2d 628, 632 (1987).
\end{itemize}
first look at the words of the statute.\textsuperscript{45} However, the court is not limited to a strict, literalist interpretation of the words of the statute as they are printed.\textsuperscript{46} The court may consider the consequences resulting from different interpretations and meanings, and adopt the construction that avoids an illogical or unreasonable result.\textsuperscript{47}

The \textit{Krauss} court determined that the legislature had recognized that the mere fact of refusal to take a breathalyzer test is collateral to the issue of whether a driver was intoxicated or under the influence of alcohol.\textsuperscript{48} A refusal is not material or relevant to the issue of guilt or innocence.\textsuperscript{49} Because the fact of refusal may be material and relevant to collateral matters,\textsuperscript{50} however, the legislature permitted the admission of a refusal subject to the restriction that no inference or presumption of guilt or innocence was to be drawn from the refusal.\textsuperscript{51}

The \textit{Krauss} court applied this interpretation of section 10-309(a) to the facts of the case.\textsuperscript{52} The court focused on the point that Krauss did not contest the facts presented by the State; in particular, he did not challenge the fact that he was provided an opportunity to take a breathalyzer test but refused to do so.\textsuperscript{53} Because of Krauss's acceptance of the facts, there was no collateral matter in question, and there was no valid reason for the State to introduce evidence of the refusal. The only purpose behind introducing this evidence was to push the jury toward a guilty verdict, and the legislature forbade the introduction of such evidence for this purpose.\textsuperscript{54} Because the refusal was not probative of the accused's guilt,\textsuperscript{55} the court held that evidence of the refusal was irrelevant and inadmissible.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{45} Id.
\item \textsuperscript{46} Id. at 514-15, 525 A.2d at 632.
\item \textsuperscript{47} Id. at 513, 525 A.2d at 632.
\item \textsuperscript{48} See 322 Md. at 386, 587 A.2d at 1107. The court relied on reports from the state Senate Judicial Proceedings Committee in reaching its decision. \textit{See id.}, 587 A.2d at 1106-07.
\item \textsuperscript{49} Id., 587 A.2d at 1106-07.
\item \textsuperscript{50} Id. at 386-87, 587 A.2d at 1107. The court referred to collateral matters as issues other than guilt or innocence, such as a defendant's claim that the enforcement authorities did not properly afford an opportunity to take the test. \textit{See id.}
\item \textsuperscript{51} Id. at 387, 587 A.2d at 1107.
\item \textsuperscript{52} \textit{See id.} at 388, 587 A.2d at 1107.
\item \textsuperscript{53} Id. As stated earlier, the defense stipulated that the investigating officers properly performed the procedures outlined in the statute. Id. at 383, 587 A.2d at 1105.
\item \textsuperscript{54} \textit{See id.} at 388, 587 A.2d at 1107-08.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} \textit{See id.}
\end{itemize}
4. Analysis.—Under Maryland law, a driver has the statutory right to refuse to take a breathalyzer test. In addition, the refusal, although admissible as evidence, may not be used as a "presumption of guilt." In Krauss, the Court of Appeals clarified how the right and the evidentiary rule affect each other. To admit an accused's refusal into evidence invites pure speculation by the jury as to what the refusal means. A refusal neither tends to establish nor tends to disprove the State's intoxication claim. A refusal, unlike blood-shot eyes, slurred speech, and a loss of balance, does not suggest that a person has been drinking. Therefore, the court determined that evidence of a refusal must be excluded in order to prevent jurors from associating the accused's refusal to take the test with the question of guilt or innocence. Otherwise, the right provided in the statute allowing citizens to refuse to take a breathalyzer test would be rendered meaningless.

While not a watershed opinion on statutory interpretation of the definition of relevance, Krauss has a major impact on Maryland's drunk driving enforcement. The Krauss decision joins Maryland with a minority of states that have held, for different reasons, that evidence of a driver's refusal to submit to a breathalyzer test is not admissible at trial. Because of the Krauss decision, it will often be in the arrestee's best interest to refuse to take a breathalyzer test. The penalty for refusal is civil in nature—a temporary suspension of the person's license; however, if the arrestee permits testing, he or
she may be offering the State additional evidence of criminal activity, as well as risking revocation or suspension of his or her driver's license. Therefore, it may benefit the arrestee to refuse the breathalyzer test unless the results of the testing are known to be favorable.

5. Conclusion.—The Court of Appeals' analysis of Maryland's evidence law is at the center of the Krauss opinion. Although the decision reaffirms the decisions in Dorsey and Joynes and has little effect on Maryland's evidence law, the decision, as applied to the facts of the case, will have a far-reaching effect on future drunk driving cases. By applying the "material and relevant" restriction to section 10-309(a), the Court of Appeals limited the reach of the statute. In the process, the court stripped Maryland law enforcement officials of one "weapon" in their fight against drunk driving.

FRANK M. CARPENTER, JR.

Driving Laws: An Overview, 11 U. BALT. L. REV. 357, 359 (1982). These statutes were based on the rationale that a condition precedent for the privilege of driving was a driver's consent to permit chemical testing whenever properly requested. If the driver refused the test, he was deemed to have withdrawn his consent, which resulted in a failure of the condition precedent to a license; hence, the state revoked the conditional privilege of driving. This implied consent rule tends to mitigate the advantage gained from refusal, especially by drivers who would test below the level that establishes the presumption of intoxication.

64. Nicholson, supra note 62, at 362. A motorist's refusal to permit blood alcohol content (BAC) testing does not prohibit the police from proceeding with criminal charges. In fact, it is a standard procedure of the Maryland State Police to seek a conviction for drunk driving regardless of whether the motorist consents to BAC testing. Id. at 362 n.39. In the absence of chemical evidence, the State may meet its burden of proof by having the arresting officer testify as to the defendant's demeanor at the time of the arrest. Id.
65. See supra notes 32-34 and accompanying text.
66. See supra notes 35-41 and accompanying text.
67. See supra notes 48-51 and accompanying text.
IX. FAMILY LAW

A. Spendthrift Trust Pensions May Be Partitioned to Ex-Spouses in Divorce Proceedings

Acknowledging that pension plan funds are marital property, the Court of Appeals held in *Prince George's County Police Pension Plan v. Burke*¹ that a trial judge has the authority to transfer an interest in one spouse’s government pension plan to the other spouse as part of a divorce settlement.² The court further determined that pension plan trustees may be ordered to make direct payment to the other spouse when the pension becomes payable.³ This ruling extends a line of Maryland divorce decisions and determines that all nonfederally regulated pensions are marital property subject to equitable distribution. In addition, the case removes any distinctions between private pension plans and local government plans.

1. The Case.—On April 4, 1986, the Prince George’s County Circuit Court granted Edward C. Burke, Jr. a divorce from Maureen M. Burke.⁴ Mr. Burke, a county police officer, had a vested pension⁵ in the Prince George’s County Police Pension Plan (“Pension Plan”).⁶ On September 19, 1989, the court awarded Mrs. Burke a share of her ex-husband’s pension equal to half of the benefits accrued during their marriage.⁷ The trial court ordered the Trustees of the Pension Plan to pay Mrs. Burke’s share directly to her when the benefits became payable.⁸ The Trustees were permitted to intervene in the case on October 18, 1989, and thereafter appealed the trial court’s ruling.⁹

¹. 321 Md. 699, 584 A.2d 702 (1991). The *Burke* proceeding was consolidated with a divorce case involving the transfer of disability retirement benefits paid by the Prince George’s County Police Pension Plan. See infra note 10.
². See 321 Md. at 708, 584 A.2d at 707.
³. See id.
⁴. Id. at 701, 584 A.2d at 703.
⁵. A pension is vested “when the minimum terms of employment necessary to receive retirement pay has [sic] been completed.” Deering v. Deering, 292 Md. 115, 118 n.3, 437 A.2d 883, 885 n.3 (1981). Once it is vested, the pension will not be extinguished if the pension recipient’s employment is terminated. Id.
⁶. Burke, 321 Md. at 701, 584 A.2d at 703.
⁷. Id., 584 A.2d at 704.
⁸. Id.
⁹. Id. The Trustees argued that although a court has the authority to order the transfer of an interest in a private pension plan, that authority does not extend to government pension plans. Id., 584 A.2d at 703.
A similar case involving the distribution of disability retirement benefits from the Pension Plan following a divorce arose at the same time. The two cases were consolidated for purposes of appeal.

The Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals to address the question of whether the intended recipient's interest in the Pension Plan was protected under section 11-504(h) of the Courts and Judicial Proceedings Article or under Maryland common law.

2. Legal Background.—Prior to 1978, Maryland's divorce laws operated under the antiquated title system. Under that system, ownership of property upon divorce was determined not by any concept of joint contribution to the marriage, but by which spouse had purchased the item and acquired title to it. Any property brought into the marriage by a spouse was also exempt from distribution to the other spouse upon divorce. Because at that time the husband was typically the wage-earning spouse, he would make many significant investments in his name only. If there was no recorded evidence of joint ownership by the wife, she would be denied an award of the property in divorce proceedings.

10. Id. at 702, 584 A.2d at 704. The second case involved the divorce of Richard and Marie Harman. At the time of the Harmans' divorce, Mr. Harman was collecting disability retirement benefits from the Pension Plan. Id. The trial judge presiding over the Harmans' divorce had ordered the Trustees to pay directly to Mrs. Harman 50% of Mr. Harman's pension. Id.

11. Id.

12. Section 11-504(h) provides, in pertinent part:

(1) . . . [A]ny money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a [qualified] retirement plan . . . shall be exempt from any and all claims of the creditors of the beneficiary or participant . . .

(2) Paragraph (1) of this subsection does not apply to:

(i) An alternate payee under a qualified domestic relations order, as defined in § 414(p) of the United States Internal Revenue Code of 1986, as amended.

13. See Burke, 321 Md. at 701-02, 584 A.2d at 704.


15. See Bender v. Bender, 282 Md. 525, 533, 386 A.2d 772, 778 (1978) ("[P]ersonal property paid for with one spouse's funds belongs to that spouse."); Lopez v. Lopez, 206 Md. 509, 518, 112 A.2d 466, 470 (1955) ("[T]he court obviously cannot make an adjustment of property rights where the wife never contributed anything toward the purchase of the husband's property.").


Maryland remedied this inequity in 1978 by enacting the Property Disposition in Divorce and Annulment Act. The new law provided for "marital property" to be distributed fairly and equitably between the spouses. Among other factors, courts are required after the Act to consider the spouses' monetary and nonmonetary contributions to the marriage. The rationale behind equitable distribution, as expressed by the General Assembly, is that by entering into a marriage, both spouses promise to contribute fully toward the marriage, in both economic and noneconomic terms. Because both spouses have contributed some combination of labor and assets for the benefit of the marriage, both are entitled to a fair return on their contributions. In 1986, the General Assembly amended the equitable distribution statute by passing the Marital Property Act, which allows the court to allocate ownership interests in a pension plan between the spouses in order to achieve equitable distribution.

In 1981, the Court of Appeals held in a landmark case that pension benefits are marital assets. In Deering v. Deering, the Court of

---


19. Section 8-201(e) of the Family Law Article, which is identical to the correlating provision of the old statute, states that:

(1) "Marital Property" means the property, however titled, acquired by 1 or both parties during the marriage.

(2) "Marital Property" does not include property:

(i) acquired before the marriage;

(ii) acquired by inheritance or gift from a third party;

(iii) excluded by valid agreement; or

(iv) directly traceable to any of these sources.

MD. FAM. LAW CODE ANN. § 8-201(e).

20. Maryland is thus considered an equitable distribution state, requiring that the property be divided between the spouses in a fair manner. Community property states, the other type of jurisdiction (aside from those still using the old title system), require that the marital assets be split evenly between the spouses. See Grace G. Blumberg, Marital Property Treatment of Pensions, Disability Pay, Workers' Compensation, and Other Wage Substitutes: An Insurance, or Replacement, Analysis, 33 UCLA L. REV. 1250, 1251-54 (1986). For a list of community property states and supporting cases, see id. at 1251 n.4.

21. See Bender v. Bender, 282 Md. 525, 535 n.7, 386 A.2d 772, 778 n.7 (1978); see also MD. FAM. LAW CODE ANN. §§ 8-201 to -213.


25. See Deering v. Deering, 292 Md. 115, 124, 437 A.2d 883, 888 (1981). Interestingly, the Deering opinion was rendered prior to enactment of the Marital Property Act,
Appeals held that pension benefits are "an economic resource acquired with the fruits of the wage earner spouse's labors which would otherwise have been utilized . . . to purchase other deferred income assets." Because a deferred income asset such as an annuity trust would be a marital asset, a pension, which serves the same function, is also a marital asset. Even if pension benefits have not matured, they are not "a mere expectancy of gain," but a contractual right to receive a salary in the future, or a property right that can be equitably divided and distributed by the trial court in a divorce proceeding. In Niroo v. Niroo, the Court of Appeals commented that "it was clear in Deering that both spouses were relying on the pension benefits to provide for their future, so that an equitable distribution of benefits was indeed proper."

In Lookingbill v. Lookingbill, the court expanded the Deering line of reasoning to include disability retirement benefits. The Lookingbill court affirmed the trial court's decision to include disability retirement benefits as marital property for settlement purposes, stating that pension interests are partial consideration for work already completed, whether triggered by age and amount of service or by disability. A disability pension is therefore property that may be considered a marital asset in a divorce proceeding.

On appeal, the Trustees in Burke relied on Hoffman Chevrolet, Inc. v. Washington County National Savings Bank. In Hoffman, a commercial creditor sought to attach a benefits check the debtor received from a pension fund, but the Court of Appeals ruled that "a
spendthrift trust can effectively protect retirement benefits." The court reasoned that the employer's purpose in setting aside the trust was to provide for the employee after retirement, and that this interest outweighed the creditor's interest in obtaining the assets to satisfy a debt. The Trustees asserted that Hoffman was controlling and further stated that the pensions were exempted from execution on judgment by section 11-504(h) of the Courts and Judicial Proceedings Article. Thus, the Burke court had to decide whether the policy of protecting spouses involved in a divorce property settlement or the principles protecting pension participants and beneficiaries from creditors would prevail when the doctrines clash.

3. Analysis.—By its terms, section 11-504(h) of the Courts and Judicial Proceedings Article exempts pension benefits from claims by creditors of the pension beneficiary. Because the common-law definition of "spendthrift trust" requires a nonalienation provision, any pension plan that meets the definition is protected from attachment by creditors. Although the court assumed that the pension plan at issue was a spendthrift trust, it determined that a spouse entitled to share in marital property is not a creditor, thereby eliminating any common-law protection and rendering section 11-504(h) inapplicable. There being no other reason to protect the pension benefits from the nonemployee spouse's marital property claim, the court affirmed the decision of the trial court.

The court's holding turned on the decision of whether to equate a spouse involved in a divorce proceeding to a creditor. Rather than addressing the question of supremacy between section 11-504(h) of the Courts and Judicial Proceedings Article and section 8-205 of the Family Law Article, the court avoided the conflict alto-

Plan, which was qualified as a spendthrift trust due to the provision. See id. at 705-06, 467 A.2d at 766.

38. Id. at 706, 467 A.2d at 766. A spendthrift trust is "[a] trust in which by the terms of the trust or by statute a valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary is imposed." RESTATEMENT (SECOND) OF TRUSTS § 152(1) (1959).

39. Hoffman, 297 Md. at 706, 467 A.2d at 766.

40. For the relevant text of § 11-504(h) of the Courts and Judicial Proceedings Article, see supra note 12.

41. Although it appears that the Lookingbill and Deering courts addressed this issue, both cases were decided before the Marital Property Act. Thus, it was necessary for the Burke court to reaffirm these opinions in light of the new statute.

42. See MD. CTS. & JUD. PROC. CODE ANN. § 11-504(h) (1989).

43. See Hoffman, 297 Md. at 706, 467 A.2d at 766.

44. See Burke, 321 Md. at 707, 584 A.2d at 706.

45. See id., 584 A.2d at 707.
gether by stating that section 11-504(h) did not apply to the facts presented because the ex-spouse was not a creditor, but a part owner of the pension.\footnote{46. See id., 584 A.2d at 706-07.} The language of section 8-205(a) expressly supports this holding: "[T]he court may transfer ownership of an interest in a pension, retirement, profit sharing, or deferred compensation plan from [one] party to either or both parties."\footnote{47. Md. Fam. Law Code Ann. § 8-205(a) (1990).} Given this language, the court may confer not merely judgment rights, but also ownership rights, to a portion of the pension. Because section 11-504(h) concerns only creditors, not owners, the statute does not apply to the ex-spouse. Further, the payments received by the ex-spouse are not part of the employee-spouse’s portion of the pension, but rather are the ex-spouse’s partial ownership interest.\footnote{48. Md. Cts. & Jud. Proc. Code Ann. § 11-504(h) (1989).}

The determination that former spouses are not creditors had already been made by the Court of Appeals in Safe Deposit & Trust Co. v. Robertson.\footnote{49. 192 Md. 653, 65 A.2d 292 (1949).} Although the circumstances of Robertson differed slightly,\footnote{50. The spendthrift trust in Robertson was actually a trust, not a pension; the wife’s claim was for alimony, not marital assets. See id. at 655-57, 65 A.2d at 292-93.} the Court of Appeals stated in that case that the purpose of a spendthrift trust is not to deprive the beneficiary’s dependents: "[The dependents] are not ‘creditors’ of the beneficiary, and the liability of the beneficiary to support them is not a debt."\footnote{51. Id. at 660, 65 A.2d at 295.} The Trustees’ argument that spouses are creditors was doomed to fail because of the earlier Robertson decision. Once the Burke trial court correctly concluded that the ex-spouses were part owners of the Pension Plan rather than creditors, section 8-205(a) gave the trial judge authority to transfer interest in the Pension Plan and to order the Trustees to make direct payment of that share to the ex-spouse.

The Burke court made a sound decision from a public policy standpoint. First, although the Trustees argued that a court cannot validly transfer interests in local government pensions,\footnote{52. Id.} there are no significant reasons for distinguishing between private and government pensions. The functions of private, government, and even military pensions are the same: providing income for the worker

\footnote{53. Burke, 321 Md. at 701, 584 A.2d at 703.}
after retirement. In fact, Lookingbill and Deering, both decided before the passage of the Marital Property Act, approved the granting of a monetary award based in part on the benefits from a local government pension. Therefore, without specific justification, there is no reason why a local government pension should be treated differently than any other civil pension for the purposes of transferring part ownership in the plan.

Second, the holding in Burke realistically acknowledges that spouses are part of a marital unit that acts for the benefit of both spouses, rather than a mere confederacy in which each spouse acts solely with self-motivation. In fact, many pension plans allow provisions for spouses as well as for the beneficiary, acknowledging the unity of the marital relationship. Moreover, as the Burke opinion states, it would be illogical to assume that the wages of one spouse should benefit both spouses, yet the pension (retirement wages) should benefit only the wage-earning spouse.

The Court of Appeals joined other jurisdictions in deciding that spendthrift provisions should not prevent division of pension benefits as marital assets. In Young v. Young, the Pennsylvania Supreme Court observed that income deferred to a pension was income that a family otherwise would have used. The court found that it would be

54. Employees with certain occupations have been exempted from the normal rule, including railroad workers and, formerly, military personnel. For example, § 231d(c)(3).1 of the Railroad Retirement Act of 1974, 45 U.S.C. §§ 231-231v (1983), specifically excludes ex-spouses of railroad workers from receiving ownership in any part of the employee’s pension annuity. There is a strong policy reason for this exception:

The 1972 Report of the Commission on Railroad Retirement said that industry employment, 1.68 million during World War II, had fallen to 582,000 by the first quarter of 1972. The system’s beneficiaries already outnumbered the employees who were contributing. The Commission said that, without the changes that it had suggested and that Congress had embodied in the 1974 Act, the system’s funds would be consumed by 1988.

Hisquierdo v. Hisquierdo, 439 U.S. 572, 585 n.18 (1979). The Supreme Court held in McCarty v. McCarty, 453 U.S. 210 (1981), that military pensions could not be apportioned to an ex-spouse, in part because of the quasi-active status and additional responsibilities of retired military personnel. See id. at 233-36. Congress has since passed the Uniformed Services Former Spouses’ Protection Act, 10 U.S.C. § 1408 (1982 & Supp. 1990), which does allow military pensions to be distributed as marital property between the spouses with certain conditions. See id.


inequitable and illogical to hold that a statutory exemption protecting such funds from attachment would place those assets saved for the benefit of the family completely out of the reach of the family members. If the protective provision was held to exclude the claims of the ex-spouse, the result would be a double denial of those funds: the family would be denied the use of the income at the time of earning, as well as its use upon the maturity of the pension. Other states have also held nonalienation provisions invalid as to divorce settlements.

Nevertheless, the court's reasoning with regard to the Harman companion case is problematic. The court blithely adopted the holding of Lookingbill that a disability pension also constitutes marital property. Although the statute supports this holding by defining marital property as "the property, however titled, acquired by [one] or both parties during the marriage," the court gave no consideration to the practical aspects of the differences between disability and retirement benefits.

Retirement benefits accrue during the time the employee is working and are intended to serve as deferred compensation. Disability benefits, however, are a different matter. A disabling accident can occur at any point in the course of a worker's career, before he or she has acquired sufficient economic support for the future. An equal split of disability pension benefits might prove to be highly unfair to the disabled spouse, who not only has inadequately prepared for this predicament, but also will have little opportunity to supplement future income. In addition, the disability might generate considerable expenses, such as medical treatment. Although the trial court may take these factors into consideration when arriving at an equitable distribution of the marital assets, the real life disparity between retirement and disability pensions might be so great

58. See id. at 269.
59. Id.
61. See Burke, 321 Md. at 705, 584 A.2d at 705 (citing Lookingbill v. Lookingbill, 301 Md. 283, 289, 483 A.2d 1, 4 (1984)).
63. For specific factors to be considered, see id. § 8-205(b)(1)-(b)(10). The Lookingbill court acknowledged these concerns, commenting that an equal distribution may not be required in every case. It is the responsibility of the trial court to select the appropriate allocation after considering all relevant factors. Lookingbill v. Lookingbill, 301 Md. 283, 292, 483 A.2d 1, 5-6 (1984) (citing Deering v. Deering, 292 Md. 115, 130-31, 437 A.2d 883, 891-92 (1981)).
that the court should not have casually declared them equal. The court should have cautioned that although disability pensions may constitute marital property, they must be partitioned to the nondisabled spouse with a much higher level of scrutiny than a traditional service-based retirement pension; otherwise, the disabled spouse might be unfairly disadvantaged. Thus, the Trustees might have fared better, at least in the Harman case, by relying less on Hoffman and more on principles of fairness.

4. Conclusion.—Burke is a consistent link in a developing chain of marital property distribution cases. It wisely allows a spouse to share in an ex-spouse's pension plan, government or private, even though the plan purports to be protected by a nonalienation provision. The Court of Appeals correctly held that section 11-504(h) of the Courts and Judicial Proceedings Article did not apply to the case because the ex-spouse is not a creditor, but a co-owner of the pension. The decision is logically supported and follows the trend in other jurisdictions.

B. Permissible Reimbursement of Birth Mothers' Expenses in Direct Adoptions

In In re Adoption No. 9979, the Court of Appeals held that section 5-327 of the Family Law Article prohibits adoptive parents from reimbursing a birth mother for the cost of maternity clothes. On procedural grounds, however, the court vacated the lower court's order directing the natural parents to return the payment to the adoptive parents. The court's opinion will have profound effects on adoption and surrogacy law.

Section 5-327 prohibits anyone who renders a service in connection with an adoptive placement from receiving any compensation with the exception of reasonable medical and legal expenses. In practice, application of this exception has varied widely. The

66. 323 Md. at 50, 591 A.2d at 473.
67. Id. at 52, 591 A.2d at 474.
68. See Md. Fam. Law Code Ann. § 5-327(a). The section does provide a limited exception for licensed adoption agencies. See id. § 5-327(b).

[s]ome practitioners as well as judges take a narrow view and permit payment
Adoption No. 9979 court construed this exception narrowly, sending a clear message that Maryland law permits only very limited types of payments in connection with independent adoptions. The concurrence, however, argued that the statute should not be construed so narrowly as to prohibit reimbursement to the birth mother for maternity clothes.

1. The Case.—In 1988, a New Jersey woman contacted a Maryland couple to inquire whether they would be interested in adopting her unborn child. The couple had adopted a child from the woman in 1987, and all parties were pleased with the placement. The second baby was born in February 1989, and in March of that year the adoptive parents filed a petition for adoption in the Circuit Court for Montgomery County. In response to an inquiry by the circuit judge, the adoptive parents filed a statement of expenses they had paid, including attorneys' fees, court costs, hospital expenses, and a $488 reimbursement to the natural mother for "maternity clothes and related expenses."

The adoption hearing was held in October 1989; neither the only of those items that are strictly of a hospital, medical or legal nature and only in amounts that are "reasonable and customary." Other practitioners take a more expansive view, reading the law to allow payments to the natural mother for anything from maternity clothes to her room and board to interstate travel to lost wages. To the extent that expenditures of this type are brought to the attention of judges at all, the Committee survey showed that some approve them and others do not.

Id. This subcommittee was created in response to a request from the conference of circuit court judges for a study of the handling of independent adoptions in Maryland. Id. at 1. The subcommittee identified what fees and expenses are allowed by current law, see id. at 2, concluding that the court should determine "whether [section 5-327] regarding prohibited compensation should be read narrowly or expansively." Id. at 64.

70. See 323 Md. at 50, 591 A.2d at 473.
71. Id. at 64-65, 591 A.2d at 481 (Eldridge, J., concurring). Although disagreeing with the majority on the substantive issues, Judge Eldridge agreed that the order was invalid on procedural grounds. See id. at 52, 591 A.2d at 475.
72. Id. at 53, 591 A.2d at 475 (Eldridge, J., concurring).
73. Id. at 52-53, 591 A.2d at 475 (Eldridge, J., concurring). Although married at the time of the second adoption, the natural parents gave up their child due to strained financial resources. Id.
74. Id. at 53, 591 A.2d at 475 (Eldridge, J., concurring).
75. Id. at 40, 591 A.2d at 469. Subsequently, the adoptive parents' attorney filed an affidavit from the natural mother detailing the composition of the $488, which included eight maternity blouses, nine pairs of maternity slacks, two maternity dresses, a winter coat, and maternity bras and underwear. Id. at 40 n.1, 591 A.2d at 469 n.1.

The concurrence questioned the circuit judge's requirement that the adoptive parents file a certification of the expenses paid. According to the concurring opinion, this practice is of "doubtful validity" given the pertinent statutes and legislative history. See id. at 54 n.3, 591 A.2d at 475 n.3 (Eldridge, J., concurring).
natural parents nor their attorney were present. 76 The trial judge expressed his doubts about the legality of the $488 payment at the hearing, but he entered a final adoption decree. 77 Although the decree did not mention either the maternity clothes or the possibility that the $488 payment was unlawful, the trial judge ordered the adoptive parents' attorney to find legal authority for allowing the payment. 78

In December 1989, the judge ordered the natural mother to return the $488 payment to the adoptive parents. 79 There was no indication in the record that she was ever notified of this decree. 80 The adoptive parents appealed the order, presumably to settle any lingering questions surrounding the adoption. The Court of Appeals issued a writ of certiorari on its own motion before the Court of Special Appeals heard the case. 81

2. The Court's Reasoning.—In holding that section 5-327 does not permit the payment of expenses for maternity clothes, the court relied primarily on the statute's language and contemporary application. 82 Section 5-327 reads, in pertinent part:

(1) An agency, institution, or individual who renders any service in connection with the placement of an individual for adoption may not charge or receive from or on behalf of either the natural parent of the individual to be adopted, or from or on behalf of the individual who is adopting the individual, any compensation for the placement.

(2) This subsection does not prohibit the payment, by any interested person, of reasonable and customary charges or fees for hospital or medical or legal services. 83

a. Application to Natural Parents.—The appellants argued that the General Assembly intended the statute prohibiting compensa-

---

76. Id. at 50, 591 A.2d at 474.
77. Id.
78. See id. at 50-51, 591 A.2d at 474. The judge directed, "I am signing the decree of adoption. I am going to give you 10 days to give me authority to justify the payment of the maternity clothes expense and if I am not convinced, I am going to order you to reimburse the [adoptive parents] the $488." Id.
79. Id. at 56, 591 A.2d at 476 (Eldridge, J., concurring).
80. Id.
81. See id. at 42, 591 A.2d at 469.
82. See id. at 50, 591 A.2d at 473.
tion to apply only to payments to doctors, lawyers, and other third parties involved with the adoption. To support this idea, they asserted that the natural mother does not render a "service in connection with the placement of an individual for adoption." They argued further that the legislature did not intend to prohibit the receipt of compensation by the birth mother.

Writing for the majority, Judge McAuliffe disagreed with both interpretations of section 5-327. He stated that a parent who signs a consent agreement and gives up a child for adoption in fact renders a service. The court insisted that the legislature intended the groups named in the statute—"an agency, institution, or individual who renders any service"—to include natural parents. The court also found that whatever the legislative intent, the contemporary use and interpretation of the statute support its application to natural parents. The majority used as support for its conclusion a report of a committee of Maryland judges, which had made no suggestion that section 5-327 does not apply to payments to natural parents.

The court also concluded that recent legislative activity evidenced the General Assembly's intent that this statute apply to natural parents. The majority pointed to Senate Bill 436, which was introduced but not passed in 1988. That Bill would have explicitly legalized the payment of reasonable living expenses to the natural mother. The court also posited that because article 27, section

84. See Adoption No. 9979, 323 Md. at 43, 591 A.2d at 470.
85. Id.
86. Id.
87. See id. at 44, 591 A.2d at 470.
88. See id., 591 A.2d at 471. The majority conceded that this characterization of the adoption process "may not be the warmest possible prose." Id.
89. See id. at 48, 591 A.2d at 473.
90. See id. at 45, 591 A.2d at 471.
91. See id.; Subcommittee Report, supra note 69. The majority bolstered this assertion with a reference to a student law review comment. See Adoption No. 9979, 323 Md. at 45, 591 A.2d at 471 (citing Carol L. Nicolette & Libby C. Reamer, Comment, Regulatory Options for Surrogate Arrangements in Maryland, 18 U. Balt. L. Rev. 110, 119 (1988) (citing Md. Ann. Code art. 27, § 35B as an example of a state law which prohibits "payment in exchange for a biological parent's consent to adoption").
93. See id.; Adoption No. 9979, 323 Md. at 46, 591 A.2d at 471-72. Senator Barbara Hoffman introduced Bill 436, and in a letter requesting a draft of the proposed legislation, wrote, "[W]hat I want to accomplish is that the natural mother in an adoption could receive payments that are now forbidden by Maryland law." Letter from Barbara A. Hoffman, State Senator, to Carvel Payne, Department of Legislative Reference (Jan. 4, 1988) (on file with the Department of Legislative Reference, Annapolis).
35C of the Annotated Code\(^\text{94}\) was enacted to forbid baby selling in Maryland, as distinguished from limiting payments made in connection with adoptive placement, section 5-327 must have been intended to address the type of payment made in this case.\(^\text{95}\)

\(b.\) Illegality of the Payment.—The court rejected the appellants’ assertion that the statute allows payments that are purely compensatory in nature, and prohibits only payments to the natural mother that result in profit.\(^\text{96}\) According to the majority, compensation in the statutory context includes but is not limited to profit, and clearly encompasses payments made for maternity clothes.\(^\text{97}\)

Perhaps most importantly, the court declared that maternity clothes do not constitute a reasonable medical expense within the context of the statute.\(^\text{98}\) Because the statute contains a broad prohibition against payments with a relatively narrow exception, the court wrote: “We will not, by artificially stretching the definition of commonly understood terms, broaden the exception.”\(^\text{99}\)

3. Analysis.—Baby selling is almost universally abhorred.\(^\text{100}\) With this in mind, the court’s construction of section 5-327 may be seen as strictly proscribing permissible payments in the adoption context in an attempt to prevent any statutory loopholes from allowing adoption for profit.


\(^{95}\) See Adoption No. 9979, 323 Md. at 47, 591 A.2d at 472. Two incidents of alleged baby selling in 1988 prompted Senator Paula C. Hollinger to introduce Senate Bill 58. See Adoption-Prohibited Compensation—Penalty, 1989: Hearings on Md. S.B. 58, 1988 Sess. Before the Senate Judicial Proceedings Comm., 1989 Sess. 1-2 (1989) (statement of Paula C. Hollinger) (on file with Department of Legislative Reference, Annapolis) [hereinafter Hearings]; Md. S.B. 58, 1988 Sess. Hollinger called the measure “a very simple bill... [which] stiffens the penalty for natural parents, or a broker attempting to gain illegal compensation in return for allowing adoption of their child.” Hearings, supra, at 1. As originally introduced, the Bill would have repealed and re-enacted § 5-237 of the Family Law Article with penalties for a violation increased to $10,000 in fines and 5 years imprisonment. Id. As finally enacted, the Bill was codified at Md. Ann. Code art. 27, § 35C. Although reasons for this codification are unclear, Senator Hollinger’s testimony and the timing of the Bill’s introduction do indicate that the General Assembly intended to strengthen the penalties for baby selling, not for adoption situations. This history gives credence to the majority’s assertion that § 35C did not apply in the Adoption No. 9979 situation.

\(^{96}\) See Adoption No. 9979, 323 Md. at 48-49, 591 A.2d at 473.

\(^{97}\) See id.

\(^{98}\) See id. at 49-50, 591 A.2d at 473.

\(^{99}\) Id. at 50, 591 A.2d at 473.

\(^{100}\) See generally Alvi Katz, Surrogate Motherhood and the Baby-Selling Laws, 20 Colum. J.L. & Soc. Probs. 1, 6-17 (1986) (discussing the relevant policy considerations and general discouragement of baby selling).
a. Application to Natural Parents.—(1) Service Analysis.—The majority's characterization of a parent's consent to the adoption of her baby as a "service" is a rather startling approach having potentially unforeseen consequences. In his concurring opinion, Judge Eldridge took issue with this characterization.101 Noting that adoptive placement may be an economic necessity, Judge Eldridge wrote that it "stretches the bounds of credulity" to view this often heart-wrenching decision as a service.102

Indeed, when it defined a "service" as including adoption,103 the majority may have been playing with fire. Given the highly publicized cases of the last few years104 and the rapid development of reproductive technology,105 it is difficult to predict the effect of this characterization on future court decisions.

For example, by applying the term "service" in this context, the court seems to have issued a preemptive strike against an argument proffered by those seeking to obtain enforcement of surrogacy contracts. Proponents of surrogacy arrangements generally characterize the birth mother's involvement as a service for which she is compensated.106 Given the court's interpretation of the term "service" in the adoption context, section 5-327 would presumably make payments to the surrogate mother illegal.107

(2) Legislative Intent, Pre- and Post-Enactment.—The majority also analyzed recent General Assembly activity to infer the legislative intent behind section 5-327. In response to the majority's assertion that the legislative intent favored their conclusion, the concurrence construed the same legislative language to reach a contrary re-

101. See Adoption No. 9979, 323 Md. at 61, 591 A.2d at 479 (Eldridge, J., concurring). Judge Eldridge was joined by Judge Rodowsky in the concurrence. See id. at 52, 591 A.2d at 474.
102. Id. at 61, 591 A.2d at 479 (Eldridge, J., concurring).
103. See supra text accompanying notes 88-89.
106. See Noel P. Keane, Legal Problems of Surrogate Motherhood, 1980 S. ILL. U. L.J. 147, 147, 157, 162 (1980) (stating that the birth mother renders "services in exchange for money"); see also Nicolette & Reamer, supra note 91, at 121.
107. The typical surrogacy arrangement involves a woman being artificially inseminated after agreeing that she will give her consent to the adoption of the baby after it is born; the surrogate is generally paid a monetary sum. Katz, supra note 100, at 2. It is widely recognized that this practice is dependent upon large payments to the natural mother. See Keane, supra note 106, at 153. One can only assume that if § 5-327 does in fact limit these payments, surrogacy arrangements will virtually cease in Maryland.
In the concurring opinion, Judge Eldridge argued that, by its plain terms, section 5-327 does not apply to natural parents, and that the legislature must have intended such a result. He also asserted that commentators and other courts have agreed that the statute applies only to third parties, and not to natural parents as the majority suggests.

Whatever the merits of the competing assertions, it should be noted that these opinions and the judicial subcommittee report are merely modern interpretations and do not necessarily reflect the original legislative intent. Additionally, Senator Hoffman’s introduction of Senate Bill 436, while evidencing a belief that Maryland law does not permit payments of living expenses to the natural mother, only reflects the current General Assembly’s construction of section 5-327.

More pertinent is the recent enactment of article 27, section 35C, which prohibits the selling, bartering, and trading of babies. The concurring opinion argued that the separate codification of this law “underscores that the two provisions address different problems and are aimed at different classes of violators.” Indeed, Judge Eldridge argued, if section 5-327 covers payments to natural parents, section 35C would be superfluous.

There had been no suggestion in this particular case, however, that the birth mother was selling or bartering her baby for a $488 payment, nor was the birth mother charged with any criminal violations. Although clearly a difference of degree, small payments like the one at issue more logically belong in the context of adoption law than baby selling. Considering the difference between impermissible payments and baby selling, and the legislative origins of section 35C, it is possible to view the two statutes as addressing distinct

---

108. See Adoption No. 9979, 323 Md. at 62-64, 591 A.2d at 479-80 (Eldridge, J., concurring).
109. See id. at 64-65, 591 A.2d at 481 (Eldridge, J., concurring).
110. Id. at 61, 591 A.2d at 479 (Eldridge, J., concurring); see Katz, supra note 100, at 8 n.34 (listing § 5-327 among state laws enacted to prohibit baby brokering); Nicolette & Reamer, supra note 91, at 120 (“The discouragement of contracts arranged by third-party intermediaries ... would appear to be one of the explicit objectives of [§ 5-327].”); John S. Strahorn, Jr., Changes Made by the New Adoption Law, 10 Md. L. Rev. 20, 27 (1949) (stating that § 5-327’s predecessor “makes criminal the receiving of compensation for arranging an adoption”). But see supra note 93 and accompanying text.
111. See supra note 93 and accompanying text.
113. Adoption No. 9979, 323 Md. at 63, 591 A.2d at 480 (Eldridge, J., concurring).
114. Id.
115. See supra note 95.
scenarios. Thus, the applicability of section 5-327 to the present facts seems preferable.

b. Payments for Maternity Clothes Prohibited.—Courts and legislatures frown on the exchange of consideration for babies, based on the simple notion that human beings cannot be sold. Accord-ingly, Adoption No. 9979 issues a clear statement that only the most limited types of payments for adoptive placement will be permitted in Maryland.

Other states vary widely as to whether payments for maternity clothes are permitted in connection with independent adoptions. While some do not allow such expenditures, others go so far as to permit adoptive parents to pay for the birth mother's living expenses during and immediately following her pregnancy. Maryland now joins the more restrictive group.

In fact, the court intimated in dicta that like maternity clothes, food and shelter may be necessary to the health of a pregnant woman but cannot be an included expense of an independent adoption. Because the court strictly construed "reasonable legal and medical expenses," it appears that the policy decision of what payments will be permitted has been left to the General Assembly. Because so many considerations are involved, and given that other


117. Although arrangements such as the one in this case are private agreements between two parties, it is well-established law in Maryland that "adoption is not a contract alone between the parties. It requires judicial determination of the advisability of permitting such action." Besche v. Murphy, 190 Md. 539, 544, 59 A.2d 499, 501 (1948).

118. See generally Joan H. Hollinger et al., Adoption Law and Practice § 1A (1991) (setting out a complete list of states' treatment of payments made to natural mothers in independent adoptions).

119. See, e.g., Tex. Penal Code Ann. § 25.11 (West 1989) (a person may not "accept[] a thing of value for the delivery of [a] child . . . for purposes of adoption . . . [except] a reimbursement of legal or medical expenses incurred by a person for the benefit of the child"); see also Kingsley v. State, 744 S.W.2d 191, 193 (Tex. 1987) (declaring that taxi rides, maternity clothes, gasoline, electricity, rent, groceries, cigarettes, and cosmetics are not legal or medical expenses). For a recent list, see Katz, supra note 100, at 2 n.34.

120. See, e.g., Fla. Stat. Ann. § 63.212 (West 1991) (prohibiting payments in connection with adoptions, but stating that "nothing herein shall be construed as prohibiting the person who is contemplating adopting the child from paying the actual prenatal care and living expenses of the mother of the child to be adopted, . . . for a reasonable time, not to exceed 6 weeks"); see also In re Brod, 522 So. 2d 973, 978 (Fla. 1988) (allowing an intermediary to pay documented living expenses to birth mother on behalf of adoptive parents).

121. See Adoption No. 9979, 323 Md. at 49, 591 A.2d at 473.
states permitting the compensation of living expenses have statutes explicitly allowing their payment, this was a prudent decision.

4. Procedural Issues.—Although the court held that section 5-327 prohibits the payment of expenses for maternity clothes for the birth mother, it vacated the trial judge’s order directing the natural mother to reimburse the adoptive parents.\(^{122}\) The court stated that because the natural mother had no notice of a potential claim against her, the requirements of due process were not met.\(^{123}\)

The concurring opinion agreed with the result on these grounds, but was more explicit in its reasoning. In addition to echoing the majority’s emphasis on the lack of notice,\(^ {124}\) the concurrence pointed to several procedural deficiencies that supported the reversal of the repayment order. Specifically, the order was void because the pleadings did not include a claim for the $488, and because the court no longer had jurisdiction and thus had no authority to order the repayment of the money once the final adoption decree had been issued.\(^ {125}\)

Notice and sufficient pleadings are fundamental requirements of due process and clearly are required before parties can be held accountable for claims made against them.\(^ {126}\) It is not surprising that the court refused to uphold an order issued without the presence of either element.

The concurring opinion also argued, most notably, that the trial judge’s authority over the adoption ended once he issued a final decree.\(^ {127}\) Because adoption is authorized in Maryland solely by statute\(^ {128}\) and because Maryland gives final adoption decrees the force and effect of final judgments,\(^ {129}\) once a trial court has entered a decree, its authority and jurisdiction are at an end.\(^ {130}\) The order in

\(^{122}\) See id. at 52, 591 A.2d at 474.
\(^{123}\) See id. at 51-52, 591 A.2d at 474.
\(^{124}\) See id. at 55, 591 A.2d at 476 (Eldridge, J., concurring).
\(^{125}\) Id. at 57-60, 591 A.2d at 476-78 (Eldridge, J., concurring).
\(^{126}\) Blue Cross of Md., Inc. v. Franklin Square Hosp., 277 Md. 93, 101, 352 A.2d 798, 804 (1976) ("Generally, due process requires that a party . . . is entitled to both notice and an opportunity to be heard on the issues to be decided in a case."); Travelers Indem. Co. v. Nationwide Constr. Corp., 244 Md. 401, 406, 224 A.2d 285, 288 (1966) ("A basic requirement of fairness is that the defendant be given notice of and an adequate opportunity to defend against the claim on which the judgment is based.").
\(^{127}\) See Adoption No. 9979, 323 Md. at 57, 591 A.2d at 477 (Eldridge, J., concurring).
\(^{130}\) The concurring opinion supports this idea by indicating that the primary concern of the court is the status of the child and that the relevant statutes do not extend the judge’s authority beyond the final entry of this determination. See Adoption No. 9979,
this case was void because it was issued after the final decree.\textsuperscript{131} This result reinforces what the Court of Appeals has called "the foundation underlying all adoptions: the need to surround the final decree with a high degree of certainty."\textsuperscript{132}

5. \textit{Conclusion}.—The Court of Appeals has stated that adoption statutes should be construed liberally "to aid, rather than hamper and frustrate, their benevolent purpose, and their application should not be restricted by any forced or narrow construction."\textsuperscript{133} Because small payments made to the birth mother may in fact greatly benefit her without harm to the child or societal interests, one must wonder whether the Adoption No. 9979 court has done more harm than good.

Nevertheless, the Court of Appeals correctly restricted permissible payments given the statutory provisions of section 5-327 and left the fundamental policy decision at issue to the General Assembly. The General Assembly would do well to reconsider this question. For the time being, though, the law is clear: adoptive parents may not reimburse natural mothers for the cost of maternity clothes.

\textbf{Brett A. Balinsky}  
\textbf{Jennifer S. Leete}

\footnotesize{323 Md. at 58-59, 591 A.2d at 477-78 (Eldridge, J., concurring). \textit{See generally} Palmisano v. Baltimore County Welfare Bd., 249 Md. 94, 98, 238 A.2d 251, 253-54 ("The Maryland rules provide that a court shall have revisory power over an enrolled decree only in cases of fraud, mistake, or irregularity."), \textit{cert. denied}, 393 U.S. 853 (1968); Falck v. Chadwick, 190 Md. 461, 467, 59 A.2d 187, 189 (1948) (noting that "[t]he court is not invested with continuous authority"); Waller v. Ellis, 169 Md. 15, 25, 179 A.2d 289, 293 (1935) ("[O]nce the issues involved in [a case] are adjudicated, the jurisdiction of the court under the statute is at an end.").}\textsuperscript{131} Adoption No. 9979, 323 Md. at 57-59, 591 A.2d at 477-78 (Eldridge, J., concurring). The trial judge issued the adoption decree on October 25, 1989. He ordered the repayment on December 14, 1989, seven weeks later. \textit{Id.} at 54-55, 591 A.2d at 476 (Eldridge, J., concurring).\textsuperscript{132} Palmisano, 249 Md. at 103, 238 A.2d at 256.\textsuperscript{133} Waller, 169 Md. at 24, 179 A. at 293.
X. HEALTH CARE

A. The Medical Peer Review Privilege: A Misguided Attempt to Promote Quality Care

In Baltimore Sun v. University of Maryland Medical System Corp.,¹ the Court of Appeals held that there is no statutory bar to access by the press to records of medical peer review committees, when such records are discoverable under a statutory exception to the general rule that protects against their use in civil litigation.² The issue came before the Court of Appeals of Maryland as a question certified by the United States Court of Appeals for the Fourth Circuit.³

The Baltimore Sun decision will affect the potential usefulness of the privilege to promote candid exchange among physicians. The peer review statute and subsequent case law have created a privilege that is not only ineffective in assuring confidentiality, but also frustrates the opposing goal of free public access to information. Moreover, an alternative to the current peer review statute exists that would more effectively serve its underlying purpose.

1. The Case.—In 1986, several malpractice actions were filed against Dr. Harlan Stone, Chief of General Surgery of the University of Maryland Hospital and Professor at the University of Maryland Medical School.⁴ At the request of Hospital officials, internal and external peer review committees investigated the allegations of the malpractice actions and reported their findings.⁵ Based on information revealed by the committees,⁶ Stone’s superiors sought his resig-

---

² See id. at 669, 584 A.2d at 688.
³ Id. at 661, 584 A.2d at 684.
⁴ See Stone v. University of Md. Medical Sys. Corp., 855 F.2d 167, 169 (4th Cir. 1988) (Stone I) (affirming summary judgment against Stone). The University of Maryland Medical System Corporation is the parent company of the University of Maryland Hospital. Id.
⁵ See id. at 169-70. The hospital referred the matter to its in-house Peer Review Committee and a specially appointed External Review Committee. Id.
⁶ The in-house Peer Review Committee concluded that “while there was no evidence of actual incompetence or deliberate falsification of patient records in the cases investigated, there were ‘significant deficiencies’ in Stone’s supervision of residents and his maintenance of patient records.” Id. at 169. The External Review Committee found more serious violations, concluding that Stone had sometimes left residents “virtually unsupervised,” that he did not permit residents to question his orders, that he followed a practice of “two-tiered” medical care in which patients received varying levels of quality of care depending upon their ability to pay, and that he had deliberately made “self-
nation, and Stone complied. Seven months later, Stone sued the University of Maryland Medical System Corporation (parent of the Hospital) and several of its officials. Stone brought suit in the United States District Court for the District of Maryland, alleging that he was forced to resign without due process.

A motion for summary judgment was filed by all the defendants in the case and Stone filed a motion in opposition. Exhibits consisting of peer review records were attached to the motions. At the request of all parties and without a public hearing, the district court sealed the entire record, giving no reasons for the seal order. The district court then granted the defendants' motion for summary judgment and Stone appealed to the United States Court of Appeals for the Fourth Circuit.

At this stage, the Baltimore Sun was permitted to intervene to challenge the seal order. Two physicians also intervened to oppose the Sun; the physicians had been named as codefendants in some of the pending malpractice actions involving Stone. The Sun contended that the seal order violated its First Amendment and common-law right of access to judicial records. The intervening doctors argued that any right of access by the press was outweighed by the state's compelling interest in protecting the confidentiality of serving misrepresentations to his superiors in order to cover up irregularities in the care of a particular patient. Id. at 170.

7. Id. at 170-71.
8. Id. at 171.
9. Id. at 171-72.
10. Baltimore Sun, 321 Md. at 662, 584 A.2d at 684.
11. See Stone v. University of Md. Medical Sys. Corp., 855 F.2d 178, 180 (4th Cir. 1988) (Stone I) (remanding case to district court for reconsideration of seal order). Excepted from the seal order were the complaint, amended complaint, and answers. Id.
14. Baltimore Sun, 321 Md. at 662, 584 A.2d at 684.
15. Stone II, 855 F.2d at 180. Courts have recognized a common-law presumption of public access to all judicial records. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). However, the presumption can be rebutted if countervailing interests heavily outweigh the public interest in access. See, e.g., Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988). The burden of proof is borne by the party seeking to overcome the presumption, and the trial court's denial of access to documents is reviewable only for abuse of discretion. Id.

On the other hand, a First Amendment right of access by the press has been extended only to specific judicial records, such as documents filed in connection with summary judgment motions in civil cases, or plea hearings and sentencing hearings in criminal cases. See Stone II, 855 F.2d at 180-81. When a right of access is found to exist under the First Amendment, access may be denied only by demonstration of a compelling government interest, and only if the denial is narrowly tailored to serve that interest. Id.
peer review committee proceedings, as reflected in section 14-501 of the Health Occupations Article.\textsuperscript{16}

The Fourth Circuit affirmed the entry of summary judgment in favor of the University of Maryland Medical System and its officers,\textsuperscript{17} but remanded the case to the district court to reconsider the appropriateness of the seal order in accordance with procedures established in the Fourth Circuit.\textsuperscript{18} On remand, the district court modified its order, lifting the seal on all but three documents containing peer review material.\textsuperscript{19} The court concluded that these protected documents were covered by section 14-501(d)(1) of the Health Occupations Article, which seeks to protect the confidentiality of peer review records.\textsuperscript{20} Although the court found that the \textit{Sun} had a First Amendment right of access,\textsuperscript{21} that right was outweighed by the compelling government interest in assuring quality patient care by protecting the confidentiality of medical peer review materials.\textsuperscript{22}

\textsuperscript{16} \textit{Stone II}, 855 F.2d at 181. The courts in \textit{Stone II} and \textit{Baltimore Sun} discussed Md. Health Occ. Code Ann. § 14-601 (1986) (recodified at § 14-501). No substantive changes that affect the \textit{Stone} holding have been made to the pertinent sections during recodification. References to the Maryland Code follow the current codification, not that used by the various courts in this case. See infra note 40 for a summary of changes.

\textsuperscript{17} See \textit{Stone I}, 855 F.2d at 178.

\textsuperscript{18} See \textit{Stone II}, 855 F.2d at 180. The court referred the district court to the procedures outlined in \textit{In re Knight Publishing Co.}, 743 F.2d 231 (4th Cir. 1984). Specifically, the district court was directed first to determine whether the \textit{Sun}'s right of access was grounded in common law or First Amendment guarantees, because "[o]nly then can it accurately weigh the competing interests at stake." \textit{Stone II}, 855 F.2d at 181; see supra note 15. Following that determination, \textit{Knight} requires that the court docket the motion for a reasonable time before deciding the issue in order to provide public notice of the request to seal and an opportunity to challenge it. 743 F.2d at 235. The court must consider less drastic alternatives to sealing, and if the seal is upheld, it must be supported by specific findings to facilitate appellate review. Id. Finally, the Fourth Circuit directed the district court to determine whether § 14-501(d)(1), which bars discovery or admission of peer review records, was applicable, and, if so, whether the right of public access nevertheless outweighed the public policy expressed in the statute. See \textit{Stone II}, 855 F.2d at 181.

\textsuperscript{19} See \textit{Baltimore Sun}, 321 Md. at 663, 584 A.2d at 684-85.


\begin{quote}
Except as otherwise provided in this section, the proceedings, records, and files of a medical review committee are not discoverable and are not admissible in evidence in any civil action arising out of matters that are being reviewed and evaluated by the medical review committee.
\end{quote}

\textit{Id.}

\textsuperscript{21} See \textit{Baltimore Sun}, 321 Md. at 663, 584 A.2d at 685; Rushford v. New Yorker Magazine, 846 F.2d 249, 253 (4th Cir. 1988) (finding First Amendment applicable to documents filed in connection with a summary judgment motion in a civil case); \textit{see also In re Washington Post Co.}, 807 F.2d 383, 389 (4th Cir. 1986) (citing historical tradition and the function of public access in serving important public purposes as two factors typically considered in deciding whether a right of access is extended by the First Amendment).
committees. The Sun appealed from the district court's order, maintaining that press access to peer review material was not barred in this case because of the applicability of section 14-501(e)(1), which provides an exception to the peer review privilege granted in section 14-501(d)(1). The Court of Appeals for the Fourth Circuit certified a question to the Maryland Court of Appeals to determine "whether [section 14-501(d)(1)] bars press access to confidential records of a hospital's peer review committee when they are discoverable under section [14-501(e)] and have been filed with and considered by the court in connection with a dispositive motion such as a motion for summary judgment." The Maryland court answered in the negative; however, the court stated that it was expressing no opinion as to the legality of the trial judge's action in sealing the records.

2. Legal Background.—Most commentators agree that ensuring high quality, cost-effective medical care depends in large part upon the willingness of physicians to police themselves by engaging in honest and critical peer review. To this end, nearly all hospitals in the United States have established systems of peer review committees that are given responsibility for such functions as quality assurance, utilization review, the granting of staff privileges to physicians, and physician discipline. Many of these committees operate under

---

22. Baltimore Sun, 321 Md. at 663, 584 A.2d at 685.
23. Md. HEALTH OCC. CODE ANN. § 14-501(e) states:
   Subsection (d)(1) of this section does not apply to: (1) A civil action brought by a party to the proceedings of the medical review committee who claims to be aggrieved by the decision of the medical review committee; or (2) Any record or document that is considered by the medical review committee and that otherwise would be subject to discovery and introduction into evidence in a civil trial.

Id.
24. Baltimore Sun, 321 Md. at 664, 584 A.2d at 685.
25. Id. at 661, 584 A.2d at 684.
26. See id. at 669-70, 584 A.2d at 688.
27. Charles D. Creech, Comment, The Medical Review Committee Privilege: A Jurisdictional Survey, 67 N.C. L. REV. 179, 179 (1988); see, e.g., Reed E. Hall, Hospital Committee Proceedings and Reports: Their Legal Status, 1 AM. J.L. & MED. 245, 246, 282 (1975). Although this principle is often repeated, its truth is unproved. See Gregory G. Gosfield, Comment, Medical Peer Review Protection in the Health Care Industry, 52 TEMP. L.Q. 552, 575 (1979) ("[E]ven if peer review activity is increased, it is unclear whether the result will be lower cost and higher quality of health care.").
28. See Hall, supra note 27, at 247-50; see also Md. HEALTH OCC. CODE ANN. §§ 14-501(b), (c) (1991) (describing the types of groups recognized as peer review organizations and the functions they perform).
state statutes, federal law, or conditions imposed by the Joint Commission on Accreditation of Healthcare Organizations. The problem in achieving effective peer review, however, is that participants are often unwilling to engage in meaningful deliberations for fear of losing referrals and professional friends, becoming entangled in patients' malpractice claims, and exposing themselves to liability for defamation actions brought by physicians receiving bad reviews.

Heeding these concerns, many laws have been promulgated by legislatures and expanded by the judiciary to protect the confidentiality of medical review committees. The major opinion in the line of cases upholding the nondiscoverability of peer review records, and the only one not based on the existence of a statute, is Bredice v. Doctor's Hospital, Inc.

Bredice involved a malpractice action in which the plaintiff sought to discover peer review documents. The court held that the public welfare was better served by a policy of confidentiality:

Candid and conscientious evaluation of clinical practices is a sine qua non of adequate hospital care. To subject these discussions and deliberations to the discovery process, without a showing of exceptional necessity, would result in terminating such deliberations. Constructive professional criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit.

Despite Bredice, common-law support for a medical review privilege has been sparse, as several courts have found the general policy favoring openness in judicial proceedings more compelling. Nev-
ertheless, nearly every state legislature in the nation has implemented a policy consistent with *Bredice*, and judicial opinions to the contrary have since been overruled by statutes. Although the scope of the privilege afforded peer review committees varies by state, the Maryland statute is typical, protecting records from discovery and admission into evidence in civil trials, and providing immunity from suit to committee members.

In the fifteen years since the Maryland peer review statute was enacted, judicial construction of the privilege it created has been scarce. In *Unnamed Physician v. Commission on Medical Discipline*, the Maryland Court of Appeals held that the words "civil action" in the statute refer only to a tort action for medical malpractice. In *Kapas v. Chestnut Lodge, Inc.*, the Fourth Circuit held that the protection against discovery applied not only to committees engaged in discipline, but also to those involved with staffing, quality assurance, and performance review. The Maryland court has stated that the "fundamental reason for preserving confidentiality in these [com-

disciplinary proceedings against a physician were discoverable in malpractice action upon a showing of good cause); Nazareth Literary & Benevolent Inst. v. Stephenson, 503 S.W.2d 177, 179 (Ky. 1973) (rejecting *Bredice* and stating that judicially granted privileges from discovery of peer review records impede the search for truth).


37. See, e.g., CAL. EVID. CODE § 1157 (West 1991) (overruling *Kenney*, 63 Cal. Rptr. 84); KY. REV. STAT. ANN. § 311.377 (Baldwin 1991) (overruling *Nazareth*, 503 S.W.2d 177).


39. See id. § 14-501(f). Personal immunity is outside the scope of the *Stone* decision, and is mentioned only to reference another major aspect of the privileges typically associated with peer review activities. For case law on this part of the Maryland statute, see DeLeon v. Saint Joseph Hosp., Inc., 871 F.2d 1229 (4th Cir.) (allowing qualified immunity granted to peer review committee members to be overcome only with a showing of malice), cert. denied, 110 S. Ct. 87 (1989); Sibley v. Lutheran Hosp., 871 F.2d 479 (4th Cir. 1989).

40. See Act of May 17, 1976, ch. 722, 1976 Md. Laws 1995. What is now MD. HEALTH OCC. CODE ANN. § 14-501(d)(1) was codified as § 14-601(d) from 1981 to 1991, and from 1976 to 1981 was article 43, § 134A(d); similarly, current § 14-501(f) was § 14-601(f) and, previously, article 43, § 134A(e). There was no change in substance through the recodification. See *Baltimore Sun*, 321 Md. at 664-65, 584 A.2d at 685-86.


42. See id. at 11-12, 400 A.2d at 402.

43. 709 F.2d 878 (4th Cir. 1983).

44. Id. at 881.
mittee] proceedings is to ensure a high quality of peer review activity leading to the primary goal of this legislation—to provide better health care."

The degree to which the peer review statute in Maryland or any state actually serves to improve medical services, however, remains unclear. Moreover, the potential impact of the confidentiality policy is weakened to the extent that exceptions to the privilege are granted. Nevertheless, courts and legislatures commonly allow certain exceptions to the peer review privilege based on perceived constitutional requirements and notions of fairness.

For example, in Maryland and many other states, an exception to the privilege against discovery is recognized for physicians aggrieved by the actions of a review committee. Although not recognized in all states, this exception has been upheld against claims of equal protection violations made by malpractice plaintiffs for whom discovery was barred. The theory is that the malpractice plaintiff is generally able to prove her case with evidence available from other, unprotected sources, but physician-plaintiffs may have only the peer review records to demonstrate an unjust discharge or denial of staff privileges. In fact, without this exception, the physician's ability to seek redress for a wrong may be unduly limited, and the statute's validity might be questioned under the Due Process

45. Unnamed Physician, 285 Md. at 13, 400 A.2d at 403.
47. A few states have broadly construed peer review statutes in order to maximize the benefits of the privilege, to the detriment of individual rights. See, e.g., Franco v. District Court, 641 P.2d 922, 927-30 (Colo. 1982) (interpreting statutory language that barred subpoena of peer review records "in any civil suit against the physician" as demonstrating intent by the legislature to bar discovery even in an action brought by an aggrieved physician); Holly v. Auld, 450 So. 2d 217, 221 (Fla. 1984) (finding that peer review privilege bars discovery not only in malpractice actions, but also in defamation actions brought by physicians, even though physician may have no other means to prove his case); Cardwell v. Rockford Memorial Hosp. Ass'n, 555 N.E.2d 6, 10 (Ill. 1990) (holding that hospital and administrator were absolutely immune from civil liability for conduct of hospital's peer review committee, even if conduct was willful or wanton); Atkins v. Walker, 445 N.E.2d 1132, 1136 (Ohio Ct. App. 1981) (holding that peer review privilege barred admission of allegedly slanderous letter even though it was the only evidence the plaintiff had to prove his case).
48. See Jenkins, 468 N.E.2d at 1167-68.
49. See Holly, 450 So. 2d at 223 (Shaw, J., dissenting). The crucial distinction lies in the fact that the conduct that is the subject of the malpractice action occurred outside the peer review committee; but in the case of defamation, antitrust, or due process claims brought by physicians, the conduct in question occurred as a part of the peer review process. Id.; see also Creech, supra note 27, at 204-05.
Unfortunately, the policy in favor of confidentiality to promote candid critiques of physician conduct suffers whether the discovering party is an aggrieved physician or a patient with a malpractice claim. Furthermore, in construing peer review statutes, courts often follow the rule that privileges, in general, are not favored in the law and therefore should be strictly construed. This tendency may serve to frustrate the underlying policy considerations that prompted the statute in the first place. Finally, under the Federal Rules of Evidence, federal courts sitting in nondiversity cases look to federal common law to determine if a privilege exists and, therefore, may not apply the state's statutory privilege even if one clearly pertains.

In all, state and federal legislation has endorsed a policy that seeks to promote peer review by ensuring its confidentiality, based on the belief that the public's right to information and potential harm to plaintiffs' actions are outweighed by the perceived benefit of improved quality of care. Despite this policy, other considerations have limited the application of the privilege, raising serious questions regarding its potential effectiveness. As noted by one commentator: "Nothing is worse than a half-hearted privilege. When the courts or the legislature attempt to give a privilege too narrow a scope, they may destroy its reason for existing."

3. The Court's Reasoning.—In Baltimore Sun, the issue was whether peer review documents that had been discovered and admitted under the statutory exception to confidentiality for a civil action brought by an aggrieved physician were also subject to access by the press. The Sun argued that although section 14-501(d)(1) protects the confidentiality of peer review records, section 14-
501(e)(1) provides an exception that should apply. "There is no middle ground permitted by the statute." The privilege either applies, or it does not.

The University of Maryland responded that the prevailing intent of the statute is to protect the confidentiality of peer review records, and section 14-501(e)(1) provides an exception intended to benefit only the aggrieved physician bringing suit. Complete waiver of confidentiality would be wholly inconsistent with the statutory objective of improving patient care by promoting candid exchange among peer reviewers.

Writing for the majority, Chief Judge Murphy recognized the legislative decision reflected in section 14-501(d)(1) that the need for complete public disclosure is outweighed by the goal of preserving confidentiality ultimately to effectuate better health care. Nevertheless, he strictly construed section 14-501(e)(1), which states that the privilege created by section 14-501(d)(1) "does not apply" when an action is brought by an aggrieved physician. He found nothing in the statute to suggest that once peer review documents are properly subject to pretrial discovery, they must remain "insulated from public disclosure for all other purposes."

Therefore, the court held that no statutory bar to press access to peer review records exists once the records are revealed in discovery. The court also found that in this case the documents were properly discovered under section 14-501(e)(1). It declined to express an opinion, however, as to the legality of the trial judge's action in sealing the records.

Judge Rodowsky, in his concurring opinion, interpreted Maryland's peer review statute from a broader policy perspective, insisting that the exception granted to aggrieved physicians suspends the rule of confidentiality only to the extent necessary to protect that individual's right to due process. Accordingly, the statute's strong

55. Baltimore Sun, 321 Md. at 664, 584 A.2d at 685.
56. Id.
57. Id.
58. Id.
59. See id. at 666-69, 584 A.2d at 686-88.
60. See id. at 668, 584 A.2d at 687.
62. Baltimore Sun, 321 Md. at 668, 584 A.2d at 687.
63. Id. at 669, 584 A.2d at 688.
64. Id. at 669-70, 584 A.2d at 688.
65. See id. at 670-71, 584 A.2d at 688-89 (Rodowsky, J., concurring). Judge Rodowsky's concurring opinion borders on actual dissent. He seems to be saying that although
policy of confidentiality continues to the greatest extent possible even when the exception applies. Judge Rodowsky concluded that the state's compelling interest in protecting peer review records must be weighed against the claimed First Amendment right of access by the press. Because this issue was not within the certified question, Judge Rodowsky found it to be a question for the federal court.

4. Analysis.—When certifying the question at issue, the Fourth Circuit stated that the Maryland court “might determine that the statute is not applicable to this case, and thus alleviate any conflict between the statute and the right to access provided by the First Amendment.” The disposition by the Maryland Court of Appeals left the Fourth Circuit free to unseal all peer review materials in the court records. The implications of this outcome, however, go well beyond the “chilling effect” on the free exchange among peer review committee members anticipated by the Maryland court.

In particular, a paradox is created by the privilege and the exception, the ramifications of which are aptly illustrated in Henry Mayo Newhall Memorial Hospital v. Superior Court. The case involved a mandamus proceeding to review the suspension of a physician by a hospital. In the physician's wrongful suspension action, the hospital submitted a full transcript of the suspension hearing conducted before its Judicial Review Committee, making the transcript a matter of public record. A patient-plaintiff who was bringing an action against the physician and hospital for malpractice and corporate negligence, respectively, obtained a copy of the tran-

the plain words of the statute may indicate otherwise, obeying the obvious intent of the legislature requires the conclusion that the statute continues to bar public access, even when peer review records are discoverable under the exception granted for aggrieved physicians. He avoids completely rejecting the majority opinion by finding the issue of balancing the legislative intent of ensuring confidentiality against the Sun's First Amendment right to access to be outside the scope of the certified question.

66. See id. at 671, 584 A.2d at 688-89 (Rodowsky, J., concurring).
67. See id.
68. Id. at 664, 584 A.2d at 685.
70. See Baltimore Sun, 321 Md. at 668, 584 A.2d at 687.
72. Henry Mayo, 146 Cal. Rptr. at 544.
73. Id.
74. See Hall, supra note 27, at 252 (describing the premise of corporate negligence as being that the hospital, by virtue of its custody of the patient, owes a duty to exercise care in the construction, maintenance, and operation of the hospital); see also Darling v.
script.\textsuperscript{75} When the patient sought to discover whether references in the transcript to an unidentified surgical patient pertained to her, the hospital asserted the peer review privilege, which the \textit{Henry Mayo} court upheld.\textsuperscript{76}

In this situation, the confidentiality of the peer review documents had already been compromised, yet the patient-plaintiff was statutorily barred from discovering whether the peer review material pertained to her. Under these circumstances, the peer review privilege did not protect confidentiality, as the transcript was already public. Rather, the court permitted the privilege to operate as nothing more than a mechanism for hospitals and physicians to hide evidence from plaintiffs.\textsuperscript{77}

Furthermore, the facts of \textit{Baltimore Sun} make clear that this situation can occur in Maryland. The two doctors who opposed the opening of the records were also named defendants in malpractice actions, and their cases were still pending.\textsuperscript{78} Because the Fourth Circuit decided to open the peer review documents,\textsuperscript{79} the malpractice plaintiffs in these cases could find themselves in a situation similar to that of the patient-plaintiff in \textit{Henry Mayo}. That is, even after the peer review documents concerning the care of particular patients become a matter of public record, malpractice plaintiffs seeking to discover the documents would be limited by section 14-501(d)(1).

Several related issues cast further doubt on the blanket protection from discovery in malpractice actions and the automatic exception in actions brought by aggrieved physicians. Specifically, as noted above, the rationale for the statutory exception to the privilege granted in actions brought by aggrieved physicians is that, unlike malpractice plaintiffs, the physician-plaintiffs would otherwise be unable to prove their cases.\textsuperscript{80} But the physician need not show that he requires an exception to the privilege to bring his action; the

\textsuperscript{75} Henry Mayo, 146 Cal. Rptr. at 544.

\textsuperscript{76} See id. Interestingly, the plaintiff argued that the transcript in the mandamus proceeding could have been sealed, and that the hospital waived its privilege by failing to make such a request. The court rejected this contention, stating that "[i]f the legislature intended to impose upon a hospital the requirement to routinely request that such transcripts be sealed it would have so provided in [the California peer review statute]." \textit{Id.} at 548.

\textsuperscript{77} See Goldberg, \textit{supra} note 53, at 157-58.

\textsuperscript{78} See \textit{Baltimore Sun}, 321 Md. at 662, 584 A.2d at 684.

\textsuperscript{79} See \textit{supra} note 69 and accompanying text.

\textsuperscript{80} See \textit{supra} note 49 and accompanying text.
exception is automatic and applies even when the physician-plaintiff has other means to prove his cause of action.\textsuperscript{81}

Moreover, a malpractice plaintiff may face a situation in which her burden of proof can be sustained only by discovering peer review material and admitting it into evidence, particularly when she seeks to prove corporate negligence on part of the hospital.\textsuperscript{82} For example, a plaintiff attempting to establish that a hospital negligently granted staff privileges to an incompetent physician may be without redress if she cannot use records of the committee that granted the privileges to establish her case.\textsuperscript{83}

The questionable ability of hospitals to waive the peer review privilege raises yet another set of issues that cast doubt on the advisability of protecting peer review materials at all. A literal interpretation of some peer review statutes, including Maryland’s, leads to the conclusion that hospitals are not empowered to waive the privilege against discovery.\textsuperscript{84} This creates the paradoxical situation in which the institution has engaged in peer review to ensure quality of care, but is barred from introducing into evidence in a negligence or other action the very records that may prove that it acted appropriately.

On the other hand, at least one court appears unwilling to allow unilateral use of peer review records by hospitals, which would give the latter an unfair advantage.\textsuperscript{85} The more likely scenario is that if hospitals are able to waive the privilege, access would also be granted to plaintiffs, thus destroying the confidentiality of the peer review process.

In sum, despite the widely held belief that confidentiality is necessary to promote effective peer review, the legislatively created privilege is inconsistently applied and often excepted. The resulting

\textsuperscript{82} A few state statutes allow the privilege to be overcome by a showing of “exceptional necessity,” which alleviates this problem. See infra note 88 and accompanying text.
\textsuperscript{83} See Goldberg, supra note 53, at 162 (“[C]ourts have continued to recognize new theories of corporate liability while state legislatures have shrouded in secrecy the most obvious source of evidence against the hospitals—the peer review records.”). But see Wheeler v. Central Vt. Medical Ctr., Inc., 582 A.2d 165 (Vt. 1990). The plaintiff in Wheeler successfully proved corporate negligence without discovering peer review records by establishing a record of improper care rendered by a certain physician, lack of knowledge of this substandard care by hospital trustees, and the failure of a peer review committee in its duty adequately to police physicians. See id at 166-67.
\textsuperscript{84} See Wheeler, 582 A.2d at 167 n.3; Goldberg, supra note 53, at 153 n.9.
\textsuperscript{85} See generally Wheeler, 582 A.2d 165 (barring plaintiff who sued hospital for corporate negligence from discovering peer review records, and also barring hospital from questioning witness regarding contents of such records).
policy follows a wavering course that favors confidentiality in some circumstances, and openness in others. Such an approach defeats the advantages of either goal.

The decision of the Court of Appeals in *Baltimore Sun* further widens the breach of confidentiality when exceptions to the privilege are granted, by finding no statutory bar to press access once peer review documents are discovered. The decision to seal the records from public inspection at this point is apparently within the trial judge's discretion, but the press's First Amendment rights make closure unlikely. Indeed, the records concerning Stone were opened by the Fourth Circuit subsequent to the *Baltimore Sun* pronouncement. The ramifications of *Baltimore Sun* make apparent the inherent anomalies of the typical peer review privilege and its inability adequately to ensure confidentiality.

5. Proposed Solution.—There are sufficient grounds to debate the basic premise that confidentiality is a necessary precondition to encouraging effective peer review. Physicians are, as a general rule, required by law to engage in peer review, whether openly or behind closed doors. Furthermore, the pressure of public scrutiny could very well be a more effective method of motivating physicians to police themselves than is the current shield of secrecy. In fact, at least one commentator has argued that particularly outrageous examples of malpractice that occurred under the noses of hospital committees indicate the ineffectiveness of self-critique by physicians in confidential review proceedings. In these cases, active policing of aberrant physician behavior did not occur until after rumors of gross malpractice had gained public attention.

Despite the cogency of these arguments, it is doubtful that a policy of openness will be implemented in Maryland or elsewhere in the near future. The perceived need for confidentiality appears deeply entrenched in the minds of physicians and legislators, making radical change unlikely. Reform of the peer review privilege is nonetheless necessary if any potential benefit from the confidentiality policy is to be realized.

Such reform must target several aspects of the statute. First,

87. See supra notes 28-31 and accompanying text.
88. See Goldberg, supra note 53, at 162-66 (citing a serious of cases in which peer review was ineffective: surgeon continued to operate despite bad results in more than 30 cases; physician privileges not curtailed despite injury to over 70 patients; anesthesiologist not investigated or dismissed despite knowledge that he was sexually battering patients during surgery).
the statute should be modified to make the privilege applicable regardless of whether a civil action is initiated by a malpractice plaintiff or an aggrieved physician. Second, in order to address due process concerns, the legislature should lift the privilege only upon a showing of "exceptional necessity" by the plaintiff. That is, courts would determine on a case-by-case basis whether the plaintiff would effectively be barred from pursuing her cause of action if not granted access to peer review documents. This determination would be made after in camera review of such records by the court.

Third, if the court decides that a showing of exceptional necessity has been made, then discovery of peer review records would be allowed. The statute, however, should explicitly direct that the confidentiality of such records be preserved to the greatest extent possible, meaning that they be placed under seal by the trial judge. Finally, courts must broadly construe peer review statutes consistently with the underlying principles of the legislature, to maximize the goals of confidentiality.

6. Conclusion.—In Baltimore Sun, the Court of Appeals strictly construed the peer review statute, further eroding a privilege already undermined by the recognition of a broad exception. By continuing along this path, the court seriously compromised the goal of protecting confidentiality to enhance peer review and ultimately improve health care. The legislature and courts must work together to pursue one course or the other: confidentiality or openness. When this does not occur, as under the current circumstances in Maryland, the peer review privilege becomes little more than "a shield behind which a physician's incompetence . . . or institutional malfeasance . . . can be hidden from parties who have suffered."

PAULA B. GRANT

89. See, e.g., D.C. CODE ANN. § 32-505 (1988) (deeming peer review material privileged absent a showing of extraordinary necessity); NEB. REV. STAT. §§ 71-2046, -2048 (1990) (attaching the privilege absent a showing of good cause arising from extraordinary circumstances); VA. CODE ANN. §§ 8.01-581.16 to .17 (Michie 1991) (requiring peer review materials to be privileged from discovery unless the circuit court orders disclosure following hearing and showing of good cause arising from extraordinary circumstances); see also Southwest Community Health Servs. v. Smith, 755 P.2d 40 (N.M. 1988) (upholding constitutionality of peer review statute, but holding that when plaintiff is able to demonstrate that privileged information is critical to the case, the court may, in its discretion, declare such evidence admissible).

90. For a discussion of this final point, see Creech, supra note 27, at 191-92.

XI. INSURANCE

A. Stretching the Limits of Uninsured Motorist Insurance

In Forbes v. Harleysville Mutual Insurance Co., the Court of Appeals held that statutorily mandated uninsured motorist (UM) provisions in automobile liability insurance policies encompass coverage for wrongful death claims. The court held more specifically that an insurer must compensate minor children insured under their father's policy for the wrongful death of their mother—even when the mother was married to but not living with the father at the time she was killed in an accident caused by an uninsured motorist.

Forbes repudiates the position taken by the Court of Special Appeals in Globe American Casualty Co. v. Chung. Chung held that the statutorily mandated UM coverage in automobile liability insurance policies encompasses coverage for claims brought by the decedent's legal representative posthumously on behalf of the decedent, but does not cover claims for wrongful death. Forbes overrules the Chung decision and extends the coverage of Maryland's UM insurance provisions to wrongful death claims brought by a victim's relatives, even when the decedent was not an "insured" as defined by the insurer's policy or the UM statute. The court's decision to extend the coverage of the UM statute to persons with a legitimate wrongful death claim against an uninsured negligent motorist

2. See id. at 701, 589 A.2d at 949.
3. See id. at 701 n.6, 589 A.2d at 951 n.6 (establishing the fact that the children were "insureds" under the terms of the policy at the time of the accident). The court noted that in cases factually similar to Forbes, authorities maintain that "the children remain residents of the household of the parent listed as the named insured on the policy." Id. Due to the language of most automobile liability insurance policies, the determination of whether a claimant—other than the named insured—is an "insured" and can therefore recover under the policy turns on whether such a claimant is a "resident" of the named insured's household as defined by the policy. See infra note 72. This issue was irrelevant as to the Forbes children because the insurer concede that the minor children were "insureds" at the time of the accident. See Forbes, 322 Md. at 701 n.6, 589 A.2d at 951 n.6.
4. Forbes, 322 Md. at 702, 589 A.2d at 950.
6. See id. at 532-33, 547 A.2d at 657-58; infra note 48 and accompanying text.
7. The Maryland wrongful death statute provides in part: "An action under this subtitle shall be for the benefit of the wife, husband, parent, and child of the deceased person." Md. CTS. & JUD. PROC. CODE ANN. § 3-904 (1989).
8. See Forbes, 322 Md. at 708-09, 589 A.2d at 953-54.
cessitated a broad reading of the UM statute, and is likely to have a significant effect on the insurance industry.

1. The Case.—Carol and Robin Forbes were married and had two children.9 On August 4, 1984, Carol Forbes left her husband and moved into an apartment with Delbert Dean, leasing on a month-to-month basis.10 Several weeks after she moved, and without Mr. Forbes's consent, Carol removed the children, Connie and George, from their father's home and brought them to the apartment she was sharing with Dean.11 Less than two months after separating from her husband, Carol Forbes was killed in an automobile accident.12 Carol and her children had been riding as passengers in Dean's uninsured automobile; the accident was caused by Dean's negligent driving.13

Robin Forbes, as husband of Carol Forbes and next friend of Connie and George, commenced an action against Dean and the Forbes' uninsured motorist carrier, Harleysville Mutual Insurance Company.14 The complaint contained five separate counts: the first two were personal injury claims on behalf of the children, and the latter three were wrongful death claims on behalf of Connie, George, and Robin Forbes respectively.15 Harleysville filed a motion for summary judgment on all counts. The circuit court granted the motion as to the wrongful death claims only,16 finding that at the time of the accident Carol Forbes was no longer an insured or "covered person"17 under Robin Forbes's policy.18 Therefore, the

---

9. Id. at 692, 589 A.2d at 945.
10. Id.
11. Id. It is noteworthy that the evidence produced at trial revealed that Carol Forbes at no time discussed with her husband the possibility of a divorce. See id. In addition, the court noted that she never changed her voter registration, nor did she notify the Motor Vehicle Administration of any change in her address. See id.
12. Id.
13. Id.
14. Id.
15. Id. at 693, 589 A.2d at 945-46.
16. Id. The court denied the motion as to the personal injury claims, and the court granted judgment against both Dean and Harleysville for the children's personal injuries. See id. Dean had fled the jurisdiction; therefore, default judgments were entered against him on all five counts pleaded by Robin Forbes. See id.
17. The Harleysville policy defined "covered person" as follows:
   1. You [the named insured] or any family member.
   2. Any other person occupying your covered auto.
   3. Any person for damages that person is entitled to recover because of bodily injury to which this coverage applies sustained by a person described in 1 or 2 above.

Id. at 703, 589 A.2d at 951.
court denied any recovery for wrongful death. 19

Robin Forbes subsequently filed a notice of appeal to the Court of Special Appeals. 20 While Forbes's appeal was pending, the Court of Special Appeals rendered its decision in Chung. 21 This prompted Forbes to file a petition for a writ of certiorari in the Court of Appeals. 22 Prior to argument in the intermediate court, the Court of Appeals granted certiorari to consider the scope of Maryland's UM statute and to determine whether the statute includes coverage for wrongful death claims, contrary to the holding in Chung. 23

2. Legal Background.—The Evolution of the UM Statute.—Uninsured motorist insurance is a byproduct of the successful push for compulsory automobile liability insurance that began in the 1950s. 24 While legislators were structuring compulsory insurance laws, insurance companies—under pressure to reform the motor vehicle accident reparations system—began offering UM insurance as a policy option. 25 Subsequently, many state legislatures enacted an array of statutory schemes that included UM provisions designed to encourage motorists to insure themselves. 26 In 1972, the Maryland legislature set forth the state's initial statutory provisions for mandatory automobile insurance policies. 27 The Maryland General

18. See id. at 693, 589 A.2d at 946. The Court of Appeals did not explain why the lower court found that Carol Forbes was not a “covered person.” However, it seems evident that such a conclusion was based on the determination that, at the time of the accident, Carol Forbes was neither a “named insured,” see infra note 72, nor a “family member” under the terms of the policy. The policy defined “family member” as “a person related to you by blood, marriage or adoption who is a resident of your household.” Forbes, 322 Md. at 704, 589 A.2d at 951. The circuit court apparently stripped Carol Forbes of her status as a resident because she moved away from her husband's household. Because she was not a “family member,” she was no longer a “covered person.”

19. Forbes, 322 Md. at 693, 589 A.2d at 946.
20. Id. at 694, 589 A.2d at 946.
21. Id.
22. Id.
23. Id.
24. ROBERT E. KEETON & ALAN I. WIDISS, INSURANCE LAW: A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES § 4.9(e) n.3 (1988).
25. See id. § 4.9(e).
26. See id.
27. See Act of Apr. 26, 1972, ch. 73, 1972 Md. Laws 281. In Jennings v. Government Employees Ins. Co., 302 Md. 352, 488 A.2d 166 (1985), the Court of Appeals noted: In addition to mandating compulsory automobile insurance with required coverages, Ch. 73 of the Acts of 1972 effected many other changes, such as creating the Maryland Automobile Insurance Fund, a state-owned automobile insurance company, to insure persons having difficulty obtaining automobile insurance policies in the private sector, abolishing the former assigned risk pro-
Assembly has since enacted a comprehensive network of statutes to induce financial responsibility on the part of automobile owners and operators.\textsuperscript{28}

In \textit{Pennsylvania National Mutual Casualty Insurance Co. v. Gartelman},\textsuperscript{29} the Court of Appeals explained the policy objectives behind this web of automobile insurance statutes:

In Maryland, there is an established legislative policy designed to make certain that those who own and operate motor vehicles in this State are financially responsible. This legislative policy has the overall remedial purpose of protecting the public by assuring that operators and owners of motor vehicles are financially able to pay compensation for damages resulting from motor vehicle accidents.\textsuperscript{30}

A minimum amount of UM coverage is mandated through section 541 of the Maryland Insurance Code.\textsuperscript{31} Whether this statute covers wrongful death claims is an issue that was never squarely before the court prior to \textit{Forbes}.\textsuperscript{32} Although the \textit{Forbes} court maintained that in the past it implicitly interpreted section 541 to encom-
pass wrongful death claims,\textsuperscript{33} the court did not rely on Maryland case law, but looked to other states with similar UM provisions to support its holding.\textsuperscript{34}

Regardless of the particular language of the statute, courts in most jurisdictions have interpreted their states' UM provisions "to provide uninsured motorist protection to persons insured under the policy and [persons] legally entitled to recover damages from the uninsured tortfeasor."\textsuperscript{35} For example, in In re Estate of Reeck,\textsuperscript{36} the Supreme Court of Ohio was asked to decide whether a settlement recovered under the UM provision of an insurance policy "is to be considered the proceeds of an insurance contract payable to the deceased insured's estate or as damages distributable under [Ohio's] Wrongful Death Act."\textsuperscript{37} The Ohio court interpreted its UM statute broadly, and held that anyone legally entitled to maintain a wrongful death action may recover damages under the UM provisions of the decedent's motor vehicle insurance policy.\textsuperscript{38} After Forbes, Maryland joins Ohio and other jurisdictions that eschew a narrow interpretation of the UM statute and render unenforceable any insurance policy that contravenes the broad coverage of the statute.\textsuperscript{39}

3. The Court's Reasoning; Analysis.—Before addressing the facts of the case, the Forbes court first disposed of the Chung decision,\textsuperscript{40} which held that the coverage mandated in the UM statute does not

\textsuperscript{33} See id.

\textsuperscript{34} See id. (citing several cases from other jurisdictions holding that wrongful death claims are covered by the state's statutorily mandated uninsured motorist (UM) provisions).

\textsuperscript{35} 2 IRVIN E. SCHERMER, AUTOMOBILE LIABILITY INSURANCE § 25.06 (2d ed. 1991).

\textsuperscript{36} 488 N.E.2d 195 (Ohio 1986).

\textsuperscript{37} Id. at 197.

\textsuperscript{38} See id.

\textsuperscript{39} See 322 Md. at 698, 589 A.2d at 948. The court has noted that "the remedial nature of the [UM statute] . . . dictates a liberal construction in order to effectuate its purpose of assuring recovery for innocent victims of motor vehicle accidents . . . ." State Farm Mut. Auto. Ins. Co. v. Maryland Auto. Ins. Fund, 277 Md. 602, 605, 356 A.2d 560, 562 (1976). Moreover, the statute's purpose has been defined as compensating the victim in an amount "'to exactly the same extent as would have been available had the tortfeasor complied with the minimum requirements of the financial responsibility Law.'" Nationwide Mut. Ins. Co. v. Webb, 291 Md. 721, 737, 436 A.2d 465, 474 (1981) (quoting Webb v. State Farm Mut. Auto. Ins. Co., 479 S.W.2d 148, 152 (Mo. App. 1972)). The Forbes court declared that "limitations on coverage or exclusions in insurance policies, which are inconsistent with the purpose of the uninsured motorist statutory provisions, are unenforceable." 322 Md. at 698, 589 A.2d at 948.

\textsuperscript{40} See Forbes, 322 Md. at 694, 589 A.2d at 946.
encompass claims for wrongful death.\textsuperscript{41} In repudiating this holding, the Court of Appeals focused on what it considered Chung's misinterpretation of the language of section 541.\textsuperscript{42} The court criticized Chung's narrow construction of the UM statute.\textsuperscript{43} Therefore, by disposing of Chung on statutory interpretation grounds, the court was left with an open judicial slate with which to effectuate its goal of broadening the scope of statutorily mandated UM coverage in Maryland.

\textit{a. Ignoring Chung.—}In overruling Chung, the court essentially ignored the legal analysis employed by the Court of Special Appeals.\textsuperscript{44} In Chung, the Court of Special Appeals was confronted with defining the scope of coverage under the UM statute.\textsuperscript{45} The decedent, Bo Hyun Chung, had been killed by a negligent uninsured motorist.\textsuperscript{46} His relatives, as well as representatives of his estate, sought compensation from an insurer that had issued Chung a motor vehicle liability insurance policy containing UM coverage.\textsuperscript{47} The court held that the claim arising from the UM provision in Chung's policy inured to the benefit of his personal representatives and not to his familial relatives.\textsuperscript{48} The court offered the following rationale:

That the statutorily required Uninsured Motorist provisions of liability policies should provide for the injured insured or his personal representative but not for the sur-

\begin{footnotesize}
\textsuperscript{42} See Forbes, 322 Md. at 694, 589 A.2d at 946. In noting the Chung court's reliance on § 541(c)(2), the Forbes court stated, "the use of the phrase 'bodily injuries' without any reference to 'death,' and the use of the word 'insured' without any reference to 'the surviving next-of-kin,' led the Court of Special Appeals to conclude that wrongful death claims were not encompassed by the statutorily mandated uninsured motorist coverage." \textit{Id.}
\textsuperscript{43} See \textit{id.} at 697, 589 A.2d at 948; see also infra note 53.
\textsuperscript{44} The court in Forbes never discussed the distinction between survival claims and wrongful death claims. This distinction was the linchpin of the Chung decision. See 76 Md. App. at 538-41, 547 A.2d at 660-62; see also infra note 48.
\textsuperscript{45} See 76 Md. App. at 529-30, 547 A.2d at 656.
\textsuperscript{46} \textit{Id.} at 528, 547 A.2d at 655.
\textsuperscript{47} \textit{Id.} at 530, 547 A.2d at 656.
\textsuperscript{48} \textit{Id.} at 532, 547 A.2d at 657. The Chung court distinguished between two distinct claims that may arise upon the death of an insured caused by the negligence of an uninsured motorist. The first is a "survival" claim brought by the personal representative of the decedent "seeking recovery for the injuries suffered by the victim;" the second is a claim for wrongful death commenced by the relatives of the decedent "seeking recovery for their loss by virtue of the victim's death." \textit{Id.} at 526, 547 A.2d at 654-55. The court opined that the language in the statutorily mandated UM provision refers to coverage of the "survival claim and not the wrongful death claim." \textit{Id.} at 541, 547 A.2d at 662.
\end{footnotesize}
viving next-of-kin is not hard to explain. The provision is primarily for the benefit of the injured insured, who in most cases will still be alive, to compensate him for his physical loss, pain, and suffering. The proviso that in the case of his death, his personal representative may initiate or continue to press his claim is but a routine recognition of the now familiar principle that the injured insured’s claim will not abate with his death. It is a claim with which the surviving relatives have nothing to do except to the extent that they are coincidentally the legatees of his estate.⁴⁹

This holding was derived from the distinction between survival claims and wrongful death claims “meticulously maintained” in Maryland since the Court of Appeals decided Stewart v. United Electric and Power Co.⁵⁰ in 1906.⁵¹ This distinction, blurred or completely lost in many other jurisdictions,⁵² was conspicuously avoided by the court in Forbes. The Forbes court evaluated Chung myopically and overruled the decision in large part because it felt that the Chung court failed to construe the pivotal “statutory language in light of the legislature’s general purpose and in the context of the statute as a whole.”⁵³

b. The Forbes Decision.—In Forbes, the court attributed its finding of coverage for a wrongful death action to the fact that section

⁴⁹. Id. at 541-42, 547 A.2d at 662.
⁵⁰. 104 Md. 332, 65 A. 49 (1906).
⁵¹. See Chung, 76 Md. App. at 527, 547 A.2d at 655. The Chung court quoted Stewart as follows:

“The points of difference between [the wrongful death statute] and the provisions of the Code giving to executors and administrators full power to commence and prosecute any personal action whatever which the testator or intestate might have commenced and prosecuted (except actions of slander and an action where the person causing the injury is dead) are striking and marked even upon a casual comparison of the two enactments. The suits are by different persons, the damages go into different channels, and are recovered upon different grounds, and the causes of action though growing out of the same wrongful act or neglect, are entirely distinct.”

Id. at 533, 547 A.2d at 658 (quoting Stewart, 104 Md. at 338-39, 65 A. at 52).

⁵². See 2 Schermer, supra note 35, § 25.01A. Although most UM provisions technically refer to recovery for the representatives of the decedent’s estate, “courts have held that the statutes contemplate recovery for wrongful death . . . even though an insuring agreement limits coverage to injuries ‘sustained by the insured.’ ” Id.

⁵³. Forbes, 322 Md. at 697, 589 A.2d at 948. “[T]he Court of Special Appeals . . . seized upon certain words in one sentence of § 541(c)(2), without regard to the legislative purpose reflected in § 541(c) and without regard to the other language in the section.” Id. at 696, 589 A.2d at 947.
541(c) explicitly extends coverage to "bodily injury or death." The court also noted that wrongful death claims are incorporated in the liability coverage mandated by both Maryland financial responsibility law and standard automobile insurance policies by virtue of the inclusion of the term "death." Additionally, claims not covered by insurance and therefore payable by the Maryland Automobile Insurance Fund (MAIF) include wrongful death claims for the same reason, according to the Forbes court. The court emphasized the need to construe these statutory liability provisions liberally to effectuate the policy objectives of the legislature. However, without any further explanation of why the inclusion of the term "death" automatically connotes the existence of a wrongful death claim, the Forbes decision seems merely to beg the question answered by the lower court in Chung. In particular, the Forbes court failed to articulate any legal rationale for determining that the existence of the term "death" in section 541 gives rise to an action for wrongful death.

The inclusion of the word "death" in pertinent MAIF provisions does not indicate in any unambiguous way what cause of action the legislature intended to be available to the family of a

54. See id. at 699, 589 A.2d at 949; see also Md. Ann. Code art. 48A, § 541(c) (1990). For the pertinent portion of § 541(c), see supra note 31.

55. See Forbes, 322 Md. at 698, 589 A.2d at 948. The Forbes court emphasized that the purpose of required UM coverage is "to make available the same coverage as would have been available had the tortfeasor complied with the liability insurance requirements of the financial responsibility law." Id.; see Md. Transp. Code Ann. § 17-103 (1977 & Supp. 1990). Section 17-103 sets the minimum required benefits for a vehicle liability insurance policy, stating that every policy must provide for at least "[t]he payment of claims for bodily injury or death arising from an accident." Id. § 17-103(b) (emphasis added).

56. See 322 Md. at 699, 589 A.2d at 949. The Maryland Automobile Insurance Fund (MAIF) was created as the successor to the Unsatisfied Claim and Judgment Fund for the purpose of providing insurance "to those eligible persons who are unable to obtain it in the private market." Md. Ann. Code art. 48A, § 243B(a) (1990). Section 541(c)(2) of the Annotated Code states that "[i]n no case shall the uninsured motorist coverage be less than the coverage afforded a qualified person under Article 48A, §§ 243H and 243-I." Md. Ann. Code art. 48A, § 541(c)(2) (1990). Further, § 243H states that "[c]laims for the death of or personal injury to a qualified person" shall be covered, id. § 243H (emphasis added), and § 243-I sets the maximum amount payable for the injury or death of an individual at $20,000. Id. § 243-1.

57. See Forbes, 322 Md. at 698, 589 A.2d at 948; see also supra note 39.

58. See 322 Md. at 699, 589 A.2d at 949. The court declared that the inclusion of the phrase "bodily injury or death of the insured" in §§ 541(c)(1) and (c)(3) "obviously reflects the General Assembly's contemplation that uninsured motorist coverage... is 'applicable to the... death of the insured' and, like liability coverage, embraces wrongful death claims." Id.

59. See supra note 56.
decedent negligently killed by an uninsured motorist. At the very least, the inclusion is no more telling than is the existence of the term “bodily injury or death of an insured” in section 541. To bridge this obvious gap, the court noted that section 541 mandates coverage that is at least commensurate with the coverage provided by MAIF. The court subsequently asserted that in *Unsatisfied Claim and Judgment Fund v. Hamilton,* it had taken “the position that [MAIF] encompass[es] wrongful death claims.”

In *Hamilton,* however, the task before the court was to determine the meaning of the term “personal representative” with regard to the statute. Moreover, the facts in *Hamilton* were quite inapposite to those in *Forbes.* In *Hamilton,* the deceased was killed in an accident while driving his own uninsured vehicle, and his surviving family members sought payment from the Unsatisfied Claim and Judgment Fund, the predecessor to MAIF. The court held that just as an uninsured owner is denied recovery from MAIF, so is his executor and “all those who stand in his place or could become entitled to recover by reason of the accident because of their relationship to him.”

Only by reference to holdings in other jurisdictions did *Hamilton* touch upon the coverage of wrongful death claims in circumstances similar to *Forbes.* Thus, the *Forbes* court’s claim that *Hamilton* is dispositive on the issue is tenuous at best.

The *Forbes* court further stated that although it has not had occasion to discuss the issue directly, it has in previous cases “treated wrongful death claims as covered under [section] 541(c).” However, both cases cited by the court involved survival actions—not wrongful death actions—arising out of the death of a victim of a

---

60. See *Forbes,* 322 Md. at 599, 589 A.2d at 949.
62. *Forbes,* 322 Md. at 700, 589 A.2d at 949.
63. See 256 Md. at 58, 259 A.2d 304-05. The court concluded “that the meaning the legislature intended to convey by the use of the term personal representative in the context in which it is found was the broader meaning that the cases have said it may have.” *Id.* at 63, 259 A.2d at 307.
64. *See id.* at 58, 259 A.2d at 304.
65. *Id.* at 63, 259 A.2d at 307.
67. 322 Md. at 700, 589 A.2d at 949.
negligent uninsured motorist. Thus, in this context, the court’s reliance on prior cases involving issues concerning the UM statute was misplaced.

Absent any solid legal justification for inferring a wrongful death action out of such language, the court’s reasoning seems to pale in the face of the analysis set forth in Chung—an analysis more squarely grounded in precedent. Consequently, the public policy objectives lurking beneath the surface of Forbes best explain the court’s decision to expand the scope of UM coverage. The predominant public policy agenda at work in Forbes is that of efficient recompense for persons injured—directly or indirectly—by financially irresponsible motorists. In Forbes, for example, the tortfeasor fled the jurisdiction. Therefore, the only possible way to compensate the Forbes children for their loss at the hands of a missing uninsured motorist was to extend the coverage of the UM statute to encompass their claims. Thus, the court’s result-oriented decision to find coverage for wrongful death claims seems to cut evenly between judicial legislation and legal pragmatism.

c. The Scope of Coverage in Maryland.—In addition to addressing whether the Maryland UM statute encompasses wrongful death claims, Forbes confronted the issue of how far to extend the statutory coverage in light of restrictions included in an insurance policy. Because Carol Forbes was arguably not a “named insured” on her husband’s policy, the court looked to whether she qualified as a “family member.” The Harleysville policy defined “family member” as “a person related to [the named insured] by blood, marriage or adoption who is a resident of [the named insured’s] house-

68. See id. In Hoffman v. United States Auto Ass’n, 309 Md. 167, 522 A.2d 1320 (1967), the plaintiff, on his own behalf and on behalf of his deceased wife’s estate, sought compensation for his personal injuries and his wife’s death, caused by a negligent uninsured driver. Id. at 170, 522 A.2d at 1321. Similarly, in Yarmuth v. Government Employees Ins. Co., 286 Md. 256, 407 A.2d 315 (1979), the personal representative of the estates of Albert Starr, his wife, and their son, after recovering damages under one policy covering the Starrs, sought further compensation under yet another policy insuring the decedents against uninsured motorists. Id. at 259, 407 A.2d at 316. Neither case involved wrongful death claims.

69. Coverage under the Harleysville policy was restricted to a “covered person [who] is legally entitled to recover from the owner or operator of an uninsured motor vehicle because of... [b]odily injury sustained by a covered person and caused by an accident.” Forbes, 322 Md. at 703, 589 A.2d at 951. For the definition of a “covered person” under the policy, see supra note 17.

70. See infra note 72.

71. See Forbes, 322 Md. at 703-08, 589 A.2d at 951-53.
Harleysville argued that because Carol Forbes had moved away from her husband's household, she was no longer a "resident" and therefore no longer qualified as a "covered person" under the "family member" provision of her husband's policy.

In finding that Carol Forbes was a "resident" and therefore a "covered person" within the policy definition, the court reasoned that marital difficulties and temporary separations are commonplace in today's society and thus do not result in the loss of "resident" status. Declining to adopt a bright-line test for determining residency, the court opted instead for a case-specific factual analysis, thus allowing for further expansion of UM coverage in the future.

The court recognized that the "critical issue" based on language in the Harleysville policy was whether Carol Forbes, who was co-owner and co-operator of the insured vehicle, was a "resident" of Robin Forbes's household. Before confronting the issue of residency, the court offered support for the notion that Carol Forbes was actually a "named insured" on the policy. See id. at 702-03, 589 A.2d at 950-51. Harleysville admitted that the premiums on the policy would have been the same if both spouses were "named insureds" instead of just the husband. See id. Furthermore, the Maryland Insurance Code defines a "named insured" as "the person nominated in the declarations in a policy of motor vehicle liability insurance." Md. Ann. Code art. 48A, § 538(c) (1990). Carol Forbes was listed on the declaration page of the Harleysville policy. Forbes, 322 Md. at 703, 589 A.2d at 951. Nevertheless, as evidence of its agenda to affirm the expansive scope of UM coverage in Maryland, the court purposefully confronted the residency issue by assuming that Carol Forbes was not a "named insured." See id.

Although Harleysville conceded that the children were "insureds," it maintained that due to Carol Forbes's status and the attendant language in the policy, Robin Forbes was precluded from recovering damages on behalf of the children. See id. The fact that the children had also moved from their father's home was of no consequence. See id. The court noted a line of cases from other jurisdictions supporting the notion that even when parents are separated or divorced, the children of those parents may remain residents of the household of the parent listed as the named insured. See id. at 701 n.6, 589 A.2d at 951 n.6. "Some courts have held that the children can be residents of both parents' households for purposes of insurance." Id. (citations omitted).

Some courts have implemented bright-line tests to determine residency in situations similar to Forbes. See Sanders v. Wausau Underwriters Ins. Co., 392 So. 2d 343, 344 (Fla. App. 1981) ("The test for whether a wife is no longer a member of her husband's household is not just physical absence, but physical absence coupled with an intent not to return."). The Forbes court, however, assessed the facts surrounding the marriage at the time of the accident rather than applying any predetermined test. See 322 Md. at 708, 589 A.2d 953. If the court had applied the Sanders test, it is questionable whether
Additionally, the court found that the intent of Robin and Carol Forbes when contracting with Harleysville was "that both of them as co-owners and co-operators would be insured with respect to their vehicle."76

Although most jurisdictions interpret their UM statutes liberally to encompass wrongful death claims,77 several courts restrict such claims to incidents in which the decedent is an "insured" or "covered person" under the terms of the insurance policy.78 In Zeagler v. Commercial Union Insurance Co.,79 a case often cited on this subject, the District Court of Appeal of Florida held that "the surviving spouse has a right to recover for the wrongful death of the insured which was occasioned by the wrongful activity of an uninsured motorist."80 Yet, recently in Valiant Insurance Co. v. Webster,81 the Supreme Court of Florida held that "a survivor in a wrongful death claim does not have a claim against the survivor's own uninsured motorist carrier when the person who suffered the bodily injury (the decedent) was not an insured under the policy."82 Similar limitations have been adopted by the courts of California.83

The policy rationale behind such recovery restrictions seems obvious. That a person in Florida may recover damages under the UM provisions of her automobile liability insurance policy for the

Carol Forbes would have been deemed a "resident" of her husband’s household; her intent not to return seemed evident regardless of the fact that she had not changed her voter registration or the address on her driver's license. See id. Carol Forbes took her children from her husband's home and leased an apartment with another man. See id. at 692, 589 A.2d 945. Such actions cannot readily be disposed of as merely temporary.76

76. Forbes, 322 Md. at 705, 589 A.2d at 952.

77. See 1 Widiss, supra note 74, § 6.2; see also Sterns v. M.F.A. Mut. Ins. Co., 401 S.W.2d 510, 517 (Mo. App. 1966) ("[Uninsured motorist coverage in its standard form includes indemnity to such survivors of deceased victims of uninsured automobiles as are legally entitled to sue for damages under wrongful death statutes—without regard to whether the coverage is provided under compulsion by statute or by voluntary contract."); Sexton v. State Farm Mut. Auto. Ins. Co., 433 N.E.2d 555, 560 (Ohio 1982) (holding that the UM statute "protects insureds who are legally entitled to recover damages related to injury or death caused by an uninsured motorist" regardless of the deceased's status under the insurance policy).

78. See, e.g., Gaddis v. Safeco Ins. Co., 794 P.2d 593, 537 (Wash. App.) ("We do not perceive that such broad coverage of losses arising from death or injury to noninsured persons was expected or intended by the average reasonable purchaser of insurance."), review denied sub nom. Estate of Bowers v. Safeco Ins. Co., 803 P.2d 324 (Wash. 1990).

79. 166 So. 2d 616 (Fla. App. 1964), cert. denied, 172 So. 2d 450 (Fla. 1965).

80. Id. at 618.

81. 567 So. 2d 408 (Fla. 1990).

82. Id. at 411.

83. See, e.g., Smith v. Royal Ins. Co., 230 Cal. Rptr. 495, 497 (1986) (holding that recovery cannot be had for wrongful death under the state's UM statute when "neither the decedent nor the car in which he was riding was insured by respondent").
wrongful death of her mother living in Alaska seems beyond the reasonable expectations of the parties on either side of the insurance contract. Nonetheless, the Forbes court overlooked the recent decisions in jurisdictions that have accepted restricted coverage of wrongful death actions and rendered an alternative holding specifically designed to effectuate the most liberal construction of Maryland's UM statute. The court held that because the children were "insureds" under the Harleysville policy, their "wrongful death claims squarely fall within [section 541(c)(2)] even if their mother at the time of the accident was not an 'insured.'"

With its alternative holding, the court deemed the purpose of the statutorily mandated UM coverage paramount to any limitations in the insurance policy that might preclude recovery. However, such an all-encompassing interpretation of Maryland's UM statute will more than likely catch the insurance industry in a state of unpreparedness. Insurers will no doubt react by adjusting their premiums to account for the additional risk thrust upon them in Forbes.

4. Conclusion.—The court in Forbes noted that the UM statute "embodies a public policy 'to assure financial compensation to the innocent victims of motor vehicle accidents who are unable to recover from financially irresponsible uninsured motorists.'" In addition to quashing the long-established distinction between survival claims and wrongful death claims, Forbes sends a powerful message to the insurance industry in Maryland. Insurance policies will be construed favorably to the insurer only to the extent that they conform to the UM statute, and the statute will be construed broadly to protect all those who are legally entitled to a wrongful death claim.

84. See Karen K. Shinevar, A Reasonable Approach to the Doctrine of Reasonable Expectations as Applied to Insurance Contracts, 13 U. Mich. J.L. Ref. 603, 608 (1980). In explaining the application of the reasonable expectations doctrine as it relates to insurance contracts, Shinevar noted, "[t]his doctrine requires that insurance contracts provide that coverage which an insured could reasonably expect after reading the policy." Id.
85. See 322 Md. at 708-09, 589 A.2d at 953-54.
86. Id. at 709, 589 A.2d at 954.
87. See id. at 710, 589 A.2d at 954.
88. Id. at 697, 589 A.2d at 948 (quoting Lane v. Nationwide Mut. Ins. Co., 321 Md. 165, 169, 582 A.2d 501, 503 (1990)).
against the uninsured tortfeasor, regardless of the decedent's status under the insurance policy.

B. Subrogee's Right to Settlement Proceeds

In GEICO v. Group Hospitalization Medical Services, Inc.,89 the Court of Appeals responded to three questions certified by the District of Columbia Superior Court. The gravamen of the court’s response was that a medical services insurer subrogated to its insured’s rights could not recover medical expenses paid to its insured by a third party once a settlement agreement had been executed between the insured and the third party.90 The court concluded that the subrogee had not acquired a lien against the settlement funds,91 nor had a contractual obligation arisen requiring the third party to pay the subrogated amount.92 Further, the court found that the settlement between the third party—a liability insurer—and the subrogor did not constitute a waiver by the liability insurer of its right to raise the defense of contributory negligence, or any other defense related to liability, in response to a later action brought by the subrogee.93

1. The Case.—On May 25, 1985, a motorcycle operated by Frederick Proctor struck an automobile driven by Louise Thompson as the automobile emerged from a driveway and entered the road on which Proctor was travelling.94 As a result of the accident, Proctor incurred medical bills totalling $21,518.26, which were paid by his medical services insurance provider, Group Hospitalization Medical Services, Inc. (GHI).95 GHI's contract with Proctor provided that GHI would be subrogated to Proctor's rights against

90. Id. at 657, 589 A.2d at 470. The District of Columbia Court of Appeals certified questions of law to the Maryland Court of Appeals pursuant to the Maryland Uniform Certification of Questions of Law Act, Md. Cts. & Jud. Proc. Code Ann. §§ 12-601 to -609 (1989); Md. R. 8-305; GEICO, 322 Md. at 647 n.1, 589 A.2d at 465 n.1. The Court of Appeals, in answering these certified questions, left open the possibility that legal liability might be established on other grounds. See id. at 657, 589 A.2d at 470.
91. See GEICO, 322 Md. at 650, 589 A.2d at 466.
92. See id. at 657, 589 A.2d at 470.
93. See id. at 650-52, 589 A.2d at 466-67.
94. Id. at 647, 589 A.2d at 465. Proctor was travelling south on Piscataway Road in Clinton, Maryland and struck Thompson's automobile as Thompson, while attempting to turn north, crossed the southbound lane. Id. Investigating police officers determined that Proctor, who was carrying a passenger at the time of the collision, was driving his motorcycle in excess of 65 miles per hour, that he had been drinking, and that the motorcycle had rapidly accelerated just before the collision. Id.
95. Id. at 648, 589 A.2d at 465.
third party tortfeasors and that GHI had the right to be reimbursed by Proctor out of any injury recovery payments that he received from a tortfeasor.\textsuperscript{96}

At the time of the accident, Thompson was insured by Government Employees Insurance Company (GEICO) with policy limits of $25,000 per person, per accident, and $50,000 total per accident.\textsuperscript{97} Despite the possible contributory negligence of Proctor,\textsuperscript{98} GEICO settled Proctor's claim against Thompson for the policy limit of $25,000.\textsuperscript{99} Prior to that settlement, however, GHI had sent GEICO written notice of GHI's right of subrogation regarding any settlement agreement that GEICO might make with Proctor.\textsuperscript{100} GEICO acknowledged that it had received GHI's notice of subrogation prior to settling with Proctor.\textsuperscript{101}

After receiving payment from GEICO, Proctor declared bankruptcy.\textsuperscript{102} GHI unsuccessfully attempted to recover the amount of the subrogated claim for medical expenses from Proctor in the bankruptcy proceedings.\textsuperscript{103} GHI subsequently filed an action in the District of Columbia Superior Court seeking judgment against GEICO in the amount of the subrogated claim, plus interest and costs.\textsuperscript{104}

The District of Columbia court certified questions to the Court of Appeals raising three issues: (1) whether a settlement payment by a tortfeasor's insurer constitutes an implied waiver of the insurer's right to raise the defense of contributory negligence in an action brought by an injured party's subrogee; (2) whether silence
by a tortfeasor's insurer, after receiving notice of a subrogated interest in a claim, creates an implied contractual relationship between the insurer and the subrogee; and (3) whether notice to a tortfeasor's insurer of a subrogee's right creates a lien against any funds offered in settlement by the insurer to the subrogor.

2. Legal Background.—

a. Subrogation Law.—Subrogation,105 which developed as an equitable doctrine,106 is the substitution of one person or entity in place of another in regard to some claim or right against a third party.107 Subrogation has the effect of placing the ultimate burden of payment upon the person who should, in fairness, bear it.108 Conventional subrogation109 is founded upon an agreement, express or implied, between a debtor or creditor and a third party, that the third party will be entitled to all the rights and securities of that debtor or creditor upon payment of the debt.110 A person entitled to subrogation “stands in the shoes” of the subrogor and is entitled to all the rights and remedies of the subrogor. The subrogee may use all the means that the subrogor could employ to enforce payment.111 Those rights and means, however, are no greater than those of the subrogor.112 In the insurance context, when an insurer

105. Subrogation is defined as “[t]he substitution of one person in the place of another with reference to a lawful claim, demand or right, so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.” Black's Law Dictionary 1279 (5th ed. 1979).


107. See Keeton & Widiss, supra note 24, § 3.10(a), at 219.


109. Subrogation is generally categorized as either conventional or legal. See Keeton & Widiss, supra note 24, § 3.10(a). Conventional subrogation results from either an agreement of the parties or a statutorily imposed requirement. Legal subrogation exists as a consequence of a judicial determination when conventional subrogation is lacking. Id.

110. Bachmann, 316 Md. at 413-14, 559 A.2d at 369.

111. Id. at 413, 559 A.2d at 369; see also Keeton & Widiss, supra note 24, § 3.10 (a).

112. See General Cigar Co. v. Lancaster Leaf Tobacco Co., 323 F. Supp. 931, 935 (D. Md. 1971); Travelers Ins. Co. v. Godsey, 260 Md. 669, 674, 273 A.2d 431, 434 (1971); see also Poe v. Philadelphia Casualty Co., 118 Md. 347, 353, 84 A. 476, 478 (1912) (“[T]he person so substituted can exercise no right not possessed by his predecessor, and can only exercise such right under the same conditions and limitations as were binding on his predecessor.”). See generally 16 Couch Cyclopedi of Insurance Law § 61:36 (Ronald A. Anderson ed., 2d ed. 1983).
reimburses an insured for a covered loss, the insurer may be subrogated to the insured's rights against a third party who is responsible for the loss.113

These canons of subrogation law were recently expressed in Hernandez v. Suburban Hospital Ass'n, Inc.,114 in which the Court of Appeals of Maryland held that a patient's unqualified assignment115 to a hospital of the proceeds of an unliquidated tort claim operated as a transfer of all the right, title, and interest of the assignor in any recovery on the claim.116 The Hernandez court disagreed with the patient's argument that his obligation to the hospital was discharged in bankruptcy and that the hospital was therefore precluded from enforcing the assignment.117 The court determined that the correct rule was that an assignee of a chose in action acquires an equitable

113. KEETON & WIDISS, supra note 24, § 3.10(a).
115. Claims in tort, notably those involving injury or interference with the person, are not assignable absent a statute or some special justification. See KEETON & WIDISS, supra note 24, § 3.10(a)(7). This principle rests largely upon the theory that allowing such a chose in action for personal injuries would lead to champerty and maintenance if a claim were permitted to survive the death of either the victim or the tortfeasor. See generally Andrea G. Nadel, Annotation, Assignability of Proceeds of Claim for Personal Injury or Death, 33 A.L.R. 4th 82 (1984).

Maryland has avoided the problem of determining whether personal injury actions survive death by its adoption of a survival statute. See Md. Cts. & Jud. Proc. Code Ann. § 6-401 (1989), which provides:

(a) At law.—Except as provided in subsection (b) of this section, a cause of action at law, whether real, personal, or mixed, survives the death of either party.
(b) Slander.—A cause of action for slander abates upon the death of either party unless an appeal has been taken from a judgment entered in favor of the plaintiff.
(c) In equity.—A right of action in equity survives the death of either party if the court can grant effective relief in spite of the death.

Id.

The assignability of an unliquidated tort claim was also considered in Hernandez. The court recognized the modern rule that "a chose in action in tort is generally assignable." Hernandez, 319 Md. at 234, 572 A.2d at 148. The court noted further that "[a]s to public policy considerations . . . we see no danger of champerty or maintenance, nor any other public policy reason to preclude the assignment of expected personal injury claim benefits to secure hospital or medical expenses actually incurred." Id. at 235, 572 A.2d at 148.

116. 319 Md. at 235-36, 572 A.2d at 148; see also Miller v. Horowitz, 172 Md. 419, 430, 191 A. 906, 911 (1937) (holding that certain acts—executing an assignment of a legacy of an interest in a trust estate, giving notice to the trustee of the assignee's rights, and making the assignee a party with the assignor's consent—serve to perfect a lien on the assignor's interest); Seymour v. Finance & Guar. Co., 155 Md. 514, 531, 142 A. 710, 716 (1928) (finding that an agreement for assignment of a debt is an assignment pro tanto of the fund and thereby vests equitable title to the fund in the assignee).

117. 319 Md. at 237-38, 572 A.2d at 149.
lien against the subject of the assignment. There is striking similarity between the assignment made by the subrogor in *Hernandez* and the assignment made in *GEICO*. Although the Court of Appeals did not cite the *Hernandez* decision when it ruled in *GEICO*, there is no apparent explanation for the *GEICO* court to contradict a decision it made thirteen months earlier.

b. Effect of Settlement or Compromise.—It is a rule of general application in most jurisdictions that the doctrine of waiver cannot be used to bring risks not covered by the terms of an insurance policy within the policy's coverage. The rule follows the theory that the doctrine of waiver should not require an insurer to pay for losses for which it charged no premium. Maryland courts have recognized this rule, holding that a waiver is valid only when the subject matter of the waiver is within the terms of the contract.

It follows that the execution of a compromise or settlement agreement by an insurer and a claimant should not act to bar the insurer from raising defenses to liability in a subsequent action brought by a party outside the settlement contract. To consider such a settlement offer or agreement as a waiver of an insurer's right to defend its insured from liability would amount to an increase in the insurer's obligations under the policy.

This rule regarding waiver parallels judicial rules concerning the admissibility of settlement agreements into evidence. Offers of settlement and compromise are considered irrelevant to the question of liability because they are not intended as admissions of liabil-

118. See id. at 238, 572 A.2d at 149.
119. Waiver is defined as "the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances." Food Fair v. Blumberg, 234 Md. 521, 531, 200 A.2d 166, 172 (1964); see also 16B JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 9085 (1981).
120. *GEICO*, 322 Md. at 651, 589 A.2d at 467 (citing A/C Elec. Co. v. Aetna Ins. Co., 251 Md. 410, 419, 247 A.2d 708, 713 (1968)); see FED. R. EVID. 408. The Rule provides:
Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.
ity by the parties making them, but rather are extended for the purpose of "buying peace." 123 Moreover, a privilege attaches to such offers in order to further the public policy of encouraging parties to settle disputes out of court. 124 An insurer's willingness to settle does not necessarily imply a specific belief that the adversary's claim is well founded; rather, it could be based on the insurer's belief that further defense of the claim would cause such annoyance or expose the insurer or insured to such risk that payment of the sum demanded is preferred. 125

c. Silence as a Mode of Acceptance.—It is a well-recognized doctrine of contract law that silence by an offeree cannot operate as acceptance of an offer or as manifestation of assent. 126 Therefore, no recovery in contract may be had against a party who is silent in the face of another's communication or conduct. 127 Similarly, an offeror does not have the power to cause silence of the offeree to operate as acceptance when the offeree does not intend acceptance. 128

In Laurel Race Course, Inc. v. Regal Construction Co., 129 the Court of Appeals reaffirmed this doctrine, 130 holding that silence can operate as an acceptance only in limited circumstances. 131 Laurel involved a demand for payment by a contractor for construction services that it had performed for a racetrack owner. There was neither a written contract nor an express acceptance of the services by the owner. 132 The court held that silence by the owner-offeree can operate as acceptance only when the offeree, with reasonable opportunity to reject the offered services, accepts the benefit of the services under circumstances that would indicate to a reasonable person that the services were offered with the expectation of compensation. 133

125. See Wigmore, supra note 123, § 1061.
127. See id.
128. See id. § 73.
130. See id. at 156-57, 333 A.2d at 328-29.
131. Id. The court noted that when the offeree, with reasonable opportunity to reject services performed by an offeror, takes the benefit of those services, he will be considered to have manifested his assent to the offer. See id. at 156, 333 A.2d at 329; see also Mohr v. Universal C.I.T. Credit Corp., 216 Md. 197, 205, 140 A.2d 49, 52 (1958) ("[M]ere silence will generally not raise an estoppel against a silent party.").
133. See id. at 157, 333 A.2d at 328-29.
d. **Subrogee’s Lien Against Settlement Proceeds.**—It has been recognized that when an insured subrogates or assigns a chose in action to an insurer-subrogee, the subrogee acquires an equitable lien against the proceeds recovered in connection with that claim or offered in settlement thereof. This tenet is most succinctly expressed in Pomeroy’s treatise on equity law:

> “[E]very express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation, or whereby the party promises to convey or assign or transfer the property as security, creates an equitable lien upon the property so indicated.”

This doctrine extends to property not yet in existence at the time when the contract is made.

Relying upon this equitable lien theory, the majority of states have adopted the principle that the rights of an insurer-subrogee are not defeated by a tortfeasor’s procurement of a full release from liability from the insured-subrogor after receiving notice of the insurer’s subrogated rights. Maryland authority is in accord with this view. In *Cleaveland v. C & P Telephone Co.*, the Court of Appeals concluded that when an insurer who may be liable to an injured party affects a settlement with and obtains a release from that party with knowledge that an insurer-subrogee has already paid the amount of its liability to that party, the insurer remains liable to the subrogee for the full amount of its subrogated claim. Both the

134. *See Keeton & Widiss, supra* note 24, § 3.10(a).
136. *Id.* § 1236.
139. *See id.* at 51, 169 A.2d at 448.
Hernandez court\(^{140}\) and the Cleaveland court\(^{141}\) noted the underlying policy concern that the release and settlement may work a fraud upon the insurer-subrogee, and therefore should not constitute a defense against an action by the subrogee to enforce its subrogation rights.

3. Analysis.—

a. Waiver Theory.—In GEICO, the Court of Appeals properly rejected GHI's argument that settlement of Proctor's personal injury claim constituted a waiver of either Thompson's or GEICO's right to raise defenses to liability in a subsequent legal action.\(^{142}\) The court noted that waiver requires an intentional relinquishment of a known right; whether a right was waived is a question of fact.\(^{143}\) The court reasoned that GEICO, faced with a possible penalty for its failure to settle a claim in good faith and in a timely manner,\(^{144}\) did not intentionally relinquish defenses that it may have had if the claim had proceeded to litigation.\(^{145}\)

The court's decision comports with general rules of evidence\(^{146}\) that consider offers to compromise or settle a disputed claim irrelevant to the issue of liability of the party making the offer. Only if the settlement contains specific admissions of fact made during the course of negotiations is the existence of a settlement admissible.\(^{147}\) If the GEICO court had found that GEICO's settlement with Proctor barred its right to raise contributory negligence in subsequent litigation, the effect would be to discourage parties from settling claims for fear that the settlement would be an admission of liability.

---

\(^{141}\) 225 Md. at 51, 169 A.2d at 448.
\(^{142}\) 322 Md. at 652-53, 589 A.2d at 467.
\(^{143}\) See id. The court stated that although waiver is applicable in the insurance context, it cannot be asserted when to do so would amount to an expansion of coverage beyond limits intended by the policy. See id. at 651, 589 A.2d at 467. The court went on to conclude, however, that this exception to the waiver doctrine was not applicable to the facts of the GEICO case. See id. at 652, 589 A.2d at 467.
\(^{144}\) See id. at 652-53, 589 A.2d at 467. The court observed that an insurer's bad faith refusal to settle a claim within the policy limits may be grounds for holding the insurer liable for any judgment in excess of policy limits. See id. The court inferred that the impetus for GEICO's settlement with Proctor was probably the fact that its insured had entered a through highway from a driveway. See id. at 653, 589 A.2d at 468. The court suggested that because Proctor had the right-of-way, GEICO settled the claim in recognition of the risk of a substantial verdict against its insured. See id. at 654, 589 A.2d at 468.
\(^{145}\) See id. at 652-53, 589 A.2d at 467.
\(^{146}\) See supra notes 122-125 and accompanying text.
\(^{147}\) See McCormick on Evidence, supra note 124, § 274, at 811.
b. Contract Theory.—The GEICO court properly concluded that GEICO's failure to respond to GHI's lien notice was insufficient to create a promise by GEICO to satisfy GHI's claim as subrogee. The court recognized that fundamental principles of contract law do not interpret silence as a mode of acceptance of an offer. The court also rejected GHI's contention that GEICO was required to include it in any settlement negotiations. In doing so, the court distinguished the facts of the case from two cases by the Maryland and New York Courts of Appeal. Relying upon both contract principles and the dissimilarity between the GEICO facts and the facts of cases cited by GEICO, the court concluded that it would not have been reasonable for GEICO to expect that its failure to respond to GHI's lien notice would induce action or forbearance by GHI.

c. Lien Theory.—An analysis of relevant case law reveals that the Court of Appeals incorrectly denied GHI's claim that, as Proctor's subrogee, GHI had acquired an equitable lien against the proceeds of any settlement funds paid by GEICO. The court did not analyze GHI's lien theory, but merely stated that "GHI offers no authority for the contention that a subrogee acquires a lien when it obtains its subrogation rights, and we know of none." The court ignored the precedent established in both Hernandez and Cleaveland—that settlement with knowledge of an insurer's subrogated claim does not extinguish liability—and instead relied upon the precept that a subrogee stands in the shoes of the subrogor and acquires only those rights to which the subrogor would have been entitled.

Although this is a familiar maxim of equity, the manner in which the court applied the principle to its analysis is weak and unconvincing. Because the court ignored prior case law, which had

148. See GEICO, 322 Md. at 655-57, 589 A.2d at 468-69; see also supra notes 126-133 and accompanying text.
149. See GEICO, 322 Md. at 655-56, 589 A.2d at 469. The court found neither Erie Ins. Exch. v. Calvert Fire Ins., 253 Md. 385, 252 A.2d 840 (1969), nor Underwriters at Lloyds, London v. Richards Frgt. L., 190 N.E.2d 8 (N.Y. 1963), to be factually similar. See GEICO, 322 Md. at 655-56, 589 A.2d at 469. In Erie, the Maryland Court of Appeals held that an insurer who was placed on notice of a subrogated claim and who "promised to pay the claim" necessarily required the subrogee to be a party to the settlement negotiations. 253 Md. at 390, 252 A.2d at 480 (emphasis added). The GEICO court similarly distinguished Richards because, in that case, the subrogee was a party throughout settlement negotiations. See GEICO, 322 Md. at 656, 589 A.2d at 469.
150. See 322 Md. at 655-56, 589 A.2d at 469.
151. See supra notes 134-141 and accompanying text.
152. GEICO, 322 Md. at 649-50, 589 A.2d at 466.
153. See supra notes 114-118, 138-141 and accompanying text.
held an insurer who settles with notice or knowledge of a subrogated interest liable for the full amount of the subrogee's claim,\textsuperscript{154} \textit{GEICO} undermines the purpose of subrogation law by allowing double recovery by the insured and promoting fraud upon the unwary subrogee.

4. \textit{Conclusion}.—The Court of Appeals' decision in \textit{GEICO}, denying an insurer-subrogee's claim for reimbursement of medical payments from the tortfeasor's insurance company, is inconsistent with prior Maryland law and contrary to the law followed in the majority of states. Moreover, the court failed to make clear the rationale behind its decision. The court did not distinguish the facts of \textit{GEICO} from other cases in which the tortfeasor's insurer was not relieved of its financial obligations to the subrogee of the tort claim when that insurer had actual knowledge of the existence of the subrogee's interest in the settlement funds. Nor did the court provide policy reasons that would justify the result of \textit{GEICO}. On the contrary, the holding appears to frustrate one of the central functions that subrogation law fulfills: placing the economic responsibility for injuries on the party who caused the loss without allowing double recovery by the injured person.\textsuperscript{155}

\textsc{Jeffrey H. Cohen}
\textsc{Joseph T. Murray}


\textsuperscript{155} See Keeton & Widiss, \textit{supra} note 24, § 3.10(a)(1).
XII. STATE AND LOCAL GOVERNMENT

A. State and Police Officer Liability to an Innocent Third Party Injured in a High Speed Chase

In Boyer v. State, the Court of Appeals considered the liability of the State, Charles County, and a state police officer for damages caused by a fatal car collision that occurred when a suspected drunk driver, pursued at high speeds by a state trooper and county deputy sheriffs, struck the rear of a car occupied by a Charles County couple. The couple’s surviving sons brought suit against the State, the County, and the state trooper, alleging vicarious liability on the part of the State and the County for the police officers’ negligence, and alleging gross negligence against the trooper in his individual capacity.

Because the State’s liability turned on the issue of whether the trooper’s decision to pursue had been negligent, the court considered for the first time the nature of the duty of care owed by police officers to third parties who might be injured as a consequence of a high speed chase involving the police. The court also addressed the meaning of “operating [an] emergency vehicle” in the context of section 19-103 of the Transportation Article, which imposes liability on the owner or lessee of an emergency vehicle for the negligent acts of the driver. Finding that a police officer engaged in a high speed automobile chase owes a duty to innocent third parties such as other drivers, and reinforcing its previous broad interpretation of the language of section 19-103, the court vacated the lower court’s grant of summary judgment for the State and remanded as

2. See id. at 562-64, 594 A.2d at 122-23. The plaintiffs did not bring suit against the county deputy sheriffs. Id. at 564 n.1, 594 A.2d at 124 n.1.
3. Id. at 564, 594 A.2d at 124.
4. See id. at 586, 594 A.2d at 135.

An operator of an emergency vehicle, who is authorized to operate the emergency vehicle by its owner or lessee, is immune from suit in his individual capacity for any damages resulting from a negligent act or omission while operating the emergency vehicle in the performance of emergency service . . . .

Id. The 1990 amendments were not relevant to the issue in Boyer; a portion of the pre-1990 version was moved to § 5-399.5 of the Courts and Judicial Proceedings Article. See Act of May 29, 1990, ch. 546, 1990 Md. Laws 2381; Md. Cts. & Jud. Proc. Code Ann. § 5-399.5 (1989 & Supp. 1991). Hereafter, all references to § 19-103 will be to the pre-1990 version, which was in effect when the incident giving rise to Boyer occurred.

763
to the County. Summary judgment in favor of Trooper Titus was affirmed, however, because the court found that the officer's actions did not rise to the level of gross negligence as a matter of law. Gross negligence must be shown in order to hold the operator of an emergency vehicle personally liable for acts committed while performing emergency services.

1. The Case.—On August 9, 1984, Maryland State trooper Robert C. Titus was patrolling Route 301 in Waldorf in his police cruiser when he observed a car being driven in an "unsafe and erratic manner." Trooper Titus suspected that the driver was intoxicated. When both vehicles stopped at a red light, Titus got out of his car and told the driver, Richard Milton Farrar, to pull his vehicle to the shoulder of the road after the light turned green. When the light turned green, however, Farrar accelerated and drove south on Route 301 at a high rate of speed. Trooper Titus pursued Farrar and was joined in the chase by several other police officers, including deputy sheriffs from the Charles County Sheriff's Office, and Maryland State Police officers.

The pursuit ended when Farrar struck the rear of another vehicle at the intersection of Route 301 and Route 225 in La Plata. The car Farrar hit was occupied by Mary Jackisch Boyer and her husband, Joseph Boyer. Mrs. Boyer died at the scene of the accident. Mr. Boyer was hospitalized and later died as a result of his injuries.

The surviving sons of the Boyers filed a complaint in the Circuit Court...
Court for Prince George’s County, naming the County Commissioners of Charles County, the Charles County “Sheriff’s Department,” Trooper Titus, the State of Maryland, and Farrar as defendants. The claim against Trooper Titus alleged that he had been grossly negligent in failing to arrest Farrar while stopped at the red light, in pursuing a suspected drunk driver at excessively high speeds through heavy traffic areas, in continuing the pursuit at such speeds, and in failing to activate immediately all of his vehicle’s emergency equipment. The complaint also asserted vicarious liability on the part of the State for Trooper Titus’s negligence, and on the part of the Charles County “Sheriff’s Department” and the County Commissioners of Charles County for the alleged gross negligence of the deputy sheriffs who joined in the chase.

The case was transferred to the Circuit Court for Charles County, which granted summary judgment in favor of the County Commissioners of Charles County, the Charles County “Sheriff’s Department,” the State of Maryland, and Trooper Titus. The Court of Special Appeals affirmed the decision. The Court of Appeals granted certiorari and affirmed as to Trooper Titus and the Charles County “Sheriff’s Department,” affirmed in part and vacated and remanded in part as to the State, and remanded as to the Charles County Commissioners.

2. Legal Background.—The doctrine of sovereign immunity “derived from the theory that the highest feudal lord was not subject to suit in his own courts.” Traditional justifications for the doctrine have had lessening impact, and seem antithetical to the

18. Id. at 563-65, 594 A.2d at 124.
19. Id. at 564, 594 A.2d at 124.
20. Id. The claims against the County and the State also alleged negligent hiring, training, retention, and supervision of the employees. Id.
21. The orders of summary judgment were certified as final pursuant to rule 2-602(b). Boyer, 323 Md. at 570-71, 594 A.2d at 127; see Md. R. 2-602(b). Farrar was not involved in the summary judgment motions; apparently his trial was still pending during the Boyer appeal. 323 Md. at 571 n.7, 594 A.2d at 127 n.7.
23. Boyer, 323 Md. at 591, 594 A.2d at 137-38.
25. Historical justifications for sovereign immunity rested on the premise that the King was infallible and that, consequently, his acts could not be impugned in the courts he had established. Id. at 654-55. Modern apologists for the doctrine have stated that the underlying premise of sovereign immunity is that it is improper to divert public funds for use by private citizens. Id. at 658. A variation of this theme argues that although private recovery from a government entity might be appropriate in some cases,
nature of state governments. Nevertheless, the doctrine has survived. The Court of Appeals has asserted that the state's sovereign immunity is grounded in considerations of public policy rather than divine right.26 However, these considerations have been subordinated in recent years to competing policies seeking to remedy the unfairness inherent in leaving innocent parties without a remedy for torts committed by state employees.

The Maryland Tort Claims Act27 provides a broad waiver of governmental immunity for certain claims arising out of the negligence of a state employee.28 Under the statutory scheme, the state, not the individual employee, may be held liable for acts of simple negligence committed by the employee while acting within the scope of his public duties.29 Maryland's statutory waiver of immunity does not extend to claims for punitive damages, however, and does not relieve employees of liability for damages caused by their gross negligence.30 Therefore, the Maryland Tort Claims Act functions both as a broad remedy for injured third parties and as a limited safety net to relieve state employees of liability for acts less than grossly negligent.

The related doctrine of public official immunity also protects a government employee from liability for negligence under certain circumstances.31 Public official immunity is supported by the disre-
tionary function doctrine, which provides that an official who makes a discretionary decision in the course of performing her public duties will not be liable if the decision is later determined to have been negligent. However, the immunity does not apply to ministerial acts, which are acts required to be performed as a duty of the official's employment. Although it is difficult to distinguish between discretionary acts and ministerial acts, Maryland still recognizes the distinction.

A third instance of immunity in Maryland is found in section 19-103 of the Transportation Article, which grants immunity to drivers of emergency vehicles "for any damages resulting from a negligent act or omission while operating the emergency vehicle in the performance of emergency service." Section 19-103 also provides that the owner or lessor of an emergency vehicle shall be liable for the negligent acts of a driver; the statute explicitly states that political subdivisions waive their immunity in this regard.

The liability imposed on owners and lessors of emergency vehicles is limited to damages occurring when the driver is "operating the emergency vehicle." In Thomas v. State, the Court of Appeals construed the term "operating" broadly to include various acts beyond the mere driving of an automobile. Relying on several decisions from other jurisdictions, the Thomas court concluded that

official from personal liability for the unintended consequences of a decision based on his judgment. Because the act of governing inherently requires decisions based on personal judgment, it is inappropriate to allow a jury to substitute its judgment for that of the decision maker. To allow otherwise would exert impermissible pressure upon those entrusted to govern. Id.

32. James v. Prince George's County, 288 Md. 315, 326-27, 418 A.2d 1173, 1179 (1980). The Court of Appeals stated:

"Where [a public officer's] duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply ministerial—he is liable in damages to anyone specially injured either by his omitting to perform the task, or by performing it negligently or unskillfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."

Id. (quoting Doeg v. Cook, 58 P. 707, 708 (Cal. 1899)).

33. See James, 288 Md. at 326-27, 418 A.2d at1179.


36. Id.


38. See id. at 316-19, 353 A.2d at 258-59.

39. See id. The court cited to several cases, including State v. Joswick, 233 A.2d 154
"operating" encompasses "driving" but also includes any manipulation of the mechanical or electrical devices of a vehicle. Although the Thomas court was interpreting "operating" in the context of a criminal action for driving or attempting to drive while intoxicated, the decision laid the foundation for a broad interpretation of "operating" within the context of section 19-103.

Further, because the waiver of immunity in section 19-103 is based on a finding of negligence by the driver, the waiver has no effect if the driver of the emergency vehicle owed no duty of care to potential victims. In Ashburn v. Anne Arundel County, the Court of Appeals held that a police officer who decided not to chase a suspected drunk driver owed no duty to innocent third parties injured thereafter by the drunk driver. Prior to Boyer, however, no Maryland court had considered the existence or breadth of the duty owed by the driver of an emergency vehicle to innocent third parties injured after the official had commenced a high speed chase.

3. The Court's Reasoning; Analysis.—The Boyer court affirmed the judgment in favor of the Charles County "Sheriff's Department," observing that no statute established the existence of such an entity. However, it remanded the claim against the County Commissioners, allowing the plaintiffs to allege, if possible, that the vehicles driven by the deputy sheriffs were owned by Charles County. The court found that Trooper Titus was protected by the doctrine of public official immunity for his decision not to apprehend Farrar at the red light, and further held as a matter of law that the trooper's conduct during the chase did not amount to gross negligence. Finally, the court affirmed in part and vacated in part the judgment in favor of the State; the State had not waived its immunity for Trooper Titus's alleged failure to apprehend the suspect, but the trooper owed a duty of due care to the Boyers such that if the duty was breached, the State would be liable for the consequences.

40. 277 Md. at 318, 353 A.2d at 258-59.
41. See id., 353 A.2d at 258.
42. 306 Md. 617, 510 A.2d 1078 (1986).
43. See id. at 626, 510 A.2d at 1082.
44. See 323 Md. at 572 n.9, 594 A.2d at 128 n.9.
45. See id. at 576, 594 A.2d at 130.
46. See id. at 578, 594 A.2d at 131.
47. See id. at 580, 594 A.2d at 132.
48. Id. at 582-83, 594 A.2d at 133.
49. Id. at 588, 594 A.2d at 136.
New proceedings were ordered to determine whether Trooper Titus breached this duty.  

Because section 19-103(c) of the Transportation Article makes the owner or lessee of an emergency vehicle liable for the negligence of authorized operators, the Charles County Commissioners and the State sought to characterize their employees‘ decisions to commence and maintain the chase as beyond the common usage of the term “operate.” Given the broad construction given to the term in Thomas v. State, this argument was doomed to fail. The court concluded that a decision to operate a vehicle in a situation in which a reasonable person would refrain from doing so may amount to the negligent “operation” of a vehicle. By adhering to the broad interpretation of the term “operate” delineated in Thomas, the Boyer court reaffirmed the remedial policy behind the statutory waivers of immunity. Construing “operate” to include the operator’s responsibility for assessing factors relevant to the decision of whether to proceed, and imposing the continuing responsibility of assessing whether intervening factors have rendered further operation of the vehicle imprudent, support the policy of providing a remedy to innocent third parties injured by the negligence of state employees.

Turning to the question of whether Trooper Titus would be personally liable for his initial decision not to apprehend Farrar at the red light, the court held that the doctrine of public official immunity protected the police officer’s decision of whether to apprehend the suspect. In Ashburn v. Anne Arundel County, the court found the arrest function to be discretionary; therefore, a police officer’s decision not to detain a suspected drunk driver is shielded from personal liability.

50. See id. at 591, 594 A.2d at 137-38.
51. Id. at 573-74, 594 A.2d at 128-29.
52. 277 Md. 314, 316-19, 353 A.2d 256, 258-59 (1976); see supra notes 36-41.
53. See Boyer, 323 Md. at 574-75, 594 A.2d at 129.
54. See id. at 577, 594 A.2d at 130-31.
56. At the time of the Boyer incident, § 16-205.1(b)(2) of the Transportation Article provided:

[1] If a police officer stops or detains any person who the police officer has reasonable grounds to believe is or has been driving or attempting to drive a motor vehicle while intoxicated, while under the influence of alcohol, while so far under the influence of any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, . . . the police officer shall:

(i) Detain the person . . . .

by the doctrine of public official immunity. The Ashburn court held in the alternative that a police officer who decided not to apprehend a suspected drunk driver owed no duty, enforceable in tort, to third parties who might later be injured by the drunk driver. In the instant case, the court regarded both holdings as dispositive of the claim that Trooper Titus was negligent for failing to apprehend Farrar at the red light.

This holding is strongly grounded in a policy that seeks to avoid any stifling effect on the discretion exercised by a police officer in deciding whether to apprehend a suspect. If officers were not shielded by public official immunity in contemplating whether to detain a suspect, they would be less likely to stop drivers who appear to be intoxicated in the first place. A policy that so hampers police officers would deter effective police conduct, decrease police morale, and fail to serve the public interest in stopping crime. The Boyer court’s continued application of public official immunity to a police officer’s decision not to detain a suspect is, therefore, amply justified.

Although the court found that Trooper Titus may have been negligent for deciding to pursue Farrar, section 19-103(b) of the Transportation Article protected Titus from liability for damages caused by negligence committed while operating his police car, an emergency vehicle. In addition, the Maryland Tort Claims Act would have protected Titus, as a state employee, from liability for negligence committed within the performance of his duties.

Both protective provisions would have been inapplicable, and

57. See 306 Md. at 625-26, 510 A.2d at 1082.
58. Id.
59. See Boyer, 323 Md. at 578, 594 A.2d at 131.
60. Though Boyer deals with an intoxicated suspect, this reasoning could apply to an officer’s decision to apprehend any driver suspected of wrongdoing. If the police were deterred from making any traffic stops, there would surely be a threat to the public safety.
62. Boyer, 323 Md. at 578, 594 A.2d at 131. See supra notes 5, 8 for the pertinent portions of § 19-103 of the Transportation Article.
63. The pre-1985 language of the Maryland Tort Claims Act waived the state’s tort immunity for “[a]n action to recover damages caused by the negligent . . . operation of a motor vehicle by a State employee,” and it rendered the State employee “not liable . . . for any damages resulting from tortious conduct for which the State has waived its immunity under this subtitle.” MD. CTS & JUD. PROC. CODE ANN. §§ 5-403(a)(1), 5-404(b) (1984) (amended 1988).
Trooper Titus held personally liable, however, if the trooper’s actions amounted to gross negligence.\textsuperscript{64} The standard for alleging gross negligence is well developed in Maryland, and requires the pleading of facts sufficient for a jury to conclude that the defendant acted with a wanton and reckless disregard for human life.\textsuperscript{65} The plaintiffs’ allegations failed to meet this requirement, and the court held that Titus’s conduct was not grossly negligent as a matter of law.\textsuperscript{66} Therefore, the summary judgment in favor of Trooper Titus was affirmed.\textsuperscript{67}

The court’s approval of a stringent standard reaffirms a policy of Maryland courts to avoid the imposition of gross negligence when it has not been clearly established.\textsuperscript{68} By refusing to infer from Trooper Titus’s conduct a “wanton and reckless disregard for human life,” the court reasserted its stance that a distinct intent requirement must be met before a state police officer will be held personally liable.

Though Trooper Titus was relieved from personal liability for his negligent decision to pursue Farrar, the court noted that the Court of Special Appeals had improperly excused the State from all liability for Trooper Titus’s actions.\textsuperscript{69} The Court of Special Appeals had relied on \textit{Bradshaw v. Prince George’s County},\textsuperscript{70} which was over-

\begin{itemize}
\item \begin{quote} 64. \textit{See Boyer}, 323 Md. at 578, 594 A.2d at 131. Section 19-103(c)(2) of the Transportation Article provides: “This subsection does not subject an owner or lessee to liability for the operator’s malicious act or omission or for the operator’s gross negligence.” \texttt{Md. Transp. Code Ann.} \textit{§} 19-103(c)(2) (1987) (amended 1990).
\end{quote}
\item \begin{quote} 65. \textit{See Nast v. Lockett}, 312 Md. 543, 566-67, 539 A.2d 1113, 1124-25 (1988). In \textit{Nast}, the court held that driving under the influence of alcohol did not constitute gross negligence as a matter of law. \textit{Id.} The court held that the traffic laws the defendant violated, coupled with the amount of alcohol she ingested, did not elevate her conduct to the level of gross negligence. \textit{See id.} The court did not believe these acts showed the requisite wanton or reckless disregard for human life. \textit{See id.; see also Hughes v. State, 198 Md. 424, 431-32, 84 A.2d 419, 422 (1951) (discussing “gross negligence” and “wanton and reckless disregard of human life” in the context of manslaughter).}
\end{quote}
\item \begin{quote} 66. \textit{Boyer}, 323 Md. at 580, 594 A.2d at 132.
\end{quote}
\item \begin{quote} 67. \textit{Id.} at 591, 594 A.2d at 138.
\end{quote}
\item \begin{quote} 68. Before a jury can consider the issue of punitive damages, “the evidence must be sufficient . . . to establish that the defendant . . . had a wanton or reckless disregard for human life in the operation of an automobile. The legal threshold that must be crossed . . . is a stringent one.” \textit{Nast}, 512 Md. at 351, 539 A.2d at 1117. The court concluded that only conduct of an outrageous nature would be sufficient to imply this state of mind. \textit{Id.} at 352, 539 A.2d at 1117.
\end{quote}
\item \begin{quote} 69. \textit{See Boyer}, 323 Md. at 582, 594 A.2d at 133.
\end{quote}
\item \begin{quote} 70. 284 Md. 294, 396 A.2d 255 (1979), \textit{overruled by James v. Prince George’s County, 288 Md. 315, 418 A.2d 1173 (1980).} The Court of Special Appeals in \textit{Boyer} relied on \textit{Bradshaw’s} holding that a governmental employer is not liable when “the alleged tortious conduct on which the suit against [it] is based results from actions of an individual
ruled by *James v. Prince George's County*. The court held that the state's waiver of immunity was co-extensive with the immunity granted to a public official, meaning that "when [the government] has waived immunity . . . [it] is liable for torts committed by its officers even though those officers themselves are not liable because of public-official immunity." This position is consistent with the pre-1985 language of the Maryland Tort Claims Act, which made the state liable for an employee's negligence, despite the employee's personal immunity.

Once the court determined that the State could be held liable if Titus's acts amounted to negligence, it considered the issue of whether and to what extent the officer owed the Boyers a duty of care. Dismissing arguments by the State regarding the applicability of *Ashburn* to the question, the court observed that police officers, though exempt from certain traffic rules, still owe others on the road a duty of care. Police officers are expected to obey this


71. 288 Md. 315, 418 A.2d 1173 (1980). The *James* court declined to follow *Bradshaw*. The court noted that most jurisdictions followed the principle that the government, when it has waived immunity, will be liable for the torts of its employees, though the employees themselves are shielded by public official immunity. See id. at 333, 418 A.2d at 1183. The *James* court decided to follow the majority. See id.

72. Id. at 333, 418 A.2d at 1183. The Court of Appeals in *Boyer* did not reach the issue of whether Trooper Titus's conduct in pursuing and continuing to pursue Mr. Farrar was protected by public official immunity, since it held his acts protected by § 19-103 of the Transportation Article and by the Maryland Tort Claims Act. See 323 Md. at 578, 594 A.2d at 131. The court did note, however, that several jurisdictions have held an officer's commencement and continuation of a high speed chase to be "ministerial" and not protected by public official immunity. *Id.* at 586-87, 594 A.2d at 135; see, e.g., *Biscoe v. Arlington County*, 738 F.2d 1352, 1363 (D.C. Cir. 1984) ("[S]upervising and instructing officers, conducting a felony stop, and conducting a felony pursuit . . . are ministerial, not discretionary acts.").


74. See *Boyer*, 323 Md. at 583, 594 A.2d at 134.

75. See id. at 584, 594 A.2d at 134. The State argued that *Ashburn* relieved Trooper Titus of a duty to the Boyers. See id. In *Ashburn*, the officer had no mandatory duty to arrest a suspected drunk driver, and the court found that the officer owed no duty of care to those whom the driver might later injure. 306 Md. 617, 626, 510 A.2d 1078, 1083 (1986). The *Boyer* court distinguished *Ashburn* as involving a decision not to apprehend and not a decision to pursue. *Boyer*, 323 Md. at 584, 594 A.2d at 134.

76. *Boyer*, 323 Md. at 584, 594 A.2d at 134. Section 21-106(d) of the Transportation Article provides: "This section does not relieve the driver of an emergency vehicle from..."
duty with regard to the safety of "all persons," and though the duty is qualified with respect to fleeing criminals, it does extend to "non-participants in . . . [the] chase." 77

With no Maryland authority directly on point, the court first examined an analogous Maryland case. In Keesling v. State, 78 the court was faced with a tort action brought by an innocent motorist who alleged that state police being held hostage in their police car suggested that the captors commandeered the plaintiff's car so as to avoid being caught in the more conspicuous police car. 79 The captors then got into the plaintiff's car, ordered him to drive, and threatened to shoot him when the car was stopped at a roadblock. 80

The Keesling court concluded that a police officer is negligent "[i]f . . . in performing his responsibilities [he] places a private citizen in a zone of danger without reasonable justification." 81 Further, negligence may be found if the "officer[ ] set[s] into motion a chain of events which the officer knew or should have known would likely lead to . . . injury [to third parties caused] by the criminals or by the police effort to [apprehend the criminals]." 82 The Boyer court found Keesling persuasive, concluding, after quoting Keesling at length, that "it seems clear under Maryland law that Trooper Titus owed the Boyers a duty of care." 83

The court then looked to out-of-state cases involving police chases. 84 In Biscoe v. Arlington County, 85 the Court of Appeals for the District of Columbia Circuit held that regardless of whether an officer's decision not to apprehend a suspect is ministerial or discretionary, the officer's decision to pursue a suspect is clearly a part of day-to-day operational activities, and therefore ministerial. 86 Because only discretionary acts are protected by immunity, 87 the Biscoe court held the county liable for the injuries of an innocent bystander struck during a county police officer's vehicular pursuit of a sus-

---

78. 288 Md. 579, 420 A.2d 261 (1980).
79. Id. at 581, 420 A.2d at 262.
80. Id. at 582, 420 A.2d at 262.
81. Id. at 589, 420 A.2d at 266.
82. Id. at 591, 420 A.2d at 267.
83. Boyer, 323 Md. at 586, 594 A.2d at 135.
84. See id. at 586-87, 594 A.2d at 135.
85. 738 F.2d 1352 (D.C. Cir. 1984).
86. Id. at 1363.
87. See supra notes 31-33 and accompanying text.
pected bank robber. The holding in Biscoe represents the majority in cases involving high speed chases that result in injury to third parties. Following the majority, the Boyer court held that Trooper Titus owed a duty of due care to the Boyers during the high speed chase.

Although it remanded to determine whether the plaintiffs' allegations of negligence were sufficient, the court offered guidance for the trial court in considering the breach of duty issue. The court properly noted that when assessing the conduct of a police officer confronted with an emergency situation, the factfinder must consider the response of a reasonably prudent police officer faced with an equally difficult and dangerous situation. Although a high speed chase is unquestionably dangerous, letting a drunk driver continue unimpeded also threatens the public safety. Thus, the officer's decision should be considered in light of these competing factors. Further, the court adopted the position that an officer's violation of in-house pursuit guidelines should be viewed only as an aggravating circumstance. This position takes on greater meaning in light of cases in other jurisdictions placing much more emphasis on self-imposed interdepartmental pursuit policies in answering the question of whether the officer's actions amounted to negligence.

4. Conclusion.—In resolving the claims set out before it, the Court of Appeals in Boyer adhered to well-developed bodies of law governing the doctrines of public official and sovereign immunity, as well as Maryland case law regarding gross negligence. The court exercised reasonable discretion in allowing the plaintiffs to amend their complaint against the Charles County Commissioners. Further, although imposing a duty of care on police officers involved in high speed chases, the court showed sensitivity to the concerns of

88. 738 F.2d at 1363.
89. Boyer, 323 Md. at 586, 594 A.2d at 135.
90. See id. at 588, 594 A.2d at 136.
91. See id. at 589, 594 A.2d at 136.
92. See id. at 591, 594 A.2d at 137.
93. See, e.g., DeLong v. City & County of Denver, 530 P.2d 1308 (Colo. Ct. App. 1974) (finding that the trial court erred in refusing to admit police department rules regarding speeds while conducting emergency procedures in congested areas), aff'd, 545 P.2d 154 (Colo. 1976). See generally David Rand, Jr., Annotation, Municipal Corporation's Safety Rules or Regulations as Admissible in Evidence in Action By Private Party Against Municipal Corporation or Its Officers or Employees for Negligent Operation of Vehicle, 82 A.L.R. 3d 1285, 1295-98 (1978) (listing cases in which courts have held it to be reversible error to refuse to admit into evidence police department safety regulations for establishing an applicable standard of care).
police officers in emergency situations, recognizing the constraints under which police officers must perform their duties. Finally, the court declined to fashion hard rules that might cause self-imposed police safety guidelines to become instruments by which liability could be presumptively imposed.

B. Limits on the Power of Referendum

In Baltimore County Coalition Against Unfair Taxes v. Baltimore County, a coalition of Baltimore County businesses and citizens unsuccessfully attempted to submit for referendum a county ordinance imposing a tax on nonreusable sealed beverage containers. Relying on the Baltimore County Charter, the Court of Appeals held that a referendum involving the county appropriations process must contain the budget line item at issue and indicate an increase in the disputed program over the previous year's appropriation amount. Individual statutes imposing a tax cannot be referred to the electorate.

Although this holding is involved and arguably complex, it is consistent with the treatment of referendum provisions by previous Maryland courts. In Baltimore County Coalition, however, the usual methods employed by courts for refusing referenda were unavailable, and the court was forced to create a new basis for denial.

1. The Case.—The Baltimore County beverage container tax ordinance imposes an excise tax upon distributors who supply nonreusable beverage containers; the tax is two cents for each container with a capacity of up to sixteen ounces and four cents for containers with larger capacities. On May 30, 1989, when the or-

97. See Baltimore County Coalition, 321 Md. at 205, 582 A.2d at 520.
98. See id.
99. See infra notes 128-135 and accompanying text. Courts are especially reluctant to shift power to the electorate when a referendum involves the budget process. See, e.g., Bickle v. Nice, 173 Md. 1, 5, 192 A. 777, 779 (1937) (holding that a gas tax statute was exempt from referendum); Winebrenner v. Salmon, 155 Md. 563, 567, 142 A. 723, 725 (1928) (refusing to allow a referendum on a statute authorizing the issuance of bonds to finance the construction of a state office building); cf. Avara v. Baltimore News American, 292 Md. 543, 553, 440 A.2d 368, 373 (1982) (holding that the public may be excluded from certain sessions of the Maryland General Assembly that focus on financial concerns).
100. See infra text accompanying notes 128-132.
dinance was enacted, the legislature also adopted the Annual Budget and Appropriation Ordinance of Baltimore County.\(^\text{102}\) Budget figures indicate that Baltimore County expected to raise \$2,125,000 in revenues from the container tax,\(^\text{103}\) less than 1 percent of the county’s total General Fund of \$807,101,657.\(^\text{104}\)

In his budget message submitted to the Baltimore County Council on April 11, 1989, Baltimore County Executive Dennis F. Rasmussen explained that the container tax would be used “to help offset the ever-increasing costs of solid waste disposal and the cost of a planned recycling effort.”\(^\text{105}\) The accuracy of this statement is questionable, however, in light of a signed affidavit by Baltimore County Budget Deputy Director Fred Homan: “[T]he budget message for FY 1990, which recommends a tax on non-reusable beverage containers, is merely justification for that levy; by no means does it set aside those funds for their contribution to a special [fund], or [any] fund other than the general fund.”\(^\text{106}\) Homan stated further that “the amounts of revenue needed to balance the budget are simply unrelated to the purpose of any one or more appropriation, but are based upon the total of estimated budget costs.”\(^\text{107}\)

The container tax law was due to take effect on December 1, 1989.\(^\text{108}\) On July 21, 1989, the Baltimore County Coalition Against Unfair Taxes (BCCAUT), an unincorporated association of individuals and corporations, filed a referendum petition seeking to delay the law’s implementation.\(^\text{109}\) Baltimore County nevertheless an-

---

102. *Baltimore County Coalition*, 321 Md. at 194, 582 A.2d at 515.
104. *Id.*, exhibit c at 16.
106. Personal Affidavit of Fred Homan, Deputy Director of the Budget at 7, *Baltimore County Coalition* (No. 90-124).
107. *Id.*
108. *Baltimore County Coalition*, 321 Md. at 188, 582 A.2d at 512.
109. Stipulation at 2, *Baltimore County Coalition* (No. 89-124). The referendum petition was “filed with the board of supervisors of elections of Baltimore County within forty-five days after the enactment of the law to be referred to the voters at the next general elections,” as required by the Charter. *Id.; Baltimore County, Md., Charter § 309(a)* (1978 & Supp. 1988-89). In addition, BCCAUT collected 21,645 valid signatures, 1202 more than were required pursuant to this section of the Charter. Stipulation at 3, *Baltimore County Coalition* (No. 89-124).

If a satisfactory referendum petition is filed, “such law or ordinance or part thereof to be so referred shall not take effect until thirty days after its approval by a majority of the qualified voters of the county voting thereon at the said next general election.” *Baltimore County, Md., Charter § 309(a).*
nounced its intention to enforce the provisions of the statute.\(^\text{110}\)

BCCAUT responded by suing the County for declaratory and injunctive relief in the Circuit Court for Baltimore County.\(^\text{111}\) On November 11, 1989, the trial judge issued a declaratory judgment in favor of the County.\(^\text{112}\) The court reasoned that section 309 of the Baltimore County Charter exempts from referendum "new or initial appropriations for maintaining the county government";\(^\text{113}\) yet the court conceded that increases in existing appropriations are not similarly immune from the process.\(^\text{114}\) The court then applied this legal framework and determined that the container tax ordinance qualified as a "new or initial appropriation" because the revenue source did not exist during the previous year.\(^\text{115}\) Consequently, the circuit judge found that the ordinance could not be submitted for referendum under section 309 of the Charter.\(^\text{116}\)

Prior to argument in the Court of Special Appeals, the Court of Appeals granted certiorari and advanced the case on its docket for prompt resolution.\(^\text{117}\) On December 1, 1989, the court issued an order affirming the circuit court's determination;\(^\text{118}\) in its subsequent opinion, however, the Court of Appeals rejected the lower court's reasoning.\(^\text{119}\)

Chief Judge Murphy, writing for the court, proclaimed that the County Charter provision allowing an increase in an appropriation to be subject to referendum under section 309(a) does not include specific laws imposing taxes, such as the container tax ordinance. Instead, the legislation brought to referendum to represent the "increase" must be in the form of a specific line item of the county budget.\(^\text{120}\) Under this analysis, the Court of Appeals claimed that BCCAUT erred in two respects. First, by focusing on the tax ordinance itself, the coalition brought the wrong item to referendum; and second, the relevant line item that could have been brought to

\(^{110}\) See Baltimore County Coalition, 321 Md. at 189, 582 A.2d at 512.

\(^{111}\) Id. BCCAUT sought a declaration that the tax ordinance was without effect and unenforceable unless and until approved by the voters. Id. The coalition also sought an injunction against enforcement of the ordinance and the collection of the tax pending the result of the vote. Id.

\(^{112}\) Id., 582 A.2d at 512-13.

\(^{113}\) Id., 582 A.2d at 513 (quoting Baltimore County, Md., Charter § 309(a)).

\(^{114}\) Id.

\(^{115}\) Id.

\(^{116}\) Id. at 189-90, 582 A.2d at 513.

\(^{117}\) Id. at 190, 582 A.2d at 513.

\(^{118}\) Id.

\(^{119}\) Id. at 205, 582 A.2d at 520.

\(^{120}\) Id.
referendum, the appropriation for solid waste disposal, was lower than the appropriation made for solid waste disposal in the previous year's budget and thus was not an "increase" amenable to the referendum process.\footnote{121}

2. Legal Background.—Section 309 of the Baltimore County Charter reserves referendum power to the people, allowing "registered voters of the county[ ] to approve or reject at the polls[ ] any enacted law or ordinance or part of any such law or ordinance of the county council."\footnote{122} The referendum power of county voters is not absolute, however. Section 309(a) details the limitations on this power:

No law making any appropriation for maintaining the county government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal under this section. This increase in any such appropriation for maintaining the county government or for maintaining or aiding any public institution shall take effect only as in the case of other laws, and such increase, or any part thereof, specified in the petition may be referred to a vote of the people of the county upon petition . . . .\footnote{123}

Article XVI of the Maryland Constitution serves as the foundation and origin of the county referendum provision.\footnote{124} The language of the state and Baltimore County provisions is almost identical; the only significant alteration is the county's allowance of legislation creating increased funding for "maintaining the county government" to be referred to county voters.\footnote{125} The state referendum provision, ratified on November 2, 1915,\footnote{126} allows appropriations increases to be submitted for referendum only if the revenue measure exclusively involves "maintaining or aiding any public institution."\footnote{127}

\footnote{121} Id. at 205-06, 582 A.2d at 520-21.
\footnote{123} Id.
\footnote{124} PROPOSED HOME RULE CHARTER FOR BALTIMORE COUNTY, MARYLAND 100 (1955); see Md. Const. art. XVI, § 1(b).
\footnote{125} Compare BALTIMORE COUNTY, MD., CHARTER § 309(a) with Md. Const. art. XVI.
\footnote{126} Md. Const. art. XVI, § 1(b).
\footnote{127} Id.; Baltimore County Coalition, 321 Md. at 202, 582 A.2d at 519. The state provision provides, in relevant part:

No law making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose, shall be subject to rejection or repeal
In response to the threat of interference with governmental functions that accompanies a grant of referendum power to voters, Maryland courts tend to curtail the power of the state and local referendum provisions. The judiciary has frequently employed three methods for invalidating or discarding referendum petitions. First, courts have strictly adhered to the technical requirements of the applicable referendum law and invalidated any petitions that failed to meet these requirements. Second, courts have held particular county referenda to be beyond the scope of the Home Rule Amendment of the Maryland Constitution. Finally, when the preceding methods are unavailable, as in Baltimore County Coalition, courts have construed the language of the specific state or county referendum statute at issue to discount the validity of the petition.

under this Section. The increase in any such appropriation for maintaining or aiding any public institution shall only take effect as in the case of other laws, and such increase or any part thereof specified in the petition, may be referred to a vote of the people upon petition.

Md. Const. art. XVI, § 1(b).

128. For example, the referendum provisions have specific requirements regarding timeliness, form of the petition, and required number of voter signatures. See Baltimore County, Md., Charter § 309 (1978 & Supp. 1988-89).

129. See City of Takoma Park v. Citizens for Decent Gov't, 301 Md. 439, 449-50, 483 A.2d 348, 354 (1984) (holding that the referendum petition did not describe the statute under consideration in sufficient detail to advise voters); see also Selinger v. Governor of Maryland, 266 Md. 431, 434-35, 293 A.2d 817, 819 (1972) (asserting that submitted petitions must carry a sufficient number of valid signatures), cert. denied sub nom. Russek v. Governor of Maryland, 409 U.S. 1111 (1973); Tyler v. Secretary of State, 229 Md. 397, 404-06, 184 A.2d 101, 104-05 (1962) (rejecting a referendum petition upon discovering the falsity of the circulator's affidavit testifying to the validity of signatures); Gittings v. Board of Supervisors of Elections, 38 Md. App. 674, 677-78, 382 A.2d 349, 351 (1978) (invalidating a petition including signatures of unqualified voters as part of the required amount).

130. Article XI-A of the Maryland Constitution, popularly known as the Home Rule Amendment, provides for the distribution of powers between the state legislature and the political subdivisions of the state. See Md. Const. art. XI-A. The underlying purpose of the article is to share with the counties and Baltimore City, within well-defined limits, powers formerly reserved to the state. See Ritchmount Partnership v. Board of Supervisors of Elections, 283 Md. 48, 57, 388 A.2d 523, 533 (1978).


132. See Jack B. Gohn, Note, Interaction and Interpretation of the Budget and Referendum Amendments of the Maryland Constitution—Bayne v. Secretary of State, 39 Md. L. Rev. 558, 564-71 (1980) (describing how petitions were held invalid as the meaning of the phrase “appropriation for maintaining state government” evolved and became increasingly refined).
The judiciary takes a particularly stringent approach to textual interpretation when the legislation sought to be referred involves state finances. Courts generally defer to the policy goals of "preventing interruptions of government,"133 and guarding "against the possibility of the government being embarrassed in the performance of its various functions."134 As one circuit judge explained: "[I]t is difficult to imagine a more effective method of sabotaging the State government than to deprive it of its anticipated revenues. It cannot be doubted that this is the very thing the [referendum] exception was designed to prevent."135

Maryland courts have narrowed the scope of the state referendum provision by refining the precise definition of an "appropriation." In 1927, the Attorney General opined that a statute authorizing a gas tax to fund highway construction was an "appropriation" because the statute explicitly assigned the use of particular funds.136 In Winebrenner v. Salmon,137 the Court of Appeals agreed with the Attorney General and refused to grant a referendum on the gas tax statute. The court also noted that the tax law and annual budget bill were in pari materia and must be construed together as though they constituted one act.138

The Winebrenner reasoning proved determinative in subsequent cases. In Bickle v. Nice,139 state bonds issued to raise money exclusively for the construction of a state office building were considered part of an appropriation scheme under article XVI.140 On the other hand, in Dorsey v. Petrott,141 the Court of Appeals ruled that a statute creating a new administrative structure to fund the conservation of Maryland fisheries was properly classified as "general law,"142 and therefore was subject to the voters' referendum powers.143 Most recently, in Kelly v. Marylanders for Sports Sanity,144 the court determined that a law authorizing a state financing scheme was an appropriation as contemplated in the referendum amendment be-

---

137. 155 Md. 563, 142 A. 723 (1928).
138. See id. at 567, 142 A. at 725.
139. 173 Md. 1, 192 A. 777 (1937).
140. Id. at 5, 192 A. at 779.
141. 178 Md. 230, 13 A.2d 630 (1940).
142. See id. at 247-49, 13 A.2d at 639.
143. Id. at 251, 13 A.2d at 640.
144. 310 Md. 437, 530 A.2d 245 (1987).
cause it set aside money for an exclusive purpose.\textsuperscript{145}

The sensitivity of the appropriations process compelled the drafters of Section 309 to limit by express language the extent to which voters can influence county budgetary policy.\textsuperscript{146} Although the definition of "appropriation" existed when the Baltimore County Charter was drafted in 1956, the county referendum provision is broader in scope than article XVI of the Maryland Constitution.\textsuperscript{147} The absolute limits of Section 309, however, must be drawn pursuant to canons of statutory construction, which place primary importance on the plain meaning of the language used,\textsuperscript{148} and prohibit the addition or deletion of words to or from the statute.\textsuperscript{149} In addition, the intent of the enacting legislature may be considered in the analysis.\textsuperscript{150}

In 1956, individual taxable income was taxed by the federal government at a maximum rate of ninety-one percent.\textsuperscript{151} Because Baltimore County voters could not significantly influence federal tax policy, the reservation of power to the electorate under the county

\begin{itemize}
\item \textsuperscript{145} \textit{Id.} at 464-65, 530 A.2d at 258-59.
\item \textsuperscript{146} A number of Maryland counties address the issue of appropriations in their respective county charters. The Anne Arundel County provision is almost identical to that of Baltimore County: "The increase in any such appropriation for maintaining the County government or for maintaining or aiding any public institution shall only take effect as in the case of other ordinances, and such increase, or any part thereof, specified in the petition may be referred to a vote of the people of the County upon petition as above provided." \textbf{ANNE ARUNDEL COUNTY, MD., CHARTER} § 308 (1983); see, e.g., \textbf{HARFORD COUNTY, MD., CHARTER} § 220(a) (1983); \textbf{HOWARD COUNTY, MD., CHARTER} § 211(a) (1977); \textbf{MONTGOMERY COUNTY, MD., CHARTER} § 114 (1984); \textbf{PRINCE GEORGE'S COUNTY, MD., CHARTER} § 319 (1987); \textbf{TALBOT COUNTY, MD., CHARTER} § 217(a) (1977).
\item \textsuperscript{147} \textit{See Baltimore County Coalition,} 321 Md. at 202, 582 A.2d at 519.
\item \textsuperscript{148} \textit{State v. Intercontinental, Ltd.,} 302 Md. 132, 137, 486 A.2d 174, 176 (1985) (stating that the primary source of legislative intent is the language of the statute itself).
\item \textsuperscript{149} \textit{In re Ramont K.}, 305 Md. 482, 485, 505 A.2d 507, 508 (1986) ("A court may not insert or omit words to make a statute express an intention not evidenced in its original form.").
\item \textsuperscript{150} \textit{Harden v. Mass Transit Admin.,} 277 Md. 399, 406, 354 A.2d 817, 821 (1976) ("The cardinal rule of statutory construction is to ascertain and carry out the real legislative intent.").
\end{itemize}
referendum provision may have been considered necessary to prevent total depletion of individual resources by the superimposition of local and state taxes on top of burdensome federal taxes. Thus, the plain language of the county provision, as well as the historic context within which it was promulgated, indicate that the power reserved to the people is broad.

3. The Court's Reasoning; Analysis.—In Baltimore County Coalition, the Court of Appeals had few sources on which to base its decision. Although the state referendum provision had been interpreted by previous courts, the variant county version had not been applied for approximately thirty years.\textsuperscript{152} Although several other counties have similar referendum provisions concerning appropriations,\textsuperscript{153} these provisions do not provide clarity as to the precise meaning of an "increase" in appropriations.

Both BCCAUT and Baltimore County agreed that the container tax ordinance was "an appropriation for maintaining county government"\textsuperscript{154}, the dispute focused on whether the tax represented an exempt "new" appropriation or a referable "increase." The Court of Appeals looked to the budgetary and fiscal procedures set forth in Article VII of the Baltimore County Charter for guidance.\textsuperscript{155} The court relied heavily on section 706, which groups the county executive's current expense budget, capital budget, capital program, and budget message together as a complete budget package.\textsuperscript{156} Section 706's further requirement of "[a] comparative statement of the receipts and expenditures" for the immediately preceding and next ensuing fiscal years as "classified by agency, character and object,"\textsuperscript{157} persuaded the court to conclude that an increase in a project or program reflected in a line item of the budget bill is referable, but the tax law itself is not.\textsuperscript{158}

There are two basic problems with the Court of Appeals' analysis. First, by separating the statute from the remainder of the budget package, the Court acted in direct contrast to Winebrenner's

\textsuperscript{152} The campaign against the container tax law represented the first time in 27 years in which a referendum petition carried the support of a sufficient number of Baltimore County voters. Brief for Petitioners at 12, Baltimore County Coalition (No. 89-124).
\textsuperscript{153} See supra note 146.
\textsuperscript{154} Reporter's Official Transcript of Proceedings, Injunction Hearing at 2-3, Baltimore County Coalition (No. 89-124).
\textsuperscript{155} See Baltimore County Coalition, 321 Md. at 205, 582 A.2d at 520; see also Baltimore County, Md., Charter art. VII, § 706 (1978 & Supp. 1988-89).
\textsuperscript{156} See Baltimore County Coalition, 321 Md. at 205, 582 A.2d at 520.
\textsuperscript{157} Baltimore County, Md., Charter art. VII, § 706.
\textsuperscript{158} Baltimore County Coalition, 321 Md. at 205, 582 A.2d at 520.
requirement that "the act and the budget . . . be construed together as though they constituted one act." Maryland law dictates that its budget and corresponding tax statutes should be treated in pari materia, and Baltimore County Coalition presented no reason to diverge from this principle.

Second, regardless of the requirements expressed in section 706, the county budget package simply does not specify an intended use for the container tax revenue. The Court of Appeals attempted to follow the County Executive's message by linking the tax revenue with a specific line item for solid waste management. This allocation, however, ignores the $2,125,000 expected revenue from the tax: the 1990 appropriation for the Department of Environmental Protection's program for solid waste management reflects a $32,074 decrease from the previous fiscal year.

Furthermore, Budget Director Homan implied that if the revenue from the tax were to be incorporated into a specific portion of the budget, it would be represented by the general fund line item for refuse collection. This suggestion has not only been unequivocally rejected by the Budget Director himself, but it creates a mathematical impossibility: the $380,760 increase from the 1989 appropriation level for refuse collection ($15,967,229) to the 1990 level ($16,347,989) cannot fully account for the $2,125,000 expected revenue from the bottle tax.

In summary, no line item in the operating budget can measure the appropriation "increase" created by the container tax statute. This is an insufficient reason to deny the voters' referendum privilege; otherwise, the County Council could refuse specifically to allo-

159. 155 Md. 563, 567, 142 A. 723, 725 (1928).
160. Id.
161. See supra note 105 and accompanying text.
162. Baltimore County Coalition, 321 Md. at 205-06, 582 A.2d at 521; see also Baltimore County, Md., Operating Budget, Fiscal Year 1990, exhibit c at 10 (May 30, 1989). This program received an appropriation of $1,514,414 in fiscal year 1989; the fiscal year 1990 appropriation for this purpose totalled $1,482,340. Id. In addition, the amount of revenue expected from the bottle container tax ($2,125,000) exceeds the Department of Environmental Protection's water quality and solid waste allocation by $642,660. Compare id., exhibit b at 2 with id., exhibit c at 10. No elements of the budget package specify the intended allocation of these remaining funds.
163. Affidavit of Fred Homan, Deputy Director of the Budget, at 7, Baltimore County Coalition (No. 89-124).
164. Id. ("In short, there is no direct causal linkage in the budget between the beverage container tax and the amount of appropriation for refuse collection and disposal set forth in [the operating budget].").
cate funds and avoid being checked by the voting public. The “increase” described in section 309 must, therefore, refer to the total “increase” in the general fund, which amounted to $59,854,918 in 1990. This reasoning, combined with the Winebrenner analysis, which clearly categorizes the budget and appropriations acts as a single entity, leads to the inescapable conclusion that BCCAUT proceeded properly by putting the container statute to referendum.

4. Conclusion.—The treatment of BCCAUT’s referendum petition under the Baltimore County Charter was consistent with the Court of Appeals’ historical trend of curtailing the power of referendum. Yet, although the court’s denial in Baltimore County Coalition may have been based on a valid policy rationale, its dubious interpretation of “increase,” under the guise of accepted statutory construction, has the effect of denying the public its right to review the Baltimore County container tax statute.

C. A Limit to Immunity for State Troopers

In Sawyer v. Humphries, the Court of Appeals held that an off-duty state trooper was not automatically entitled to immunity from a tort action when the plaintiff alleged that the trooper instigated a roadside altercation, physically assaulted the plaintiff, and later had the plaintiff arrested. Significantly, the court held that the pertinent statutory scheme granting state employees immunity for actions within the scope of their public duties should be read in light of the common-law phrase “scope of employment.” Under this interpretation, it was a question for the jury whether the alleged conduct was beyond the protection of statutory immunity because the officer acted outside the scope of his public employment.

In holding that the trooper could be exposed to a claim for damages, the Sawyer court reversed the Court of Special Appeals, which had held that a law enforcement officer is considered “on duty” at all times, and had then drawn from this holding the non sequitur that this trooper was therefore acting within the scope of

166. See id., exhibit c at 16.
168. See id. at 260-61, 587 A.2d at 473-74. The court concluded that the trial court erred in dismissing the complaint but noted that at trial the evidence could still establish immunity. See id. at 262, 587 A.2d at 474.
170. Sawyer, 322 Md. at 254, 587 A.2d at 470.
171. Id. at 260-61, 587 A.2d at 473-74.
his duty. The intermediate court's ruling, while expanding the trooper's personal shield against liability, would have concurrently diminished the state's immunity from claims; therefore, the Sawyer court responded appropriately by blocking what might have become a wide open door for plaintiffs at the state's expense.

1. The Case.—According to the complaint in Sawyer, the plaintiffs, Robert Andrew Sawyer and Dean Hundley, were driving along Route 31 in Carroll County behind a car driven by the defendant, Edwin M. Humphries. Unknown to the plaintiffs, Humphries was an off-duty state trooper. Humphries was wearing civilian clothing and was driving his personal car.

At some point, Sawyer and Hundley noticed Humphries making hand signals toward them. Humphries then pulled over to the shoulder of the road. Sawyer and Hundley passed Humphries's vehicle and turned down a side road to investigate a construction site at which they hoped to obtain employment. Upon returning to Route 31, the plaintiffs saw Humphries's car parked on the side of the road; Humphries was leaning against his car and motioning for Sawyer and Hundley to approach him.

As the plaintiffs drove slowly toward him, Humphries allegedly picked up some rocks and threw one at their car, denting the passenger side. Sawyer swerved, then made a U-turn and parked on the opposite side of the street from Humphries. As Sawyer got out of his car, Humphries picked up more rocks; Sawyer grabbed an empty beer bottle, allegedly to defend himself. Humphries then attacked Sawyer, "grabbing him by the hair, beating him about the face and threatening to kill him."

When Hundley stepped out of the car to help his companion,

173. The Court of Appeals treated the allegations of the complaint as true because the appeal was from the trial court's granting of the defendant's motion to dismiss. Sawyer, 322 Md. at 253 n.4, 587 A.2d at 470 n.4; see Cox v. Prince George's County, 296 Md. 162, 169, 460 A.2d 1038, 1042 (1983).
174. Sawyer, 322 Md. at 249, 587 A.2d at 468.
175. Id. at 249-50, 587 A.2d at 468.
176. Id. at 250, 587 A.2d at 468.
177. Id.
178. Id.
179. Id.
180. Id.
181. Id.
182. Id. Humphries claimed that he acted in self defense. Id. at 257 n.6, 587 A.2d at 472 n.6.
Humphries released Sawyer and warned Hundley to get back in the car; Hundley heeded the warning.\textsuperscript{183} Sawyer then got into the passenger seat of his car, apparently too badly injured to drive.\textsuperscript{184} Humphries approached Sawyer’s vehicle and offered to exchange information; Sawyer refused, and he and Hundley drove away from the scene.\textsuperscript{185}

Later that day, the plaintiffs again encountered Humphries when they came to a stop sign in the town of New Windsor.\textsuperscript{186} Humphries got out of his car, approached the plaintiffs, and slapped Sawyer across the chest, stating that he was a Maryland State Police Officer.\textsuperscript{187} Humphries attempted to arrest Sawyer by physically removing him from the car, but Sawyer’s seat belt was fastened.\textsuperscript{188} Despite repeated requests by Hundley and Sawyer for Humphries to present his police identification, Humphries refused.\textsuperscript{189} Other officers eventually arrived and arrested Sawyer. The record presented to the court, however, did not indicate whether Sawyer had been charged with any offense.\textsuperscript{190}

One year later, Sawyer and Hundley filed a complaint against Humphries, alleging several counts of assault and battery.\textsuperscript{191} The state was not named as a defendant, however, and Humphries moved to dismiss, claiming he was entitled to personal immunity as a state employee acting within the scope of his employment and without malice.\textsuperscript{192} The Circuit Court for Carroll County dismissed the complaint, and the Court of Special Appeals affirmed.\textsuperscript{193}

\textsuperscript{183} Id. at 250, 587 A.2d at 468. According to the plaintiffs, Humphries said to Hundley, “[u]nless you want some too, boy, you better get back in the car.” Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 250-51, 587 A.2d at 468.
\textsuperscript{186} Id. at 251, 587 A.2d at 469. Sawyer and Hundley claimed they had seen Humphries driving in front of them at one point, but he later turned down a side road and began following them. Id., 587 A.2d at 468. The Court of Special Appeals’ opinion indicated that Humphries pursued the plaintiffs from the time they left the initial incident. Sawyer v. Humphries, 82 Md. App. at 75, 570 A.2d at 342.
\textsuperscript{187} Sawyer, 322 Md. at 251, 587 A.2d at 469.
\textsuperscript{188} Id.
\textsuperscript{189} Id.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Id. at 251-52, 587 A.2d at 469. It is not clear why the plaintiffs did not seek to reach the state coffers. It is possible that their grievances against Humphries were so vehement that they wanted personal retribution. Also, Humphries may have had sufficient assets to pay punitive damages, which are not available against the state. See Md. Cts. & Jud. Proc. Code Ann. § 5-399.2(a)(1) (Supp. 1991). It is also possible, however, that the plaintiffs simply missed the 180-day notice deadline for tort actions against the state. See Md. State Gov’t Code Ann. § 12-106(d)(2) (1984).
\textsuperscript{193} See Sawyer v. Humphries, 82 Md. App. at 87, 570 A.2d at 348.
plaintiffs' petition, the Court of Appeals granted certiorari.\textsuperscript{194}

2. \textbf{Legal Background}.—Until passage of the Maryland Tort Claims Act\textsuperscript{195} in 1981, Maryland was one of a handful of states that retained absolute sovereign immunity in tort.\textsuperscript{196} This common-law doctrine, derived from the immunity of the English crown, held state governments immune from liability for the torts of their employees.\textsuperscript{197} The doctrine had two aspects: procedurally, a state could not be sued without its consent; and substantively, a state could not be found liable in tort unless it had waived its immunity.\textsuperscript{198}

In certain circumstances, the state employee could also claim a qualified immunity, often leaving an injured plaintiff with no remedy. For instance, the doctrine that was known as “public official immunity” shielded certain government employees—including law enforcement officers—if they were considered public officials, rather than mere employees, and if they were exercising discretionary, rather than ministerial functions.\textsuperscript{199}

The resulting inequity against victims prompted a general erosion of sovereign tort immunity, both by statute and by judicial abrogation.\textsuperscript{200} Maryland’s response was the enactment of the Tort Claims Act, which waives the state’s immunity to the extent of insurance coverage, but only when the tortfeasor-employee acts both “within the scope of the [employee’s] public duties” and without


\textsuperscript{195} The Maryland Tort Claims Act was initially codified at MD. CTS. & JUD. PROC. CODE ANN. §§ 5-401 to -408 (1984) and was recodified at MD. STATE GOV'T CODE ANN. §§ 12-101 to -204 (Supp. 1990).

\textsuperscript{196} KENNETH C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 25.00-2, at 557 (1976). In 1976, Maryland was one of only five states that adhered to the traditional rule, granting immunity from liability for torts occurring in the exercise of governmental functions. \textit{Id}. By 1977, two of the five states had judicially abolished the immunity. \textit{Id}. § 25.00 (Supp. 1977).

\textsuperscript{197} See, \textit{e.g.}, State ex rel. Watkins v. Rich, 126 Md. 643, 645, 95 A. 956, 957 (1915) (holding that the State Roads Commission, as a governmental agency charged with a public function, was protected by sovereign immunity).

\textsuperscript{198} RESTATEMENT (SECOND) OF TORTS § 895B cmt. a (1977). The lack of immunity, of course, does not automatically constitute liability, but does make it possible to establish liability. \textit{Id}.

\textsuperscript{199} See, \textit{e.g.}, State ex rel. Cocking v. Wade, 87 Md. 529, 541-44, 40 A. 104, 106-07 (1898) (holding that the sheriff was a public officer exercising judgment and discretion; thus, there was no cause of action against him for the murder of a prisoner by a lynch mob); \textit{cf}. Robinson v. Board of County Comm’rs, 262 Md. 342, 347, 278 A.2d 71, 74 (1971) (holding that police officers enjoy immunity only when acting without malice); see \textit{also supra} text accompanying notes 31-33.

\textsuperscript{200} RESTATEMENT (SECOND) OF TORTS § 895B cmt. b (1977).
malice or gross negligence. In those situations, a state government employee retains personal immunity.

Determining the appropriate defendant under the statute, therefore, depends on the facts of each case. A state employee is not entitled to immunity and may be held personally liable if she commits a tort with malice or gross negligence or outside the scope of her "public duties." On the other hand, the state may be liable if one of its employees commits a tort while acting within the scope of his "public duties" and without malice or gross negligence. Before Sawyer, however, neither the Maryland legislature nor Maryland courts had defined the phrase "scope of the public duties." Confronted by the question, the Court of Special Appeals looked extensively at the history and functions of Maryland State Police troopers, and policemen in general, concluding that a trooper is considered to be, "for police purposes[,] on duty twenty-four hours a day, seven days a week, fifty-two weeks a year." The lower appellate court then stated that "[s]ince Trooper Humphries acted as a law enforcement officer[ ] at the time of the incident about which Sawyer and Hundley complain, he was under the umbrella of the Maryland Tort Claims Act.""\(^{205}\)

---

201. Md. State Gov't Code Ann. §§ 12-101 to -204 (1984 & Supp. 1990). Section 12-104 provides: "Subject to the exclusions and limitations in this subtitle, the immunity of the State and of its units is waived as to a tort action, in a court of the State, to the extent of insurance coverage under Title 9 of the State Finance and Procurement Article." Id. § 12-104(a).

Section 5-399.2 of the Courts and Judicial Proceedings Article provides exclusions from the waiver of immunity. See Md. Cts. & Jud. Proc. Code Ann. § 5-399.2 (Supp. 1991). The state has not waived its sovereign immunity for claims based on a state employee's tortious act or omission that "[i]s not within the scope of the public duties of the State personnel[,] or . . . [i]s made with malice or gross negligence." Id. § 5-399.2(a).

Consistent with its desire to ensure a remedy to injured plaintiffs, the Maryland legislature dictated that the provisions of the Tort Claims Act should be construed broadly. See Md. State Gov't Code Ann. § 12-102 (1984).

202. Md. Cts. & Jud. Proc. Code Ann. § 5-399.2(b). This section provides that "[s]tate personnel are immune from suit in courts of the State and from liability in tort for a tortious act or omission that is within the scope of the public duties of the State personnel and is made without malice or gross negligence." Id.

203. 322 Md. at 253, 587 A.2d at 470. The court noted, however, that it had impliedly treated the phrase to mean scope of employment in Rucker v. Harford County, 316 Md. 275, 292, 558 A.2d 399, 407 (1989). See Sawyer, 322 Md. at 253, 587 A.2d at 470.

204. Sawyer v. Humphries, 82 Md. App. at 84, 570 A.2d at 347. As the Court of Appeals later commented, however, whether Humphries was on duty was only one factor in determining whether he had acted within the scope of his duties. See Sawyer, 322 Md. at 259, 587 A.2d at 473.

205. Sawyer v. Humphries, 82 Md. App. at 84, 570 A.2d at 347. Perhaps the court concluded that Humphries had "acted as a law enforcement officer" because of Sawyer's
The court also held that the trial court's dismissal was appropriate because Sawyer could not prevail on his claim that Humphries acted maliciously in throwing a rock at Sawyer's car, pulling his hair, and punching him repeatedly.\textsuperscript{206} The Court of Special Appeals dismissed these assertions as "[b]ald allegations of malice or gross negligence . . . not sufficient to remove the immunity protective umbrella from police officers. To allow bald allegations to serve to close the immunity umbrella would, in effect, render all law enforcement officers susceptible to the pleader's pen."\textsuperscript{207}

3. \textit{The Court's Reasoning; Analysis.---}The Court of Appeals in Sawyer read the scope of a police officer's duties more narrowly than the lower courts. After determining that the General Assembly intended the state to bear tort liability for its employees' actions to the same extent as a private employer, the court held that the phrase "scope of the public duties" was synonymous with the phrase "scope of employment" as used in the common-law rule of respondeat superior.\textsuperscript{208}

This rule of vicarious liability allows a plaintiff to sue the employer, or principal, for the tortious acts of an employee, or agent,
when committed within the scope of employment.\textsuperscript{209} The scope of employment includes conduct that is in furtherance of the employer's interests or incidental to authorized acts.\textsuperscript{210} Whether conduct is incidental depends on a number of considerations, including whether the conduct is of the same general nature as that authorized, whether the act is close in time and place to the authorized time and place of duties, and whether the conduct is foreseeable.\textsuperscript{211}

Factors indicating that an act is outside the scope of employment include serious criminality of the act; personal motives and self-interest, or a departure from the employer's business; and unprovoked, unusual, or outrageous conduct.\textsuperscript{212} Given these principles of respondeat superior, the Court of Appeals concluded that Humphries's alleged actions, if proven, would lie clearly outside the scope of his employment, and Humphries could not, therefore, claim immunity.\textsuperscript{213} The court reversed the Court of Special Appeals

\textsuperscript{209} See, e.g., Wilson Amusement Co. v. Spangler, 143 Md. 98, 101-05, 121 A. 851, 853-54 (1923) (holding a theater owner liable for damages resulting from an assault and battery by an employee-doorkeeper). When employees have deviated grossly from the line of duty, or are pursuing what are clearly their own interests, they are said to be on a "frolic of [their] own," and the employer is absolved of vicarious liability. See, e.g., Carroll v. Hillendale Golf Club, Inc., 156 Md. 542, 546, 144 A. 693, 695 (1929) (holding that employer was not liable when its employee shot someone, because the employee was motivated by personal interests); see also Stavitz v. City of New York, 471 N.Y.S.2d 272, 274 (N.Y. App. Div. 1984) (holding that a police officer's assault on his neighbor was the result of a personal dispute).

\textsuperscript{210} See generally Restatement (Second) of Agency §§ 228-29 (1957).

\textsuperscript{211} Id.; see also Wood v. Abell, 268 Md. 214, 226-28, 300 A.2d 665, 672 (1973) (holding that the vice president of the county fair association acted within the scope of employment because the acts performed were customary for that position); Drug Fair of Md., Inc. v. Smith, 263 Md. 341, 347, 283 A.2d 392, 396 (1971) (holding that a store cashier was acting within the scope of employment when apprehending an alleged shoplifter at the employer's request). But see LePore v. Gulf Oil Corp., 237 Md. 591, 595-600, 207 A.2d 451, 453-56 (1965) (holding that an assault by an employee authorized only to attempt to make a collection did not occur within the scope of employment).

\textsuperscript{212} Restatement (Second) of Agency § 229 (1957). Outrageous and seriously criminal acts by employees have usually been held to be outside the scope of employment, sometimes as a matter of law. See, e.g., Henley v. Prince George's County, 305 Md. 320, 330 n.2, 503 A.2d 1333, 1338 n.2 (1986) (holding employer not liable for sexual assault and murder committed by employee). This is true even when the outrageous act was aided by abuse of the employee's official position. See, e.g., City of Green Cove Springs v. Donaldson, 348 F.2d 197, 202 (5th Cir. 1965) (holding that a rape and assault by a police officer was outside his scope of duty as a matter of law, even though the victim was initially taken into custody for speeding); Gambling v. Cornish, 426 F. Supp. 1153, 1155 (N.D. Ill. 1977) (holding that imprisonment, false arrest, and rape by police officers were acts outside the scope of duty as a matter of law); Snell v. Murray, 284 A.2d 381, 385 (N.J. Super. Ct. Law Div. 1971) (holding that the city was not liable for bullet wounds inflicted by a drunken police officer who was trying to extort the proceeds of a dice game), aff'd per curiam, 296 A.2d 538 (N.J. Super. Ct. App. Div. 1972).

\textsuperscript{213} Sawyer, 322 Md. at 257, 587 A.2d at 472.
and remanded the case for trial, leaving open the question of liability. According to the court, the evidence would show as a matter of fact or law whether Humphries acted within the scope of his employment, and it was the trial court's duty to proceed with the case.\footnote{214}

In addition, the Court of Appeals found that "the complaint sufficiently alleged malice so that Mr. Humphries would not be entitled to immunity under the Act."\footnote{215} The plaintiffs' allegations that Humphries threw rocks at them, physically attacked Sawyer, and threatened to kill him, clearly showed malice on the part of Humphries.\footnote{216} Thus, the plaintiffs were entitled to proceed to trial even if Humphries had acted within the scope of his police duties.\footnote{217}

Because Humphries's claim of immunity required factual determinations and the plaintiffs sufficiently alleged malice to overcome an immunity defense, Humphries was not entitled to a dismissal.\footnote{218} The Court of Appeals thus effectively placed governmental immunity for state troopers at roughly the same level as that of private employees; the scope of employment of a state trooper is no longer

\begin{itemize}
  \item In light of these principles, it seems obvious that the defendant's alleged conduct, at least prior to the incident in the town of New Windsor, was outside of the scope of his employment. The defendant was off duty and driving his personal car. Under the allegations of the complaint, the defendant's throwing a rock at the plaintiffs' car and his attack upon the plaintiffs along Route 31 had nothing to do with the defendant's duties as a police officer. As to that activity, there is no suggestion in the complaint that Mr. Humphries was attempting to question, stop, detain or arrest the plaintiffs in connection with any traffic or criminal offense or any other matter of concern to the police department. On the contrary, insofar as it appears from the complaint, Mr. Humphries was acting for purely personal reasons and not incidental to any State law enforcement purpose.\footnote{Id. at 257-58, 587 A.2d at 472. In a footnote, the court added that even under Humphries's version of the events, he was acting initially not to detain or arrest Sawyer, but in self defense. Id. at 257 n.6, 587 A.2d at 472 n.6.}
  \item Although the court seemed to indicate that self defense is a personal motive not imputable to the employer, it is not clear whether the court would be so harsh if the self defense was combined with the exercise of a police function. Other courts have held such a mixture to be within the scope of duties. \textit{See, e.g.}, \textit{Banks v. City of Chicago}, 297 N.E.2d 348, 349 (Ill. App. Ct. 1973).\footnote{214. \textit{See Sawyer}, 322 Md. at 262, 587 A.2d at 474. In most respondeat superior cases, whether an agent or servant was acting within the scope of his employment has been held, at least when the facts are in dispute, to be a question for the jury. \textit{See, e.g.}, \textit{Wood}, 268 Md. at 228, 300 A.2d at 672; \textit{Drug Fair of Md., Inc.}, 263 Md. at 346-47, 283 A.2d at 396; \textit{LePore}, 237 Md. at 593, 207 A.2d at 452; \textit{Rusnack v. Giant Food, Inc.}, 26 Md. App. 250, 265, 337 A.2d 445, 454 (1975).}
  \item \textit{Id.} at 257 n.6, 587 A.2d at 472 n.6.
  \item In most respondeat superior cases, whether an agent or servant was acting within the scope of his employment has been held, at least when the facts are in dispute, to be a question for the jury. \textit{See, e.g.}, \textit{Wood}, 268 Md. at 228, 300 A.2d at 672; \textit{Drug Fair of Md., Inc.}, 263 Md. at 346-47, 283 A.2d at 396; \textit{LePore}, 237 Md. at 593, 207 A.2d at 452; \textit{Rusnack v. Giant Food, Inc.}, 26 Md. App. 250, 265, 337 A.2d 445, 454 (1975).\footnote{215. \textit{Sawyer}, 322 Md. at 261, 587 A.2d at 474.}
  \item \textit{Id.}\footnote{216. \textit{Id.}}
  \item \textit{Id.}\footnote{217. \textit{Id.}}
  \item \textit{Id.} at 262, 587 A.2d at 474.\footnote{218. \textit{Id.} at 262, 587 A.2d at 474.}
\end{itemize}
all-encompassing.219

At least one important difference remains between the liability of the state as employer and private employers' liability, however. Under the traditional respondeat superior doctrine, if an employee commits a tort while acting within her scope of employment, the employer may be vicariously liable, even if the employee acts with malice.220 Under the terms of the Act, however, the state retains immunity when the employee acts with malice or gross negligence.221

4. Conclusion.—Because Sawyer recognizes a boundary around a state trooper's scope of employment, and therefore a limit on the trooper's immunity, the opinion restores the possibility of an effective remedy to a plaintiff who sues the trooper in his personal capacity, whether because of a missed notice deadline, out of a desire for personal retribution, or in hopes of a punitive damages award. For plaintiffs who seek to reach the deeper pockets of the state, however, Sawyer strikes a note of caution against excessive hyperbole in drafting a complaint.222 The more outrageous the depiction of the trooper's actions, the less likely the actions will be found to be within the scope of employment. If the trooper's actions are held to be outside the scope of employment, the plaintiff has no cause of action against the state. For the defendant, either state trooper or state government, Sawyer means more instances in which a case will turn on its facts, with liability assessed against the government when the trooper's negligent tort arises from the performance of his duties, and against the trooper personally when he acts outrageously or in his private capacity.

D. Local Elected Officials Are Not Immunized for Electioneering Activities

In Ennis v. Crenca,223 the Court of Appeals held that an elected official's statements to the press are outside the scope of employ-

219. Although the court did not specifically delineate what constitutes the scope of employment of a police officer, the nature of an officer's duties requires the scope to be broader than that of other government and private employees. Id. at 258, 587 A.2d at 472.

220. See, e.g., Cox v. Prince George's County, 296 Md. 162, 170, 460 A.2d 1038, 1042 (1983) (accepting the common-law notion that a master is responsible for the conduct of his servant, even if the servant acted recklessly or willfully).


222. Hyperbole in such a situation is probably unnecessary anyway, because the state has not waived immunity for punitive damages. See id. § 5-399.2(a)(1).

ment when such statements can be characterized as campaign activity and are made for the elected official's own purposes. Because the Maryland Local Government Tort Claims Act (LGTCA) only immunizes local elected officials from personal liability for conduct within the scope of employment, the LGTCA did not apply to the electioneering activities at issue in Ennis.

1. The Case.—On September 22, 1987, Joan Ennis and Rosalie Crenca, a Montgomery County legislator, met for lunch in the Montgomery County Council office building. At the time of the meeting, Ennis was president of the Allied Civic Group, Inc., an organization opposed to a proposed development plan for Silver Spring. According to Ennis, the purpose of the brief meeting was to express the Allied Civic Group's opposition to the development plan. Despite the opposition, Crenca voted for the development plan in November 1987.

In December, Crenca requested a fellow county employee to notify the press that Ennis had offered Crenca a bribe at the September meeting. Further, Crenca told a local reporter that Ennis had offered to pay off Crenca's campaign debt in exchange for Crenca's vote against the development project. Crenca's allegations of bribery were published in the Montgomery Journal, the Washington Times, and the Washington Post. On April 29, 1988, Ennis

224. See id. at 295-96, 587 A.2d at 490-91.
226. The LGTCA definition of "employee" includes elected officials. See id. § 5-401(c)(ii).
227. See id. § 5-402(a).
228. See 322 Md. at 294, 587 A.2d at 490.
229. Id. at 288, 587 A.2d at 486.
231. See Ennis, 322 Md. at 288, 587 A.2d at 486-87.
232. See id., 587 A.2d at 487. The Montgomery County Council voted 4 to 3 for the development plan. Crenca, president of the council at the time, was a key vote. Armano, supra note 230, at B1.
233. Ennis, 322 Md. at 288, 587 A.2d at 487.
234. Id. According to the Washington Post, Crenca had a campaign debt of approximately $3800. In the same article, Ennis claimed that she personally had no money, the Allied Civic Group was "threadbare poor," and the other organization to which she belonged had not given her authority to spend money. Armano, supra note 230, at B1.
was indicted for offering a bribe to an elected official. The State later entered a nolle prosequi in that case.

Ennis filed suit against Crenca in the Circuit Court for Montgomery County, charging Crenca with libel and slander. Ennis did not name Montgomery County as a codefendant in her complaint and did not notify the county of the suit against Crenca.

Under the LGTCA, a party may not maintain an action for unliquidated damages against a local government or its employees unless notice is given to the local government within 180 days of the alleged injury. Therefore, Crenca moved to dismiss Ennis's action, claiming that Ennis failed to provide the required notice to the county. Ennis amended her complaint, stating that she was suing Crenca in her individual capacity and not as an officer or representative of the county.

The circuit court held that as a matter of law Crenca was acting within the scope of her employment, and therefore, the LGTCA applied when she allegedly defamed Ennis. Because Ennis had not given the required notice to Montgomery County, the circuit court dismissed the action. Ennis filed an appeal with the Court of Special Appeals, and prior to argument in that court, the Court of Appeals issued a writ of certiorari.

The Court of Appeals held that Crenca was acting outside the scope of her employment and that the LGTCA consequently did not apply. The court reversed the dismissal by the Circuit Court for Montgomery County and remanded the case for trial.

---


236. Ennis, 322 Md. at 289, 587 A.2d at 487.

237. Id.

238. Id.

239. Id.


241. Ennis, 322 Md. at 290, 587 A.2d at 487.

242. Id., 587 A.2d at 488.

243. Id.

244. Id.

245. Id. at 291, 587 A.2d at 488.

246. Id.

247. See id. at 296, 587 A.2d at 491.

248. See id. at 296-97, 587 A.2d at 491.
2. Legal Background.—

a. Sovereign Immunity.—Sovereign immunity is based upon the common-law presumption that the "King can do no wrong." The State of Maryland and its political subdivisions have sovereign immunity "by reason of [the state's] prerogative as a sovereign, and on grounds of public policy." Among the public policy grounds forwarded in support of sovereign immunity, financial considerations are perhaps the most prominent.

Political subdivisions in Maryland have sovereign immunity unless the General Assembly directly or by implication waives that immunity. In 1987, the General Assembly partially waived the sovereign immunity of local governments by enacting the Local Government Tort Claims Act. The main purpose of the LGTCA was to require local governments to defend their employees in lawsuits, thereby reducing the impact of lawsuits "on the incentive of public employees and officials to do their jobs to the best of their abilities."

The liability of a local government is limited, however. The LGTCA only requires a local government to defend one of its employees in a lawsuit if the action is based on alleged tortious conduct that occurred while the employee was acting within the "scope of employment." Therefore, the duty to defend an employee hinges upon whether the alleged tortious conduct falls within the scope of employment.

252. See id. at 334, 260 A.2d at 299 (finding negligence arising out of the maintenance of county roads to be an implicit exception to the rule that counties have sovereign immunity).
254. Ennis, 322 Md. at 291, 587 A.2d at 488.
   Each local government shall provide for its employees a legal defense in any action that alleges damages resulting from tortious acts or omissions committed by an employee within the scope of employment with the local government.

Id. Governments act through their employees. Theoretically, the state could always be impleaded under the general allegation that one of its employees has acted tortiously, absent maintenance of a boundary between personal acts and acts in the name of the state. The term "scope of employment" provides such a boundary. See generally Borchard, supra note 249, at 13. Cf. supra note 208 and accompanying text.
b. Test for Scope of Employment.—In Sawyer v. Humphries, the Court of Appeals analogized the “scope of public duties” under the Maryland Tort Claims Act to the scope of employment concept under the doctrine of respondeat superior. The Sawyer court confirmed earlier decisions that found an employee’s conduct within the scope of employment if (1) the conduct furthered the employer’s business, and (2) it was such that it would have been authorized by the employer. Unauthorized conduct could be within the scope of employment if it was incidental to the performance of duties entrusted to the employee.

The Sawyer court emphasized that an employee’s protection of personal interests is outside the scope of employment, even if the conduct occurs during business hours at the place of business. Therefore, whether the activity at issue can be considered the promotion or protection of personal interests by the government employee is an important determination to be made in disputes involving local government employees.

c. Analogous Legislative Immunity at the Federal Level.—The extent of legislative immunity at the federal level illustrates the types of activities that are often considered protection of personal interests, and therefore outside the legislator’s scope of employment. Federal legislators are protected by the Speech or Debate Clause of the United States Constitution for statements made in committee and Senate or House proceedings. The purpose of the clause is to prevent members of Congress from being hindered in the performance of their legislative tasks by having to defend their actions in

258. 322 Md. at 254, 587 A.2d at 470 (holding that an off-duty police officer had not acted within the scope of his public duties when he assaulted and battered a motorist). For a thorough analysis of Sawyer, see supra Subpart XII.C.
259. 322 Md. at 254, 587 A.2d at 470.
260. Id. at 256, 587 A.2d at 471. The court recognized that the time, place, and purpose of the action are key factors in determining whether the conduct, although not authorized, is nevertheless incidental to the scope of employment. See id.
261. Id. at 256-57, 587 A.2d at 471.
262. U.S. Const. art. I, § 6, cl. 1. The clause provides that “for any Speech or Debate in either House, [Senators or Representatives] shall not be questioned in any other Place.” Id.
263. See Gravel v. United States, 408 U.S. 606, 625 (1972) (extending the protection of the Speech or Debate Clause to matters that are “an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings”).
court,\textsuperscript{264} a policy similar to the stated purpose of the LGTCA.\textsuperscript{265}

The Supreme Court has limited the scope of protection granted by the Speech or Debate Clause, finding that the clause "does not extend beyond what is necessary to preserve the integrity of the legislative process."\textsuperscript{266} In \textit{United States v. Brewster},\textsuperscript{267} the Court held that activities such as news releases or speeches delivered outside of Congress are "political in nature rather than legislative"\textsuperscript{268} and are not likely to be protected under the Speech or Debate Clause.\textsuperscript{269}

Further, in \textit{Hutchinson v. Proxmire},\textsuperscript{270} the Court specifically held that newsletters and press releases are beyond the protection of the Speech or Debate Clause.\textsuperscript{271} United States Senator William Proxmire bestowed his "Golden Fleece of the Month" award\textsuperscript{272} upon several agencies that provided funding to Ronald Hutchinson, a research behavioral scientist, who Proxmire claimed "made a fortune from his monkeys and in the process made a monkey out of the American taxpayer."\textsuperscript{273}

Proxmire delivered a speech in the Senate\textsuperscript{274} about Hutchinson's research and included the text of the speech in a press release.\textsuperscript{275} The substance of the speech was repeated again in a newsletter sent to many of Senator Proxmire's constituents.\textsuperscript{276} When Hutchinson brought a defamation suit against Proxmire, the Senator maintained that the statements made in the press release

\textsuperscript{264} Hutchinson v. Proxmire, 443 U.S. 111, 123 (1979).
\textsuperscript{265} See supra text accompanying note 254.
\textsuperscript{266} United States v. Brewster, 408 U.S. 501, 517 (1972); see also Benford v. American Broadcasting Co., 502 F. Supp. 1148, 1152 (D. Md. 1980) (summarizing the limitations on the applicability of the clause).
\textsuperscript{267} 408 U.S. 501 (1972).
\textsuperscript{268} Id. at 512.
\textsuperscript{269} See id.
\textsuperscript{270} 443 U.S. 111 (1979).
\textsuperscript{271} See id. at 133.
\textsuperscript{272} Senator Proxmire gave his "Golden Fleece" awards to agencies that sponsored projects he considered the most glaring examples of wasteful government spending. The National Science Foundation, the National Aeronautics and Space Administration, and the Office of Naval Research received the award for their sponsorship of research scientist Ronald Hutchinson's research. Id. at 114.
\textsuperscript{273} Id. at 116. Hutchinson filed suit in the United States District Court in Wisconsin for defamation, interference with contractual relations, intentional infliction of emotional anguish, and invasion of privacy. Id. at 121-22.
\textsuperscript{274} Proxmire does not remember actually delivering the speech on the Senate floor, but it appeared in the Congressional Record. The Court assumed, without discussion, that a speech printed in the Congressional Record carries immunity under the Speech or Debate Clause. Id. at 116 n.2.
\textsuperscript{275} Id. at 115-16.
\textsuperscript{276} Id. at 117.
and newsletter were protected by the Speech or Debate Clause as part of the “informing function” of Congress.\(^{277}\) The Supreme Court concluded that “[v]aluable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process.”\(^{278}\) Congressional activities such as constituent newsletters and press releases are thus excluded from the protection of legislative immunity.

3. The Court’s Reasoning.—The Court of Appeals examined several factors in deciding that Crenca’s report to the press about the alleged bribe offer was outside the scope of her employment as a county legislator. The court found that Crenca’s statements to the press were essentially electioneering activities\(^{279}\) and that such activities are outside the scope of an elected official’s employment, rendering the LGTCA inapplicable.\(^{280}\)

a. Statements to the Press.—According to the Court of Appeals, Crenca’s statements to the press were not made in furtherance of her duties as a county legislator, nor were the statements implicitly authorized by the county.\(^{281}\) Thus, the Sawyer standard was not met.\(^{282}\) Crenca’s argument that her statements to the press were protected because they related to her activities as a public official regarding matters of public interest\(^{283}\) therefore failed. The Court of Appeals found that there was nothing peculiar to Crenca’s job as a county legislator that made revelation of an alleged bribe a benefit to the public.\(^{284}\)

Although the Hutchinson and Brewster opinions support the proposition that an elected official’s reports to the press are political rather than legislative activity,\(^{285}\) the Court of Appeals explicitly

\(^{277}\) See id. at 132.
\(^{278}\) Id. at 133.
\(^{279}\) See Ennis, 322 Md. at 295, 587 A.2d at 490.
\(^{280}\) See id. at 294, 587 A.2d at 490.
\(^{281}\) See id. at 296, 587 A.2d at 490.
\(^{282}\) See supra notes 259-261 and accompanying text.
\(^{283}\) Defendant’s Response to Opposition to Motion to Dismiss Amended Complaint at 2, Ennis (Montgomery Cir. Ct. No. 36177). Crenca’s argument was very similar to the “informing function” argument put forth by Senator Proxmire. See Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979); supra text accompanying note 277.
\(^{284}\) See Ennis, 322 Md. at 295, 587 A.2d at 490.
\(^{285}\) Brewster provides the basis for determining that statements to the press are political rather than legislative in nature. See 408 U.S. 501, 512 (1972). Hutchinson provides
stated that "under some circumstances, an elected official may be acting within the scope of his or her employment when making statements to the press." The court then examined the surrounding circumstances to determine the nature of Crenca's actions. In particular, the court determined that the length of time that elapsed before Crenca reported the alleged bribe offer to the press indicated that Crenca's remarks were initiated for reasons other than to discharge her duties as a county legislator. Furthermore, the court referred to an article in the Washington Post that indicated that Crenca was being considered as a candidate for Congress at the time of the press statements. This fact undoubtedly influenced the court's determination that Crenca was politically motivated to publicize the alleged bribe offer. Finally, the court was influenced by the fact that Crenca had not notified the Attorney General or the State's Attorney of the bribe offer prior to her statements to the press.

The Court of Appeals concluded from its analysis of the facts that Crenca's statements to the press were intended to discredit her political opponents and that the undermining of political opponents characteristically constitutes electioneering. According to the court, electioneering activities were not the type of activities for which the LGTCA was enacted.

b. Campaign Activities.—The relationship of campaign activities to scope of employment was an issue of first impression in Maryland. Other states, however, had dealt with the issue in the context of interpreting the terms of homeowners' insurance policies to determine whether particular activities of a political candidate are in

the basis for determining that news reports are not protected by legislative immunity.

See 443 U.S. at 133.

286. Ennis, 322 Md. at 296, 587 A.2d at 491.
287. See id. at 294, 587 A.2d at 490.
288. See id. at 289, 587 A.2d at 487. The Washington Post reported that "leading county Democrats are pressuring [Crenca] to change her mind and run [for Congress]." Armano, supra note 230, at B5.
289. See Ennis, 322 Md. at 295 n.6, 587 A.2d at 490 n.6 (stating that the report of an alleged bribe to an appropriate government official is quite different from a report to the press). Crenca said she notified the county attorney in late September or early October but no official action resulted from the discussion. Armano, Crenca Claim, supra note 235, at B6.
290. The case was before the Court of Appeals on an appeal from an order to dismiss Ennis's complaint. Therefore, the allegations of the complaint were accepted as true. Ennis, 322 Md. at 287, 587 A.2d at 486.
291. See id. at 294-95, 587 A.2d at 490.
292. See id. at 294, 587 A.2d at 490.
the pursuit of an occupation or are within the scope of political employment. The Court of Appeals supported its determination that campaigning activities are outside the scope of an elected official's employment by pointing to these states' opinions involving coverage under a business-pursuit clause in a homeowner's insurance policy. Business-pursuit clauses limit the insurer's obligation to indemnify the insured for tortious conduct arising from activities related to the insured's business.

The Court of Appeals gave primary emphasis to a decision of the Appellate Division of the New Jersey Superior Court. In Burdge v. Excelsior Insurance Co., two motorists were injured in an accident allegedly caused by the negligent placement of a campaign sign of a candidate seeking re-election. The candidate sought coverage for his liability under his homeowner's policy although the policy contained a business-pursuit exclusion. The Burdge court held that although campaign activities "may result in the candidate's obtaining a 'profession or occupation,' they cannot themselves be regarded as activities conducted in the performance of that profession or occupation." Because the insured was not engaged in a business pursuit by maintaining a campaign sign, the insurance company was obligated to indemnify him under the homeowner's policy.

By adopting the rationale of the Burdge court that campaigning activities are job-seeking rather than job-related, the Court of Appeals decided that electioneering activities are outside the scope of employment. Thus, Crenca's actions were not within the coverage of the LGTCA.

4. Analysis.—"Scope of employment" is a limitation on the responsibility of a local government to shield its employees from liability. As such, the types of activities considered outside the scope of a public official's employment are important considerations for all parties in a dispute involving a local government employee.

294. See Ennis, 322 Md. at 294-95, 587 A.2d at 490.
295. See Burdge, 476 A.2d at 882.
297. Id. at 881.
298. Id. at 882.
299. Id. at 883.
300. See Ennis, 322 Md. at 295, 587 A.2d at 490.
301. Id.
The Court of Appeals' first finding, that statements to the press are electioneering activities, is consistent with the Speech or Debate Clause cases in the federal courts. However, Crenca's statements to the press do not appear to be electioneering activities. Unlike statements made at a fund-raising dinner or statements made in a constituent newsletter, allegations of a community organization's bribery are not clearly made for campaign purposes.

In Kilgore v. Younger, the California Court of Appeals found that an action by an elected official may be motivated by political aspirations and yet be within the official's scope of authority if such action is "indistinguishable from actions initiated by public officials truly oblivious to the political ramifications of their moves." However, the timing and circumstances surrounding Crenca's disclosures to the press distinguish them from actions initiated by officials "oblivious to the political ramifications." Crenca was being considered as a candidate for Congress, and therefore theoretically had a motive to discredit her political opponents by intimating that they had accepted a bribe from Ennis. Although the Court of Appeals did not analyze Crenca's statements under this more appropriate standard, the court correctly found that Crenca's statements to the press were initiated to secure her own political future.

The justification for the Court of Appeals' second finding, that electioneering activities are outside the scope of employment, is more apparent than the first. The Court of Appeals recently determined in Sawyer v. Humphries that when a public official is acting to protect personal interests, the acts are outside the scope of employment.

302. See Hutchinson v. Proxmire, 443 U.S. 111, 127-28 (1979) ("Whatever imprecision there may be in the term 'legislative activities,' it is clear that nothing in history or in the explicit language of the [Speech or Debate] Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber.").

303. See Cheatum v. Wehle, 159 N.E.2d 166 (N.Y. 1959) (concerning slanderous statements made by commissioner of the State Conservation Department about a department employee during a dinner speech given before a number of civic and business leaders).

304. See Hutchinson, 443 U.S. 111.

305. 162 Cal. Rptr. 469 (1980).

306. Id. at 476.

307. Marilyn Piety, a friend of Crenca and a fellow county employee, leaked the allegations about Ennis to the press because "[Crenca] felt strongly it ought to come out." Armano, Montgomery Political Flap, supra note 235, at B4. The leak to the press occurred three months after the alleged bribe offer was made, but shortly after an Allied Civic Group meeting during which Crenca was harshly criticized for her vote in favor of the development plan. Armano, Crenca Claim, supra note 235, at B6.

309. See id.; see also supra text accompanying notes 256-261.
311. See Ennis, 322 Md. at 294, 587 A.2d at 490.
duties are outside the scope of employment. The elected officials will continue to seek media coverage, but local governments are not responsible under the LGTCA for providing legal representation to those officials who make defamatory statements in an effort to further their own political aspirations. "'No man ought to have a right to defame others under colour of a performance of the duties of his office . . . . It is neither within the scope of his duty, nor in furtherance of public rights, or public policy.'"

Stephen S. Burgoon
Karen E. Goldmeier
Kamil Ismail
Martha E. Joseph

313. 322 Md. at 296, 587 A.2d at 491.
XIII. Torts

A. Assumption of Risk As a Matter of Law

In Schroyer v. McNeal, the Court of Appeals held, as a matter of law, that a defendant who walks across a surface she knows to be covered with "packed snow and ice" assumes the risk of injury due to the slippery conditions. In so doing, the court expanded the implied assumption of risk defense in Maryland by providing a way for judges to reassess a plaintiff’s right to recover without directly overruling a jury’s finding of negligence by the defendant.

Although the Schroyer decision builds on extensive Maryland precedent and respected authority, it warrants criticism for its cryptic interpretation of that precedent and its aggressive encroachment on the fact-finding role traditionally reserved for the jury. Future defendants now have the luxury of shopping between judge and jury when arguing that tortious injuries were the plaintiff’s own fault. Future plaintiffs must avoid framing their denials of contributory negligence in ways that will subject them to findings of assumption of risk as a matter of law. And judges in future trials have gained an additional tool with which to combat excessive judgments and plaintiff-biased juries.

1. The Case.—In January 1985, Frances McNeal slipped and fell on the snow- and ice-covered parking lot of Thomas and Patricia Schroyer’s hotel in Garrett County, Maryland. McNeal had registered as a guest in the hotel and requested a room close to an exit for the convenience of carrying work materials from her car to her room. Part of the hotel parking lot was cleared, but the rooms closest to an exit were adjacent to an uncleared area of the lot. That part of the lot was covered by "packed ice and snow" and the sidewalk was unshoveled and slippery.

The Schroyers gave no warning when they assigned the room to

2. See id. at 277, 592 A.2d at 1120.
3. See id. at 288, 592 A.2d at 1126. Although the doctrines of contributory negligence and assumption of risk both remain fact specific, the court concluded that "while the issue of [McNeal’s] contributory negligence may well have been for the jury, the opposite is true with respect to her assumption of risk." Id.
4. Id. at 278, 592 A.2d at 1120.
5. Id., 592 A.2d at 1120-21.
6. Id.
7. Id. at 279, 592 A.2d at 1121.
McNeal, even though it was the hotel's policy to warn guests not to use the unshoveled exits during inclement weather. Moreover, it was contrary to stated hotel policy to assign rooms in those parts of the hotel during inclement weather.

McNeal fell and broke her ankle upon returning to her car after having previously made one successful crossing of the snow-covered area. She testified that although she noticed that the entrance was not shoveled, she "didn't think it was that slippery." McNeal also insisted that she had walked "carefully."

The Schroyers moved for judgment after the close of McNeal's case and again at the conclusion of all the evidence, based in part on the theory that McNeal had assumed the risk of injury by crossing a sidewalk she knew to be slippery. The court denied both motions. The jury found the Schroyers negligent and awarded McNeal $50,000. The trial judge had not instructed the jury on the issue of assumption of risk and presumably the jury did not consider this issue during its deliberations. Contending that the trial judge erred in denying both motions, the Schroyers appealed.

The Court of Special Appeals affirmed the judgment of the trial court. In so doing, it focused on whether contributory negligence (rather than assumption of risk) could be found as a matter of law and decided that it could not. Further, the court noted the deference due to the jury's fact-finding role, concluding that "this case properly belonged in the hands of the jury."

After granting the Schroyers' petition for certiorari, the Court of Appeals reviewed the case in light of the assumption of risk defense and reversed.

8. Id. at 278, 592 A.2d at 1121.
9. Id.
10. Id. at 279, 592 A.2d at 1121.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id. at 277, 592 A.2d at 1120.
16. Brief of Appellee at 10, Schroyer (No. 90-162).
18. See id. at 659, 581 A.2d at 477.
19. See id. at 656-57, 581 A.2d at 475-76.
20. Id. at 659, 581 A.2d at 477. The intermediate appellate court noted, "While this Court might not have come to [the] conclusion [that the plaintiff acted reasonably] or reached the same verdict, this case properly belonged in the hands of the jury." Id.
22. See Schroyer, 323 Md. at 289, 592 A.2d at 1126.
2. Legal Background.—Rather than reversing the Court of Special Appeals' finding that McNeal was not contributorily negligent as a matter of law, the Court of Appeals instead focused on the issue of assumption of risk. To define assumption of risk and distinguish it from contributory negligence, the Schroyer court relied on Dean Prosser's treatise on torts and the American Law Institute's Restatement, and the Maryland case law that has interpreted them.

In Gibson v. Beaver, the court quoted Prosser extensively to fashion its own version of assumption of risk. The Gibson court determined that "implied assumption of risk requires knowledge and appreciation of the risk, and a voluntary choice to encounter it," and that an objective standard should be used to determine whether the plaintiff had the requisite knowledge and appreciation. The court stated that the plaintiff's knowledge and appreciation are usually questions of fact for the jury, "but where it is clear that any person of normal intelligence in his position must have understood the danger, the issue must be decided by the court." Thus, the Gibson court opened the door to authorized judge-made determinations of the assumption of risk issue.

The Schroyer decision was built directly on the foundation laid by Gibson. Notably, however, the Gibson court found the plaintiff's
conduct to indicate that the defendant had breached no duty, while the Schroyer court found the plaintiff's conduct to bar recovery regardless of whether any duty of care had been breached by the defendant. Gibson, in other words, recognized the form of the defense known as "primary" implied assumption of risk, while Schroyer recognized "secondary" implied assumption of risk.

Meistrich v. Casino Arena Attractions, Inc., a New Jersey decision, is considered the leading case on the distinction between primary and secondary implied assumption of risk, as well as the leading case abolishing secondary assumption of risk. The New Jersey court explained:

[W]e think it clear that assumption of risk in its secondary sense is a mere phase of contributory negligence, the total issue being whether a reasonably prudent man in the exercise of due care (a) would have incurred the known risk and (b) if he would, whether such a person in the light of all of the circumstances including the appreciated risk would have conducted himself in the manner in which plaintiff acted.

Although Maryland has recognized Meistrich's assertion that assumption of risk and contributory negligence frequently overlap, it has never specifically questioned the validity of the secondary form of the implied assumption of risk defense.

Regardless of whether the primary or secondary form is at issue, strict standards limit the court's ability to apply assumption of risk as a matter of law. Illuminating the Gibson decision on this point is Kasten Construction Co. v. Evans, in which the court stated that

---

33. See 245 Md. at 422, 226 A.2d at 276 ("This voluntary undertaking . . . freed the defendants as a matter of law from liability for harm which might flow from the undertaking.").

34. See 323 Md. at 282, 592 A.2d at 1123.

35. This form of the defense, actually reflecting the defendant's non-negligence, has been generally accepted as a valid defense. See KEETON et al., supra note 25, § 68, at 496; see also 4 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 21.7, at 256 (2d ed. 1986) (Assumption of risk in the primary sense "is simply a left-handed way of describing a lack of duty.").

36. "Secondary" implied assumption of risk, which bars recovery despite the defendant's breach of duty, has taken on a disfavored status in many jurisdictions. 4 HARPER et al., supra note 35, § 21.0, at 190 n.4.


"the doctrine of assumption of risk will not be applied unless the undisputed evidence and all permissible inferences therefrom clearly establish that the risk of danger was fully known to and understood by the plaintiff." Further, the Kasten decision's focus on what the plaintiff appreciated reveals a shift toward a subjective standard. Using the language of a subjective test, the court stated: "It would be putting it too high, we think, to say that, as a matter of law, [the plaintiff] knew, understood and appreciated [the risk he was taking] and that he voluntarily assumed that risk." Thus, leaving the issue to the jury was appropriate.

Subsequently in Kahlenberg v. Goldstein, the court used the Kasten rule as a specific limitation on a trial court's right to encroach on the jury's fact-finding authority. The Kahlenberg court vacated a Court of Special Appeals' finding of assumption of risk as a matter of law, reinstating the jury's verdict and affirming the trial judge's decision to let the jury decide the facts.

It was with this backdrop of Maryland cases, in which assumption of risk as a matter of law was foreclosed and the issue left to the jury, that the Schroyer decision was made. Schroyer departs from the standards of Kasten and Kahlenberg, interpreting Gibson as allowing judges more freedom in finding assumption of risk as a matter of law.

3. The Court's Reasoning.—The Gibson objective focus and the Kasten-Kahlenberg subjective focus collide head on in Schroyer. The result, however, is not a selection of one standard over the other but, rather, a further muddling of the issue.

The Schroyer court carefully isolated for its review the issue of assumption of risk, avoiding the previously litigated issues of neg-

42. Id. at 544, 273 A.2d at 94.
43. The Kasten court did note without criticism, however, that Gibson called for an objective standard. See id.
44. Id. at 545, 273 A.2d at 94.
46. See id. at 494, 431 A.2d at 86. The Kahlenberg court inserted the phrase "as a matter of law" into the Kasten caveat, so that the rule now reads, "'assumption of the risk will not be applied [as a matter of law]' " absent extremely clear circumstances. Id. (brackets in original) (quoting Kasten, 260 Md. at 544, 273 A.2d at 94).
47. See id. at 497, 431 A.2d at 87 ("The differences... both within the Plaintiff's own testimony and by comparison to the description given by other witnesses... created a factual question for the jury to resolve on the issue of the Plaintiff's assumption of the risk.").
48. See 323 Md. at 283, 592 A.2d at 1123 (stating that "[a] plaintiff who proceeds reasonably, and with caution, after voluntarily accepting a risk, not unreasonable in itself, may not be guilty of contributory negligence, but may have assumed the risk").
ligence and contributory negligence. Judge Bell, writing for the court, offered an extensive overview of the development of assumption of risk case law in Maryland and explained how assumption of risk differs from contributory negligence. The holding, however, hinged on a reading of the three precedents cited above.

The heart of the opinion, as well as the heart of the confusion, lies in the following passage:

The test of whether the plaintiff knows of, and appreciates, the risk involved in a particular situation is an objective one, and ordinarily is a question to be resolved by the jury. Thus, "the doctrine of assumption of risk will not be applied unless the undisputed evidence and all permissible inferences therefrom clearly establish that the risk of danger was fully known to and understood by the plaintiff." On the other hand, when it is clear that a person of normal intelligence in the position of the plaintiff must have understood the danger, the issue is for the court.

This passage demands close scrutiny with regard to who decides "appreciation" and by what standard. In the first sentence, the court put forth an objective standard to be used by juries. The second sentence indicates a more subjective test by focusing on the particular plaintiff's awareness, while reiterating the jury's authority to decide the issue. Next, inexplicably, the last sentence reverts back to the Gibson holding, favoring an objective test to be applied by the court. These mixed messages demand resolution.

The Schroyer court, however, spared itself the task of reaching such a resolution by relying on Dean Prosser. The court stated, "[t]he danger of slipping on ice was identified by Prosser as one of the risks which anyone of adult age must be taken to appreciate." According to the court, Prosser's assertion eliminated the need to evaluate McNeal's appreciation of the risk on either an objective or a subjective basis, by either the jury or the court. Appreciation of this particular risk is simply deemed a settled issue. Because McNeal had admitted in her testimony that she knew of the risk and

49. See id. at 280-84, 592 A.2d at 1121-24.
50. The court here cited Gibson, 245 Md. at 421, 226 A.2d at 275, and Kahlenberg, 290 Md. at 494-95, 431 A.2d at 86.
51. The court here quoted Kasten, 260 Md. at 544, 273 A.2d at 94.
52. Schroyer, 323 Md. at 283-84, 592 A.2d at 1123. The court here cited Gibson, 245 Md. at 421, 226 A.2d at 275.
53. Schroyer, 323 Md. at 284, 592 A.2d at 1123; see Keeton et al., supra note 25, § 68, at 488.
had voluntarily encountered it, the Prosser view of the appreciation requirement was dispositive of the issue.

In dicta, the court seemed to indicate a preference for the judge-determined objective standard. The court inferred from McNee’s testimony that “it cannot be gainsaid that she intentionally exposed herself to a known risk,” even though such voluntariness and knowledge were never evaluated by the jury. “Consequently,” the court continued, “while the issue of her contributory negligence may well have been for the jury, the opposite is true with respect to her assumption of the risk.” This assertion reflects the Schroyer court’s favoring of the older Gibson rule over the more recent Kasten-Kahlenberg test. Such a conclusion was only possible, however, because the factual question of appreciation was foreclosed from consideration by reliance on Prosser.

4. Analysis.—The Schroyer court demonstrated its willingness to find assumption of risk as a matter of law even though the issue was never fully addressed at trial, either by judge or by jury. In fact, the trial judge’s refusal to grant the Schroyers’ motions for judgment based on the assumption of risk defense, and his failure to instruct the jury on the issue, reveal his determination that consideration of the issue was unnecessary. In one stroke, the Court of Appeals revived the issue, noted that some risks are presumed appreciated, and took the entire issue from the jury. The questions remain: When must (or may) a trial judge decide the issue, and what is left for the jury?

Both Prosser and the Restatement provide strong counter-arguments to the court’s ruling. Based on their rationale and the Schroyer court’s failure to state a final assumption of risk standard, it seems

54. See Schroyer, 323 Md. at 278, 288, 592 A.2d at 1121, 1125; infra text accompanying notes 85-89 (illustrating that testimony offered for the purpose of denying an accusation of contributory negligence should not be used to satisfy the unaddressed elements of assumption of risk).
55. See Schroyer, 323 Md. at 284, 592 A.2d at 1123.
56. Id. at 288, 592 A.2d at 1126.
57. See supra text accompanying note 16. The fact that neither the judge nor jury considered the assumption of risk issue at the trial level highlights the aggressiveness of the position taken by the Court of Appeals.
58. Schroyer, 323 Md. at 288, 592 A.2d at 1126.
59. The trial judge may not have offered an assumption of risk instruction because he believed the fully litigated contributory negligence dispute disposed of the issue. “[W]hen they overlap, a discussion of contributory negligence may necessarily include assumption of the risk.” Id. at 287, 592 A.2d at 1125; see Bull S.S. Line v. Fisher, 196 Md. 519, 528, 77 A.2d 142, 147 (1950).
possible to limit the effects of Schroyer to a narrow line of disputes surrounding very common risks.

a. Appreciation of the Risk.—The Schroyer court accepted, without hesitation, Prosser's suggestion that "the danger of slipping on ice" is a risk appreciated as a matter of law. Prosser also states, however, "[i]n the usual case, [a plaintiff’s] knowledge and appreciation of the danger will be a question for the jury." The Restatement is even more explicit, warning that "[t]he court may itself determine the issue only where reasonable men could not differ as to the conclusion." This call for a fact-specific determination indicates that the Kasten-Kahlenberg approach is preferred.

Both Prosser and the Restatement propose that the standard should be a subjective one—what the particular plaintiff appreciates—rather than the objective standard used for considerations of negligence. Similarly, both also caution that a plaintiff’s unreasonable failure to appreciate a danger is a consideration in contributory negligence rather than assumption of risk.

Given these considerations, Prosser's proffer of specific dangers

---

60. See 323 Md. at 284, 592 A.2d at 1123; Keeton et al., supra note 25, § 68, at 488. Other specified risks assumed to be appreciated are the risks "of falling through unguarded openings, of lifting heavy objects, of being squeezed in a narrow space, of inflammable liquids, of driving an automobile whose brakes will not operate, of unguarded circular saws or similar dangerous machinery, and doubtless many others." Id.

61. Keeton et al., supra note 25, § 68, at 489. See generally id. § 37, at 238 (Functions of Court and Jury). "The most common statement is that if reasonable persons may differ as to the conclusion to be drawn, the issue must be left to the jury; otherwise it is for the court." Id.


63. In the interest of intellectual honesty, it must be noted that agreement between the Restatement and Dean Prosser should come as no surprise. Dean Prosser was the reporter of the second Restatement. See id. at iii, viii.

64. See supra note 31; Keeton et al., supra note 25, § 68, at 487 ("The standard to be applied is, in theory at least a subjective one, geared to the particular plaintiff and his situation . . . .").

65. Prosser does note that "the standard applied in fact [to assumption of risk deliberations] does not always differ greatly from that of the reasonable person." Keeton et al., supra note 25, § 68, at 488. This problem lies at the heart of the on-going debate over the continued existence of the implied assumption of risk defense. See generally 4 Harper et al., supra note 35, § 21.7, at 256 ("[W]here the phrase assumption of risk is used to refer to contributory negligence—plaintiff’s unreasonable assumption of a risk defendant is bound not to put on him—then the rule for pleading or proving contributory negligence should apply.").

66. See Restatement (Second) of Torts § 496D cmt. b; Keeton et al., supra note 25, § 68, at 487. A plaintiff’s "failure to exercise due care either to discover or to understand the danger is not properly a matter of assumption of risk, but of the defense of contributory negligence." Restatement (Second) of Torts § 496D cmt. b.
to be deemed appreciated as a matter of law provides the court with an unfortunate crutch. In *Schroyer* there was compelling testimony to suggest that reasonable people could indeed differ as to whether McNeal appreciated the risk she knowingly encountered. Rather than a sheet of ice, McNeal walked across "packed ice and snow," a surface arguably less dangerous and less susceptible to full appreciation than sheet ice. This distinction highlights the essential problem of considering Prosser's examples as absolutes. Furthermore, McNeal's own testimony calls into question her appreciation of the danger. She stated, "I didn't think it was *that* slippery," noting that she had walked across the area without incident one time already. Finally, the Schroyers' failure to warn indicates that McNeal may not have had an opportunity to appreciate fully the risk. The Court of Special Appeals, in affirming the jury's verdict, noted that "the jury could have decided that she assumed she would not have been assigned a room at the west side entrance if the entrance was too dangerous to use."

Taken together, these facts cloud the court's assertion that "[i]t is clear, on this record, that McNeal took an informed chance." Likewise, the conclusory declaration that "[t]he record reflects . . . that McNeal was fully aware of the dangerous condition of the premises" becomes suspect. Awareness requires knowledge coupled with appreciation; knowledge alone is insufficient. Reasonable minds could differ as to McNeal's awareness (regardless of what Prosser said about the dangers of ice) and, therefore, the issue should have been submitted to a jury for proper determination.

67. A list of dangers such as those mentioned earlier, see supra note 60, allows the court to avoid evaluation of the facts by any standard, to avoid remanding the case for further factual inquiry, and to avoid juries who may tend to favor injured plaintiffs.
68. *Schroyer*, 323 Md. at 279, 592 A.2d at 1121.
69. See, e.g., Gast, Inc. v. Kitchner, 247 Md. 677, 687, 234 A.2d 127, 132 (1967). "Cases dealing with slipping on ice recognize the varying degrees of opaqueness of ice and many adjectives are used in describing its appearance, such as, 'glassy sheet,' 'smooth,' 'slick,' 'thin,' 'slippery,' 'glazed,' 'solid,' 'thick,' 'wavy,' 'ridged,' and 'uneven,' to mention a few." Id. Each adjective suggests a different level of danger and recognition.
70. *Schroyer*, 323 Md. at 279, 592 A.2d at 1121 (emphasis added).
71. *Id.* The standard the court proposed to apply required the danger to be "fully known . . . and understood." *Id.* at 283, 592 A.2d at 1123.
73. *Schroyer*, 323 Md. at 288, 592 A.2d at 1125.
74. *Id.*
75. See *Keeton* et al., supra note 25, § 68, at 487 ("Moreover, he must not only know of the facts which create the danger, but he must comprehend and appreciate the nature of the danger he confronts.").
b. *The Landowner-Invitee Approach.*—Many Maryland slip-and-fall cases similar to *Schroyer* have been decided by applying an analysis of the liabilities of a landowner to an invitee. In fact, the Court of Special Appeals briefly considered this area of law, but limited its landowner-invitee review to a discussion of the Schroys’ primary negligence. Applying the same principles, the *Schroyer* court could have found a more appropriate way to justify its finding that McNeal assumed the risk. This approach, however, contains familiar problems.

Restatement section 343A has been generally accepted in Maryland as meaning that a “landowner or occupier owes to invitees a duty of reasonable care to see that the place is safe, but he is not the insurer of the invitee’s safety.” The Restatement adds, “[t]he possessor of land may reasonably assume that [an invitee] will protect himself by the exercise of ordinary care, or that he will voluntarily assume the risk of harm if he does not succeed in doing so.” As an invitee, McNeal should have been expected to protect herself from obvious dangers such as the icy condition she knew to exist.

Section 343A warns, however, that landowners still have a duty to warn “against the known or obvious condition or activity, if the possessor has reason to expect that the invitee will nevertheless suffer physical harm.” The Schroys’ failure to warn once again becomes relevant, suggesting that because McNeal had not been alerted, she could not have assumed any risk.

Furthermore, section 343A inquiries belong in the hands of...
the jury. ""[U]nder ordinary negligence principles the question [of whether a warning is necessary] is properly one of fact for the jury except in the clearest situations." 83 Jury determination is also required for the knowledge requirement, which includes appreciation of the danger involved. 84

For these reasons, it is doubtful that section 343A landowner-invitee law could have provided the court with a way to justify a determination of the issue by a court, as a matter of law.

c. The Practical Trap.—A final consequence of the Schroyer decision is its creation of a practical trap for future plaintiffs arguing against accusations of contributory negligence. To deny such negligence, plaintiffs must demonstrate to the factfinder, i.e., the jury, that they acted reasonably. However, in so demonstrating, plaintiffs must now be wary not to admit certain knowledge that will allow the court to find assumption of risk as a matter of law. The Schroyer facts provide a perfect example of this dilemma.

In the course of denying the Schroyers' assertion that she was contributorily negligent, McNeal testified that she saw the ice and snow, knew it to be slippery, and proceeded "carefully." 85 The jury found that this did not meet the standard for contributory negligence and, thus, did not bar McNeal from recovering for the Schroyers' established negligence. 86 The Court of Appeals used that same testimony to deny McNeal's right to recover, construing admissions made in one context (denial of contributory negligence) to satisfy the elements of a separate defense that McNeal had no direct opportunity to dispute.

This was a practice the court had earlier sought to prevent. "While assumption of risk and contributory negligence . . . are not the same," the court stated in Bull Steamship Line v. Fisher, 87 "nevertheless they may arise from the same fact, and, in a given case, a discussion of one may necessarily include the other." 88

83. 4 Harper et al., supra note 35, § 27.13, at 247.
84. See Restatement (Second) of Torts § 343A cmt. b. See supra text accompanying notes 68-71 for a full discussion of the factual questions surrounding appreciation of the risk in Schroyer.
85. Schroyer, 323 Md. at 279, 592 A.2d at 1121.
86. See id.
87. 196 Md. 519, 77 A.2d 142 (1957).
88. Id. at 528, 77 A.2d at 147; see also Western Md. Ry. Co. v. Griffis, 253 Md. 643, 648, 253 A.2d 889, 893 (1969) ("There was no testimony that Griffis knew of the danger. But even if this were not the case, the court's instruction on contributory negligence was broad enough to cover an assumption of the risk . . . .").
The backdoor approach to assumption of risk taken in Schroyer creates new problems in trial planning. Injured plaintiffs must assert their reasonableness to deny their own negligence, but now they must also affirmatively deny that their reasonableness reflects an assumption of the risk. The Schroyer decision essentially forces plaintiffs to raise (and deny) the issue of their own assumption of risk.

5. Conclusion.—Schroyer marks an expansion of the assumption of risk defense in Maryland. Following the lead of the Court of Appeals, trial judges are likely to take a more active role in finding assumption of risk as a matter of law and preventing injured plaintiffs from recovering from negligent defendants. It is likely that defendants will force the issue of assumption of risk when the true debate of any negligence action should center on the reasonableness of the parties. And it is likely that plaintiffs will have to adopt preventative measures in their negligence cases to avoid any consideration of the defense or to keep the crucial issues in the hands of the jury.

In a case in which the Court of Appeals clearly could have left the fact-finding role in the hands of the jury, it assumed that role under the guise of assumption of risk analysis. Most distressing, it is now likely that courts in negligence actions will unjustly exclude issues of reasonableness (and appreciation of danger, its assumption of risk counterpart) from the consideration of juries.

B. Good Samaritan Statute—Emergency Medical Technicians

In Tatum v. Gigliotti, the Court of Appeals extended the protection provided by Maryland's Good Samaritan statute to Emergency Medical Technicians (EMTs) providing emergency services in the course of their employment. The court held that the statute affords protection regardless of whether the technicians have a pre-existing duty to render care or are paid a salary for their services. The court's holding dictates that the statute's gross negligence standard should be applied to EMTs under virtually any

89. But see Restatement (Second) of Torts § 496G, at 580 (1977) ("[T]he burden of proof of the plaintiff's assumption of risk is upon the defendant."). The Schroyer court's willingness to find assumption of risk as a matter of law is likely, in some cases, to cause a de facto shift of the burden to the plaintiff to prove that she did not assume the risk.

92. 321 Md. at 629, 583 A.2d at 1065.
93. See id.
To a certain extent, the impact of the court's interpretation of Maryland's Good Samaritan statute has been lessened by a subsequent statute conferring limited civil immunity upon fire and rescue squads for injury resulting from acts or omissions performed within the course of their duties. While the Tatum holding will no longer have a direct effect on EMTs, the decision will affect a number of other groups that are included in the Good Samaritan statute.

Prior to the enactment of Good Samaritan statutes, health care workers who voluntarily treated patients in emergency situations could be held liable for a failure to use reasonable care. Over the last thirty years, most states have enacted statutes designed to encourage health care workers to render gratuitous services in emergency situations without fear of potential liability. Maryland's Good Samaritan statute originally provided protection against civil liability only to physicians. The statute has since been expanded to include numerous other health care professionals (including licensed EMTs) who might provide gratuitous services in emergency situations.

94. See id.
95. See Md. Cts. & Jud. Proc. Code Ann. § 5-309.1. This section applies to individual fire and rescue personnel, as well as their respective companies, and provides immunity from civil liability for all acts performed within the course of duty, except for willful or grossly negligent acts. See id. The language of this section supports a far more limited interpretation of the Good Samaritan statute than was given by the Court of Appeals. See infra notes 158-160 and accompanying text.
96. Members of law enforcement agencies and the National Ski Patrol are also protected by § 5-309. See Md. Cts. & Jud. Proc. Code Ann. § 5-309(b)(2). Section 5-309.1 confers immunity only on fire and rescue squads. Id. § 5-309.1.
97. See Keeton et al., supra note 25, § 56, at 378 & n.57.
98. See Samuel J. Hessel, Good Samaritan Laws: Bad Legislation, 2 J. Legal Med. 40, 40 (1974). Over 80% of the states have enacted "Good Samaritan" statutes for the purpose of encouraging and protecting health care professionals who render emergency care. Id.
99. See Act of March 14, 1963, ch. 65, 1963 Md. Laws 100 (current version codified at Md. Cts. & Jud. Proc. Code Ann. § 5-309). The statute provided limited immunity to physicians licensed by the state's Board of Medical Examiners for acts or omissions not amounting to gross negligence if the services were rendered gratuitously. See id.
100. In 1964, the General Assembly expanded the statute to include "members of volunteer ambulance and rescue squads." See Act of April 7, 1964, ch. 48, 1964 Md. Laws 104. One year later, the statute was expanded further to include registered nurses and licensed practical nurses. See Act of April 8, 1965, ch. 475, 1965 Md. Laws 668. In 1969, the General Assembly deleted the word "volunteer" that preceded "ambulance and rescue squads," and provided coverage to members and employees of all fire departments and ambulance and rescue squads. See Act of May 14, 1969, ch. 616, 1969 Md. Laws 1432. In 1976, the various provisions enacted in the prior 13 years were consolidated into 4 subsections and listed in § 132 of article 43. See Md. Ann. Code art. 43, § 132 (1980). The current version of Maryland's Good Samaritan statute is simply
By applying the Good Samaritan statute to salaried emergency employees who are already under a duty to render services, the court expanded the scope of the statute's coverage. The court's interpretation takes the statute beyond its original purpose of encouraging health care professionals to volunteer their services in emergency situations. The language of a subsequent legislative enactment dealing specifically with EMTs cuts against this interpretation and supports the proposition that the scope of immunity conferred by the Good Samaritan statute was intended to be more limited than the Tatum holding mandates.

1. The Case.—Norman Tatum, Jr., the plaintiff's son, had suffered from chronic asthma since the age of three. On September 21, 1981, Tatum experienced a severe asthma attack and called the Prince George's County Fire Department for assistance. The defendants, Gregory Gigliotti and Richard Miller, who were state-certified EMTs employed by the Prince George's County Fire Department, responded to the call.

In an effort to help Tatum breathe, the EMTs placed a paper bag over Tatum's face; this procedure contravened the prescribed treatment for an asthma attack. Although Tatum was having great difficulty breathing, the EMTs assisted him in walking down twelve flights of stairs to the ambulance rather than carrying him out on a stretcher. While in the ambulance, Gigliotti attempted to place an oxygen mask over Tatum's face, but Tatum struggled and refused to wear the mask. Tatum fell off the ambulance bench on the way to the hospital, arriving at the emergency room lying face down on the floor of the ambulance.

Although the ambulance report listed Tatum as conscious and stable, an emergency room nurse testified that Tatum was in complete cardiac and respiratory arrest when he arrived at the hospital. Tatum died at the hospital after unsuccessful attempts to
revive him; the physician who performed the autopsy listed severe oxygen deprivation as the cause of Tatum's death.¹⁰⁹

Elizabeth Tatum, Norman's mother, brought a wrongful death action against Gigliotti, Miller, and Prince George's County.¹¹⁰ Before trial, the counts against Miller and the county were dismissed.¹¹¹ After twelve hours of deliberation, the jury informed the court that it was deadlocked as to the liability of Gigliotti.¹¹² The court declared a mistrial and then granted the defendant's motion for judgment on the grounds that the Good Samaritan statute applied to Gigliotti and there was insufficient proof of gross negligence.¹¹³ The Court of Special Appeals affirmed on several grounds.¹¹⁴ The only issue considered by the Court of Appeals was whether the immunity provided by the statute applied to a salaried EMT who was acting within the scope of his employment duties.¹¹⁵

2. Legal Background.—At common law, a person had no affirmative duty to aid another in peril.¹¹⁶ One who voluntarily attempted to aid another assumed the legal duty to use reasonable care under the circumstances.¹¹⁷ In response to the fear that this rule operated as a serious deterrent to physicians who might otherwise be willing to give emergency aid, a great majority of states have enacted Good Samaritan statutes absolving certain individuals or groups from liability under certain circumstances.¹¹⁸ Good Samaritan legislation has been branded ineffective and unnecessary by some commentators, however.¹¹⁹

¹⁰⁹. Id.
¹¹⁰. Id.
¹¹¹. Id.
¹¹². Id.
¹¹³. Id.
¹¹⁴. See Tatum v. Gigliotti, 80 Md. App. 559, 574, 565 A.2d 354, 361 (1989), aff'd, 321 Md. 623, 583 A.2d 1062 (1991). The Court of Special Appeals held that the Good Samaritan statute applied to an EMT regardless of the fact that he received a salary. See id. at 568, 565 A.2d at 358. The court reached this conclusion by focusing on the difference between the situation in which a rescuer receives a salary from a third party and the situation in which a rescuer charges the victim directly for his services. See id. at 567, 565 A.2d at 357. The court held that only the latter situation would prohibit application of the statute. See id. at 568, 565 A.2d at 358. The court also held that Gigliotti's conduct did not, as a matter of law, constitute gross negligence. See id. at 569, 565 A.2d at 359.
¹¹⁵. See Tatum, 321 Md. at 625, 583 A.2d at 1062.
¹¹⁶. See Keeton et al., supra note 25, § 56, at 378.
¹¹⁷. Id.
¹¹⁸. Id. Over 80% of the states and the District of Columbia have enacted Good Samaritan statutes since the first statute of this kind was enacted in 1959. Hessel, supra note 98, at 40.
¹¹⁹. See, e.g., Hessel, supra note 98, at 40 (questioning the actual effect the statutes
Most Good Samaritan statutes share several common characteristics. A few statutes confer immunity to all persons; however, most apply only to physicians and other health care professionals. Another common requirement is that the emergency services must be rendered "in good faith"; some states require an absence of willful or grossly negligent conduct. A final similarity among many Good Samaritan statutes is that the protected emergency services must be rendered gratuitously.

Although the coverage as to specific individuals or groups under Maryland's Good Samaritan statute has expanded since the statute's adoption, the basic requirements of the statute have remained relatively unchanged. At the time of Tatum's death in 1981, Maryland's Good Samaritan statute was located in article 43, section 132. There is little difference between that version and the current version of the statute other than format changes; no substantive change was made via the recodification. Section 132 per-
tained to civil liability for "[p]hysicians, nurses and certain other persons rendering aid under emergency conditions."128 Section 132(a) limited civil liability to professional acts or omissions amounting to gross negligence performed "(1) at the scene of an emergency; (2) in transit to medical facilities; or (3) through communications with personnel rendering emergency assistance."129 Those entitled to immunity included persons licensed by the State of Maryland to provide medical care who "charge[d] no fee or compensation" for the services at issue.130 Section 132(b) provided the same protection to "a member of any State, county, municipal or volunteer fire department [or] ambulance and rescue squad . . . certified . . . as an emergency medical technician."131

3. The Court's Reasoning.—Before the Tatum decision, Maryland's Good Samaritan statute had never been interpreted by the Court of Appeals, beyond the court's recognition that the statute creates no affirmative duty to render assistance to one in need.132 On appeal, Tatum contended that the statute did not apply to Gigliotti for two reasons: He was paid a salary by Prince George's County and thus his services were not rendered "without compensation"; and Good Samaritan statutes do not apply to persons who are under a pre-existing duty to render assistance due to the nature of their employment.133

a. Compensation Exclusion.—The Court of Appeals summarily dismissed the argument that the statute was inapplicable because Gigliotti was paid a salary.134 However, this question was discussed more thoroughly by the Court of Special Appeals, which held that the statutory requirement that no fee be "charged" was satisfied because Gigliotti did not charge a fee directly to Tatum.135 The Court of Appeals relied on the lower court opinion and an opinion of the Attorney General in determining that a salaried EMT is covered by

129. Id. § 132(a).
130. Id.
131. Id. § 132(b).
132. 321 Md. at 627, 583 A.2d at 1064. In Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979), the Court of Appeals found that § 132 imposed no requirement that assistance be rendered to a person in need. Id. at 325, 396 A.2d at 1064.
133. See Tatum, 321 Md. at 628, 583 A.2d at 1064.
134. See id.
the Good Samaritan statute.\textsuperscript{136} The Attorney General opined:

The whole statutory scheme reflects the principle that, if the victim is charged for the help by the person seeking immunity, then no immunity is available under the Good Samaritan Law; but, if the victim is not charged by the one rendering the assistance and seeking immunity, then even a salaried employee is entitled to immunity absent gross negligence.\textsuperscript{137}

Further, the court was influenced by the fact that the word "volunteer," which had preceded the phrase "ambulance and rescue squads," was deleted when the statute was amended in 1969.\textsuperscript{138} Based on the fact that Gigliotti received no compensation from Tatum directly, coupled with the legislature's deletion of the term "volunteer" from the statute, the court determined that the compensation exclusion did not prevent the granting of immunity to Tatum.\textsuperscript{139}

\textit{b. Pre-existing Duty.}—Tatum's next argument was that Good Samaritan statutes do not apply to persons who are under a pre-existing duty to render assistance by the nature of their employment.\textsuperscript{140} For support, Tatum cited several out-of-state cases indicating that when there is a pre-existing duty to rescue, Good Samaritan statutes are inapplicable.\textsuperscript{141} For example, in \textit{Henry v. Barfield},\textsuperscript{142} the Court of Appeals of Georgia reasoned that a doctor with an employment duty to render medical services had no need for an inducement to render such aid.\textsuperscript{143} The Georgia Court held that Good Samaritan statutes are directed at persons "who by

\textsuperscript{136} See \textit{Tatum}, 321 Md. at 627-28, 583 A.2d at 1064.
\textsuperscript{137} 64 Op. Att'y Gen. 175, 177 (1979).
\textsuperscript{138} See \textit{Tatum}, 321 Md. at 629-30, 583 A.2d at 1065; \textit{supra} note 100.
\textsuperscript{139} See \textit{Tatum}, 321 Md. at 629-30, 583 A.2d at 1064-65.
\textsuperscript{140} See id. at 628, 583 A.2d at 1064.
\textsuperscript{141} See id. at 628-29, 583 A.2d at 1064 (citing \textit{Lee v. State}, 490 P.2d 1206, 1209 (Alaska 1971) (finding that a police officer acting under a statutory duty to rescue was not protected by Good Samaritan statute), \textit{rev'd on other grounds}, 545 P.2d 165 (1976); \textit{Henry v. Barfield}, 367 S.E.2d 289, 290 (Ga. Ct. App. 1988) (concluding that a doctor was covered by the Good Samaritan statute unless there was a pre-existing duty to treat); \textit{Clayton v. Kelly}, 357 S.E.2d 865, 868 (Ga. Ct. App. 1987) (determining that a doctor with an employment duty to aid a patient at the hospital was not covered by the Good Samaritan statute); \textit{Hovermale v. Berkeley Springs Moose Lodge No. 1483}, 271 S.E.2d 335, 341 (W. Va. 1980) (holding that members of Moose Lodge with a pre-existing duty to aid a fellow member on land owned by the lodge were not covered by the Good Samaritan statute)).
\textsuperscript{142} 367 S.E.2d 289 (Ga. Ct. App. 1988).
\textsuperscript{143} Id. at 290.
chance and on an irregular basis come upon or are called upon to render emergency care."  

Although there are relatively few reported cases addressing this question, Good Samaritan statutes are usually held not to apply to situations in which a rescuer has a pre-existing duty to rescue. Rescuers in this situation require no encouragement from the legislature to volunteer services that they are already obligated to perform.

The Court of Appeals was unpersuaded by these authorities, however, and instead relied on principles of statutory construction. The court held that the clear language of section 192(b) expressly applied to a member of a county ambulance and rescue squad certified as an EMT. Gigliotti was such an individual. The court stated that the General Assembly must have known that members of ambulance squads are under a pre-existing duty to provide medical care and are typically salaried and that if those EMTs were not intended to be covered by the statute, they would have been excluded, rather than having immunity expressly extended to them. Thus, as a county EMT, Gigliotti was entitled to the statutory immunity.

4. Analysis.—

a. Compensation Exclusion.—Both the Attorney General and the Court of Special Appeals overlooked an interpretation of the "no fee" requirement that fits more squarely within the purpose of the Good Samaritan statute than the interpretation chosen. Rather than distinguishing between the situation in which a rescuer receives a salary from a third party and the situation in which a rescuer directly charges the victim, the more appropriate distinction focuses on

144. Id.
145. See supra note 141.
146. Citing Potter v. Bethesda Fire Dep't, Inc., 309 Md. 347, 353, 524 A.2d 61, 64 (1987), the court noted that the words of a statute are to be given their ordinary meaning and reasonably construed in reference to the purpose to be accomplished. See Tatum, 321 Md. at 629, 583 A.2d at 1065.
147. Tatum, 322 Md. at 629, 583 A.2d at 1064. The court asserted that the Maryland statute is distinguishable from the out-of-state cases because of its express inclusion of EMTs. See id. In doing so, the court ignored the possibility that the mere inclusion of a group (EMTs) does not necessarily mandate that the statute be applied to members of that group under all circumstances. The statute might apply only in situations in which the incentive purpose of the statute is required.
148. Id. at 625, 583 A.2d at 1063.
149. Id. at 629, 583 A.2d at 1065.
150. Id.
151. Id.
whether the emergency services are provided while the rescuer is receiving a salary, or whether they are provided during a time when the rescuer is not directly earning a salary. In the latter situation, the statutory incentive fills the gap left by the absence of a salary incentive. Thus, one of the purposes of Good Samaritan statutes is promoted if the above interpretation is applied.

The fact that the word "volunteer" was deleted from the preface to the phrase "ambulance and rescue squads" also can be understood within this context. If the purpose of the Good Samaritan statute is to encourage skilled professionals to provide gratuitous services in emergency situations without the fear of potential liability, there is no logical reason why volunteer members of ambulance crews should be any more encouraged than paid members with the same qualifications. Absent any clear legislative purpose for this deletion, an equally plausible explanation is that the General Assembly simply intended to encourage paid as well as volunteer members of ambulance crews to come to the rescue while off duty. Under this analysis, Gigliotti was receiving a salary at the time he rendered emergency services to Tatum and the Good Samaritan protection would not apply.

b. Pre-existing Duty.—The court also overlooked the possibility that EMTs could be included in the statute, but that the statute is not applicable under all situations, particularly when a pre-existing duty exists. If the purpose of the Good Samaritan statute is to encourage individuals with specialized skills to provide medical services in emergencies, then EMTs—individuals possessing specialized skills in such situations—clearly should be included in the statute. However, inclusion of a given group in the statute does not, by itself, mandate that the statute be applied to every individual in that group in every situation. The goals of such statutes must also be taken into consideration in determining whether a particular person warrants protection. If circumstances arise in which the statute's ultimate goal—trained emergency care for injured parties—is already

152. Thus, an ambulance crew member would be receiving compensation within the meaning of the statute if he was on duty at the time he performed the emergency services. He would not be receiving compensation within the meaning of the statute if he was off duty at the time the services were provided.

153. See supra note 98 and accompanying text.

154. The amendment to the Good Samaritan statute by which the word "volunteer" was deleted contains no explanation for the change. See Act of May 14, 1969, ch. 616, 1969 Md. Laws 1432.
achieved by a pre-existing duty, then application of the statute is superfluous and serves no useful purpose.

The argument that the statute is inapplicable to EMTs performing emergency services in the course of their duties is further supported by the language of a subsequently adopted statute that essentially provides broad immunity to fire and rescue squads for acts performed within the course of their duties under any circumstances.\textsuperscript{155} Apparently, this statute was enacted in response to \textit{Utica Mutual Insurance Co. v. Gaithersburg-Washington Grove Fire Department, Inc.},\textsuperscript{156} in which the Court of Special Appeals indicated that a volunteer fire department or ambulance squad might not enjoy the same sovereign immunity that a city or county fire or ambulance squad enjoys.\textsuperscript{157}

Because the language of the later statute applies to rescue squads performing acts within the course of their duties,\textsuperscript{158} the argument can be made that the legislature did not believe that the prior Good Samaritan legislation covered EMTs in the course of performing their pre-existing duties.\textsuperscript{159} Also, if the Good Samaritan statute was intended to cover EMTs while performing acts outside of their employment duties, then EMTs should remain in the statute even after the

\begin{footnotesize}
\begin{enumerate}
\item[155.] See \textit{MD. CTS. & JUD. PROC. CODE ANN.} § 5-309.1 (1989). This section was enacted in 1983 and provides immunity from civil liability to fire and rescue companies and their individual members for acts or omissions performed within the course of their duties, except those acts or omissions that are willful or grossly negligent. \textit{See id}; \textit{see also} Act of May 31, 1983, ch. 546, 1983 Md. Laws 1736.
\item[156.] 53 Md. App. 589, 455 A.2d 987, \textit{cert. denied}, 296 Md. 224 (1983); \textit{see also} Washington Suburban Sanitary Comm'n v. Riverdale Heights Volunteer Fire Co., 308 Md. 556, 569, 520 A.2d 1319, 1326 (1987) (noting that the statute was passed in response to the \textit{Utica} decision).
\item[157.] 53 Md. App. at 62, 455 A.2d at 994. The bill was originally introduced "for the purpose of providing that certain volunteer fire companies are immune from civil liability in the same manner as a local government agency." Act of May 31, 1983, ch. 546, 1983 Md. Laws 1736. The specific language of the original purpose clause was significantly expanded in the final version of the statute. \textit{See id}.
\item[158.] \textit{See MD. CTS. & JUD. PROC. CODE ANN.} § 5-309.1.
\item[159.] Of course an equally reasonable counter argument is that the legislature had always intended to cover EMTs for negligent acts arising out of the provision of emergency services performed within the course of their duties. The subsequent statute, it could be argued, was only enacted to cover other acts of negligence for which a rescue squad might also be held liable and for which municipal and county squads were already protected via sovereign immunity.
\end{enumerate}
\end{footnotesize}
subsequent grant of immunity.  

5. Conclusion.—The general purpose of Good Samaritan statutes is to mitigate the harshness of the common-law rule that a rescuer may be held liable for failure to exercise ordinary care during a rescue attempt. By limiting the scope of potential liability, the statutes were designed to encourage medical professionals to render assistance in emergency situations. The Tatum court's holding, although no longer applicable to EMTs, will have an effect on other rescuers included in the statute. Because those paid a salary to provide emergency services are already under a duty to come to the rescue of individuals in need of emergency medical assistance, extension of Good Samaritan protection by the Court of Appeals does little to further the statute's purpose, and unnecessarily allows negligent professionals to escape the obligation to respond in civil damages for their wrongful acts.

C. Punitive Damages for Torts Arising out of Contracts*

In Schaefer v. Miller, the Court of Appeals reaffirmed its holding in H & R Block, Inc. v. Testerman that actual malice must be established prior to an award of punitive damages in an action involving a tort arising out of a contractual relationship. The court expressly declined to create an exception to the Testerman rule establishing implied rather than actual malice as the standard for recovery in cases involving breach of fiduciary duty or fraud. The court's decision also has the effect of extending the Testerman rule to medical malpractice suits.


*EDITOR'S NOTE: The Court of Appeals decided Owens-Illinois, Inc. v. Zenobia, No. 90-66, slip op. (Md. Ct. App. Feb. 14, 1992) too late for inclusion in the discussion that follows. The Zenobia court abandoned the "arising out of contract" distinction in regard to punitive damage claims. See id. at 32. The court held that in all tort actions not involving intentional torts, a plaintiff must prove actual malice in order to recover punitive damages. See id. at 41.


163. See Schaefer, 322 Md. at 309-10, 587 A.2d at 497; see also Testerman, 275 Md. at 47, 338 A.2d at 54.

1. The Case.—At age seventy-two, Amelia R. Schaefer was diagnosed by her ophthalmologist, Gerald A. Miller, M.D., as having a cataract in her right eye. A stronger prescription for her eyeglasses temporarily corrected the problem. During Schaefer’s next annual eye examination, however, Miller advised her that the cataract needed to be removed. On July 27, 1983, Miller surgically removed the cataract and implanted an intraocular lens in Schaefer’s eye.

A few days after the surgery, Schaefer developed an infection in her right eye; Miller admitted her to the hospital. Miller treated the infection with antibiotics and a vitrectomy. On August 24, 1983, Miller determined that Schaefer’s eye was still infected, and he performed laser therapy. Schaefer’s final visit to Miller’s office resulted in a new eyeglasses prescription.

In October of 1984, Schaefer filed a medical malpractice suit against Miller. The claim was heard by a Health Claims Arbitration panel, whose award recommendation was rejected by both parties.

Schaefer brought suit in the Circuit Court for Baltimore County, alleging that Miller performed the cataract surgery without informed consent. The complaint also alleged that he failed to comport with the standard of care applicable to all preoperative and postoperative care. A jury found for Schaefer on both counts and awarded her $350,000 in compensatory damages and $750,000 in punitive damages.

---

165. Schaefer, 322 Md. at 301-02, 587 A.2d at 493.
166. Id. at 302, 587 A.2d at 493.
167. Id.
169. Schaefer, 322 Md. at 302, 587 A.2d at 494. Schaefer remained in the hospital for two weeks. During that time “she was on antibiotics, suffered pain, and was unable to see out of the affected eye.” Id.
170. Id. A vitrectomy is a procedure in which the fluid in the eye is removed and replaced with saline solution. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2128 (2d ed. 1987).
171. Schaefer, 322 Md. at 302, 587 A.2d at 494. The therapy was conducted over the course of three office visits. Id.
172. Id. at 302-03, 587 A.2d at 494.
173. Id.
174. Id. at 303, 587 A.2d at 494. The Health Claims Arbitration panel awarded Schaefer $1.00 in compensatory damages and $25,000 in punitive damages. Id.
175. See id. At trial, another ophthalmologist testified as an expert witness. The testimony included statements that Miller had not complied with the required standard of care for obtaining informed consent and treating Schaefer’s postoperative infection. Id.
punitive damages.\(^\text{176}\)

Miller appealed, claiming that because the alleged tort arose out of a contractual relationship, punitive damages could not be awarded absent proof of actual malice.\(^\text{177}\) The Court of Special Appeals reversed the award of punitive damages. It held that the negligence counts arose out of an implied contractual relationship between the parties,\(^\text{178}\) despite Schaefer's assertion that Miller had committed three distinct torts.\(^\text{179}\)

Therefore, the case fell within the ambit of *H & R Block, Inc. v. Testerman*,\(^\text{180}\) which established that actual malice must be proven in order to recover punitive damages for tortious conduct arising out of a contractual relationship.\(^\text{181}\) Having decided that the case fell under *Testerman*, the court found that Schaefer failed to prove actual malice,\(^\text{182}\) and reversed the award of punitive damages.\(^\text{183}\)

The Court of Appeals granted certiorari and affirmed.\(^\text{184}\) In its opinion, the Court of Appeals reiterated its application of the rule announced in *Testerman*,\(^\text{185}\) specifically declining to create an exception to the actual malice requirement. Such an exception would have established implied malice as the standard for the recovery of punitive damages for injuries arising out of contract actions involv-

---

\(^\text{176}\) Id. at 304, 587 A.2d at 495. The compensatory damages were later reduced to $50,000. Id.

\(^\text{177}\) Id. at 304-05, 587 A.2d at 495. The trial judge characterized the claim against Miller as a negligence claim, and the jury was instructed that it could award punitive damages if it found that Miller had acted with implied malice. Id. at 304, 587 A.2d at 495.

\(^\text{178}\) See Miller v. Schaefer, 80 Md. App. at 76, 559 A.2d at 821. The Court of Special Appeals found that a contractual relationship existed between Miller and Schaefer based on Schaefer's acceptance of Miller's diagnosis that the cataract had to be removed. See id. at 75, 559 A.2d at 820.

\(^\text{179}\) Schaefer argued that Miller committed fraud, battery, and negligence. See id. at 72, 559 A.2d at 818. The Court of Special Appeals held, however, that because Schaefer did not claim fraud and battery before the trial court, only the claim of negligence could be addressed on appeal. See id. at 73, 559 A.2d at 819.

\(^\text{180}\) 275 Md. 36, 338 A.2d 48 (1975).

\(^\text{181}\) See id. at 47, 338 A.2d at 54.

\(^\text{182}\) Miller v. Schaefer, 80 Md. App. at 77, 559 A.2d at 821. Actual malice has been defined as "the performance of an act without legal justification or excuse, but with an evil or rancorous motive influenced by hate, the purpose being to deliberately and willfully injure the plaintiff." *Testerman*, 275 Md. at 43, 338 A.2d at 52. This definition is in contrast to that of implied malice, which was defined by the court in *Wedeman v. City Chevrolet Co.*, 278 Md. 524, 366 A.2d 7 (1976), as "conduct of an extraordinary nature characterized by a wanton or reckless disregard for the rights of others." Id. at 532, 366 A.2d at 13.

\(^\text{183}\) Miller v. Schaefer, 80 Md. App. at 77, 559 A.2d at 821.

\(^\text{184}\) See *Schaefer*, 322 Md. at 311, 587 A.2d at 498.

\(^\text{185}\) See id. at 510-11, 587 A.2d at 498.
ing the breach of a fiduciary duty.186 Further, for the benefit of the lower courts, the court identified the characteristics of torts "arising out of" contractual relationships.187

2. Legal Background.—

a. General Rule.—It is a well-settled principle in American common law that punitive damages188 may not be awarded in actions arising out of a breach of contract.189 An award of punitive damages is permitted, however, in actions based solely on tort law.190 Historically, contract and tort remedies have been separately delineated, on the theory that punitive damages are meant to punish the tortious actor and to deter future tortious actions, while compensatory damages are awarded to compensate the plaintiff for an actual loss.191

Within the past two decades, however, a "hybrid" or "borderland area" of tort and contract has developed.192 In "hybrid" cases, the plaintiff receives punitive damages based on tortious conduct arising out of a breach of contract.193 These cases are considered exceptions to the general rule that punitive damages are not awarded for a breach of contract.194

The earliest cases in which courts allowed punitive damages for breach of contract involved the breach of a contract to marry and the breach of public service contracts.195 More recently, various states have developed several other categories. The most prominent exceptions are: (1) breach of contract accompanied by

186. See id. at 310, 587 A.2d at 497.
187. See id., 587 A.2d at 497-98.
188. Punitive damages have also been called exemplary damages, vindictive damages, or "smart money." See Charles T. McCormick, Handbook on the Law of Damages § 77 (1935).
189. See Restatement (Second) of Contracts § 355 (1981); 5 Arthur L. Corbin, Corbin on Contracts § 1077, at 498 (1964).
190. See Keeton et al., supra note 25, § 2, at 9; McCormick, supra note 188, § 81, at 286.
191. See 5 Corbin, supra note 189, § 1077, at 437-38; McCormick, supra note 188, § 77, at 276.
193. See infra notes 195-199 and accompanying text.
195. 5 Corbin, supra note 189, § 1077, at 440-44.
fraud;\textsuperscript{196} (2) breach of fiduciary duty;\textsuperscript{197} (3) breach of contract accompanied by an independent tort;\textsuperscript{198} and (4) breach of an implied covenant of good faith and fair dealing.\textsuperscript{199}

\textit{b. Development of the Maryland Rule.}—Rather than categorizing certain types of contractual breaches as exceptions to the rule, the Court of Appeals has held fast to the principle that punitive damages are not to be awarded in breach of contract actions.\textsuperscript{200} The


\textsuperscript{197} See, \textit{e.g.}, Ramsey v. Culpepper, 738 F.2d 1092, 1099 (10th Cir. 1984) (finding that under New Mexico law "the failure of a realtor to disclose important information to a fiduciary, if willful or wanton, can be the basis for a punitive damages award"); Wagman v. Lee, 457 A.2d 401, 404 (D.C.) (noting that "[a]lthough punitive damages are not recoverable for breach of contract, this rule is inapplicable if there exists an independent fiduciary relationship between the parties"), \textit{cert. denied}, 464 U.S. 849 (1983); Capitol Fed. Sav. & Loan Ass'n v. Hohman, 682 P.2d 1309, 1310 (Kan. 1984) (permitting a punitive damages award for willful breach of trust); Purcell v. Automatic Gas Distrib., Inc., 673 P.2d 1246, 1251 (Mont. 1983) (holding that the "breach of a fiduciary relationship constituting a constructive fraud forms the basis for an award of punitive damages"); Mulder v. Mittelstadt, 352 N.W.2d 223, 230 (Wis. Ct. App. 1984) (allowing punitive damages in shareholder's derivative suit in which directors' breaches of fiduciary duty were deliberate and malicious).


\textsuperscript{199} See John, supra note 192, at 2046-48. This exception has its origins in California law and has also been characterized as an exception created for the breach of an insurance contract. \textit{See} Sullivan, supra note 194, at 240-44.

\textsuperscript{200} See \textit{Schaefer}, 322 Md. at 299, 587 A.2d at 492; Miller Bldg. Supply v. Rosen, 305
court has created its own unique rule, however, for those cases in which a tort "arises out of" a contractual relationship. The rule provides that punitive damages may be awarded if actual malice is proven.

The Court of Appeals first delineated the Maryland hybrid rule in *H & R Block, Inc. v. Testerman.* In that case, the court held that "where the tort is one arising out of a contractual relationship, actual malice is a prerequisite to the recovery of punitive damages." The *Testerman* court based its holding on the seminal case of *Knickerbocker Ice Co. v. Gardiner Dairy Co.*, which stated that "if . . . there was evidence tending to show that the defendant had caused the contract to be broken for the sole purpose and with the deliberate intention of wrongfully injuring the plaintiff, exemplary damages might be recovered."

The Court of Appeals has attempted to address the "gray area separating pure torts from contract cases," by requiring actual malice for punitive damages when a tort arises out of a contractual relationship. As the court stated in *General Motors Corp. v. Piskor,* torts arising out of contractual relationships "frequently bear close resemblance to actions for pure breach of contract" in which punitive damages are not recoverable. Nevertheless, torts of this genre

---

201. See Strausberg, *supra* note 192, at 280-81. Both Chief Judge Gilbert of the Court of Special Appeals and Judge Eldridge of the Court of Appeals characterized the Maryland formula as unique. See *Schaefcr, 322 Md. at 312, 587 A.2d at 499 (Eldridge, J., concurring) (stating that "the Testerman-Wedeman rule . . . is not supported by the decisions in any other jurisdiction"); Miller v. Schaefer, 80 Md. App. at 78, 559 A.2d at 821 (Gilbert, J., concurring) (claiming that "[n]o other jurisdiction has opted to march to the Testerman drum beat, dance to Wedeman's tune, or vocalize Piskor lyrics").

202. 275 Md. 36, 338 A.2d 48 (1975); see also *Food Fair Stores, Inc. v. Hevey, 275 Md. 50, 53-54, 338 A.2d 43, 45 (1975) (decided the same day as *Testerman*).

203. *Testerman, 275 Md. at 47, 338 A.2d at 54.* *Testerman* involved a suit for damages in both tort and contract alleging that the defendant "negligently, wantonly, maliciously and intentionally" prepared federal income tax returns. *Id. at 37-38, 338 A.2d at 49.

204. 107 Md. 556, 69 A. 405 (1908).

205. *Id. at 569-70, 69 A. at 410. According to the *Testerman* court, "this rule has been followed consistently." 275 Md. at 44, 338 A.2d at 53 (citing *Siegman v. Equitable Trust Co., 267 Md. 309, 313, 297 A.2d 758, 760 (1972); Daugherty v. Kessler, 264 Md. 281, 284, 286 A.2d 95, 97 (1972); St. Paul at Chase Corp. v. Manufacturers Life Ins. Co., 262 Md. 192, 238, 278 A.2d 12, 34 (1971); Damazo v. Wahby, 259 Md. 627, 639, 270 A.2d 814, 819 (1970)). But see *Schaefcr, 322 Md. at 316-17, 587 A.2d at 501 (Eldridge, J., concurring) (stating that the rule formulated by the *Testerman* court "had no support in the Maryland cases relied on" by that court).

206. *General Motors Corp. v. Piskor, 281 Md. 627, 639, 381 A.2d 16, 22 (1977).*

207. *Id.*
often involve conduct of the most opprobrious kind, which society
might well seek to punish and deter by means of exemplary dam-
ages."\textsuperscript{208} The Testerman rule is therefore an attempt to "fashion a
workable rule governing the recovery of punitive damages which
would be more stringent than that applied in pure tort cases, but
which at the same time would allow the possibility of recovery where
the particular conduct clearly warranted the imposition of such
damages."\textsuperscript{209}

The Testerman rule has been refined since its inception in 1975.
As a result of the refinements, a three-prong test has been devel-
oped to determine whether a tort arises out of a contractual rela-
tionship. "[T]he ingredients of the three-pronged test are 1) a
contract pre-exists the tort; 2) the contract is essential to the tort;
and 3) the plaintiff could sue on alternative theories of tort or
contract."\textsuperscript{210}

The court explained the first prong six months after Testerman
in Wedeman v. City Chevrolet Co.,\textsuperscript{211} which involved an allegation of
fraudulent misrepresentation. The Court of Special Appeals had
held that punitive damages were not recoverable because the fraud
at issue was a tort arising out of a contractual relationship and the
plaintiff had not presented the requisite proof of actual malice.\textsuperscript{212}
The Court of Appeals reversed the decision,\textsuperscript{213} holding that when
the nature of the fraud at issue is fraudulent inducement to enter
into a contract, the fraud does not "arise out of" a contractual rela-
tionship.\textsuperscript{214} The Wedeman court therefore established that in order
for a tort to arise out of a contractual relationship, the contractual
relationship must have existed prior to the commission of the
tort.\textsuperscript{215}

\textsuperscript{208} Id., 381 A.2d at 22-23 (citation omitted).
\textsuperscript{209} Id., 381 A.2d at 23.
\textsuperscript{210} James F. McCadden, \textit{Punitive Damages in Tort Cases in Maryland}, 6 U. BAL.
T. L. REV. 203, 217 (1977); cf. Strausberg, supra note 192, at 283-84 (identifying the three basic
elements as "(1) actual malice; (2) a contract that precedes the tort; and (3) a nexus
between the contract and the alleged tort").
\textsuperscript{211} 278 Md. 524, 366 A.2d 7 (1976).
\textsuperscript{212} City Chevrolet Co. v. Wedeman, 30 Md. App. 637, 643, 354 A.2d 185, 189, rev'd,
278 Md. 524, 366 A.2d 7 (1976).
\textsuperscript{213} Wedeman, 278 Md. at 528, 366 A.2d at 10.
\textsuperscript{214} Id. at 529, 366 A.2d at 11. Because the fraud did not arise out of a contractual
relationship, the case was not within the Testerman holding. Therefore, only implied mal-
ice, and not the higher standard of actual malice, was necessary to support an award of
punitive damages. \textit{See id.} at 530-31, 366 A.2d at 11-12.
\textsuperscript{215} A second case decided the same day as Wedeman addressed the meaning of actual
malice, holding that actual malice may be inferred from "acts and circumstantial evi-
The second prong of the test was enunciated in General Motors Corp. v. Piskor, which involved "torts in the purest sense of that term—false imprisonment and assault." The Piskor court held that despite the existence of a contractual relationship, punitive damages were appropriate upon a finding of actual or implied malice because the torts at issue did not arise out of that relationship. The court clarified this determination, stating that for a tort to arise out of a contractual relationship, it must arise "directly from performance or breach of the contract" and there must be "a direct nexus between the tortious act and performance or breach of the terms and conditions of the parties' underlying contract."

In Miller Building Supply v. Rosen, the court reaffirmed the Testerman rule, suggesting a third prong of the "hybrid" case test. The Rosen court explained that "[p]erhaps the clearest applications of the Testerman principle occur when the plaintiff and the tortfeasor are in privity and the conduct of the tortfeasor may properly be pleaded alternatively (whether or not actually pleaded), as a breach of contract and as a tort." The opinion implies that if a claim could properly be pleaded as a tort or breach of contract claim, the claim arises out of a contractual relationship and the Testerman rule applies to a punitive damages request.

3. The Court's Reasoning; Analysis.—Initially it appears that the decision in Schaefer merely reaffirms, without comment, the Court of Appeals' adherence to a rule that no other jurisdiction has adopted. Closer examination of the Schaefer decision, however, reveals that it has expanded the Testerman rule to include claims of

---

217. Id. at 639, 381 A.2d at 23.
218. See id. at 640, 381 A.2d at 23.
219. Id. at 637, 381 A.2d at 21.
220. Id. at 640, 381 A.2d at 23.
221. 305 Md. 341, 503 A.2d 1344 (1986). Rosen involved a claim of fraud arising out of an employment contract. See id. at 344, 503 A.2d at 1345.
222. Id. at 349, 503 A.2d at 1348; see also McCadden, supra note 210, at 217; Strausberg, supra note 192, at 284.
223. In his concurrence, Judge Eldridge (joined by Judges Cole and Chasanow) sharply criticized the rule. Judge Eldridge's criticism is that the Testerman rule has "utterly no relationship to the purposes of punitive damages, leads to irrational results, and has been arbitrarily and inconsistently applied." Schaefer, 322 Md. at 312, 587 A.2d at 499 (Eldridge, J., concurring). He advocated overruling Testerman and its progeny and reinstating either the rule established in Davis v. Gordon, 183 Md. 129, 36 A.2d 699 (1944) (concluding that in negligence actions, punitive damages are not recoverable unless there is proof of actual malice), or the rule outlined in Smith v. Gray Concrete Pipe Co., 267 Md. 149, 297 A.2d 721 (1972) (allowing punitive damages upon a finding of implied malice). See Schaefer, 322 Md. at 330, 587 A.2d at 508 (Eldridge, J., concurring).
medical malpractice premised on negligence in which an implied contractual relationship exists between a physician and patient.

The Schaefer decision sets the outer parameters for cases in which there is a tort arising out of a contractual relationship. Based on its decisions in Wedeman and Piskor, the court reiterated the determinative test for whether a tort arises out of a contractual relationship. The test has several factors: (1) the contractual relationship must pre-exist the contract; (2) the negligence must find "its source in the contract without which the wrong would not have been committed"; (3) there must "be a direct nexus between the tortious act and performance or breach of the ... contract" and (4) the tort and contract must be so "intertwined that one could not be viewed in isolation from the other."

The court said nothing about the "third prong" of the test expressed in Rosen—whether the plaintiff could plead alternatively in tort or in contract. This may be because the "alternative pleading" test has been called "definitional": in order to receive punitive damages at all, one must allege a separate cause of action in tort. Otherwise, the action is pled only in contract and punitive damages will not be available.

The Schaefer court also expressly declined to create an exception that would have established implied rather than actual malice as the standard for cases involving a breach of fiduciary duty. The court rejected the exception, however, only on the basis that Schaefer failed to claim the independent torts of breach of fiduciary duty and battery in her original complaint. There was no indication in the opinion as to whether, in the future, the court will set implied malice as the standard for recovery of punitive damages for a breach of

226. See Schaefer, 322 Md. at 310, 587 A.2d at 497-98.
227. Id., 587 A.2d at 497 (quoting Wedeman, 278 Md. at 529, 366 A.2d at 11).
228. Id., 587 A.2d at 498 (quoting Piskor, 281 Md. at 640, 381 A.2d at 23).
229. Id. (quoting Piskor, 281 Md. at 637, 381 A.2d at 21). The factors set out in Schaefer are essentially the same as those described earlier, see supra note 210 and accompanying text, specifically factors one and two of the McCadden list and factors two and three of the Strausberg list.
231. See id. at 349, 503 A.2d at 1348. This is the third factor in McCadden's list. See supra note 210 and accompanying text.
232. See Strausberg, supra note 192, at 284.
233. See supra note 189 and accompanying text.
234. See 322 Md. at 309-10, 587 A.2d at 497.
235. See id. at 310, 587 A.2d at 497.
fiduciary duty resulting from a breach of contract. The most significant aspect of the Schaefer decision is the court's implicit expansion of the Testerman-Wedeman rule. Testerman and its progeny involved contracts in a commercial setting. The cases relied on by the Testerman court also involved commercial contracts. Schaefer is the first case after Testerman in which the court has found that a malpractice claim of negligence arose from an implied contract between a doctor and patient.

In finding that a contract existed between Schaefer and Miller, the Court of Special Appeals explained that "[t]he relationship between a physician and patient is a consensual one arising out of an express or implied contract." However, "malpractice is predicated upon the failure to exercise requisite medical skill and, being tortious in nature, general rules of negligence usually apply in determining liability." Nonetheless, the Court of Special Appeals based its opinion to deny punitive damages on its holding in Roebuck v. Steuart, in which it "unequivocally held, based on Testerman, that actual malice was a requirement for the recovery of punitive damages in an attorney malpractice action." The Court of Appeals accepted the lower court's finding that an implied contract existed between the parties, without reference to the lower court's discussion. In doing so, the court implicitly expanded the Testerman-Wedeman actual malice standard to all malprac-

236. See id.
239. See 322 Md. at 309-10, 587 A.2d at 497.
241. Id. at 74, 559 A.2d at 819 (quoting Benson v. Mays, 245 Md. 632, 636, 227 A.2d 220, 223 (1967)).
244. See Schaefer, 322 Md. at 309-10, 587 A.2d at 497.
tice cases. Thus, it is likely that in future malpractice cases, punitive damages will be awarded only after actual malice has been established. Moreover, because the court found that Schaefer's complaint was "based solely upon two theories of negligence," future courts could read Schaefer as requiring actual malice for the recovery of punitive damages in actions based solely on claims of negligence.

4. Conclusion.—Since 1975, a Maryland plaintiff bringing a tort action that arose out of a contractual relationship had to prove actual malice to recover punitive damages. In Schaefer, the court expanded the actual malice requirement to the field of medical malpractice suits. The court has indicated its willingness to look beyond the pleadings to the underlying facts to find that an alleged tort is intertwined with an implied contractual relationship, even when the allegations describe tortious conduct such as negligence. This rule will further limit the award of punitive damages in actions involving torts arising out of a breach of contract and potentially in actions involving allegations of negligence.

D. Extension of the Witness's Privilege to Make Defamatory Statements

In Odyniec v. Schneider, the Court of Appeals held that a physician who was to serve as an expert witness in a hearing pending before the Health Claims Arbitration Office was immune from liability for making an allegedly defamatory statement to a party in the arbitration during a medical examination of that party. In so holding, the court properly extended the absolute privilege granted to witnesses in judicial proceedings to witnesses in quasi-judicial Health Claims Arbitration proceedings.

Two further implicit extensions of the privilege, however, may prove more significant. This case is the first in Maryland in which a court has protected a verbal statement made during the pendency of a judicial or quasi-judicial proceeding. It also appears to be the first case in Maryland or any other state applying the privilege to a preliminary statement made by a potential witness to someone other than an attorney or person with similar fact-gathering responsibility.

There are persuasive arguments for both extensions of the privilege and, on balance, the case appears to have been decided correctly. The court weakened the impact of its opinion, however, by failing explicitly to identify and justify these extensions.

245. Id. at 305, 587 A.2d at 495.
247. See id. at 535, 588 A.2d at 793.
The Case.—On August 13, 1986, Virginia R. Ensor underwent arthroscopic surgery on her right knee, during which the orthopedic surgeon allegedly lacerated the popliteal artery in her knee. The surgeon did not discover the resultant internal bleeding until October 21, 1986, when he performed a magnetic resonance imagery (MRI) scan.

Having lost confidence in this surgeon, Ensor sought surgical advice and treatment from Norman A. Odyniec, M.D. and Mitchell Mills, M.D. Odyniec subsequently performed corrective surgery on Ensor's right knee to ligate the ends of the severed artery.

On June 9, 1987, Ensor filed a medical malpractice claim with the Health Claims Arbitration Office against the initial surgeon who had severed her artery. Pursuant to Maryland Rule 2-423, Ensor was required to undergo a physical examination by a physician of the defendant's choice. The expert retained for this purpose was Roger E. Schneider, M.D. After a “cursory examination” of Ensor, Schneider said to her:

You have been lied to by [Odyniec and Mills]. Your popliteal artery was never ligated. They have not told you the truth. There is nothing wrong with your artery. You are perfectly all right. It is just that you have been given false information.

Upon hearing this, Ensor believed that Odyniec and Mills had fraudulently treated her, had performed unnecessary surgery upon her, and were responsible for her disability. She then underwent an arteriograph, however, which indicated that they had properly treated her knee.

Odyniec and Mills filed a complaint against Schneider in the Circuit Court for Baltimore County, alleging defamation. Schneider moved to dismiss on the ground that the complaint failed to
state a claim upon which relief could be granted; he claimed that his statements were absolutely privileged because they were made during the course of a judicial proceeding. The circuit court agreed and granted the motion to dismiss. The plaintiffs appealed and the Court of Appeals granted certiorari prior to consideration by the Court of Special Appeals.

2. Legal Background.—Participants in judicial proceedings are immune from liability for defamatory statements made during the proceedings. This “absolute privilege” derives from English common law. The underlying justification was explained by an early commentator:

A participant in judicial proceedings may be utterly free from malice, and yet in the eyes of a jury be open to that imputation; or he may be cleared by the jury of the imputation, and may yet have to encounter the expense and distress of a harassing litigation. With such possibilities hanging over his head, he cannot be expected to speak with that free and open mind which the administration of justice demands.

Thus, immunity from liability for defamation promotes society’s interest in the absolute candor and confidence of participants in judicial proceedings. In addition, there is an assumption that judicial proceedings have internal safeguards that act to “minimize the occurrence of defamatory statements” and offer an alternative remedy to those who are defamed. These safeguards include strict control by the judge or judicial officer over the proceedings; the rights to receive notice, to appear, to be represented by counsel, and to cross-examine witnesses; and the penalty of perjury that may

260. Id. at 524, 588 A.2d at 788.
261. Id. at 524-25, 588 A.2d at 788.
262. See id. at 525, 588 A.2d at 789.
be imposed on sworn witnesses who lie.  

The privilege is "absolute" in the sense that it "protects the person publishing the defamatory statement from liability even if [the speaker's] purpose or motive was malicious, he knew that the statement was false, or his conduct was otherwise unreasonable." Although most states follow the American rule, which requires that to be protected the speaker must make statements somewhat pertinent to the subject matter of the judicial proceeding, Maryland has always adhered to the English rule, which protects the speaker even if the statement is irrelevant to the proceeding.

The judicial proceedings privilege originally applied only to statements made in the courtroom. It has since been extended, however, to "statements contained in pleadings, affidavits and other documents filed in a judicial proceeding or directly related to the case." The rationale for this extension is that these documents aid in determining the truth, which is the ultimate goal of the judicial process. Because the purpose of the discovery phase of a judicial proceeding is the investigation of facts, declarants whose statements are to be included in documents later filed with the court should feel as uninhibited in communicating as they would in court.

Employing this reasoning, the Court of Appeals joined the majority of other jurisdictions when it held, in Adams v. Peck, that "any defamatory statement which appears in a document prepared for possible use in connection with a pending judicial proceeding should be accorded an absolute privilege, regardless of whether the

268. See Veeder, supra note 265, at 470-71; Note, supra note 267, at 880-83.
269. Adams v. Peck, 288 Md. 1, 3, 415 A.2d 292, 293 (1980). A "qualified" privilege, on the other hand, is destroyed upon a showing of malice. See Gersh, 291 Md. at 192, 434 A.2d at 549.
271. See Odyniec, 322 Md. at 527, 588 A.2d at 789; Keys v. Chrysler Credit Corp., 303 Md. 397, 404, 494 A.2d 200, 203 (1985). Although courts continue today to note the distinction between the American and English rules, most American courts apply the American rule so broadly that the practical distinction has almost vanished. See Keeton et al., supra note 25, § 114, at 818.
274. See Adams, 288 Md. at 5, 415 A.2d at 294.
document has been filed."276

In Adams, a woman believed that her husband, from whom she was separated, was abusing their children during his visits with them.277 The mother's attorney referred her and one of her children to a psychiatrist, Dr. Peck, for an evaluation. Peck then sent a written report to the attorney in which he stated that the father had abused the children.278 The father brought a defamation action against Peck, who moved for summary judgment on the basis that his statements were privileged because they were made in connection with the pending divorce litigation.279 In affirming the trial court's grant of summary judgment, the Court of Appeals cited an early English case, Watson v. M'Ewan,280 in which the House of Lords extended the judicial privilege to a witness's statements published in a document that was prepared by an attorney in connection with pending litigation.281 The Court of Appeals, using Watson as support, reasoned that the same public policy that protects witnesses' statements in court "must as a necessary consequence involve that which is a step towards and is part of the administration of justice—namely, the preliminary investigation of witnesses to find out what they can prove."282

In Adams, as in the vast majority of American cases that have held privileged the statements of a potential witness made during the pendency of a judicial proceeding, the protected statement was made to an attorney.283 The courts have justified extending the privilege on these occasions by referring, as in Watson, to the importance of aiding the lawyer in his capacity as investigator of the facts of a case.284 In those cases in which the witness's privilege has been held applicable to preliminary statements made to someone other than an attorney, that person has exercised a similar investigative

276. Id. at 8, 415 A.2d at 295.
277. Id. at 2, 415 A.2d at 292-93.
278. Id.
279. Id. at 2-3, 415 A.2d at 292-93.
281. See id.
282. Adams, 288 Md. at 7, 415 A.2d at 295.
283. See id. at 8, 415 A.2d at 296.
284. See, e.g., Robinson v. Home Fire & Marine Ins. Co., 49 N.W.2d 521, 527 (Iowa 1951) ("To hold an attorney or witness liable for statements made in a preliminary conference would discourage him from conferring about proposed testimony ... and thus tend to defeat the ends of justice."); see also Restatement (Second) of Torts § 588 cmt. b (1964) (stating that witnesses are protected "while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal"); Laurence H. Eldridge, The Law of Defamation § 73, at 366-69 (1978) (discussing how courts have applied the privilege to allow lawyers to investigate cases properly).
function with regard to the judicial proceeding.\textsuperscript{285}

In many jurisdictions, but not in Maryland, courts have applied the privilege to verbal statements made by a witness to an attorney.\textsuperscript{286} This is the view of the Restatement (Second) of Torts, which provides that a "witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding."\textsuperscript{287} Comment b under that section explains further that:

> [t]he rule stated in this Section protects a witness while testifying. It is not necessary that he give his testimony under oath; it is enough that he is permitted to testify. The privilege also protects him while engaged in private conferences with an attorney at law with reference to proposed litigation, either civil or criminal.\textsuperscript{288}

Many courts have also extended the privilege to witnesses testifying in settings other than traditional civil or criminal litigation. For example, the privilege has been applied to witnesses in hearings before federal administrative agencies,\textsuperscript{289} state insurance commissions,\textsuperscript{290} state licensing boards,\textsuperscript{291} and in other proceedings that have been commonly termed "quasi-judicial."\textsuperscript{292}

The Court of Appeals indicated in \textit{Gersh v. Ambrose}\textsuperscript{293} that it would extend the privilege to "quasi-judicial" proceedings and announced a two-part test by which it would determine, on a case-by-case basis, whether a proceeding is sufficiently quasi-judicial to warrant the privilege. The \textit{Gersh} court stated that the decision would "turn on two factors: (1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards which


\textsuperscript{287} \textit{RESTATEMENT (SECOND) OF TORTS} § 588.

\textsuperscript{288} Id. cmt. b (emphasis added).


\textsuperscript{291} See, e.g., McAlister \textit{& Co. v. Jenkins}, 284 S.W. 88, 91 (Ky. 1926).

\textsuperscript{292} See \textit{Odyniec}, 322 Md. at 529, 588 A.2d at 790.

\textsuperscript{293} 291 Md. 188, 434 A.2d 547 (1981).
will minimize the occurrence of defamatory statements." The test is intended to determine whether a given proceeding is sufficiently analogous to litigation, in which the public function and procedural safeguards are presumed to exist, to warrant the potential harm to defamed individuals.

In Gersh, the Court of Appeals applied the test to a public hearing before the Baltimore City Community Relations Commission. A staff member of the Commission brought a defamation action against an Assistant State's Attorney for remarks made before the Commission. The court held that the hearing failed the quasi-judicial nature test: it lacked the requisite procedural safeguards, and its apparent benefit to society was "not sufficiently compelling to outweigh the possible damage to individual reputations to warrant absolute witness immunity."

The Court of Appeals applied the Gersh test in two more recent cases. In Miner v. Novotny, the court held that the privilege was applicable to a citizen's statements in a brutality complaint against a deputy sheriff, which triggered a full disciplinary investigation and hearing. However, in McDermott v. Hughley, the court declined to apply the privilege to a statement contained in a psychologist's report obtained as part of an "administrative investigation" concerning a park policeman's fitness for duty.

3. The Court's Reasoning.—On its face, the Odyniec opinion appears to be straightforward. The court began its analysis by outlining the scope and policy basis of the judicial privilege in Maryland, including a quotation from Adams v. Peck:

The evaluation and investigation of facts and opinions

294. Id. at 197, 434 A.2d at 551-52.
295. See id. at 189, 434 A.2d at 547.
296. Id.
297. Id. at 196, 434 A.2d at 551.
299. Id. at 176, 489 A.2d at 275. The court examined the procedural safeguards of the proceedings, which included an impartial three-officer review board with power to subpoena witnesses and documents and the officer's right to be represented by counsel and to cross-examine sworn witnesses. See id., 489 A.2d at 274. Recognizing the importance of encouraging the filing of valid complaints, the court concluded that any damage caused to a defamed officer's reputation by a false complaint was outweighed by the public's interest in the proceedings. See id., 489 A.2d at 275.
300. 317 Md. 12, 561 A.2d 1038 (1989).
301. See id. at 26, 561 A.2d at 1045. The court found inadequate procedural safeguards in a "mere status conference," specifically noting the absence of sworn witnesses, cross-examination, and, most importantly, a "legally cognizable tribunal administering the proceeding." Id.
for the purpose of determining what, if anything, is to be raised or used in pending litigation is as integral a part of the search for truth and therefore of the judicial process as is the presentation of such facts and opinions during the course of the trial, either in filed documents or in the courtroom itself. Such evaluation and investigation, and the documents which these activities generate, are directly related to the pending litigation and occur during the course of the judicial proceeding.\(^{302}\)

Next, the court discussed at length the *Gersh* test for determining the applicability of the absolute privilege to "nonjudicial proceedings," describing its application of the test in *Gersh, Miner, and McDermott*.\(^{303}\) The court then applied the test with meticulous care to the Health Claims Arbitration procedure at issue.\(^{304}\) Because the procedure contained statutorily mandated due process safeguards and because the proceedings served an obvious public function, the court concluded that the procedure was "at least as functionally comparable to a trial before a court as the administrative disciplinary proceedings involved in *Miner v. Novotny*."\(^{305}\)

The court's initial analysis implied that it was merely following precedent. However, the court then made an abrupt departure from established case law in its sweeping statement: "[W]e conclude that the absolute privilege may safely be extended to statements of potential witnesses made during the pendency of [Health Claims Arbitration] proceedings."\(^{306}\) By itself, this implies that the privilege attaches to any statement, written or not, made to any person during the pendency of the proceeding. The court implicitly modified this holding in its next sentence, however, stating that "[i]n this regard, we reiterate that '[t]he investigation, evaluation, presentation and determination of facts are inherent and essential parts of this process.'"\(^{307}\) This suggests that to be protected, witnesses must make their defamatory statements while participating in one of these factfinding tasks.

The court further qualified its holding with what is probably the most significant statement in the opinion:

\(^{302}\) 288 Md. 1, 8, 415 A.2d 292, 295 (1980), quoted in *Odyniec*, 322 Md. at 527-28, 588 A.2d at 789.

\(^{303}\) See *Odyniec*, 322 Md. at 528-31, 588 A.2d at 790-91.

\(^{304}\) See id. at 531-34, 588 A.2d at 791-93.

\(^{305}\) *Id.* at 534, 588 A.2d at 792; see *supra* notes 298-299 and accompanies text.

\(^{306}\) *Odyniec*, 322 Md. at 534, 588 A.2d at 793.

\(^{307}\) *Id.* (quoting Adams v. Peck, 288 Md. 1, 5, 415 A.2d 292, 294 (1980)).
Whatever Dr. Schneider's motivation may have been, he made his verbal statement to Ms. Ensor, a party in the then pending arbitration proceeding, while he was conducting a medical examination of her in preparation for his participation in that proceeding. It was thus made in the course of his participation in that pending proceeding and therefore . . . the verbal statement is accorded the same absolute privilege as if it had been made by a witness during the arbitration hearing itself.

Finally, the court recognized the potential harm of a defamatory statement to a physician's reputation, but determined that such harm is outweighed by the "societal value of maintaining the integrity of the [health claims] process itself." 308

4. Analysis.—The Odyniec decision extends the witness's privilege in Maryland in three ways. The court chose, however, to identify and explain in detail only the least questionable of these extensions—the application of the privilege to the quasi-judicial Health Claims Arbitration process. It is difficult to understand why the court so exhaustively treated this particular issue, given the unquestionable public interest in the proper resolution of malpractice claims and the thorough procedural safeguards mandated by law. Indeed, it is difficult to imagine a nonjudicial proceeding that more closely resembles traditional litigation. Nevertheless, this issue was clearly and correctly decided by the court.

The extension of the privilege to apply to verbal statements by a potential witness made during the pendency of a judicial or quasi-judicial proceeding is also, by itself, not very susceptible to criticism. If the main purpose of the witness's privilege is to elicit truthful testimony, it would be counter-productive and arbitrary to limit the privilege to statements that are recorded in a document, as this surely would inhibit some potential witnesses from being totally candid during an oral investigation. Furthermore, preliminary verbal statements are protected in many other states, a view echoed

308. Id.
309. Id. at 535, 588 A.2d at 793.
310. Although Odyniec involves statements made during the pendency of quasi-judicial Health Claims Arbitration proceedings, logic requires that the extension of the witness's privilege to protect certain verbal and written statements made to persons other than attorneys applies to traditional litigation as well. If a quasi-judicial proceeding contains a sufficient number of the necessary protections to allow the privilege to apply, the privilege must apply to judicial proceedings in which all the necessary protections exist.
311. See supra note 286 and accompanying text.
by the *Restatement (Second) of Torts*. Finally, there are hints in existing Maryland precedent that some verbal statements should be privileged.

The most significant extension of the privilege in *Odyniec* is also the most ambiguous. *Odyniec* appears to be the first American case to hold privileged the defamatory statement of a potential witness in pending litigation made to someone other than an attorney involved in the litigation or a person with an analogous fact-gathering function in the case. It is the court's vagueness that makes the limits of the extension difficult to ascertain. The difficulty lies in the sentence in the opinion that most resembles a holding, which cannot reasonably be construed literally. In stating, "we conclude that the absolute privilege may safely be extended to statements . . . made during the pendency of such proceedings," the court could not have intended the privilege to apply to a statement made by a witness to *any* person at *any* time after the institution of the action.

Fortunately, the court did provide additional language indicating the probable limits of the privilege. The court emphasized that Schneider made his statement "to Ms. Ensor, a party in the then pending arbitration proceeding . . . while he was conducting a medical examination of her in preparation for his participation in that proceeding . . . . It was thus made in the course of his participation in that pending proceeding . . . ." Therefore Schneider's statements were privileged. It is reasonable to conclude that the court applied the privilege to Schneider's statements because he made them at a time and place in which he was acting as a proper participant in the fact-gathering phase of the proceeding, and because he published them to another

---

312. See supra notes 287-288 and accompanying text.
313. See, e.g., Kennedy v. Cannon, 229 Md. 92, 98, 182 A.2d 54, 58 (1961) (stating in dicta that an attorney's verbal statements would be privileged if made to someone with an interest in the case); see also Adams v. Peck, 43 Md. App. 168, 185, 403 A.2d 840, 849 (1979) (holding that privilege extends to verbal statements), aff'd, 288 Md. 1, 415 A.2d 292 (1980). It is possible that the Court of Appeals avoided the verbal statement issue in *Adams*, applying the more narrow "published in a document" requirement, to ensure that there would be no problem establishing that the statements were pertinent to the case. This is of course despite Maryland's claimed adherence to the English rule. See *Adams*, 288 Md. at 4, 415 A.2d at 294; supra text accompanying notes 270-271.
314. See supra note 285 and accompanying text.
315. *Odyniec*, 322 Md. at 534, 588 A.2d at 793.
316. Obviously, this would be an absurd rule. The justification for the privilege is based on eliciting the greatest amount of truthful testimony from witnesses so that it may be considered by the attorneys in shaping the case and by the jury in deciding it. See *id.* at 528, 588 A.2d at 789. Protecting a witness's slanderous statement to an uninvolved third party simply would not serve this purpose.
317. *Id.* at 534, 588 A.2d at 793 (emphasis added).
participant with an interest in the investigation. Thus, although he did not make his statement to a lawyer, Schneider was still acting, in a loose sense, in his role as a witness. This kind of broad inquiry accords with the view of a frequently cited commentator, who wrote that "the circumstances in which a communication is made must be such that it may properly be considered a part of the proceeding... that it tend to further the proceeding in some manner."

Thus, the Court of Appeals' decision to apply the privilege to encompass the statements made by potential witnesses in pending litigation, who are in a position analogous to Schneider's, has a logical grounding in the traditional policy rationale of the privilege. The court's repeated underscoring of the fundamental connection between the investigative work that precedes a judicial proceeding and the proceeding itself naturally suggests that any potential witness performing a legitimate role in that investigation should be protected by the privilege.

Although it may be fruitless to speculate as to why the court did not call attention to this seemingly justified extension of the privilege, it is possible that the court's dominant concern in Odyniec was simply to avoid sending a danger signal to potential expert witnesses in malpractice claims. This hypothesis is bolstered by the court's reference to the grave need to protect "the integrity of the process" of malpractice arbitration.

5. Conclusion.—In Odyniec, the Court of Appeals applied the judicial privilege of a witness to the quasi-judicial Health Claims Arbitration process. The case also extended the privilege (in both judicial and quasi-judicial proceedings) to protect some verbal statements made by potential witnesses and, more importantly, to protect certain statements made by a potential witness to persons other than attorneys or individuals with a similar investigative function. Although there appears to be a valid basis for the latter two exten-

318. It is unlikely that the court intended to imply that statements made to a person not involved in the proceeding would be privileged, when case law from Maryland and other jurisdictions suggests otherwise. See, e.g., Kennedy v. Cannon, 299 Md. 92, 98, 182 A.2d 54, 58 (1961) (indicating that the attorney was not protected by the privilege as to "actionable words spoken before persons in no way connected with the proceeding"); Troutman v. Erlandson, 593 P.2d 793, 794 (Or. 1979) (holding that the attorney's statement was not protected because it was made to a person not directly related to the proceeding); Converters Equip. Corp. v. Condes Corp., 258 N.W.2d 712, 717 (Wis. 1977) (finding that statements to parties not involved with proceedings are not protected).

319. Note, supra note 272, at 923.

320. Odyniec, 322 Md. at 535, 588 A.2d at 793.
sions which can be discerned by a close examination of the opinion's language, the failure of the court to identify and explain these changes in the scope of the privilege may be the cause of unnecessary confusion in the future. Inevitably, the court will have to explicitly acknowledge and define the extensions to the privilege that it implicitly recognized in *Odyniec*.

Lawrence M. Hettleman
Joseph W. Hovermill
Jane Lewis Rempe
Dwight W. Stone, II
Survey Table of Cases

Maryland cases from the period June 1990 to June 1991 that are discussed in the Survey are indexed below.

<table>
<thead>
<tr>
<th>CASES</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baltimore County Coalition Against Unfair Taxes v. Baltimore County</td>
<td>775</td>
</tr>
<tr>
<td>Baltimore Sun v. Colbert</td>
<td>538</td>
</tr>
<tr>
<td>Baltimore Sun v. University of Maryland Medical System Corp.</td>
<td>726</td>
</tr>
<tr>
<td>Bowie v. State</td>
<td>623</td>
</tr>
<tr>
<td>Boyer v. State</td>
<td>763</td>
</tr>
<tr>
<td>Coleman v. State</td>
<td>557</td>
</tr>
<tr>
<td>Ennis v. Crenca</td>
<td>792</td>
</tr>
<tr>
<td>Finch v. Holladay-Tyler Printing, Inc.</td>
<td>681</td>
</tr>
<tr>
<td>First Virginia Bank v. Settles</td>
<td>509</td>
</tr>
<tr>
<td>Forbes v. Harleysville Mutual Insurance Co.</td>
<td>740</td>
</tr>
<tr>
<td>GEICO v. Group Hospitalization Medical Services, Inc.</td>
<td>753</td>
</tr>
<tr>
<td>Hammond v. State</td>
<td>640</td>
</tr>
<tr>
<td>Hoffman v. Maryland</td>
<td>548</td>
</tr>
<tr>
<td>In re Adoption No. 9979</td>
<td>716</td>
</tr>
<tr>
<td>Krauss v. State</td>
<td>701</td>
</tr>
<tr>
<td>Marr, P.C. v. Langhoff</td>
<td>597</td>
</tr>
<tr>
<td>Maryland National Bank v. Cummins</td>
<td>521</td>
</tr>
<tr>
<td>Mustafa v. State</td>
<td>671</td>
</tr>
<tr>
<td>Nissen Corp. v. Miller</td>
<td>581</td>
</tr>
<tr>
<td>Odyniec v. Schneider</td>
<td>835</td>
</tr>
<tr>
<td>Owens v. State</td>
<td>652</td>
</tr>
<tr>
<td>Prince George’s County Police Pension Plan v. Burke</td>
<td>708</td>
</tr>
<tr>
<td>Ricks v. State</td>
<td>661</td>
</tr>
<tr>
<td>Sawyer v. Humphries</td>
<td>784</td>
</tr>
<tr>
<td>Schaefer v. Miller</td>
<td>825</td>
</tr>
<tr>
<td>Schroyer v. McNeal</td>
<td>804</td>
</tr>
<tr>
<td>State v. McCallum</td>
<td>612</td>
</tr>
<tr>
<td>Tatum v. Gigliotti</td>
<td>815</td>
</tr>
<tr>
<td>United States ex rel. Trane v. Bond</td>
<td>571</td>
</tr>
<tr>
<td>Watson v. Peoples Security Life Insurance Co.</td>
<td>690</td>
</tr>
</tbody>
</table>