The Maryland Survey: 2002-2003

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# THE MARYLAND SURVEY: 2002-2003

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Recent Decisions:
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I. COMMERCIAL LAW

A. Judicial Deference to Deposit Agreements: Rewriting the UCC and Allocating Risks to Customers

In *Lema v. Bank of America*, the Court of Appeals of Maryland considered whether a deposit agreement between a bank and an account holder that exempted the bank from liability for accepting an unauthorized deposit was valid under the Maryland Uniform Commercial Code (UCC). Despite UCC section 3-401, which declares that an account holder is not to be held liable for a bank’s acceptance of a deposit into the account that is not signed by the account holder or his authorized agent, the Court of Appeals validated the deposit agreement. The court concluded that UCC sections 4-205 and 4-401(b), which allow a bank to supply a customer’s endorsement to a check and to hold a customer liable for the amount of an unsigned check in specific circumstances pertaining to overdrafts, displaced section 3-401 and demonstrated that the UCC allows banks to charge back a customer for the amount of an unlawful check. In so holding, the court not only misinterpreted the UCC, but it ignored analogous precedent that consistently enforced UCC section 3-401, even while

2. A deposit agreement is a contract between “a financial institution and its customer governing the treatment of deposited funds and the payment of checks and other demands against a customer’s account.” *Black’s Law Dictionary* 321 (7th ed. 1999). Generally, deposit agreements are activated when a bank customer opens a checking account and signs a signature card, which binds him to the bank’s deposit agreement. M.H. Gersonsky, *Deposit Agreements Between Banks and Their Customers—A Wall of Protection or a Wall with a False Foundation?*, 31 Tex. Tech. L. Rev. 1, 3 (2000).
3. An unauthorized deposit is a check for a certain amount of money deposited into a checking account, but not signed by the account holder or the account holder’s authorized agent. Md. Code Ann., Com. Law I §§ 3-401(a) to 3-403(a) (2002). In Maryland, account holders are not liable for unauthorized deposits. *Id.*
5. *Id.* at 647, 826 A.2d at 517.
6. *Id.* at 639-40, 826 A.2d at 513. Section 3-102 of the Maryland UCC specifies that “[i]f there is a conflict between this title and Title 4 . . . , Title[ ] 4 govern[s].” Md. Code Ann., Com. Law I § 3-102(b) (2002).
7. *Lema*, 375 Md. at 647, 826 A.2d at 517; see also infra notes 113-129 and accompanying text (examining the statutes relied on by the majority and their inapplicability to Lema’s factual scenario).
simultaneously deferring to deposit agreements. Additionally, the majority's interpretation of the UCC underscored a consistent trend of judicial deference to deposit agreements, thereby providing banks with a contractual advantage over their account holders and expanding the ability of banks to impose unjust contract terms on their customers. Lema demonstrates the need for courts to balance common law precedent with UCC provisions to protect equally the rights of banks and their account holders.

1. The Case.—

   a. Facts.—In 1999, Nkiambi Lema opened a business checking account with Bank of America and endorsed a signature card binding him to the terms of a deposit agreement. The deposit agreement declared that "unless prohibited by applicable law or regulation," Bank of America could charge back Lema's account the amount of any forged or altered checks that were wrongly credited to his account. On November 24, 1999, a friend and former client of Lema's, Willy Amuli, deposited a check for $63,000 into Lema's account without Lema's knowledge. Lema said that he first noticed the increase in his account balance at the end of that month. Amuli then asked Lema to write checks periodically to Amuli for specified amounts because he had no bank account in which to deposit the $63,000 check and did not want to cash the entire amount of the check at one time. Following Amuli's request, Lema visited Bank of America and was told that the proceeds from the check would be available in seventeen days—the time estimated for the check to clear. Lema also requested a copy of the check, which Bank of America sent to him in February of 2000.

8. See infra notes 130-142 and accompanying text (describing analogous precedent that reinforced UCC section 3-401's rule against customer liability for a bank's acceptance of an unauthorized check).

9. See, e.g., First United Bank v. Philmont Corp., 533 So. 2d 449, 457 (Miss. 1988) (enforcing the terms of a merchant agreement over the provision of Mississippi's commercial law code); Etelson v. Suburban Trust Co., 263 Md. 376, 380, 283 A.2d 408, 410-11 (1971) (allowing a bank to contract out of the UCC through a contract located on the back of a check); see also infra notes 150-176 and accompanying text (exploring the roots of favoritism of contractual expediency over customer rights regarding the UCC).

10. Lema, 375 Md. at 628, 826 A.2d at 505.

11. Id.

12. Id.

13. Id. at 630, 826 A.2d at 506.

14. Id.

15. Id., 826 A.2d at 506-07.

16. Id., 826 A.2d at 507.
Amuli's check was drawn by an Italian bank on its account at the Bank of New York. The check was designed with at least once inch of space between the phrase "USD" and the amount of the check, which was $63,000. In a series of transactions between December of 1999 and February of 2000, Lema withdrew money from his account and sent it to Amuli in Africa. On January 12, 2000, the Bank of New York informed Bank of America that the amount of the check Amuli deposited into Lema's account had been altered from $3,000 to $63,000. On February 22, 2000, Bank of America informed Lema that it was charging back his account for $60,000. The Bank collected $57,888.60 from Lema's accounts. In response, Lema sent Bank of America an affidavit stating that he did not participate in altering the check. Lema also alerted the United States Secret Service of the check's alteration and assisted in the government's investigation regarding the check.

b. Procedure.—On April 5, 2000, Lema filed a complaint in the Circuit Court for Baltimore City to enjoin Bank of America from charging back his account for the money he had transferred to Amuli. Bank of America counterclaimed in an attempt to recover damages resulting from the altered check, asserting that Lema had breached the deposit agreement by permitting an altered check to pass through his account. Bank of America also attempted to join Amuli in the suit through a third party complaint, but Amuli evaded service.

In April of 2001, the circuit court entered a judgment for Lema, citing UCC section 3-401, which provides that a customer is not responsible to a bank for a deposit unless the customer or his authorized agent signed it. The circuit court rejected Bank of America's counterclaims, holding that the Bank's right to charge back Lema's

17. Id. at 628, 826 A.2d at 506. Cassa di Risparmio di Padova e Rovigo designed the check that Amuli altered. Id.
18. Id. at 653, 826 A.2d at 520 (Harrell, J., dissenting).
19. Id. at 628, 826 A.2d at 506.
20. Id. at 629, 826 A.2d at 506.
21. Id.
22. Id. at 629 n.3, 826 A.2d at 506 n.3.
23. Id. at 630, 826 A.2d at 507.
24. Id.
25. Id. at 629, 826 A.2d at 506.
26. Id.
27. Id. at 629 n.2, 826 A.2d at 506 n.2.
28. Id. at 631, 826 A.2d at 507.
account for an unauthorized check was limited by the deposit agreement and section 3-401. ²⁹

In an unreported opinion, the Court of Special Appeals reversed the judgment and held that in light of sections 4-205 and 4-401(b), the deposit agreement controlled, and Bank of America was not prohibited by applicable law from charging back Lema’s account for $60,000. ³⁰ Lema appealed, and the Court of Appeals granted certiorari to consider whether the deposit agreement invalidated section 3-401’s requirement that all items accepted by Bank of America must be endorsed by the account holder or his agent. ³¹

2. Legal Background.—Common law dictates that a bank accepting an unauthorized check cannot charge its customer’s account for its own mistake if the acceptance creates an overdraft. ³² This basic principle was codified as UCC section 3-401. ³³ Title 4 of the UCC provides exceptions to this rule. ³⁴ Generally, courts defer to written agreements between banks and customers that alter UCC provisions. ³⁵ Validated by courts nationwide, such agreements are sometimes attacked for neglecting customers’ interests. ³⁶ Often debate over the enforcement of these contracts turns on policy issues such as bank risk assumption and customer rights. ³⁷

²⁹. Id.
³⁰. Id. The official comment to section 4-205 allows unauthorized deposits from “‘lock-box’ agreements from customers who receive a high volume of checks.” Md. Code Ann., Com. Law I § 4-205 cmt. 1 (2002). Official comment 2 to section 4-401 allows banks to charge back account holders for the amount of overdrafted checks, even if the customer did not sign the check. Id. § 4-401 cmt. 2.
³¹. Lema, 375 Md. at 632, 826 A.2d at 508.
³². E.g., Leather Mfrs. Bank v. Morgan, 117 U.S. 96, 107 (1886) (noting the longstanding rule that banks are liable for accepting unauthorized checks).
³⁴. See id. § 4-401(b) cmt. n.2 (stating that in multiple account holder situations “the nonsigning customer is not liable for an overdraft unless that person benefits from the proceeds of the item”); see also id. § 4-205 cmt. 1 (stating that a bank may charge back an account for an unauthorized deposit made pursuant to a “lock-box” agreement where no signature requirement existed).
³⁵. See, e.g., First United Bank v. Philmont Corp., 533 So. 2d 449, 455-56 (Miss. 1988) (allowing a merchant agreement to change a bank’s allowable charge back period from the fallback period in the UCC provisions).
³⁷. Id.; see also Messing v. Bank of Am., 373 Md. 672, 701, 821 A.2d 22, 40 (2003) (stating that facilitating commercial activities is a policy reason for permitting a bank to shift the risk of loss to customers for unauthorized checks).
a. The Evolution of the Common Law Rule Against Charge Backs.—More than one hundred years ago, in *Leather Manufacturers' Bank v. Morgan*, the Supreme Court of the United States determined that a customer's bank account should not be charged back when a bank accepts an unauthorized, forged, or altered check on the customer's behalf. Maryland courts traditionally adhered to this rule. For example, in *Bank of Southern Maryland v. Robertson's Crab House*, the Court of Special Appeals held a bank liable for accepting and depositing checks not signed by a customer or the customer's authorized agent. Even though the customer in *Robertson's Crab House* retained one trusted employee to deposit business checks, the court refused to categorize the employee as an authorized agent and found the bank liable for allowing the employee to divert business funds into a personal account.

The Court of Appeals reiterated this rule in *Atlantic Trust Co. v. Subscribers to Automobile Insurance Exchange*. In *Atlantic Trust*, even though a banker was deceived by a third person with the appearance of authority, the court held the bank responsible for accepting an unauthorized check and liable for the costs resulting from its mistake. In that case, the resident manager of an automobile insurance company deposited insurance checks into a personal account under his name, as well as checks on behalf of the auto insurance company into a separate business account. Adhering to the principle that a customer is not liable for the acts of another—except for a person empowered as an authorized agent to represent the account holder, the court found that the resident manager lacked the authority to deposit items as an agent for the insurance company into his personal account and held the bank liable.

b. Statutory Codification of the Common Law Rule: UCC Sections 3-401, 4-205, and 4-401(b).—The UCC codified the *Leather Manufacturers' Bank* rule in section 3-401. Section 3-401 states unequivocally that a bank is liable for a customer's injury resulting from the bank's

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38. 117 U.S. 96 (1886).
39. Id. at 107.
41. Id. at 723, 389 A.2d at 397.
42. Id. at 722, 389 A.2d at 397.
44. Id. at 476, 133 A. at 321.
45. Id. at 473, 133 A. at 320.
46. Id.
47. See MD. CODE ANN., COM. LAW I § 3-401 (2002).
acceptance of an unauthorized check.\textsuperscript{48} However, a bank's only obligation when executing the terms of a deposit agreement is to exercise good faith and ordinary care to its account holders, which is the only UCC obligation that an independent deposit agreement cannot alter.\textsuperscript{49} Thus, a deposit agreement that alters the obligation of bank liability for acceptance of unauthorized checks as stipulated in section 3-401 can supersede the UCC unless it is "manifestly unreasonable."\textsuperscript{50}

In addition to section 3-401, Title 4 governs bank deposits and collections.\textsuperscript{51} Despite section 3-401's declaration of bank liability for unauthorized deposits, two provisions of Title 4 allow banks to accept unauthorized deposits on a customer's behalf in specified situations.\textsuperscript{52} For example, section 4-205 allows a bank to accept an unsigned check and endorse it for the account holder if the customer personally delivers the check to the bank.\textsuperscript{53} Also, section 4-401(b) allows a bank to accept unauthorized overdrafts by stating that "a customer is not liable for the amount of an overdraft if the customer neither signed the item nor benefits from the proceeds of the item."\textsuperscript{54}

c. Courts' Widespread Deference to Deposit Agreements.—A consistent trend of judicial deference to deposit agreements has emerged in case law.\textsuperscript{55} Courts have allowed banks to change UCC provisions in deposit agreements in a variety of circumstances. In\textit{Etelson v. Suburban Trust Co.},\textsuperscript{56} the Court of Appeals found that the customers of a bank renounced their protection under the UCC by signing an endorsement on the back of a check that granted the bank the right to

\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id. § 1-102 (b) (stating that UCC provisions can be altered by agreement as long as they do not interfere with the obligations of "good faith, diligence, reasonableness and care").
\textsuperscript{51} See\textit{MD. CODE ANN., COM. LAW tit. 4} (2002).
\textsuperscript{52} The UCC also addresses conflicts between separate titles of the UCC. Sections 3-102(b) and 4-102(a) address direct conflicts between Title 3 and Title 4 of the UCC. \textit{Id.} § 3-102(b);\textit{ see also id.} § 4-102(a). Section 3-102(b) states that if there is a conflict with a provision in Title 3 and a provision in Title 4, the Title 4 provisions govern. \textit{Id.} § 3-102(b). Section 4-102(a), also discussing conflicts between UCC titles, confirms the rule of 3-102(b). \textit{Id.} § 4-102(a) cmt. 1. Nevertheless, in the event that no conflict exists between the Title 3 and Title 4, the Title 4 provisions remain subject to the provisions of Title 3, including section 3-401. \textit{Id.}
\textsuperscript{53} § 4-205(l) (2002).
\textsuperscript{54} Id. § 4-401(b).
\textsuperscript{55} See supra note 35 (discussing cases where courts affirmed deposit agreements).
\textsuperscript{56} 263 Md. 376, 283 A.2d 408 (1971).
dispose of collateral without notice to them.\textsuperscript{57} Courts in other jurisdictions have permitted even more deviation from the UCC. For example, the Supreme Court of Mississippi validated a merchant’s agreement that increased the allowable time for a bank to charge back a customer’s account from 3 days to 120 days in First United Bank v. Philmont Corporation.\textsuperscript{58}

More recently, courts have expanded the applicability and enforceability of deposit agreements. In Triffin v. First Union Bank,\textsuperscript{59} the Superior Court of New Jersey, Appellate Division, held that a bank may contractually exculpate itself from liability unless the customer proves that the terms of the deposit agreement were unreasonable.\textsuperscript{60} In shifting the burden of proof to the customer, the Triffin court produced another obstacle for account holders to confront when suing a bank. Furthermore, in National Title Insurance Corp. Agency v. First Union National Bank,\textsuperscript{61} the Supreme Court of Virginia allowed a bank to reduce the time frame in which a customer can sue a bank for paying an item containing an unauthorized signature or alteration from one year to sixty days.\textsuperscript{62} Triffin and National Title Insurance, therefore, demonstrate judicial deference to independent deposit agreements, despite such agreements infringing on the rights for customers recommended by the UCC.\textsuperscript{63}

d. Risk Allocation: Balancing Bank Interests with Customer Rights.—Policy reasons are the common judicial rationale for refusing to enforce deposit agreements. For example, in Cumis Insurance Society, Inc. v. Girard Bank,\textsuperscript{64} the United States District Court for the Eastern District of Pennsylvania invalidated a deposit agreement that absolved the bank of liability in almost all circumstances.\textsuperscript{65} There, Girard Bank accepted and paid five unauthorized checks and debited the customer’s account in the amount of $100,000.\textsuperscript{66} After the ac-

\textsuperscript{57} Id. at 379, 283 A.2d at 410. Specifically, the bank disposed of a 1969 truck, which had been used as collateral to secure a loan for Mr. Etelson’s business. Id. at 377, 283 A.2d at 409.

\textsuperscript{58} 533 So. 2d 449, 457 (Miss. 1988).


\textsuperscript{60} Id. at 875.

\textsuperscript{61} 559 S.E.2d 668 (Va. 2002).

\textsuperscript{62} Id. at 672.

\textsuperscript{63} Id.; Triffin, 724 A.2d at 875.


\textsuperscript{65} Id. at 423. Provisions of the agreement purported that “the company [Credit Union] agrees to indemnify and hold harmless the Bank . . . from any damages the Bank may suffer.” Id. at 416 (internal quotation marks omitted).

\textsuperscript{66} Id. at 417.
count holders discovered that the bank had accepted five forged checks for $20,000 each, they called upon their insurance company to pay for the debt. The customer’s insurance company then sued the bank for $100,000, and the district court found that a deposit agreement did not absolve the bank from liability for accepting unauthorized checks. The Cumis court expressed doubt about the validity of “any agreement which seeks to abrogate the fundamental rules of forged signatures” in the UCC. The court cited policy reasons for its holding, including the principle that industry must be prevented from “contractually exculpating itself from the consequences of its own negligence or lack of good faith in the performance of any of its banking functions.”

Courts also cite policy reasons as a basis for enforcing deposit agreements, because deposit agreements further a primary objective of the UCC—promoting commercial transactions. Recently, in *Messing v. Bank of America*, the Court of Appeals cited policy reasons as a basis for allowing a bank to refuse to cash a check drawn on the bank to a non-customer. The court acknowledged that banks face substantial risks of loss when conducting their business and should be allowed to protect themselves from potential liabilities. Also, the court found that reducing the risks associated with conducting business encourages the growth of commercial practices, a legitimate and important goal of public policy. In addition, the Supreme Court of Mississippi justified a bank’s right to minimize risk assumption by charging back on provisional deposits in *First United Bank v. Philmont Corporation*. The court recognized that bank losses were often caused by customers withdrawing money provisionally deposited into their accounts by banks. On this basis, the court validated a deposit agreement extending the bank’s right to charge back the account from three days, as provided in the UCC, to 120 days. The *First

67. *Id.*
68. *Id.* at 421.
69. *Id.* at 423.
70. *Id.* at 422.
72. 373 Md. 672, 821 A.2d 22 (2003).
73. *Id.* at 701-02, 821 A.2d at 39.
74. *Id.*
75. *Id.*
76. 533 So. 2d 449, 451-52 (Miss. 1988). In *First United*, the bank agreed to provisionally credit the customer’s account for deposited credit card slips that the customer, a businessman, received by selling discount travel packages through a telemarketing scheme. *Id.*
77. *Id.*
78. *Id.*
United court explicitly relied on policy influences, namely the bank's right to allocate risks to customers, to justify its holding.\textsuperscript{79}

3. The Court's Reasoning.—In Lema v. Bank of America, the Court of Appeals held that a deposit agreement and the UCC authorized Bank of America to charge back an account holder for an unauthorized deposit of $60,000.\textsuperscript{80} Writing for the majority,\textsuperscript{81} Judge Battaglia reasoned that charging back a customer's account after a bank accepts an unauthorized check is not prohibited by section 3-401 because sections 4-401 and 4-205 designate specific situations in which banks may accept unauthorized deposits.\textsuperscript{82} Acknowledging that section 3-401 requires a customer's or an authorized agent's signature before a bank can accept a check, the court turned to section 1-102(3), which allows parties to alter provisions of the UCC by an independent agreement.\textsuperscript{83} After citing various cases demonstrating that deposit agreements can alter and negate UCC provisions, the court established that the contract between Bank of America and Lema qualified as an "agreement."\textsuperscript{84}

Finding that the deposit agreement terms applied to the bank-customer relationship unless "prohibited by applicable law," the majority turned to the UCC to determine whether any UCC provisions prohibited validation of the deposit agreement.\textsuperscript{85} The majority found both Title 3 and Title 4 of the UCC applicable law to the deposit agreement and focused on two sections in Title 4 that permitted banks to accept unendorsed checks in certain circumstances.\textsuperscript{86} First, the court observed that section 4-401(b) authorizes a bank to accept an unendorsed item and prevents a bank from liability if the customer benefits from the deposit.\textsuperscript{87} The court cited this provision as evidence of the UCC's permission for banks to accept unauthorized checks.\textsuperscript{88} In addition, the court speculated that section 4-205, which authorizes acceptance of unsigned checks when deposited personally by the account holder, was further proof that the UCC permitted banks to ac-

\textsuperscript{79} See id. at 457 ("Bottom-line policy considerations favor the Bank's position here.")
\textsuperscript{80} Lema, 375 Md. at 647, 826 A.2d at 517.
\textsuperscript{81} Judge Battaglia was joined by Judges Raker, Wilner, and Cathell. Id. at 627, 826 A.2d at 505.
\textsuperscript{82} Id. at 639-40, 826 A.2d at 512-13.
\textsuperscript{83} Id. at 635, 826 A.2d at 510.
\textsuperscript{84} Id. at 638, 826 A.2d at 511.
\textsuperscript{85} Id. at 639, 826 A.2d at 512.
\textsuperscript{86} Id. at 639-40, 826 A.2d at 512-13.
\textsuperscript{87} Id. at 640, 826 A.2d at 512-13.
\textsuperscript{88} Id.
cept unauthorized checks.\textsuperscript{89} Reasoning that the Title 4 provisions demonstrated that charging back a customer's account for an unauthorized check was not prohibited by the UCC, the majority concluded that the deposit agreement legally altered the effects of the UCC, thereby making Lema liable for the $60,000.\textsuperscript{90}

Finally, the majority disregarded Lema's claim that the deposit agreement abandoned Bank of America's obligations of good faith and ordinary care, as required under UCC sections 1-102(3) and 4-103(a).\textsuperscript{91} The court reasoned that nothing in the deposit agreement explicitly relieved Bank of America of those obligations and concluded that the duty of good faith was to be "read into" the deposit agreement.\textsuperscript{92}

In his dissent, Judge Harrell suggested that the majority's reasoning may have been obscured because it suspected that Lema had participated in a "sinister plot" with Amuli to deceive Bank of America.\textsuperscript{93} Judge Harrell observed that according to section 3-401, Lema was not liable for the altered check.\textsuperscript{94} Reasoning that section 3-401 is the default provision for any unauthorized check, Judge Harrell criticized the majority's conclusion that the UCC impliedly allows for banks to charge back accounts for unauthorized checks.\textsuperscript{95}

Judge Harrell argued that for the Title 4 exceptions to displace section 3-401, there must be a direct conflict between Titles 3 and 4.\textsuperscript{96} Rejecting the majority's reliance on sections 4-205 and 4-401(b), Judge Harrell cited the official comments of section 4-401 and 4-205 for support.\textsuperscript{97} First, Judge Harrell concluded that section 4-401 applied specifically to situations involving overdrafts, and thus was inapplicable to the situation in Lema.\textsuperscript{98} Then, Judge Harrell cited to the section 4-205 stipulation that banks can accept unauthorized checks only from holders, and established that Lema was not a holder under the UCC.\textsuperscript{99} After finding that neither section 4-205 nor section 4-401 applied to Lema, the dissent concluded that there was no direct con-

\textsuperscript{89} Id. at 639, 826 A.2d at 512.
\textsuperscript{90} Id. at 641, 826 A.2d at 513.
\textsuperscript{91} Id. at 643-44, 826 A.2d at 514-15.
\textsuperscript{92} Id. at 645, 826 A.2d at 516.
\textsuperscript{93} Id. at 649, 826 A.2d at 518 (Harrell, J., dissenting). Judges Bell and Eldridge joined the dissent. Id. at 648, 826 A.2d at 517.
\textsuperscript{94} Id. at 649, 826 A.2d at 518.
\textsuperscript{95} Id. at 649-50, 826 A.2d at 518.
\textsuperscript{96} Id. at 650, 826 A.2d at 518-19.
\textsuperscript{97} Id. at 651, 826 A.2d at 519.
\textsuperscript{98} Id.
\textsuperscript{99} A "holder" of a check is "the person in possession . . . ." Md. Code Ann., Com. Law I § 1-201(20) (2002).
lict between Title 3 and Title 4, and that section 3-401 was therefore the controlling law. Because section 3-401 states that a customer cannot be charged back for an unauthorized item, Judge Harrell concluded that Bank of America was prohibited from charging back the $60,000 to Lema's account.

The dissent deduced that the Italian Bank should be liable for the alteration because the design of its check invited alteration. Furthermore, Judge Harrell speculated that Bank of America chose to sue Lema rather than the Italian bank because the litigation was less expensive and because a victory against Lema would significantly expand Bank of America's contractual power over its account holders.

Judge Harrell further noted that the UCC prohibits agreements that waive a bank's duty of good faith and ordinary care. Observing that Bank of America missed its deadline for giving Lema notice that it was charging back his account and that notice is an unwaiveable component of ordinary care, the dissent determined that the burden of proof should have shifted to Bank of America to show that its actions were reasonable.

Finally, the dissent concluded that Titles 3 and 4 were applicable law. Finding that UCC section 4-214 controlled, Judge Harrell determined, according to section 4-214, that Bank of America's right to charge back Lema's account depended on whether the deposit was provisional or final. Because Section 4-214 stipulates that banks cannot charge back an account once a settlement is final, the dissent concluded that Bank of America failed to meet its burden of proving that the deposit was, in fact, final.

4. Analysis.—In Lema v. Bank of America, the Court of Appeals relied on a deposit agreement to effectively negate section 3-401, which holds banks liable for accepting unauthorized deposits on behalf of their account holders. Several factors render the majority's holding unconvincing and vulnerable to criticism. First, the majority's interpretation of statutory exceptions to the general rule of bank

100. Lema, 375 Md. at 651, 826 A.2d at 519 (Harrell, J., dissenting).
101. Id.
102. Id. at 652-53, 826 A.2d at 519-20; see supra note 18 and accompanying text (describing the face of the check).
103. Lema, 375 Md. at 654, 826 A.2d at 521 (Harrell, J., dissenting).
104. Id. at 655-56, 826 A.2d at 522.
105. Id. at 655, 826 A.2d at 523.
106. Id. at 659, 826 A.2d at 524.
107. Id. at 660, 826 A.2d at 524.
108. Id., 826 A.2d at 525.
109. Id. at 627, 826 A.2d at 505.
liability for acceptance of unauthorized checks is problematic because the statutory exceptions are inapplicable to the Lema case.110 Second, nothing in Lema distinguishes it from similar cases where courts have validated deposit agreements while applying the rule against customer liability for a bank allowing an unauthorized deposit.111 Third, the majority's reasoning surpasses the usual trend of judicial deference to deposit agreements by weakening the rule that banks are liable for accepting unauthorized checks and thereby forces account holders to assume the risk of liability if an unauthorized check is deposited in their account.112 In effect, the court's holding causes a debilitation of the UCC rule against customer liability for unauthorized deposits and represents the expansion of bank contracting power at the expense of customers' rights.

a. The Majority's Reliance on Title 4 Provisions is Unconvincing.—The majority's reasoning depended heavily on sections 4-401 and 4-205, which allow banks to charge back customer accounts in specific instances.113 However, these sections are inapplicable to Lema's situation and when no conflict between Title 3 and Title 4 of the UCC exists, Title 3 controls.114 Thus, section 3-401's prohibition of customer liability for bank deposits of unauthorized checks should have applied and Bank of America should not have charged back Lema's account for $60,000.115

The majority's reliance on section 4-401's authorization of undorsed deposits in specific situations is inapposite to the Lema case. While section 4-401 does permit a bank to charge-back a customer's account for unauthorized overdrafts, it does not purport to apply to altered checks like Amuli's.116 When the Bank charged back Lema's account for $60,000, it recovered $57,888.60 from Lema's accounts with the Bank.117 Thus, only one of the four checks that Lema wrote to repay Amuli could have resulted in an overdraft of Lema's account.118 Because only one of the checks Lema wrote resulted in an overdraft of Lema's account, UCC section 4-401 is inapplicable to the

110. See infra notes 113-129 and accompanying text.
111. See infra notes 130-142 and accompanying text.
112. See infra notes 143-176 and accompanying text.
113. See supra notes 82-90 and accompanying text (discussing the majority's dependence on sections 4-401 and 4-205).
115. See supra notes 96-108 and accompanying text (describing the dissent's view that the majority's reliance on sections 4-401 and 4-205 was misplaced).
117. Lema, 375 Md. at 629 n.3, 829 A.2d at 506 n.3.
118. Id. at 628, 829 A.2d at 506.
other checks. If section 4-401 does not apply to the other checks that Lema wrote Amuli, no conflict exists between Titles 3 and 4 for those checks, and Title 3 controls.\textsuperscript{119} If Title 3 controls, then section 3-401, which codifies the rule against customer liability for unauthorized deposits, is valid, and Lema should not be held liable.\textsuperscript{120}

The majority's interpretation of section 4-401 contradicts not only the facts in \textit{Lema}, but also the reasoning of precedent on this issue. In \textit{Taylor}, the Court of Appeals held that section 3-401 prohibited a bank from charging back the customer's account for a forged check.\textsuperscript{121} The court in \textit{Taylor} used section 4-401 to support its finding that when a banker has been misled by a person appearing to have the authority of the account holder, the bank is still answerable for any loss when it accepts an unauthorized check.\textsuperscript{122} In \textit{Taylor}, the Court of Appeals interpreted sections 4-401, 3-404, and 3-401 to form collectively an implied contract holding the bank liable for charging a customer's account on any item not authorized by the customer.\textsuperscript{123} In applying section 4-401 to Lema's altered check and upholding the bank's charge back to his account, the \textit{Lema} court contradicted its own previous interpretations of these statutory provisions.\textsuperscript{124}

Likewise, the majority's argument that section 4-205 validates the conclusion that the UCC generally permits banks to accept unauthorized checks is unpersuasive.\textsuperscript{125} Section 4-205 allows a bank to deposit unsigned checks from a customer who is a "holder" of the check at the time the check is deposited into a bank.\textsuperscript{126} However, Lema was not a holder when Amuli deposited the check.\textsuperscript{127} Therefore, section 4-205

\begin{itemize}
\item \textsuperscript{119} \textsc{Md. Code Ann., Com. Law I § 4-102(a)} (2002).
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} 269 Md. 149, 157, 304 A.2d 838, 842-43 (1973).
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.} ("When these sections are taken together with § 4-401, the UCC codifies the underlying contract implied between the bank and its customer that the bank will change any item which is otherwise properly payable against the depositor's account only on the order of the depositor or of someone authorized by him.") (internal quotation marks omitted).
\item \textsuperscript{124} \textit{See id.}
\item \textsuperscript{125} \textit{Lema}, 375 Md.
\item \textsuperscript{126} \textit{See id.}
\item \textsuperscript{127} \textit{Lema}, 375 Md.
\end{itemize}
is inapplicable to him. In allowing section 4-205 to influence its holding, the majority thus relied on an inapposite UCC provision. Because it relied heavily on an inapplicable Title 4 provision, the majority's reasoning remains vulnerable to criticism.

b. The Court Rejected Analogous Case Law in Allowing a Bank's Acceptance of Unauthorized Checks.—Maryland courts have repeatedly found that the UCC does not permit unendorsed checks to be deposited by third parties. In Robertson's Crab House, the Court of Special Appeals found a bank liable even where a third party depositor was a frequent visitor to the bank as the customer's trusted employee. In that case, the court reasoned that the customer never assented to the employee's actions and thus was not liable for diverted funds. In contrast, Lema's relationship with Amuli was much more attenuated than the employee's relationship with his employer in Robertson's Crab House. Amuli was Lema's client; he was not an employee regularly entrusted with the duty of handling Lema's finances. Thus, it runs contrary to previous Maryland cases to find Amuli's deposit permissible because unauthorized third party deposits have not been allowed by Maryland courts.

In fact, the Court of Appeals has upheld the Leather Manufacturers' rule that a bank may not charge a customer's account when it mistakenly accepts an unauthorized check while abiding by a deposit agreement. In Atlantic Trust, a resident manager of an insurance agency was found to lack both actual and apparent authority to deposit checks for his employer. The court stated that a customer can be

128. Lema, 375 Md. at 639-40, 826 A.2d at 512.
129. Id.
132. Id. at 719, 389 A.2d at 395.
133. Id. The depositor in Robertson's was a friend of Robertson's and the Bank accepted an unauthorized check. Id. at 709, 389 A.2d at 390. However, given the frequency of the employee's deposits for the employer in Robertson, the bank argued that it had reason to believe that the employee was, in fact, an agent. Id. In contrast, Amuli only deposited one check in the Lema case, clearly not enough to establish a sufficient custom to deceive the bank into believing he was an authorized agent of Lema. Lema, 375 Md. at 628, 826 A.2d at 505-06.
134. Joint Record Extract, Lema (E095).
135. See supra notes 38-46 (discussing Maryland cases adhering to the rule against unauthorized third party deposits).
137. Id. at 475, 133 A. at 321.
responsible for the acts of another only when that person is a designated agent and, even if a bank mistakenly believes that a person is an authorized agent, the bank remains liable for accepting unauthorized endorsements.\textsuperscript{138} However, in the present case, Amuli was not Lema's employee, much less a regular representative of Lema at the bank.\textsuperscript{139} Indeed, in \textit{Atlantic Trust}, the bank had more reason to believe the depositor was an authorized agent because the depositor was a familiar face who regularly represented the account holder, unlike the depositor in \textit{Lema}.\textsuperscript{140} Nevertheless, the \textit{Atlantic Trust} court chose to enforce the \textit{Leather Manufacturers'} rule that a bank is liable for accepting unauthorized checks, even when the depositor was closely associated with the account holder.\textsuperscript{141} Amuli was not closely associated with Lema from Bank of America's viewpoint, so Bank of America should not have been able to justify the acceptance of the unauthorized check by claiming that Amuli had the implied authority to deposit for Lema.\textsuperscript{142} Thus, the \textit{Lema} court departed from the holding in \textit{Atlantic Trust} by finding Bank of America not liable for \$60,000, even though in \textit{Atlantic Trust} the court had more convincing reasons to absolve the bank of liability than it had in \textit{Lema}.

c. Judicial Tolerance of Customer Risk Assumption.—Generally, courts enforce deposit agreements to promote commercial transactions, even if those transactions are contrary to the customer's interest.\textsuperscript{143} Indeed, many scholars viewed the enactment of the UCC as an attempt to shift the risk of loss from banks to customers.\textsuperscript{144} Article 4, in particular, was criticized for predetermined that liability would fall with bank customers.\textsuperscript{145} The UCC was enacted amidst blatant accusations that Article 4 was "a deliberate sell-out of the American Law Institute and the Commission of Uniform Laws to the bank lobby in

\begin{itemize}
\item \textsuperscript{138} \textit{Id.} at 475-76, 133 A. at 321.
\item \textsuperscript{139} \textit{Lema}, 375 Md. at 628, 826 A.2d at 505.
\item \textsuperscript{140} \textit{Atl. Trust Co.}, 150 Md. at 475, 133 A. at 321.
\item \textsuperscript{141} \textit{Id.} at 475-76, 133 A.2d at 321.
\item \textsuperscript{142} \textit{See Lema}, 375 Md. at 628, 826 A.2d at 505.
\item \textsuperscript{143} \textit{See Messing v. Bank of Am.}, 373 Md. 672, 701, 821 A.2d 22, 39 (2003) ("In short, when a bank cashes a check over the counter, it assumes the risk that it may suffer losses for counterfeit documents, forged endorsements, or forged or altered checks. Nothing in the Commercial Law Article forces a bank to assume such risks."); \textit{see also} First United Bank v. Philmont Corp., 533 So. 2d 449, 457 (Miss. 1988) (listing losses incurred by banks because they cannot charge back customers' accounts).
\item \textsuperscript{144} Frederick K. Beutel, \textit{The Proposed Uniform \textcopyright\ Commercial Code Should Not Be Adopted}, 61 YALE L.J. 334, 361 (1952) (declaring that "[a] careful examination of the wording of the act will show that [Article 4 of the UCC] was drafted entirely with the purpose of protecting the banks so that they could carry on their business at the risk of the customer").
\item \textsuperscript{145} \textit{See id.} (stating that the UCC has shifted liability from banks to consumers).
\end{itemize}
Even some drafters and proponents of the UCC objected to the one-sidedness of Article 4. Specifically, the provision permitting banks to contract out of the UCC was attacked for the obvious advantages it gave to banks.

Since the UCC's enactment, the responsibility for maintaining a fair balance between customer and bank rights has fallen on American courts. However, courts have increasingly validated unreasonable and unfair deposit agreements against customers in favor of bank interests. For example, the Court of Appeals found in *Messing* that a bank should not be forced to assume the risk of cashing a check drawn by a Bank of America customer over the counter to a non-customer. *Messing* exemplified the court's willingness to consider the risks that a bank takes in its transactions and a bank's right to protect itself from potential liabilities. As such, the *Lema* decision typifies the trend of courts to neglect customer interests to uphold the interests of banks.

The *National Title* case also demonstrates the trend of judicial deference to deposit agreements at the expense of customer rights. In enforcing a deposit agreement, the Supreme Court of Virginia abridged customers' interests by drastically reducing the allowable window of time in which a customer could sue a bank in *National Title*. The *National Title* court validated a deposit agreement's provision that reduced the amount of time in which a customer could file a claim against a bank from one year to sixty days. The court noted that altering a provision of the UCC by reducing the period of time in which a customer can make a claim did not alter the inherent scheme

146. Id. at 362 (internal quotation marks omitted).
148. Id. at 375.
150. See *supra* notes 55-63 (listing cases that shrink consumer rights granted by the UCC by enforcing increasingly egregious deposit agreements).
152. Id. Also, by listing losses of banks in its opinion, *First United* demonstrates how much weight and credit some courts give banks for conducting their business. *First United Bank v. Philmont Corp.*, 533 So. 2d 449, 457 (Miss. 1988).
153. See *Lema*, 375 Md. at 628, 826 A.2d at 505.
154. 559 S.E.2d 668, 672 (Va. 2002).
155. Id.
156. Id.
of liability established in the UCC.\textsuperscript{157} By supporting its decision on this basis, the \textit{National Title} court implied that if the UCC-established scheme of liability has been altered, then the provisions of the deposit agreement would be invalid.\textsuperscript{158} In contrast to \textit{National Title}, the deposit agreement in \textit{Lema} did alter the ultimate scheme of liability because the presumption of liability for unauthorized deposits shifted from the bank to the customer, where the UCC presumes that the bank is liable.\textsuperscript{159} Thus, the \textit{Lema} court’s holding represented a more obvious departure from the UCC than that of \textit{National Title} because it shifted the ultimate scheme of liability outlined in the UCC by allocating the liability for unauthorized deposits to the customer and not to the bank.\textsuperscript{160}

In addition, other precedent that defers to the terms of deposit agreements still contradicts the \textit{Lema} court’s rejection of the rule against customer liability for unauthorized deposits.\textsuperscript{161} In \textit{First United}, the Supreme Court of Mississippi upheld a deposit agreement that extended the bank’s right to charge back a customer’s account from the UCC designated period of 3 days to 120 days.\textsuperscript{162} The \textit{First United} court never questioned the principle that a bank is liable for accepting unauthorized deposits, as the \textit{Lema} court did.\textsuperscript{163} The only issue considered in \textit{First United} was whether the deposit agreement could validly increase the time frame in which a bank could charge back from the time frame provided in the UCC, a query which does not alter the UCC’s fundamental method of determining liability.\textsuperscript{164} On the other hand, the \textit{Lema} court’s interpretation of the UCC allowed the deposit agreement to change which party was ultimately liable on the overdraft, not just the time period in which claims can be

\textsuperscript{157} \textit{Id.} at 671-72.
\textsuperscript{158} \textit{Id.} at 672.
\textsuperscript{159} \textit{See Lema,} 375 Md. at 654, 826 A.2d at 521 (Harrell, J., dissenting) (stating that Bank would be liable if the case were decided solely on statutory grounds).
\textsuperscript{160} \textit{See National Title,} 559 S.E.2d at 672 (holding that a sixty-day time limit for a customer to file an action against the bank was not unreasonable). The Supreme Court of Virginia remained consistent with the \textit{Leather Manufacturers} rule because it did not concede that banks should not be held liable for accepting unauthorized checks. \textit{Id.} at 670.
\textsuperscript{161} \textit{First United Bank v. Philmont Corp.,} 533 So. 2d 449, 457 (Miss. 1988).
\textsuperscript{162} \textit{Id.}
\textsuperscript{163} \textit{Lema,} 375 Md. at 642, 826 A.2d at 514.
\textsuperscript{164} \textit{First United,} 533 So. 2d at 454 n.2. The court here observed that the merchant agreement substituted the UCC provision stating that banks have three days to charge back a customer’s account, extending the time to 120 days. \textit{Id.} However, this substitution does not raise issues to the court of whether the change in charge back dates contradicts another UCC provision, nor does the merchant agreement in this case hinge on whether its terms are “prohibited by applicable law,” as in \textit{Lema.} \textit{Lema,} 375 Md. at 659-60, 826 A.2d at 524.
made. Consequently, the Lema court surpassed other courts’ liberal interpretations of deposit agreements by altering the fundamental system of liability, not simply changing procedural requirements for check depositing under the UCC.

The Lema case highlights another legal concern that existed at the time the UCC was enacted—that allowing banks to craft deposit agreements contradictory to nearly all UCC provisions would result in a system that devastates the rights of account holders. Without the UCC to regulate them, banks can effectively exculpate themselves from any liability. This fear has been expressed in both case law and scholarly commentary. In Cumis, a court found a deposit agreement that absolved a bank of liability in virtually any circumstance as void against public policy. Although banks should naturally try to protect themselves from business risks, the Cumis court believed that such self-protection went too far when banks attempt “to abrogate the fundamental rules of liability for forged signatures.” Case law demonstrates that standard, bank-written deposit agreements often, in an attempt to minimize bank liability, condense the rights of customers to sue. While customers and banks benefit from an expeditious and inexpensive bank collection system, society should remain wary of unfair contracting power. Virtually all banks write their own deposit agreements, and such agreements are cumbersome, difficult for the average person to comprehend, and similar from bank to bank. Thus, customers lack meaningful choices if they intend to pick a bank with a customer-friendly deposit agreement. The imbalance in contracting power between banks and customers is reflected in the deposit agreements, which increasingly advantage banks’ interests.

In truth, the courts are entrusted with the duty of maintaining a fair balance between liability of banks and customer protection from

165. 375 Md. at 647, 826 A.2d at 517.
166. See supra notes 150-164 and accompanying text (exemplifying other courts’ uses of deposit agreements).
168. Id. at 423.
169. Id.
170. See supra notes 56-79 and accompanying text (discussing judicial treatment of deposit agreements and UCC provisions and their effects on customer rights).
171. Gilmore, supra note 147, at 376.
172. See id. (stating that bankers possess the knowledge to understand a complex deposit agreement).
173. Id.
risks. A bank’s position commands the trust and confidence of entire communities and must be regulated to prevent a breach of that trust. The UCC was adopted as a mechanism to balance the potential liabilities of customers and banks, but the UCC provision that authorizes parties to make independent contracts that supersede UCC provisions does not warrant the cursory assumption that deposit agreements are valid. A more conscientious and balanced common law approach towards enforcing deposit agreements is desperately needed if customers’ rights are to be preserved. Lema signifies the abandonment of one of these cherished rights.

5. Conclusion.—A general common law rule, embodied in UCC section 3-401, holds that when a bank accepts a check unsigned by the account holder or the account holder’s authorized agent, it will be held liable for any damage to the account holder from that transaction. In Lema v. Bank of America, the Court of Appeals interpreted the UCC in a controversial manner, ultimately allowing a deposit agreement to protect Bank of America from liability for accepting unauthorized checks on an account holder’s behalf. The majority’s reasoning in Lema was questionable because it used two inapplicable provisions of UCC Title 4 to negate the well-established rule against customer liability for bank acceptance of unauthorized deposits. Additionally, the Lema court departed from analogous precedent that consistently enforced the rule against customer liability for bank acceptance of unauthorized deposits, even while deferring to deposit agreements. The culminating effect of the Lema decision is an expansion of the power of banks to escape liability under the UCC through deposit agreements.

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174. Cersonsky, supra note 2, at 61.
175. Taylor v. Equitable Trust Co., 269 Md. 149, 156 n.7, 304 A.2d 838, 842 n.7 (1972).
178. Lema, 375 Md. at 646-48, 826 A.2d at 516-18.
179. See supra notes 113-129 and accompanying text.
180. See supra notes 130-142 and accompanying text.
181. See supra notes 143-176 and accompanying text.
II. CONSTITUTIONAL LAW

A. Driven to Distraction: Egregious Juror-Witness Misconduct Demands Retrial Without Regard to Actual Prejudicial Effect on the Jury's Verdict

In Jenkins v. State, the Court of Appeals of Maryland considered whether the trial court abused its discretion in refusing to grant Marvin Jenkins a new trial after the court ascertained, after taking the final verdict, that a juror and a witness had engaged in *ex parte* communications during the trial. The court held that the mid-trial communications were egregious and therefore created a presumption of prejudice that the State could not rebut under the restrictions on post-verdict juror testimony imposed by Maryland Rule 5-606. Concluding that the verdict could diminish the integrity of the jury process, the court held that the trial court abused its discretion by not granting Jenkins a new trial. In focusing on the egregious nature of the juror-witness misconduct, the court failed to fully consider whether Jenkins was actually prejudiced in the verdict and created no substantive standard, even within the confines of Maryland Rule 5-606, to determine whether egregious conduct discovered post-verdict is actually prejudicial to a defendant. The court's failure to grant the trial court discretion to determine the actual prejudice of juror misconduct suggests that any juror-witness misconduct discovered post-verdict demands a retrial. Moreover, in attempting to protect the

2. Id. at 289, 825 A.2d at 1011; see infra notes 22-34 and accompanying text (discussing Pikulski's and McDonald's interaction at a retreat during Jenkins' trial).
3. Jenkins II, 375 Md. at 289, 825 A.2d at 1011. Maryland Rule 5-606 prevents jurors from testifying post verdict as to the effect of any conduct or incident that may have influenced the jury's decision-making process. Maryland Rule 5-606 provides, in relevant part:
   (b) Inquiry into validity of verdict.
   (1) In any inquiry into the validity of a verdict, a juror may not testify as to
   (A) any matter or statement occurring during the course of the jury’s deliberations, (B) the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent or dissent from the verdict, or (C) the juror’s mental processes in connection with the verdict.
   (2) A juror’s affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may not be received for these purposes.
   Md. R. 5-606(b).
4. Jenkins II, 375 Md. at 289, 825 A.2d at 1011.
5. See infra notes 170-190 and accompanying text.
6. See infra notes 191-211 and accompanying text.
integrity of the jury system by declaring such misconduct prejudicial, the court failed to recognize the harm done to the jury system when a reasonably supported decision, despite egregious misconduct, is reversed. By creating a standard of review for juror misconduct that fully considers the actual effect on the outcome in determining prejudice, the court could have simultaneously affirmed the judgment in this case, maintained the discretion of the trial court, and protected the integrity of the jury system.

1. The Case.

   a. Background Facts.—On the night of April 13, 2000, Stephen Dorsey, Jr. and Michael Clark were involved in a shooting near Lincoln Park in Montgomery County, Maryland. Dorsey was shot and killed. The State charged Marvin Jenkins and David Barnett with numerous crimes resulting from the shooting, and the two were tried separately in the Circuit Court for Montgomery County. Detective Patricia Pikulski was the first of several detectives that interviewed Clark at the scene of the shooting. At Jenkins' trial, Clark was a witness for the State, testifying that Barnett shot Dorsey. On cross-examination, the defense entered Pikulski's notes as a defense exhibit, and she answered questions concerning her interview of Clark and the notes. On March 30, 2001, a jury convicted Jenkins of second-degree murder, attempted first- and second-degree murder, first-degree assault, and the use of a handgun in the commission of a crime of violence.

   b. Witness-Juror Interaction and Trial Court Evidentiary Hearing.—On April 4, 2001, five days after Jenkins' conviction, Detective Pikulski commented to Deborah Armstrong, the prosecutor in Jenkins' case, that during the trial she had an incidental encounter with

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7. See infra notes 212-224 and accompanying text.
8. See infra notes 170-224 and accompanying text.
11. Id. Jenkins was charged with attempted first-degree murder, attempted second-degree murder, second-degree murder, use of a handgun during the commission of a crime of violence, first-degree assault, and conspiracy to commit first-degree murder. Id. at 94, 806 A.2d at 688.
12. Id. at 96, 806 A.2d at 689.
13. Id., 806 A.2d at 689-90.
14. Id.
15. Id. at 97, 806 A.2d at 690.
16. Id. at 94, 806 A.2d at 688.
Bruce McDonald, one of the sitting jurors. That same day, Ms. Armstrong contacted the court and defense counsel and requested an emergency hearing to investigate the incident. On April 5, 2001, Armstrong informed the court of Pikulski’s contact with McDonald during the trial. On April 9, 2001, Jenkins filed a motion for a re-trial on the basis that the improper contact between Pikulski and McDonald prejudiced him and deprived him of his right to a fair trial. Pursuant to Maryland Rule 4-331(a), the trial court scheduled an evidentiary hearing for April 19, 2001.

At the evidentiary hearing, the trial court heard testimony from Pikulski and McDonald. Both Pikulski and McDonald testified that they attended a small religious retreat in Virginia on March 23 and 24 of 2001. At the retreat, McDonald recognized Pikulski and approached her, indicating that he was a sitting juror in a trial in which she testified. Pikulski, assuming McDonald was a juror in the already-decided Barnett case, asked McDonald whether he was one of the ones who had convicted the defendant. McDonald indicated that he was presently unable to discuss the case. McDonald then clarified that the trial was ongoing and that he was “right now” sitting on the jury. After Pikulski realized that McDonald was involved in the ongoing Jenkins trial, Pikulski and McDonald agreed, per the

17. Id. at 97, 806 A.2d at 690.
18. Id.
19. Id. at 98, 806 A.2d at 690.
20. Id.
21. Id. Maryland Rule 4-331(a) provides that “within ten days after a verdict, the court, in the interest of justice, may order a new trial.” Md. R. 4-331(a).
22. Jenkins II, 375 Md. at 292, 825 A.2d at 1012. The court questioned McDonald, and he explained the nature of his contact with Detective Pikulski, but—in accordance with Maryland Rule 5-606—he was not asked questions pertaining to and did not testify as to the effect this contact had on his decision-making process as a juror. Id. at 292 n.9, 825 A.2d 1013 n.9.
23. Jenkins I, 196 Md. App. at 99, 806 A.2d at 691. Twenty-five to thirty people attended the retreat. Id.
24. Id. at 98, 806 A.2d at 690. The hearing record indicates that McDonald could not remember specifically how he explained his involvement in the Jenkins case. Id. He testified that he “was” or “is” “on the jury.” Id.
25. Id. Pikulski said to McDonald: “Oh, you’re one of the ones that convicted him?” to which McDonald replied, “I can’t talk about it.” Id.
26. Id.
27. Id. at 99, 806 A.2d 690-91.
court's orders,\(^{28}\) that they could not talk about the case thereafter.\(^{29}\) McDonald testified that they did not discuss the case any further.\(^{30}\)

Though they agreed not to talk about the case, Pikulski and McDonald unintentionally sat next to one another during the next day of the retreat and, upon McDonald's invitation, went to lunch together at the conclusion of the retreat.\(^{31}\) Based on the trial judge's instructions to the jury, Pikulski's and McDonald's decision to have lunch together violated the court's order to avoid contact with one another.\(^{32}\) After eating for approximately an hour and a half, Pikulski then drove McDonald approximately one-half mile to pick up his car.\(^{33}\) After the retreat and lunch following, Pikulski and McDonald had no further contact.\(^{34}\)

c. Trial Court Hearing on Jenkins' Motion for a Retrial.—On June 20, 2001, the trial court held a hearing on Jenkins' motion for a new trial and issued a written opinion denying the motion on July 16, 2001.\(^{35}\) The court concluded that the contact between Pikulski and McDonald was improper but that Jenkins was not prejudiced in the process.\(^{36}\) The court found that any possible confusion with Barnett's trial and conviction resulting from Pikulski's statement, "you're one of

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28. Jenkins II, 375 Md. at 292-93 n.10, 825 A.2d at 1013 n.10. After jury selection, the trial judge indicated that jurors "must do everything reasonable within your power to avoid contact with any of the witnesses, parties, or persons you see in close contact with them outside of the courtroom.” Id. Prior to the weekend recess in question, the court offered the following instructions to the jurors: “Do not have any contact outside the courtroom with any of the parties, witnesses, or lawyers.” Id. (emphasis omitted). Though the record is not clear whether Detective Pikulski was in the courtroom during either of the instructions, she was still subject to subpoena and was told not to “discuss your testimony with any other witness or permit any other witness to discuss their testimony with you.” Record at 307, Jenkins v. State, 375 Md. 284, 825 A.2d 1008 (2003) (No. 107).


30. Jenkins II, 375 Md. at 294, 825 A.2d at 1013.

31. Id., 825 A.2d at 1014. Pikulski and McDonald ate lunch at a nearby restaurant for approximately an hour and a half. Id. at 295, 825 A.2d at 1014. They each paid for their own meals. Id. Pikulski and McDonald were alone in the restaurant except for a brief time when a friend of McDonald's joined them. Id. at 294 & n.12, 825 A.2d at 1014 & n.12. During lunch, Pikulski and McDonald shared personal information about each other and their families. Id. at 295, 825 A.2d at 1014. Specifically, McDonald shared information about his occupation in environmental matters and Pikulski shared information about her son who was also interested in the environment. Jenkins I, 146 Md. App. at 100, 806 A.2d at 691.

32. Jenkins II, 375 Md. at 292-93 n.10, 825 A.2d at 1013 n.10.

33. Jenkins I, 146 Md. App. at 100, 806 A.2d at 691. McDonald's car was being repaired at a nearby dealership. Id.

34. Id.

35. Id., 806 A.2d at 692.

36. Id.
the ones that convicted him," would not have harmed Jenkins because Jenkins' defense was that Barnett shot Dorsey. Additionally, because the defense adopted Pikulski's testimony to discredit Clark, the State's primary witness, the court found that any enhanced credibility of Pikulski in the eyes of McDonald "would have worked in [Jenkins'] favor." Finally, the court found that even if McDonald had an enhanced view of Pikulski's credibility, corresponding credibility did not logically transfer to other police detective witnesses and therefore did not enhance the State's case. The court held that even if prejudice was to be presumed, the State had adequately rebutted the presumption by showing that Jenkins was not actually prejudiced in the verdict and was consequently not entitled to a new trial.

d. Jenkins' Appeal to the Court of Special Appeals.—Jenkins appealed to the Court of Special Appeals, which affirmed the trial court's refusal to grant a new trial. On appeal, Jenkins, inter alia, contended that the improper contact between Pikulski and McDonald deprived him of his right to an impartial finder of fact and that the court's denial of a retrial was legal error. Jenkins maintained that the improper contact gave rise to a "probability of prejudice" because it enhanced Pikulski's credibility, enhanced the credibility of the entire police department, implied Jenkins' guilt, and that the affirmation of the misconduct in the form of upholding the verdict would jeopardize the integrity of the judicial system.

The court, applying an abuse of discretion standard, determined that the factual findings of the trial court on the determination of prejudice were supported by competent evidence; therefore, the decision to deny Jenkins' motion for a trial was sound and did not deny Jenkins due process. The court agreed with the trial court's determination that the defense relied on Pikulski's credibility and that any enhanced credibility of Pikulski in McDonald's mind was only helpful

37. Id. at 102, 806 A.2d at 692. The court stated: "Indeed, part of the defense theory was that [Jenkins] was a victim of mistaken identity and that Barnett had committed the murder with [Barnett's] brother, not with [Jenkins]. Barnett's having been found guilty was consistent with that theory." Id.
38. Id.
39. Id. at 101-02, 806 A.2d at 692.
40. Id. at 101, 806 A.2d at 692.
41. Id. at 141, 806 A.2d at 716.
42. Id. at 102, 806 A.2d at 692.
43. Id., 806 A.2d at 693.
44. Id. at 111, 806 A.2d at 698.
to Jenkins' defense.\textsuperscript{45} Relying on the trial record, the court found that because Pikulski was not tied strongly to either side of the case, it would be incorrect to assume that she endorsed a particular outcome of the case or communicated a desired particular outcome to McDonald.\textsuperscript{46} Finally, the court rejected the argument concerning the preservation of the public image of the criminal justice system because it was not raised during trial.\textsuperscript{47}

Jenkins appealed to the Court of Appeals.\textsuperscript{48} The court granted \textit{certiorari} to consider whether the trial judge erred in refusing to grant Jenkins' request for a new trial after it ascertained that a juror and a State's witness engaged in \textit{ex parte} communications during the trial.\textsuperscript{49}

\textbf{2. Legal Background.—The Sixth Amendment guarantees that a defendant in a criminal prosecution will be judged by an impartial jury of his peers.\textsuperscript{50} Since the adoption of the "impartial jury" standard, the federal and state judicial systems have been in search of a just, yet realistic and efficient method of ensuring this fundamental right. The United States Supreme Court has opined that impartiality is subjective and is, therefore, difficult to encapsulate in a rule or standardized test.\textsuperscript{51} Though "impartiality" implies absolute juror "indifference," the Supreme Court and Maryland courts have determined that the right to an impartial jury is only violated, particularly as a result of juror communications with third parties, when the juror communications have a prejudicial effect on the outcome of the defendant's trial.\textsuperscript{52} Both the Supreme Court and the Maryland courts have con-

\textsuperscript{45} \textit{Id.} at 112, 806 A.2d at 698. The court noted that "a trial court may reasonably find that extrinsic evidence that actually assists a defendant's case is not prejudicial to him and therefore, not sufficient evidence upon which to direct a mistrial." \textit{Id.}, 806 A.2d at 699 (citing Allen \textit{v. State}, 89 Md. App. 25, 49, 597 A.2d 489, 501 (1991)).

\textsuperscript{46} \textit{Id.} at 115, 806 A.2d at 700.

\textsuperscript{47} \textit{Id.} at 115-16, 806 A.2d at 700-01.

\textsuperscript{48} Jenkins \textit{II}, 375 Md. at 288, 825 A.2d at 1010.

\textsuperscript{49} \textit{Id.} at 289, 825 A.2d at 1010-11.

\textsuperscript{50} U.S. CONST. amend. VI (stating in relevant part that "[i]n 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"). The Fourteenth Amendment extends this right to defendants in state proceedings. U.S. CONST. amend. XIV, § 1 (stating that no state can "deprive any person of life, liberty, or property, without due process of law . . . ").

\textsuperscript{51} See, \textit{e.g.}, United States v. Wood, 299 U.S. 123, 145-146 (1936). Chief Justice Hughes stated: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." \textit{Id.}

\textsuperscript{52} See United States \textit{v. Olano}, 507 U.S. 725, 738 (1993) (noting that it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote" and that the ultimate inquiry demanded by due process is whether the miscon-
cluded that actual prejudicial effect, not inconsequential bias, is required in order for a defendant’s due process rights to be violated. However, the Maryland court’s strict adherence to Maryland Rule 5-606 introduces a complexity in determining actual prejudice resulting from the rule’s preclusion of post-verdict juror testimony regarding jurors’ subjective decision-making process. In order to ensure that trial court judges are accorded the proper discretion, Maryland law has a well-established abuse of discretion standard of review to both assess and assure the protection of the trial court judges’s superior vantage point in granting or denying a defendant’s motion for a new trial.

a. The Development of the Supreme Court’s “Ultimate Inquiry” into Jury Prejudice: “Did the Intrusion Affect the Jury’s Deliberations and Thereby its Verdict?” —The right to trial by a jury whose decision is based solely on evidence developed at trial is a fundamental principle of American jurisprudence. As a result, communications between deliberating jurors and influential third parties inject doubt on the jurors’ ability to make a decision regarding the guilt of the defendant based solely upon the evidence submitted at trial. In 1892, the Supreme Court, in Mattox v. United States, addressed the concern of potential prejudice resulting from juror-third party contact by adopting a rule forbidding such contact and invalidating a verdict unless the State could show that no harm resulted from the contact.

In Remmer v. United States, the Court considered the potential effect a third party who attempted to bribe a juror had on the outcome of the trial. The Court created a procedural mechanism to
conduct a post-trial determination of prejudice to a defendant resulting from private communications between sitting jurors and third parties.\textsuperscript{63} The Court determined that private communications between jurors and third parties about the case presently pending before the court is "presumptively prejudicial."\textsuperscript{64} The Court further stated that the presumption of prejudice was rebuttable and that the State bears the burden of establishing that the communication did not harm the defendant.\textsuperscript{65} The Court held that where communication takes place between a sitting juror and a witness, the trial court should conduct a hearing with all interested parties to determine the nature and circumstances of the contact during the trial, the effect of the contact upon the juror, and whether the contact had a prejudicial effect upon the defendant.\textsuperscript{66} The Court then remanded the case and directed the lower court to grant a new trial if it determined that the prejudice affected the jury's decision making process.\textsuperscript{67}

In \textit{Turner v. Louisiana},\textsuperscript{68} the Court did not rely on \textit{Remmer} explicitly, but it conducted a \textit{Remmer}-like hearing to determine whether deputy sheriffs who attended to the jury and simultaneously served as witnesses in the trial prejudiced the defendant.\textsuperscript{69} In its opinion, the Court reproduced a portion of the record transcribed from the hearing where one of the deputies testified about his relationship with the jurors.\textsuperscript{70} The deputy testified that he had not talked about the case with any of the jurors but throughout the course of the trial, he had repeatedly spoken with the jurors, ate meals with them, ridden in the same vehicles with them, and had made acquaintances with most of the jurors.\textsuperscript{71} From the deputy's testimony, the Court established that the continuous association with the jurors throughout the three-day trial, notwithstanding a lack of any conversation about the trial itself, was prejudicial.\textsuperscript{72} Expanding the Court's holding in \textit{Remmer}, the \textit{Turner} Court determined that the establishment of a jury's confidence in a witness, in addition to direct conversations about the matter pend-

\begin{itemize}
\item \textsuperscript{63} \textit{Id.} at 229.
\item \textsuperscript{64} \textit{Id.}
\item \textsuperscript{65} \textit{Id.}
\item \textsuperscript{66} \textit{Id.} at 229-30.
\item \textsuperscript{67} \textit{Id.} at 230.
\item \textsuperscript{68} 379 U.S. 466 (1965).
\item \textsuperscript{69} \textit{Id.} at 468.
\item \textsuperscript{70} \textit{Id.} at 468-69 n.6.
\item \textsuperscript{71} \textit{Id.}
\item \textsuperscript{72} \textit{Id.} at 473.
\end{itemize}
ing before the jury specifically addressed in Remmer, had the capacity to prejudice the defendant.73

In Smith v. Phillips,74 the Court considered whether a sitting juror who had a pending application in the District Attorney’s Office, assumedly predisposing the juror to favor the prosecution’s case, violated the defendant’s due process rights.75 In considering the defendant’s due process claim, the Court articulated that “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.”76 The Court reasoned that voir dire77 and protective instructions,78 though effective, could not eliminate every influence that may affect a juror’s decision and that a Remmer-like hearing could determine whether an influence was prejudicial.79 Though upholding Remmer’s admonition to conduct an evidentiary hearing upon post-trial allegations of misconduct, the Smith Court did not recognize misconduct as “presumptively prejudicial” and indicated that the burden is on the defendant to establish that the misconduct resulted in “actual bias.”80 In addition to the substantive requirements of due process set forth in Remmer and Turner, the Smith court recognized the procedural role of the trial judge in preventing prejudicial occurrences and determining the ultimate effect of alleged misconduct.81

Finally, in United States v. Olano,82 the Court considered whether the presence of alternate jurors during jury deliberations was prejudicial to the defendant.83 In examining the procedure for determining

73. Id. at 474.
74. 455 U.S. 209 (1982).
75. Id. at 212.
76. Id. at 217.
77. Voir dire helps to alleviate the problem of juror impartiality by providing judges and counsel from both sides the opportunity to determine whether any member of the venire panel are predisposed, either directly or indirectly, to harbor bias or prejudice that would affect their ability to decide the case solely on the evidence before it. Davis v. State, 333 Md. 27, 35-36 (1993).
78. Though the actual effect of jury instructions has been the subject of speculation, protective instructions are intended to assist juries in reaching a verdict according to the law as opposed to their own assumptions about the law or predispositions toward a particular outcome in a case. See Walter W. Steele, Jr. & Elizabeth G. Thornburg, Jury Instructions: A Persistent Failure to Communicate, 67 N.C. L. REV. 77, 96 (1988); see also Firoz Dattu, Illustrated Jury Instructions: A Proposal, 22 LAW & PSYCHOL. REV. 67, 68 (1998).
79. Smith, 455 U.S. at 217.
80. Id. at 215. The Court provided that “[t]his Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.” Id. (citing Remmer v. United States, 347 U.S. 227 (1954)).
81. Id. at 217.
83. Id. at 727.
whether a defendant's due process rights were violated, the Court reaffirmed the use of evidentiary hearings proposed in Remmer. 84 More significantly, the Court clarified that regardless of a presumption of prejudice or a specific showing of prejudice, the ultimate inquiry is: "Did the intrusion affect the jury's deliberations and thereby its verdict?" 85 In support of this finding, the Court insisted that "reversal would be pointless" if no harm resulted from an intrusion. 86 In Olano, the Court definitively clarified the purpose of the Remmer-like hearing and insisted that a defendant's substantive due process right to an impartial jury is violated only when the court finds an actual prejudicial effect on the outcome of the trial. 87

b. Maryland's Determination of the Prejudicial Effect of Juror Misconduct.—In addition to a criminal defendant's right to an impartial jury under the Sixth Amendment, the right to an impartial jury is a right explicitly recognized in Article 21 of the Maryland Declaration of Rights. 88 Maryland courts have determined that the right to an impartial jury is violated when the defendant is actually harmed by misconduct between a juror and a third party. 89 Maryland courts have adopted Remmer's presumption of prejudice and the Remmer-like hearing to determine the potentially prejudicial nature of misconduct between jurors and third parties. 90 The Remmer-like hearings in Maryland courts, however, are limited in the review that can occur because a juror is prohibited under Maryland Rule 5-606 from making statements regarding any influences on his decision-making process. 91 Consequently, the Remmer-like hearings conducted in Maryland cannot directly inquire into the potential prejudice in a juror's subjective decision-making process, and are thus limited solely to the external facts surrounding the juror-witness misconduct and the trial itself. 92

84. Id. at 739-40.
85. Id. at 739.
86. Id. at 738.
87. Id. at 739-40.
88. MD. DECL. OF RTS. art. 21 (stating in relevant part "[t]hat in all criminal prosecutions, every man hath a right to . . . a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty").
90. Id. at 421, 541 A.2d at 1006.
91. MD. R. 5-606. Under Rule 5-606, jurors are unable to testify as to the effect of anything upon any of the jurors' minds or emotions or anything that may have influenced a juror's mental decision making in connection with the verdict. Id.
92. Id.
(1) The Maryland Courts' Preservation of Impartial Juries in Light of Juror Misconduct.—In Eades v. State, the Court of Special Appeals considered the potential prejudicial effect of a sitting juror discussing a procedural evidentiary issue with her husband, who was a lawyer. The court recognized the potential for such communications between jurors and third parties to prejudice the jury's decision. While the Eades court recognized that the Supreme Court's decision in Smith, which held that it was improper to impute bias when a juror had a job application pending with the District Attorney's office, may have cast doubt on Remmer's required "presumption of prejudice," the court continued to embrace the Remmer presumption. After finding a presumption of prejudice, the court also followed Remmer's corresponding requirement of a post-trial evidentiary hearing to determine whether the defendant was prejudiced by improper contact between jurors and third parties. After reviewing the evidence, the court affirmed the trial court's consideration of the contents of the juror-third party conversation and its relation to the appellant's guilt or innocence—and not the level of juror misconduct. The court affirmed the trial court's decision to deny Eades' motion for retrial.

In Allen v. State, the Court of Special Appeals considered the potential prejudicial effect of improper communications between an alternate juror and a sitting juror. The court stated that a trial court's determination of prejudice must consider the probability of prejudice in relation to specific circumstances of each case. In Allen, the court posited three distinct methods of dealing with potentially prejudicial conduct: (1) if the court finds an affirmative showing of prejudice to the defendant resulting from improper communications, the case requires reversal; (2) if the court can make no affirmative showing of prejudice, then that case does not require

94. Id. at 415, 541 A.2d at 1004.
95. Id. at 420, 541 A.2d at 1006.
96. Id. at 421, 541 A.2d at 1006.
97. Id. Maryland courts have determined that the "evidentiary hearing" required by Remmer must only be sufficiently detailed to afford the judge the opportunity to determine prejudicial effect and that a full evidentiary hearing is not necessary. Id.
98. Id. at 425, 541 A.2d at 1008.
99. Id.
101. Id. at 39, 597 A.2d at 496.
102. Id. at 46, 597 A.2d at 499 ("It is well established in Maryland that in determining whether jury contact is prejudicial, a trial court must balance the probability of prejudice from the face of the extraneous matter in relation to the circumstances of the particular case.") (internal quotation marks omitted).
103. Id. (relying on Eades, 75 Md. App. at 422-23, 541 A.2d at 1007).
reversal;\textsuperscript{104} and (3) if the court is unable to determine the existence of or lack of prejudice, the court is to presume prejudice and then the State assumes the burden of rebutting the presumption of harm.\textsuperscript{105} Maryland courts have been reluctant to grant retrials and therefore require that mistrials be declared only when the circumstances make it absolutely necessary and the record demonstrates that the defendant has suffered clear and egregious prejudice.\textsuperscript{106} Furthermore, the \textit{Allen} court explicitly stated that "[t]he general rule is that a trial court may reasonably find that extrinsic evidence that actually assists a defendant's case is not prejudicial to him and, therefore, not sufficient ground upon which to direct a mistrial."\textsuperscript{107} The \textit{Allen} court reiterated that declaring a mistrial in Maryland trial courts is a "drastic measure" that should be declared only "under extraordinary circumstances and where there is a manifest necessity to do so."\textsuperscript{108}

\textbf{(2) Limited Post-Trial Inquiry Under Maryland Rule 5-606.—}After reasonable allegations of juror misconduct are presented to the court, \textit{Remmer} directs courts to conduct a hearing with all interested parties to determine the nature and circumstances of the contact during the trial, the effect of the contact upon the juror, and whether the contact had a prejudicial effect upon the defendant.\textsuperscript{109} Maryland Rule 5-606 imposes significant limitations on such post-verdict inquiries by prohibiting a juror from making statements regarding influences upon his or her subjective decision-making process.\textsuperscript{110} Maryland Rule 5-606 is the codification of a principle set forth in 1785 in Lord Mansfield's opinion in \textit{Vaise v. Delaval}, 1 Term R. 11 (K.B. 1785).\textsuperscript{111}
As a result of Maryland Rule 5-606, Remmer-like hearings in Maryland are limited to factual findings surrounding the trial and alleged misconduct rather than an actual determination of the juror's decision-making process. The continued application of Maryland Rule 5-606 in light of juror-witness misconduct has been historically justified on grounds that to allow such inquiry into jury decision-making would be to violate the confidentiality of jury deliberations and increase the likelihood of abuse by more readily exposing the jury to opportunities for fraud and perjury. Reiterating this pre-Remmer principle, the Eades court justified preserving the rule because it prevents "the harassment of jurors" by losing parties and supports the finality of judicial decisions.

The Eades court reiterated that Maryland has adopted a strict interpretation of the rule precluding "a juror from testifying as to any matter that may have affected the verdict." The court, however, noted that even if Maryland maintained a strict application of Maryland Rule 5-606, a pre-verdict exception allows the court to question individual jurors about circumstances that may have affected deliberations before a final verdict is rendered. Through a procedural element often incorporated as part of a jury trial, the judge has the opportunity to examine the jury to determine whether their verdict would be subject to question as a result of misconduct or other irregularities. The court reasoned that this pre-verdict exception supports the public policy rationale for the rule to be maintained while giving the court an opportunity to ensure proper grounds for the final verdict. The Maryland court's strict adherence to Maryland Rule 5-606 and the allowance of only a pre-verdict exception evidences the court's desire to balance the court's discretion in ensuring fair trials and the protection of the jury system.

secrets of the jury room and afford an opportunity for fraud and perjury." Id. at 417, 541 A.2d at 1004.

112. Id.

113. See Brinsfield v. Howeth, 110 Md. 520, 531, 73 A.2d 289, 294 (1909). The Brinsfield court insisted that allowing inquiry into jury deliberations would "open such a door for tampering with weak and indiscreet men that it would render all verdicts insecure; and . . . . [would] permit a verdict, openly and solemnly declared in the Court, to be subverted by going behind it and inquiring into the secrets of the jury room." Id.


115. Id. at 418, 541 A.2d at 1005.

116. Id. at 419, 541 A.2d at 1005.

117. Id.

118. Id.
Abuse of Discretion Standard: The Maryland Courts’ Deference to Trial Court’s Denial of Motion for New Trial.—In Maryland, a trial judge’s discretion extends to decisions regarding juror misconduct and the misconduct of others that potentially may affect the jury’s impartiality. A trial court’s denial of a motion for a new trial is subject to reversal only when the appellate court determines that the trial court abused its discretion. Maryland courts have given considerable deference to the trial judge’s determination of prejudice and the decision to grant or deny a motion for a new trial. Maryland courts have applied this heightened standard of review because the trial judge has the exclusive opportunity and superior vantage point to observe jurors during trial and determine whether a juror’s misconduct has compromised the defendant’s right to an impartial jury.

The abuse of discretion standard demands that trial judges not act in an “arbitrary or capricious” manner or “beyond the [letter or] reason of the law.” In other words, the trial record must adequately reflect the judge’s sound application of his or her discretion. Though substantially deferential to the trial judge, the Court of Appeals has noted that this discretion is not “boundless.” The court has allowed a trial judge’s discretion to expand and contract based upon the facts of each case and whether the trial judge had an adequate opportunity during the trial to determine whether the jury reached a fair and just result. Though trial court decisions are subject to appellate review, the abuse of discretion standard attempts to ensure that trial court judges will have a reasonable opportunity to thoughtfully and efficiently assess whether misconduct has resulted in prejudice to the defendant.

3. The Court’s Reasoning.—In Jenkins v. State, the Court of Appeals considered whether the trial court abused its discretion in refus-
ing to grant Jenkins a new trial when the court ascertained, post-verdict, that a juror and a witness engaged in ex parte communications during the trial. The Court of Appeals reversed the decision of the Court of Special Appeals and held that egregious misconduct violated Jenkins' right to an impartial jury and that the trial court's denial of Jenkins' motion for a retrial was an abuse of discretion. Judge Cathell, writing for a unanimous court, determined that a presumption of prejudice arose from mid-trial conversations between Detective Pikulski and Juror McDonald and that the presumption of prejudice could not be adequately rebutted under Maryland Rule 5-606's limitation on post-verdict jury inquiry.

The court began by recalling the judicial system's long tradition of holding that communications between jurors and witnesses are improper and will violate a criminal defendant's constitutional right to an impartial jury unless the State can prove that the misconduct was harmless. The court relied on the Supreme Court's decision in Remmer v. United States, noting that instances of misconduct between jurors and third parties are presumed to be prejudicial and that the State assumes the burden of showing the harmlessness of the contact. The court noted that Jenkins is the first case in Maryland to require an interpretation of the presumption of prejudice established in Remmer. Nevertheless, the court noted that the Maryland courts' interpretations of prejudice before the Remmer decision maintained that a finding of improper communication and an inability to show such conduct actually prejudiced the defendant creates a presumption of prejudice. The court referenced and cited approvingly the Court of Special Appeals decision to adopt the Remmer presumption of prejudice considered in Eades and Allen.

Next, the court considered the effect of Maryland Rule 5-606 on post-verdict determinations of juror prejudice and concluded that "[t]here simply is no way in a specific case for the trial court in that

128. Jenkins II, 375 Md. at 289, 825 A.2d at 1011.
129. Id. at 340-41, 825 A.2d at 1041.
130. Id.
131. Id. at 301, 825 A.2d at 1018.
132. Id. at 301-02, 825 A.2d at 1018-19 (quoting Remmer v. United States, 347 U.S. 227, 229 (1954)).
133. Id. at 302, 825 A.2d at 1019.
134. Id. at 304-05, 825 A.2d at 1020.
135. Id. at 305-06, 825 A.2d at 1021. Although the court recognized the potential limitation of the presumption of prejudice introduced in the decisions of Smith v. Phillips, 455 U.S. 209 (1982), and United States v. Olano, 507 U.S. 725 (1993), it concluded that the limitations did not apply to situations where egregious misconduct or improper contact occurs between jurors and third parties or witnesses. Id. at 316, 825 A.2d at 1027.
case to meaningfully investigate the matter of juror motives and impartiality during jury deliberations after the verdict is in and accepted."136 The court also noted that overcoming the presumption of prejudice is particularly difficult post-verdict because the limited inquiry permitted under Maryland Rule 5-606 lacks the requisite capacity to show that the improper conduct did not affect the juror’s deliberations.137 The court noted that in both *Eades* and *Allen* the trial court had the opportunity to investigate thoroughly the effect of juror misconduct, as it was brought to the attention of the court prior to when the jury rendered its verdict.138

Before focusing on the specific facts of the case, the court turned to the Supreme Court’s decision in *Turner*, which it considered helpful in analyzing *Jenkins*.139 The court recalled that in *Turner*, two State’s witnesses also served as parish deputy sheriffs who, during the trial, ate, talked, and generally associated with the jurors.140 The Court of Appeals noted that in *Turner*, the Supreme Court reversed the trial court’s decision not to grant a retrial and reasoned that the continual association exhibited extreme prejudice and essentially evidenced that the jury would have come to the same conclusion whether a formal trial had or had not been held.141 The court highlighted *Turner*’s finding that the circumstances of that case “operated to subvert [the] basic guarantees of trial by jury.”142 The court further stated its belief that the situation in *Jenkins* was akin to the situation in *Turner*.143

Turning to *Jenkins*, the court reasoned that under its interpretation of the Supreme Court’s precedent in *Smith* and *Olano*144 and under the Maryland Declaration of Rights, a presumption of prejudice is required in cases where egregious juror-witness misconduct jeopardizes the defendant’s right to due process.145 The court opined that the right to an impartial jury is a fundamental right that “cannot be compromised by even the hint of possible bias or

136. *Id.* at 308-09, 825 A.2d at 1022 (emphasis added).
137. *Id.* at 309, 316, 825 A.2d at 1023, 1027.
138. *Id.* at 309, 825 A.2d at 1022-23.
139. *Id.* at 316, 825 A.2d at 1027.
140. *Id.* at 316-17, 825 A.2d at 1027.
141. *Id.* at 318, 825 A.2d at 1028 (citing *Turner* v. *Louisiana*, 379 U.S. 466, 471-74 (1965)).
142. *Id.* at 317, 825 A.2d at 1028 (emphasis omitted).
143. *Id.* at 318, 825 A.2d at 1028.
144. *Id.* at 319, 825 A.2d at 1028. The court read the Supreme Court decisions in *Smith* and *Olano* to not eviscerate the concept of egregious actions established in *Remmer* and *Turner*. *Id.*
145. *Id.*
prejudice that is not affirmatively rebutted."\(^{146}\) In focusing on the im-
proper contact between Pikulski and McDonald, the court reasoned
that even if the presumption of prejudice doctrine did not exist in all
instances of misconduct, the concept of egregious actions in *Remmer*
and *Turner* demand that the deliberate and personal nature of the
interaction be considered presumptively prejudicial.\(^{147}\) In determin-
ing the egregiousness of the misconduct between Pikulski and Mc-
Donald, the court cited Pikulski and McDonald’s blatant refusal to
avoid contact with one another, the extent of their contact, and their
shared failure to inform the court of their interaction during the
trial.\(^{148}\) While recognizing that not all incidental contacts are inher-
ently prejudicial, the court reasoned that the totality and intentional-
ality of the contact in explicit violation of court orders between Pikulski
and McDonald raised serious concerns.\(^{149}\)

After establishing the existence of a rebuttable presumption of
prejudice, the court considered the State’s attempt to rebut the pre-
sumption. First, the State argued that because the defense embraced
Pikulski’s testimony, any impartiality would have worked in the defen-
dant’s favor and would not be, by definition, prejudicial to the defen-
dant.\(^{150}\) The court dismissed the argument and stated that the issue
was not the believability of Pikulski but that McDonald, as a result of
the friendship, would be likely to rule in the State’s favor because
Pikulski was a State’s witness.\(^{151}\) The court continued by reiterating
that Rule 5-606 would make this issue nearly impossible to resolve.\(^{152}\)

Next, the court agreed with Jenkins’ argument that the enhanced
credibility of Pikulski would have a spillover effect that would enhance
the credibility of all of the State’s police witnesses and thus further

\(^{146}\) *Id.*, 825 A.2d at 1028-29.
\(^{147}\) *Id.*, 825 A.2d at 1029.
\(^{148}\) *Id.* at 319-20, 825 A.2d at 1029-30. The court cited the trial court’s instruction to
Pikulski not to discuss her testimony with any other witness and the instruction to McDon-
ald to “do everything reasonable within your power to avoid contact with any of the wit-
nesses . . . . In addition, please avoid any contact with the . . . witnesses involved in this
case.” *Id.* at 320-21, 825 A.2d at 1029-30 (emphasis omitted). The court had instructed the
jury to write the court a note as soon as possible if anything contrary to the instructions
occurred. *Id.* at 321, 825 A.2d at 1030. However, neither Detective Pikulski nor McDonald
reported the incident. *Id.* at 323, 825 A.2d at 1031. The court heavily criticized Detective
Pikulski’s actions in light of her twenty-two years of police experience, numerous testimo-
nies in other cases, and her remaining under subpoena while the conversation occurred.
*Id.*

\(^{149}\) *Id.* at 321-22, 825 A.2d at 1030.
\(^{150}\) *Id.* at 329, 825 A.2d at 1034-35.
\(^{151}\) *Id.*, 825 A.2d at 1035.
\(^{152}\) *Id.; see supra* note 3 and accompanying text (providing language of Rule 5-606).
prejudice the defendant.\textsuperscript{153} The court reasoned that the \textit{voir dire} process is intended to give parties the option of excluding jurors who know or have had contact with any of the parties, attorneys, or witnesses.\textsuperscript{154} The court ruled that the failure to alert the trial court of the mid-trial conduct deprived Jenkins of the right to conduct a mid-trial \textit{voir dire} of the jurors to determine the potential prejudicial effect this relationship would have on his decision-making process.\textsuperscript{155}

The court conceded that it could not conclude that prejudice actually occurred in the case.\textsuperscript{156} However, the court stated that the heightened possibility of prejudice in this particular case demanded that the "\textit{only method of affirmatively rebuffing} prejudice to the defendant was to ask McDonald, in violation of Rule 5-606, about his thought process during jury deliberations.\textsuperscript{157} The court reasoned that the imposition of Rule 5-606 would not allow the prejudice to be rebutted.\textsuperscript{158}

Finally, the court argued that, most importantly, a failure to find the egregious conduct prejudicial would compromise the standard of impartiality necessary to uphold the integrity of the jury trial process.\textsuperscript{159} The court stated that the appearance of impropriety resulting from such egregious misconduct questions the integrity of the trial process and diminishes the perception and integrity of the system in the mind of defendants and the public.\textsuperscript{160} The court found that the State offered no rebuttal to the damage that would be caused to the jury system by finding the misconduct in this case non-prejudicial.\textsuperscript{161} The court declared that it had an inherent interest in protecting the integrity of the jury system and concluded that the verdict could not stand.\textsuperscript{162}

4. \textit{Analysis}.—In \textit{Jenkins v. State}, the Court of Appeals of Maryland held that mid-trial communications between a juror and a State's witness were egregious and created a virtually irrefutable presumption of prejudice that the State could not rebut under the restrictions on post-verdict juror testimony imposed by Maryland Rule 5-606, which

\textsuperscript{153} Jenkins II, 375 Md. at 325, 825 A.2d at 1032.
\textsuperscript{154} Id. at 326-27, 825 A.2d at 1033.
\textsuperscript{155} Id. at 327, 825 A.2d at 1033.
\textsuperscript{156} Id. at 329, 825 A.2d at 1034.
\textsuperscript{157} Id. at 329-30, 825 A.2d at 1035 (emphasis added).
\textsuperscript{158} Id. at 333, 825 A.2d at 1037.
\textsuperscript{159} Id. at 327-28, 825 A.2d at 1034.
\textsuperscript{160} Id. at 328, 825 A.2d at 1034.
\textsuperscript{161} Id. at 333, 825 A.2d at 1037.
\textsuperscript{162} Id.
prohibits inquiry into the jury’s or a juror’s decision-making process. The court concluded that the trial court abused its discretion in not granting Jenkins a retrial. Unlike the trial court and the Court of Special Appeals, the Court of Appeals was distracted by the particularly egregious nature of the juror-witness misconduct and the limitations of Maryland Rule 5-606, and consequently failed to fully consider the actual prejudicial effect of the juror-witness misconduct on the outcome of the trial. The court’s failure to consider the actual prejudicial effect of the juror-witness misconduct on the outcome of the trial suggests a bright-line rule that any post-verdict determinations of egregious, mid-trial juror misconduct demand an automatic retrial. The Jenkins precedent removes a trial judge’s discretion to determine the actual effect of mid-trial juror misconduct and results in a significant deviation from the court’s historic application of an abuse of discretion standard to a trial court’s denial of a motion for a new trial. Though the Jenkins decision was couched in an effort to protect the integrity of the jury system, the court reversed a reasonably determined verdict, ironically harming the efficiency and thereby the integrity of the jury system it was so vigilantly trying to protect. The court could have avoided this result by fully considering the actual prejudicial effect of the misconduct on the jury verdict and by appropriately deferring to the trial court’s superior ability to make such a determination.

a. A Distracted Court Demands that Egregious Misconduct is Necessarily Prejudicial.—The Jenkins court focused on the nature of the juror-witness misconduct to the point of distraction and, resultantly, suggested that a post-verdict determination of egregious mid-trial misconduct cannot be rebutted in Maryland. In contrast to the Court of Appeals, the trial court and Court of Special Appeals, even with the limitations of Maryland Rule 5-606, were able to remain focused on determining the prejudicial effect on the outcome of the trial and on the defendant. The Court of Appeals, however, focused almost ex-

163. Id.
164. Id.
165. See infra notes 170-197 and accompanying text.
166. See infra notes 198-211 and accompanying text.
167. See infra notes 198-211 and accompanying text.
168. See infra notes 212-224 and accompanying text.
169. See infra notes 170-224 and accompanying text.
170. See Jenkins II, 375 Md. at 340, 825 A.2d at 1041 (holding that the egregious misconduct and the prohibitions of Maryland Rule 5-606 create “virtually irrefutable” prejudice to the defendant.)
clusively on the egregiousness of the misconduct rather than on the prejudicial effect of such conduct on the verdict and on the defendant. The court's focus represents a significant departure from the prejudicial effect inquiry established by the Supreme Court in Olano and by Maryland courts in Eades and Allen.

The Court of Appeals' unyielding focus on what all parties admit to be misconduct evidences the distraction of the court. The court reasoned that the gross and excessive nature of the misconduct is itself evidence of prejudice to the defendant. The court recited at length the trial court's orders and primarily analyzed the prejudicial effect of the misconduct from the perspective of McDonald and Pikulski's conduct violating these orders, not from the substantive nature or effect of the conduct on the verdict. The court's focus on the violations rather than the substantive effect of the conduct is further evidenced in the court's statement that "[t]hese gross violations of the court's orders inherently prejudice [the] petitioner . . . ." Upon considering the potential public perceptions of the integrity of the jury system by allowing this case to stand, the court explicitly stated that its decision was based on a desire to admonish the misconduct and to show the public that such conduct would not be tolerated.

While this determination of egregiousness and desire to protect the integrity of the jury system is not inherently problematic, the court's focus on the violation of the court orders and admonishing of the juror-witness misconduct is more akin to a parental reprimand rather than a substantive determination and explanation of actual prejudice to the defendant required under Olano and Allen.

The court's focus on the egregious nature of the misconduct prevented it from determining the actual prejudicial effect required by the Supreme Court and Maryland case law. In Olano, the Supreme

172. See infra notes 175-178 and accompanying text.
173. See supra notes 82-87 and accompanying text (demanding that the effect upon the verdict, not the nature of the misconduct, is the ultimate inquiry).
174. See supra notes 93-108 and accompanying text (reasoning that evidence that actually assists a defendant's case is not prejudicial).
175. See, e.g., Jenkins II, 375 Md. at 323, 825 A.2d at 1031 (remarking on the incredibility of a police officer engaging in the misconduct of going to lunch with a juror).
176. Id. at 319, 825 A.2d at 1029.
177. Id. at 320-21, 825 A.2d at 1029-50. The court recited at length the explicit instructions given to both McDonald and Pikulski to refrain from having any contact with other witnesses, jurors, or parties and to notify the court immediately if anything occurred to the contrary. Id.
178. Id. at 324, 825 A.2d at 1032.
179. Id. at 333, 825 A.2d at 1037.
180. Id. at 324-25, 825 A.2d at 1032.
Court indicated that the ultimate inquiry to determine prejudice is: “Did the intrusion affect the jury’s deliberations and thereby its verdict?” The meaning of this inquiry is clarified by the Olano court’s insistence that reversal is pointless if it can be determined that the misconduct imposed no harm to the jury’s verdict. The Olano court’s reasoning reveals that the misconduct’s effect on the verdict, not its level of egregiousness, is the necessary inquiry. In Allen, the Court of Special Appeals echoed this sentiment by reasoning that misconduct that can be reasonably determined to assist a defendant’s case does not prejudice the defendant and is, therefore, an insufficient reason to declare a mistrial. Olano and Allen together reveal that there is a clear distinction between actual prejudice to the defendant and inconsequential bias that ultimately has no effect upon the verdict. An appropriate determination of prejudicial effect to the defendant therefore insists that misconduct, even egregious misconduct, that ultimately works in favor of a defendant’s case, cannot be prejudicial to the defendant.

The Jenkins court’s cursory consideration and dismissal of the State’s argument that any enhanced credibility of Pikulski in the mind of McDonald actually supported Jenkins’ case reveals that it did not undertake a thorough determination of actual prejudice. The court’s minimal consideration of the prejudicial effect on the verdict is also evidenced by the court’s insistence that the “only method” of determining whether the contact was prejudicial to Jenkins would be to ask him, in violation of Maryland Rule 5-606, about his decision-making process. The court’s explicit holding that egregious juror-witness misconduct discovered post-verdict creates a “virtually irrefutable” presumption of prejudice under the constraints of Maryland Rule

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182. Id. at 738 (quoting United States v. Watson, 669 F.2d 1374, 1391 (11th Cir. 1982)). The inquiry in Olano focused on ensuring that the proper verdict is reached rather than determining the level of egregiousness of the misconduct. Id.
183. Id.
186. Olano, 507 U.S. at 739. Olano insists that prejudice to the defendant demands that the defendant suffer some harm as a result of the conduct. Id. If egregious misconduct can ultimately be determined to have helped the defendant, then the defendant has suffered no harm and the constitutional right to an impartial jury has not been violated. Id. The logical extension of this argument insists that if misconduct can be determined to have inured to the defendant’s benefit and the defendant still loses the case, the jury’s decision is in fact reinforced because it shows that the defendant could not prevail even with the benefit of such misconduct.
187. See Jenkins II, 375 Md. at 329, 825 A.2d at 1034-35.
188. Id., 825 A.2d at 1035.
5-606 further illustrates the court's focus on a juror's subjective decision-making process, not a determination of actual prejudice to the verdict as set forth in Olano and Allen. By insisting on knowledge of McDonald's decision-making process to determine prejudice, the Court of Appeals foreclosed on the admonition of the Supreme Court and previous Maryland decisions that bias that inures to a defendant's benefit does not have the capacity to be prejudicial. The Jenkins court's focus on the egregiousness of the conduct, rather than the substantive effect of the conduct on the outcome of the trial, represents a significant departure from substantive determinations of prejudice established in Olano and in Allen.

b. The Court of Appeals Did Not Accord the Trial Court Proper Deference.—In summarily dismissing the trial court's determination of actual prejudice, the Court of Appeals did not accord the trial judge the highest level of deference required—an abuse of discretion standard of review. As noted previously, the abuse of discretion standard demands that a trial judge only be reversed if he or she exercises discretion in an "arbitrary or capricious" manner or "without the letter or beyond the reason of the law." Acting in accordance with Remmer, the trial court in Jenkins immediately held an evidentiary hearing to determine the nature and effect of the misconduct.

While staying within the bounds of Maryland Rule 5-606, the trial court determined the extent, nature, and effect of the contact between Pikulski and McDonald. After viewing the trial and post-trial process in its entirety, the trial court determined that the defense's reliance upon Pikulski's testimony to discredit the State's case revealed that any enhanced credibility of Pikulski in the mind of McDonald actually assisted Jenkins' case. The trial court also based its decision upon a reasonable determination that Pikulski was a neutral witness with no strong ties to either side of the case and that she never indicated to McDonald a preferred outcome or opinion regarding the case. The trial record, as required under Ricks v. State, reflected

189. Id. at 340-41, 825 A.2d at 1041.
190. Olano, 507 U.S. at 739; Allen, 89 Md. App. at 49, 597 A.2d at 501.
193. Jenkins II, 375 Md. at 375 Md. 1352, 825 A.2d at 1010.
194. Record at 1631-39, Jenkins II (No. 107).
195. Id. at 1637, 1639.
that the trial judge's determinations were reasonable, appropriately supported, and well within his accorded discretion.\footnote{197}

c. Failure to Provide Proper Deference to Trial Court Demands Retrial Despite Possibility of Determining Prejudicial Effect of Juror Misconduct.—Despite the court's couching its opinion under the unusual circumstances of this case, the effect of the court's holding and failure to afford the trial court the proper deference will clearly extend beyond Jenkins.\footnote{198} In holding that egregious juror-witness misconduct discovered post-verdict results in a virtually irrefutable presumption of prejudice under the constraints of Maryland Rule 5-606, the court has removed the trial judge's discretion to determine whether egregious conduct amounts to actual prejudice and warrants a retrial.\footnote{199} Though not quite a bright-line rule, the court's reasoning and holding suggest that all post-verdict determinations of egregious juror misconduct require an automatic retrial.\footnote{200}

The court's failure to afford the trial court proper discretion in this case is in direct contravention to the very premise of the rebuttable presumption of prejudice and evidentiary hearing established in Remmer and subsequently followed by the Supreme Court in Olano\footnote{201} and Smith,\footnote{202} and the Maryland courts in Eades\footnote{203} and Allen.\footnote{204} Although Remmer established the principle of a presumption of prejudice in cases of irregularities involving sitting jurors and third parties, Remmer also provided a procedural mechanism by which trial court judges had the capacity to make a substantive determination as to any prejudicial effect of the misconduct on a defendant's due process rights.\footnote{205} As indicated above, Olano specifically clarified that the necessary inquiry in the case of juror misconduct is "Did the intrusion

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\footnote{197. Jenkins I, 146 Md. App at 116, 806 A.2d at 701.}

\footnote{198. Jenkins II, 375 Md. at 340, 825 A.2d at 1041.}

\footnote{199. Id. at 340-41, 825 A.2d at 1041.}

\footnote{200. Id.}

\footnote{201. See supra notes 82-87 and accompanying text (affirming the use of evidentiary hearings established in Remmer and utilizing the hearing to determine the actual effect of juror-witness misconduct).}

\footnote{202. See supra notes 74-81 and accompanying text (upholding the Remmer Court's admonition to conduct an evidentiary hearing and using it to determine whether actual bias resulted from the misconduct).}

\footnote{203. See supra notes 93-99 and accompanying text (utilizing Remmer's presumption of prejudice and the post-trial evidentiary hearing to determine whether the defendant was actually prejudiced).}

\footnote{204. See supra note 105 and accompanying text (reasoning that a presumption of prejudice is assumed if the record does not show whether the misconduct prejudiced the defendant).}

\footnote{205. Remmer v. United States, 347 U.S. 227, 229, (1954).}
affect the jury's deliberations and thereby its verdict?"\textsuperscript{206} The *Olano* Court’s provision of a determinative question logically demands that trial court judges be afforded the discretion necessary to evaluate the circumstances surrounding the misconduct and provide an answer. In denying the trial court discretion to determine whether egregious misconduct discovered post-verdict had an actual prejudicial effect on the defendant, the *Jenkins* court has essentially removed *Olano*’s inquiry from the trial court’s consideration and has replaced it with a demand for an automatic retrial.\textsuperscript{207}

The court’s limitation of the trial judge’s discretion is further evidenced by the court’s failure to adopt any assessment that considers the actual prejudicial effect of the misconduct on the defendant.\textsuperscript{208} Despite the court not finding the State’s argument that the juror’s misconduct inured to Jenkins’ benefit persuasive, the court, at a minimum, should have acknowledged that egregious misconduct could in fact inure to a defendant’s benefit, and that under those circumstances the defendant should not be granted a retrial.\textsuperscript{209} For example, if the court discovered post-verdict that Juror McDonald had attended a retreat and had lunch with the defense’s star witness during the trial, the court assumedly would not grant Jenkins a retrial because Jenkins would clearly not have been prejudiced by such misconduct. The *Jenkins* court’s reasoning, however, allows for no such determination because it is the egregiousness of the misconduct, not the effect of the conduct on the verdict, which determines whether a defendant was prejudiced and should be granted a retrial.\textsuperscript{210} This omission evidences the court’s failure to consider the possibility that the facts surrounding the misconduct, rather than a juror’s subjective decision-making process, could reasonably determine prejudice even within the confines of Maryland Rule 5-606. Post-*Jenkins*, trial court judges will be forced to grant retrials whenever egregious misconduct is determined post-verdict, despite their capacity to reasonably find that the defendant was not actually prejudiced by the verdict.\textsuperscript{211}

d. An Attempt to Protect the Jury System from Egregious Misconduct Fails to Recognize the Harm Done to the Jury System in Unnecessary Reversal.—The *Jenkins* court argued that allowing this case to stand in light of the misconduct would irreparably damage the integrity of the


\textsuperscript{207} *Jenkins II*, 375 Md. at 340-41, 825 A.2d at 1041.

\textsuperscript{208} Id.

\textsuperscript{209} Id. at 329, 825 A.2d at 1053.

\textsuperscript{210} Id.

\textsuperscript{211} See supra notes 204-205 and accompanying text.
jury system.\textsuperscript{212} This argument fails to recognize the damage perpetrated against the integrity of the trial process when cases are unnecessarily reversed and remanded for retrial.\textsuperscript{213} The court reasoned that the "inherent appearance of impropriety casts a shadow over the trial process, which necessarily diminishes the integrity of the system in [the] minds of defendants and the public itself."\textsuperscript{214} This admonition by the Court of Appeals reveals that the court is understandably concerned about the public perception of the jury system as a result of extra-judicial influences; however, a broad reading of Remmer's declaration that "[t]he integrity of jury proceedings must not be jeopardized by unauthorized invasions" could be interpreted to admonish "invasions" made by the judiciary that demand retrying a case that was appropriately decided by the lower courts.\textsuperscript{215}

The court demanded that Jenkins be retried in part because of the public perception of impropriety accompanying the juror-witness misconduct in the case.\textsuperscript{216} The court, while indicating that a juror's complaint about published defects in the Jenkins proceedings was not determinative "to any degree" in its opinion, stated that such a response illustrates the types of questions the public may raise about the integrity of the jury system.\textsuperscript{217} The court's suggestion that the juror was upset due to an appearance of impropriety in the judicial system, however, is a misinterpretation of the juror's anger.\textsuperscript{218} The juror expressed anger resulting from wasting two weeks sitting on and rendering a verdict in a case that was going to be retried.\textsuperscript{219} The juror's anger is an example of the public's desire to see cases resolved in a timely and efficient manner.\textsuperscript{220} Protecting the integrity of the jury system demands a holistic approach that includes not retrying cases

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\item \textsuperscript{212} Jenkins II, 375 Md. at 328, 825 A.2d at 1034.
\item \textsuperscript{213} See generally Maryland Judiciary, Annual Report, Statistical Abstract and Court-Related Agencies 2001-02, at DC-9-DC-11 (charting the rising levels of cases that come before the Maryland courts and implying the strain an increased case load puts on the court system).
\item \textsuperscript{214} Jenkins II, 375 Md. at 328, 825 A.2d at 1034.
\item \textsuperscript{215} Remmer v. United States, 347 U.S. 227, 229 (1954).
\item \textsuperscript{216} Jenkins II, 375 Md. at 333, 825 A.2d at 1037.
\item \textsuperscript{217} Id. The defense counsel stated, "I also note in one of our footnotes that another juror had contacted chambers after the story had broke in 'The Journal' and had expressed extreme displeasure for having spent two weeks involved in this trial only to find out that there was this serious defect in the proceeding . . . ." Id.
\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} See David B. Rottman & Alan J. Tomkins, Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges, 36 Court Review 24, 28 (1999) (noting that eighty percent of survey respondents do not feel that cases are resolved in a timely manner).
\end{itemize}
that were reasonably decided at the trial court level and appropriately affirmed by the intermediate appellate court.\textsuperscript{221}

Moreover, the public wants to know that court will safeguard litigants’ inherent rights, but the public also wants to know that the time they sacrificed or could sacrifice in the future as a member of a jury will be put to good use.\textsuperscript{222} Despite the egregious misconduct in this case, a well-reasoned opinion clearly defining prejudice as that which harms the defendant through the rendering of an ill-affected verdict would presumably be sufficient to justify the opinion for the sake of public image. As stated by the Court in \textit{Smith}, “due process does not require a new trial every time a juror has been placed in a potentially compromising situation.”\textsuperscript{223} Thus, the Court of Appeals should have appropriately acknowledged the misconduct and reasoned that the misconduct did not violate due process in this case because there was no prejudicial effect on the verdict.\textsuperscript{224} If the court had adopted this approach, the court could have established a standard that properly evaluates misconduct in light of its prejudicial effect upon the verdict, affirmed the reasonable findings of the trial court, and maintained the integrity of the judicial system.

5. \textit{Conclusion}.—In \textit{Jenkins v. State}, the Court of Appeals of Maryland held that mid-trial communications between a juror and State’s witness were egregious and created a “virtually irrefutable” presumption of prejudice that the State could not rebut under the restrictions on post-verdict juror testimony imposed by Maryland Rule 5-606.\textsuperscript{225} The court’s holding marks a regressive turn in the court’s post-verdict determination of impartiality by focusing its inquiry on juror motive and public perception of the jury system rather than a substantive determination of any prejudicial effect on the defendant required under Supreme Court and Maryland jurisprudence.\textsuperscript{226} The court’s failure to consider the actual prejudicial effect of the juror-witness misconduct suggests a bright-line rule that any post-verdict determinations of egre-

\begin{itemize}
\item \textsuperscript{221} Id.
\item \textsuperscript{222} See \textit{generally id.} at 28 (noting that public opinion surveys of the judiciary generally suggest that the public desires a judicial system that is efficient, equally accessible to all people, is administered by honest and fair judges, and provides equal treatment for poor and minority groups).
\item \textsuperscript{223} \textit{Smith v. Phillips}, 455 U.S. 209, 217 (1982).
\item \textsuperscript{224} Id.
\item \textsuperscript{225} \textit{Jenkins II}, 375 Md. at 340, 825 A.2d at 1041.
\item \textsuperscript{226} See \textit{id.} at 332-33, 825 A.2d at 1036-37 (failing to fully consider the possibility that misconduct, even egregious misconduct, that inured to the defendant’s benefit is not prejudicial, and that this reasoning could adequately contravene the claimed damage to the integrity of the jury system).
\end{itemize}
igious, mid-trial juror misconduct demand an automatic retrial.\textsuperscript{227} This bright-line rule significantly circumscribes a trial judge's discretion to determine the actual effect of mid-trial juror misconduct and results in a significant deviation from court's historic application of an abuse of discretion standard to a trial court's denial of a motion for a new trial.\textsuperscript{228} Though couched in an effort to protect the integrity of the jury system, the court reversed a reasonably determined verdict, ironically harming the efficiency and thereby the integrity of the jury system it was so vigilantly trying to protect.\textsuperscript{229} The \textit{Jenkins} court could have avoided this result by fully considering the actual prejudicial effect of the misconduct on the jury verdict and by appropriately deferring to the trial court's superior ability to determine such prejudicial effect.

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\textsuperscript{227} See supra notes 198-211 and accompanying text (providing the foundation for an inquiry into the actual prejudicial effect of the misconduct rather than relying on the \textit{Jenkins} court's inquiry into a juror's subjective decision-making process, which is prohibited by Maryland Rule 5-606).

\textsuperscript{228} Id.

\textsuperscript{229} See supra notes 212-224 and accompanying text (reasoning that the integrity of the jury system would be better served by creating a mechanism whereby reasonably determined opinions would not be reversed and remanded, and where juror-witness misconduct could be explained as having no actual prejudicial effect on the verdict and thereby no effect upon the defendant).
III. FAMILY LAW

A. Abrogating Interspousal Immunity: Modernizing Maryland Law
   Through Judicial Action in the Face of Legislative Silence

In Bozman v. Bozman,1 the Court of Appeals of Maryland abrogated
the doctrine of interspousal immunity and allowed a husband to
sue his wife for the tort of malicious prosecution.2 This abrogation,
which for the first time allows suits between spouses for all intentional
torts, completes the court's twenty-five year dismantling of what has
come to be seen as an outmoded doctrine.3 As the courts gradually
discredited the arguments that supported interspousal immunity, the
doctrine increasingly became seen as an arbitrary rule of law that lim-
ited certain citizens' equal enjoyment of their rights.4 With complete
abrogation, courts in Maryland will finally treat the married and un-
married alike with respect to their tort claims, and will abandon the
"rule in derogation of married women."5 The length of the period in
which Maryland retained the doctrine of interspousal immunity, how-
ever, demonstrates the tight grip that outdated and, at times, unjust
perspectives have on Maryland law.6 The doctrine's judicial abroga-
tion, nonetheless, shows the court's willingness to use public policy
arguments and overturn legal obstacles that prevent every citizen from
enjoying equally the administration of justice.7 Nevertheless, the
question remains of the Court of Appeals' legitimacy after acting
when the legislature clearly chose not to do so.8 Although the court
must refrain from usurping the legislature's responsibility, the court

2. Id. at 462, 830 A.2d at 451; see infra notes 11-13 and accompanying text (explaining
   the tort of malicious prosecution and the charges the wife had alleged).
3. Bozman, 376 Md. at 496-97, 830 A.2d at 471. The Court of Appeals in Lusby v. Lusby,
   283 Md. 334, 335, 390 A.2d 77, 77 (1978), abrogated interspousal immunity as to any "outrage-
   ous, intentional tort," and in Boblitz v. Boblitz, 296 Md. 242, 275, 462 A.2d 506, 522
   (1983), did so for all negligence claims.
4. See infra notes 178-180 and accompanying text (describing the increasingly negative
   treatment by the courts of the historical reasons for upholding interspousal immunity).
5. Bozman, 376 Md. at 480, 830 A.2d at 461.
6. See, e.g., Gregg v. Gregg, 199 Md. 662, 668, 87 A.2d 581, 583 (1952) (noting that
   "[t]he ancient and medieval restrictions placed upon married women" at common law
   were still applied in Maryland, and could only be removed by legislative action).
7. See infra notes 237-239 and accompanying text (arguing that the Court of Appeals
   correctly abrogated interspousal immunity given the arbitrariness of the rule and its unjust
   effects).
8. Bozman, 376 Md. at 491-93, 830 A.2d at 468-69; see infra notes 240-243 and
   accompanying text (describing the problem of legitimacy raised by judicial abrogation in
   place of legislative action).
will and must act to remove an unjust and arbitrary bar to certain citizens from vindicating their wrongs; in this way, the Court of Appeals has indeed upheld its legitimacy.

1. The Case.—William Bozman and Nancie Bozman were married in 1968. Mr. Bozman filed for divorce on February 24, 2000, on grounds of adultery, and the couple divorced on March 12, 2001. In January 2001, however, while still married, Mr. Bozman filed a complaint for malicious prosecution against his wife in the Circuit Court for Baltimore County. He complained in one count that he had been arrested and charged with several crimes alleged by his wife. She brought the charges against him on three separate occasions: one seven days before he filed for divorce and twice in the ensuing months. He alleged that all of the charges lacked probable cause and that Ms. Bozman brought the charges solely to have him arrested. He alleged that she was motivated by his failure to concede to her demands during the divorce and that the charges served as a retaliatory move for his having initiated the divorce. As damages, he claimed loss of liberty, legal expenses concerning his arrests, and emotional distress.

Ms. Bozman filed a motion to dismiss her husband’s claim based on interspousal tort immunity, and the circuit court granted the motion, with leave to amend. Mr. Bozman amended his complaint in response, and this time he added allegations concerning his damages, including the fact that he had been arrested and incarcerated multiple times. He further alleged that as a result of one charge he was placed in home detention and forced to wear an ankle bracelet for

10. Id. at 462-63, 830 A.2d at 451.
11. Id. The tort of malicious prosecution consists of: “1) a criminal proceeding instituted or continued by the defendant against the plaintiff; 2) without probable cause; 3) with malice, or with a motive other than to bring the offender to justice; and 4) termination of the proceedings in favor of the plaintiff.” Heron v. Strader, 361 Md. 258, 264, 761 A.2d 56, 59 (2000).
14. Record Extract at E-2, Bozman (No. 105).
15. Id. He further alleged, as evidence of his wife’s ill will and lack of credibility, that she had been convicted of second-degree assault during the divorce proceedings. Id.
16. Id.
17. Bozman, 376 Md. at 463, 830 A.2d at 451.
18. Record Extract at E-25, Bozman (No. 105). Specifically Mr. Bozman alleged that as a result of the criminal charges he “was arrested on five separate occasions and was incarcerated for 3 days, 10 days, 1 day, 1 day and 1 day respectively.” Id.
over eight months, until he was finally acquitted.\textsuperscript{19} Through the amended complaint Mr. Bozman attempted to allege that his wife's actions were sufficiently outrageous so as to defeat her interspousal immunity defense.\textsuperscript{20}

Finally, on the day of the hearing for the motion to dismiss the amended complaint, Mr. Bozman filed a second amended complaint and alleged through a second malicious prosecution count that his wife had filed more charges of violating an \textit{ex parte} order.\textsuperscript{21} He alleged that, although these charges were eventually dismissed, he was incarcerated and spent additional money on legal services.\textsuperscript{22} Moreover, he again tried to defeat interspousal immunity by urging that his wife's motivation for the last charge was based on his first malicious prosecution count, which had been dismissed after both parties were divorced.\textsuperscript{23} Because dismissal of the charges is an element in malicious prosecution, Mr. Bozman argued that the second cause of action had arisen after the divorce.\textsuperscript{24} Ms. Bozman, therefore, as Mr. Bozman's (now) ex-wife, could not use interspousal immunity as a defense.\textsuperscript{25} The Circuit Court for Baltimore County granted Ms. Bozman's motion to dismiss for both counts alleged in the second amended complaint.\textsuperscript{26}

Mr. Bozman appealed the dismissal of both counts to the Court of Special Appeals.\textsuperscript{27} He again argued that interspousal immunity did not apply to Count I given the outrageous nature of malicious prosecution and that it did not apply to Count II because the parties were divorced when the cause of action arose.\textsuperscript{28} Although the Court of Special Appeals questioned the doctrinal underpinnings of interspousal immunity as a valid principle of law, it found itself bound to

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\item \textsuperscript{19} \textit{Id.} Mr. Bozman alleged in his complaint that "the charges were brought to trial and [he] was acquitted of some counts and other counts were dismissed pre-trial." \textit{Id.} at E-1 (emphasis added). Thus, it is unclear if some counts against Mr. Bozman were not dismissed, and therefore could not be included in Mr. Bozman's malicious prosecution complaint. \textit{Id.}
\item \textsuperscript{20} \textit{Bozman}, 376 Md. at 463, 830 A.2d at 451. Interspousal immunity was not a defense to outrageous, intentional torts. See \textit{Lusby v. Lusby}, 283 Md. 334, 335, 390 A.2d 77, 77 (1978) (abrogating interspousal immunity where a husband kidnapped and raped his wife with the help of two friends, who also attempted to rape the wife).
\item \textsuperscript{21} \textit{Bozman}, 376 Md. at 464, 830 A.2d at 451.
\item \textsuperscript{22} \textit{Id.}
\item \textsuperscript{23} \textit{Id.}, 830 A.2d at 452.
\item \textsuperscript{24} \textit{Id.} at 465, 830 A.2d at 452.
\item \textsuperscript{25} \textit{Id.}
\item \textsuperscript{26} \textit{Id.}
\item \textsuperscript{27} \textit{Id.}
\item \textsuperscript{28} \textit{Id.} at 464-65, 830 A.2d at 452.
\end{itemize}
apply the law of Maryland. Turning specifically to the issues on appeal, the court upheld the dismissal of Count I because the allegations did not reach the level of outrageousness required to defeat interspousal immunity. The court reversed the dismissal of Count II, however, stating that Mr. Bozman's second count of malicious prosecution did arise after the divorce, and thus interspousal immunity by definition could not apply.

Both Mr. Bozman and Ms. Bozman filed petitions for Writ of Certiorari in the Court of Appeals. Mr. Bozman challenged not only the Court of Special Appeals’ determination of the outrageousness of Count I, but he also challenged interspousal immunity as a proper ground for dismissal. Ms. Bozman, meanwhile, appealed the reversal of the trial court’s dismissal of Count II. The Court of Appeals granted both petitions.

2. Legal Background.—Common law, both in Maryland and throughout the rest of the country, contained provisions for interspousal tort immunity. The historical reasons for barring suits between husband and wife rested with the legal identity of the couple at common law, especially with the husband’s hierarchical role in society and women’s general lack of power and independent legal rights. The passing of the Married Women’s Acts at the end of the nineteenth century revamped women’s rights and social roles in many ways, such as permitting a woman to sue independently from her husband on contracts, property, or for other personal injuries she sustained. Nevertheless, Maryland and many other states refused to extend to a woman the right to sue her husband in tort for any such

30. Id. at 197-98, 806 A.2d at 748. Specifically, the court recognized that Ms. Bozman’s alleged actions “did not involve extreme violence of the most personal and invasive sort, the threat of death and a display of the means by which to carry out that threat, or the physical and psychic trauma that the victim in Lusby endured.” Id.
31. Id. at 200, 806 A.2d at 750.
32. Bozman, 376 Md. at 467, 830 A.2d at 453.
33. Id.
34. Id.
35. Id., 830 A.2d at 454.
37. See Lusby v. Lusby, 283 Md. 334, 337, 390 A.2d 77, 78 (1978) (noting that the common law “disabilities formerly existing insofar as women are concerned are difficult for those of us of the present generation to fully comprehend,” as they stem from a time before the Nineteenth Amendment to the United States Constitution, which granted women the right to vote, and other societal changes).
courts cited principles of marital harmony, *stare decisis*, and the desire to prevent fraudulent or collusive claims all as reasons for maintaining the doctrine. Soon many jurisdictions, including Maryland, began seriously criticizing interspousal immunity, and many also rejected the doctrine, with or without legislative action. The process of abrogation in Maryland took longer than most states, but the Court of Appeals, despite no action from the General Assembly, partially abrogated interspousal immunity as to outrageous intentional torts in 1978, and subsequently for negligence claims in 1983. Even after 1983, however, spouses still could not sue each other for intentional, but not outrageous, torts.

a. Interspousal Immunity at Common Law.—Not only did the law historically prevent women from suing their husbands, it joined the two legally, and thus prevented married women from suing anyone at all unless their husbands joined the suit. Specifically, the common law, as noted by William Blackstone in the eighteenth century, considered that a woman's independent recognition by the law vanished during marriage, and her legal identity and existence was subsumed into that of her husband. A married woman could not sue independently from her husband, and any legal action she took required his consent and would be brought in both their names. Therefore, she could not form independent contracts, own property by herself, or sue for personal injuries in tort without obtaining her husband's consent and filing the suit in his name. Such was the

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39. See, e.g., Furstenburg v. Furstenburg, 152 Md. 247, 251-53, 136 A. 534, 535-36 (1927) (relying on the U.S. Supreme Court decision in *Thompson v. Thompson*, 218 U.S. 611 (1910), and denying under the Maryland's Married Women's Act that a married woman could sue her husband for injury suffered in an automobile accident due to her husband's negligence).

40. See, e.g., Gregg v. Gregg, 199 Md. 662, 666-68, 87 A.2d 581, 582-83 (1952) (upholding interspousal immunity, while disagreeing with some fundamental reasons supporting it, because the legislature had not removed it by statute).


42. *Lusby*, 283 Md. at 357-58, 390 A.2d at 88-89.

43. *Boblitz*, 296 Md. at 275, 462 A.2d at 522.

44. Id.


46. Id.

47. Id. at 431.

48. Id.
power of the husband during marriage that he could even legally punish his wife using physical force. Because the law did not independently recognize a married woman, the law held a husband responsible for his wife's actions, and it was, therefore, reasonable to allow him the "power of restraining her, by domestic chastisement."

An interspousal suit, as an action by a husband against his wife, or vice versa, is not logical under the premise that the husband and wife are one legal identity, and that a married woman has no right to sue without her husband. The common law, therefore, barred suits from within this legal entity. Upon this particular view of the marital relation, Maryland adopted its own legal structure, which included the doctrine of interspousal immunity.

b. Married Women's Acts and Thompson.—Many states' legislatures attempted to ameliorate married women's inferior position by enhancing their rights and redefining their legal role in society. In 1898, for example, Maryland passed its own version of the so-called Married Women's Acts in order to replace common law restrictions on married women. The act allows a married woman to participate in business and form contracts on her own, as well as sue independently for those contracts, for the recovery of her property, or for tortious injury—all as if she had never married. An amendment two years later further provided that a woman could contract with her husband, form partnerships with him and others, and sue on the contracts made with him. Thus, the legal fiction of husband and wife as a single identity began to dissolve. Not only could each take legal action independently, but they could now contract with each other.

49. Id.
50. Id. at 432.
51. See Philips v. Barnet, 1 Q.B.D. 436, 438 (1876) ("[T]he objection to the action [brought by an ex-wife who was beaten by her ex-husband before they divorced] is not merely with regard to the parties, but a requirement of the law founded upon the principle that husband and wife are one person.").
52. Id.
54. See Lusby v. Lusby, 283 Md. 334, 339, 390 A.2d 77, 79 (1978) (noting that "[o]ur laws relative to women were completely revised by" the passage of the Married Women's Act).
56. Id. § 4-204(1)-(7). The act specifically provides that a married woman can "sue for any tort committed against her." Id. § 4-204(7).
57. 1900 Md. Laws 633 (currently codified in Md. Code Ann., Fam. Law § 4-204(4)-(5)).
58. See David v. David, 161 Md. 532, 534, 157 A. 755, 756 (1932) (recognizing that the Married Women's Acts have "had the effect of partially dissipating that fiction" of the legal
which would be impossible without recognizing the couple as separate legal entities. Some courts, however, refused to interpret the Married Women's Acts as recognizing an independent right to sue a spouse in tort. These courts refused despite the logical argument that if the legal identity of husband and wife has been partly destroyed by legislation, then interspousal immunity, founded on that identity, should no longer be necessary.

The Supreme Court of the United States considered the issue of whether the new acts permitted interspousal tort suits in Thompson v. Thompson, as it interpreted the District of Columbia's Married Women's Act. Holding that the statute did not permit a wife to sue her husband for assault and battery, a majority of the Court interpreted the legislative purpose of the law narrowly. It held that the act expanded a married woman's rights only so far as to permit her to bring a cause of action in tort, property, or contract in her own name and without her husband's consent, as previously required. The majority refused to interpret the statute as permitting interspousal tort suits. It reasoned that to do so would usher into the courtroom a variety of false, trivial, or inappropriate claims brought by embittered spouses and that such a consequence did not correlate with the legislative intent as the Court interpreted it. Indeed, the Court stated that, had the legislative intent been to allow tort suits between husband and wife, the legislators could have stated as much in plain, unambiguous terms. Moreover, the majority rejected the contention that the identity of husband and wife by giving each independent legal rights, as well as the ability to sue each other on contracts they have made).

59. Id.
61. David, 161 Md. at 535, 157 A. at 756. The Court of Appeals in David recognized "a determined effort" in other jurisdictions to construe the Married Women's Acts in this manner, and thus rid themselves of interspousal immunity fully.
63. Id. The D.C. statute is "practically identical" to that of Maryland, and extends to married women the same legal rights "as if they were unmarried." Furstenburg v. Furstenburg, 152 Md. 247, 249, 136 A. 534, 534 (1927).
64. Thompson, 218 U.S. at 617.
65. Id. at 617.
66. Id.
67. Id. at 617-18.
68. Id. at 618. The Court reasoned that allowing one spouse to sue another would result in such "radical changes in the policy of centuries" that the Court would exceed its proper role by inferring the change in the absence of absolutely clear language to that effect. Id. The dissenting Justice Harlan, however, joined by Justices Holmes and Hughes, felt the legislators had designed the act to institute just this type of change, an intent he drew from "the clearly expressed will of the legislature." Id. at 623-24 (Harlan, J., dissent-
that justice required a married woman to have the ability to sue in tort so as to redress the wrongs inflicted by her husband. Instead, the majority reasoned that a married woman always retained the remedies of divorce and alimony, and if need be, the recourse provided by criminal courts. The dangers of allowing tort suits between husband and wife, and the type of claims this would bring before the courts, outweighed any benefits of allowing married women to sue.

The Court of Appeals of Maryland followed the Supreme Court's reasoning seventeen years later in *Furstenburg v. Furstenburg*, as it interpreted Maryland's Married Women's Act. Because the Maryland statute was similar to that of the District of Columbia, the Court of Appeals deferred almost completely to the decision in *Thompson* and incorporated broad passages of the majority's opinion in place of its own independent analysis. The Court of Appeals focused specifically on the District of Columbia's statute, which included the word "separately" in reference to the tort suits married women could now bring. Although Maryland's statute does not include this term, the court inferred by way of comparison that both statutes provided a very limited right: they only allowed married women to sue and be sued on their own, without having to join their husbands or obtain their consent.

Moreover, the Court of Appeals considered the amendment passed two years after the original Married Women's Act, which explicitly permitted married women to sue their husbands on contracts they have formed together. The court noted not only that this would be "wholly superfluous" had interspousal suits already been allowed by the original statute, but had the legislature intended interspousal tort suits, it would have been just as explicit as it had for

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69. *Id.* at 617.
70. *Id.* at 619.
71. *Id.* at 617-18.
73. *Id.* at 249, 136 A. at 534.
74. *Id.* at 249-51, 136 A. at 534-35.
75. *Id.* at 250-51, 136 A. at 535.
76. *Id.* at 251, 136 A. at 535.
77. *Id.* at 252, 136 A. at 535.
The court, therefore, agreed with the Supreme Court and affirmed interspousal tort immunity as the law in Maryland.  

**c. Maryland's Application of Interspousal Immunity After Furstenburg.**—With the validity of interspousal immunity established in Maryland, the State's courts continued to apply the doctrine, although they questioned its supporting rationales frequently and developed novel reasons for applying it. As a whole the courts recognized four major arguments in support of interspousal immunity: (1) upholding the fictional, legal identity of husband and wife; (2) preventing discord and disharmony from entering the marital relationship; (3) preventing fraudulent, collusive, or trivial claims, which presumably would flourish with the ability of spouses to sue one another; and (4) respecting principles of *stare decisis* and leaving changes in the law to the legislature.

(1) The Legal Identity of Husband and Wife as a Bar to Suits Between Spouses.—The courts at first adopted the arguments from the common law, and based their support for interspousal immunity on the legal identity at common law of husband and wife. Shortly after *Furstenburg*, however, the Court of Appeals in *David v. David* noted that this legal fiction had begun to disintegrate, as women were given independent legal rights, and in certain situations were in fact permitted to sue their husbands. Increasingly as the twentieth century progressed, married women's roles, both legal and otherwise, expanded greatly in society. In turn, the legal identity of the husband and wife argument diminished greatly in importance. Although this precise idea served as the original argument in favor of interspousal immunity, the courts eventually abandoned this line of reasoning entirely, labeling it antiquated, "artificial," and no longer useful to support barring certain tort suits.

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78. Id.
79. Id.
81. Id. at 256-57, 462 A.2d at 513.
82. See *supra* notes 51-53 and accompanying text (discussing treatment of marriage at common law and the bar of suits between husband and wife).
84. Id. at 534-35, 157 A. at 756; see also *supra* notes 55-59 (discussing the effect of Married Women's Acts on marital relationship).
85. See Gregg v. Gregg, 199 Md. 662, 666, 87 A.2d 581, 582-83 (1952) (rejecting "the fiction of the legal identity of the husband and wife" as a ground for interspousal immunity).
86. Id.
Protecting the Marital Relationship from Discord and Disharmony.—As the legal identity of husband and wife deteriorated, the Court of Appeals in *David* adopted an additional rationale for interspousal immunity to support the precedent of *Furstenburg*. In place of the “technical and artificial ground” of the fictional legal identity, the court cited a more expansive social and political desire to prevent introducing discord and disharmony into the marriage and the home; interspousal immunity thus became a tool to promote the public welfare. It was argued that allowing spouses to sue each other would promote frequent and serious disputes in the home, and the ability to litigate would increase already acrimonious disputes, such as divorce.

The prevention of discord and promotion of marital harmony, however, was also abandoned soon after its adoption. In *Gregg v. Gregg*, for example, the Court of Appeals rejected this theory explicitly, as it pointed out that barring suits between spouses to prevent discord ignored the fact that discord was already present; if the suit was one for assault and battery, for example, preventing one spouse from recovering for injuries did nothing to promote “marital harmony” or a healthy marriage relationship. Connecticut’s high court went even further, reasoning that prohibiting interspousal tort suits would not only do nothing to promote marital harmony, but such a bar would affirmatively harm both the marriage and the public wel-

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88. See, e.g., *Corren v. Corren*, 47 So. 2d 774, 776 (Fla. 1950). In *Corren*, the Supreme Court of Florida explained this rationale:

> When one ponders the effect upon the marriage relationship were each spouse free to sue the other for every real or fancied wrong springing even from pique or inconsequential domestic squabbles, one can imagine what the havoc would be to the tranquility of the home. Certainly the success of the sacred institution of marriage must depend in large degree upon harmony between the spouses, and the relationship could easily be disrupted and the lives of offspring blighted if bickerings blossomed into law suits and conjugal disputes into vexatious, if not expensive, litigation.

*Id.*

89. *Gregg*, 199 Md. at 666, 87 A.2d at 582.
90. 199 Md. 662, 87 A.2d 581 (1952).
91. *Id.* at 667. The court said of the theory that interspousal immunity protected the marriage:

> It applies to a post-bellum situation a theory which is clearly only applicable to conditions prior to the difficulty which caused the bringing of the legal action. After discord, suspicion and distrust have entered the home, it is idle to say that one of the parties shall not be allowed to sue the other because of fear of bringing in what is already there.

*Id.*
fare.\(^92\) If courts could not adequately compensate the injuries married people suffer at the hands of a spouse, the court stated that those injured persons would instead privately seek out their own revenge.\(^93\) Not only does this destroy any marital harmony, but it also harms the public safety because the home, in place of the court, serves as a forum for private vengeance.\(^94\)

(3) Prevention of Fraudulent, Collusive, or Trivial Claims.—Another fundamental argument supporting interspousal immunity arose in an attempt to safeguard the courts from a rise in fraudulent, collusive, or trivial claims, although this argument has received relatively scant, explicit treatment by judicial opinions in Maryland.\(^95\) The Supreme Court in Thompson, for example, worried that destroying interspousal immunity would flood the courts with embittered spouses airing private, domestic concerns in public.\(^96\) Modern courts translated that early worry into a fear that insured spouses will instead conspire with one another, and an increase in litigation will result at the expense of insurance companies.\(^97\) Without immunity, spouses would feel free to concoct fictitious stories, and given that both are on opposite ends of the lawsuit, there would be little chance of ferreting out the truth and validity of the claim.\(^98\) Moreover, in Raisen v. Raisen, the Supreme Court of Florida worried that even unintentional fraud could take place, given the obviously close and intimate relationships spouses have with one another.\(^99\) Because of this intimacy, the court felt it unreasonable to assume that a negligent wife or husband would seriously defend a case where a spouse stood to gain, and where an insurance company would cover all damages.\(^100\) While Maryland case

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93. Id.
94. Id. ("No greater public inconvenience and scandal can thus arise if [spouses] were left to answer one assault with another and one slander with another slander until the public peace is broken and the criminal law invoked against them.").
97. See Raisen v. Raisen, 379 So. 2d 352, 355 (Fla. 1979) (holding, in a negligence suit by a wife against her husband and his insurance company, that interspousal immunity is "still a viable solution" for preventing fraudulent claims).
98. Id.
99. Id.
100. Id. The court reasoned:
We expect too much of human nature if we believe that a husband and wife who sleep in the same bed, eat at the same table, and spend money from the same purse can be truly adversary to each other in a lawsuit when any judgment ob-
law has not addressed these arguments explicitly, several other jurisdictions have, and they have found them persuasive as reasons to uphold interspousal immunity.101

Other states, while initially adopting this argument, have eventually rejected it. In Klein v. Klein,102 for example, the Supreme Court of California recognized that the danger of fraud and collusion did exist in the context of interspousal tort suits, but the court held it to be unfair to deny a person who would otherwise receive compensation for injuries solely because of a fear of fraud.103 Not only does the possibility of fraud exist in any given case, but courts have stated that in those cases they have ample means to weed out unmeritorious claims.104 Finally, some courts have relied on data showing that fraud has not increased in jurisdictions where courts have abrogated interspousal immunity.105 The difficulty in having a court predict the effects of abrogation led the court in Klein further towards abrogation because such a prediction involved the weighing of complicated judgments of policy.106 The court held that arguments based on insurance should be presented to the legislature, which can more appropriately deal with complicated policy choices that might involve formal evidentiary hearings.107 Until such a time, the court refused to bar valid claims for a potentially invalid reason.108

The Court of Appeals of Maryland, on the other hand, has not stated its position either way; the court has mentioned the argument based on fraud and collusion only by way of quoting from other jurisdictions’ opinions or from scholarly criticisms of interspousal immunity.109 A critical Chief Judge Gilbert of the Court of Special Appeals has explicitly broached the topic in a footnote and stated that "[o]ne cannot help but wonder in the light of present day circumstances

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102. 376 P.2d 70, 72 (Cal. 1962).

103. Id.

104. Id. at 73. In the context of insurance concerns regarding interspousal immunity, for example, one court noted that insurance defense lawyers have developed ample means and skills at hunting out fraudulent claims and defeating trivial ones during early stages of litigation. Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 343 (W. Va. 1978).


106. Klein, 376 P.2d at 72.

107. Id.

108. Id.

whether the doctrine [of interspousal immunity] continues to exist to protect the marriage or to protect an insurance carrier from possible collusion.\textsuperscript{110} Outside of a footnote or excerpt, however, Maryland courts have not openly implicated insurance interests as a reason to uphold interspousal immunity.

(4) Stare Decisis and the Role of the Judiciary in Changing the Common Law.—By far the most frequently cited support for interspousal immunity in Maryland cases has been adherence to \textit{stare decisis}, and the principle that the legislature, and not the court, should determine the course of Maryland law.\textsuperscript{111} In \textit{Gregg}, the Court of Appeals began harshly criticizing the underlying reasons for interspousal immunity but was unwilling to abrogate the doctrine.\textsuperscript{112} Instead, the court held that “[t]he ancient and medieval restrictions placed upon married women [could] only be removed by legislative action.”\textsuperscript{113} The question of whether any such mandate had been issued from the General Assembly was answered firmly in the negative by \textit{Furstenburg}, when the court narrowly interpreted the Married Women’s Act.\textsuperscript{114} Furthermore, although the Court of Appeals proceeded to question the validity of each of the arguments in support of interspousal immunity for another twenty-six years, the court refused to abrogate the doctrine in \textit{Fernandez v. Fernandez},\textsuperscript{115} \textit{Ennis v. Donovan},\textsuperscript{116} \textit{Hudson v. Hudson},\textsuperscript{117} and \textit{Stokes v. Ass’n of Independent Taxi Operators, Inc.}\textsuperscript{118} Even though the court recognized interspousal immunity as a judicially created common law doctrine, it viewed its proper role only as an interpreter of the law, and not a body permitted to determine public policy issues such as whether husband and wife should be able to sue each other in tort.\textsuperscript{119} Because the Court of Appeals had ruled in \textit{Furstenburg} that the Married Women’s Act did not permit interspousal

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  \item \textsuperscript{110} Linton v. Linton, 46 Md. App. 660, 661 n.2, 420 A.2d 1249, 1250 n.2 (1980) (holding that the application in a Maryland court of Virginia law, which does not bar suits between spouses, would not violate Maryland public policy).
  \item \textsuperscript{111} See, e.g., \textit{Gregg v. Gregg}, 199 Md. 662, 667-68, 87 A.2d 581, 583 (1952).
  \item \textsuperscript{112} \textit{Id.} at 667-68, 87 A.2d at 583.
  \item \textsuperscript{113} \textit{Id.} at 668, 87 A.2d at 583.
  \item \textsuperscript{114} \textit{Lusby v. Lusby}, 283 Md. 334, 357, 390 A.2d 77, 88 (1978). No other legislation had been passed on the question since the Married Women’s Act and its amendments. \textit{See id.} (stating that “[t]he General Assembly has not heeded the suggestions by this Court that a new statute be enacted”).
  \item \textsuperscript{115} 214 Md. 519, 135 A.2d 886 (1957).
  \item \textsuperscript{116} 222 Md. 536, 161 A.2d 698 (1960).
  \item \textsuperscript{117} 226 Md. 521, 174 A.2d 339 (1961).
  \item \textsuperscript{118} 248 Md. 690, 237 A.2d 762 (1968).
  \item \textsuperscript{119} \textit{See Gregg v. Gregg}, 199 Md. 662, 667, 87 A.2d 581, 583 (1952) (“[T]hese ancient theories which form a part of the common law have to be followed by us unless they have
tort suits, the court stated repeatedly that, regardless of its criticisms, it must wait for a new, express legislative mandate before it could allow such a suit.\textsuperscript{120}

\textbf{d. Partial Abrogation of Interspousal Immunity in Maryland.}—In \textit{Lusby v. Lusby},\textsuperscript{121} however, the Court of Appeals abandoned this restrictive view of the ideal role of the court, and it partially abrogated interspousal immunity for the first time in Maryland.\textsuperscript{122} Through the abrogation, the court permitted a married woman to sue her husband in tort; in the suit the woman alleged that, not only had her husband threatened her by pointing a rifle at her while she was driving on the highway, but he then forced her off the road with the help of two friends, kidnapped her, raped her violently, and allowed the two friends to attempt to rape her.\textsuperscript{123} The Court of Appeals refused to apply interspousal immunity in this situation.\textsuperscript{124}

The court began its consideration of the case by noting the common law roots and historical arguments in favor of interspousal immunity, and their subsequent evolution.\textsuperscript{125} The court conceded that doctrines such as interspousal immunity are “difficult for those of us of the present generation to fully comprehend.”\textsuperscript{126} It then traced the conservative application of interspousal immunity in Maryland courts, and it also recognized the current trend in other jurisdictions toward abrogation.\textsuperscript{127} It also noted that even though the courts might be divided on the issue, scholarly commentators had almost unanimously rejected interspousal immunity’s continuing validity.\textsuperscript{128} Specifically, however, the court asserted that no previous Maryland decision involved intentional torts, nor the “outrageous conduct” alleged in the case at bar.\textsuperscript{129} It explained that the policy reasons cited in previous

\begin{footnotes}
\item[120.] See, \textit{e.g.}, Fernandez, 214 Md. at 521, 135 A.2d at 887 (noting that because of the strict interpretation given to the Maryland Married Women’s Act, the court was “unable to follow the authorities elsewhere without overruling our prior decisions, despite the appeal to reason and convenience that the rule [permitting interspousal tort suits] urged upon us has”).
\item[121.] 283 Md. 334, 390 A.2d 77 (1978).
\item[122.] Id. at 395-36, 390 A.2d at 77-78.
\item[123.] Id.
\item[124.] Id. at 357, 390 A.2d at 88.
\item[125.] Id. at 337, 390 A.2d at 78.
\item[126.] Id.
\item[127.] Id. at 337, 350, 390 A.2d at 78, 84-85.
\item[128.] Id. at 350, 390 A.2d at 84-85.
\item[129.] Id. at 352, 390 A.2d at 86. \textit{Thompson v. Thompson}, 218 U.S. 611 (1910), an assault and battery case, served as the only slightly analogous case in the court’s mind. \textit{Lusby}, 283
\end{footnotes}
decisions, especially the marital discord and legal identity theories, could never apply in the face of these allegations. In fact, the court could find no worthwhile public policy goals in modern society that would support barring the woman’s recovery in this situation. In the end, the court admitted that the only argument against abrogating interspousal immunity came from stare decisis and the continued silence on the part of the General Assembly. Noting that no prior case dealt with the conduct at issue, however, the Court of Appeals asserted that it was not in fact overruling precedent. To the contrary, the court found no support for the contention that a wife had ever been prevented from suing a husband in Maryland for the alleged conduct. Therefore, the Court of Appeals held that one spouse could sue another in Maryland for an “outrageous, intentional” tort, and thus limited the application of interspousal immunity to suits of this type.

The Court of Appeals further limited interspousal immunity in Boblitz v. Boblitz, as it allowed a suit for negligence to proceed by a woman against her husband. Prior cases having sufficiently discredited most doctrinal rationales for interspousal immunity, the Court of Appeals in this case struggled mainly with stare decisis, and how it could justify abrogation without the legislature having acted. Therefore, the court discussed at length the status of the law in other jurisdictions, outlined how other states’ courts treated each of the arguments in favor of interspousal immunity, and noted that modern scholars criticized the rule extensively. Finally, after considering its own decision in Lusby and the exacting analysis of interspousal immunity’s foundation conducted in that decision, the court recognized that “the foundation [for the rule] was resting on sand.”

Md. at 352, 390 A.2d at 86. The court noted that that case was decided before women had attained the right to vote, and it “sense[d]” in the majority’s opinion “a reluctance to permit change.” Id. at 357, 390 A.2d at 88.

130. Id. at 352-54, 390 A.2d at 86-87.
131. Id. at 357, 390 A.2d at 88.
132. Id.
133. Id. at 358, 390 A.2d at 89.
134. Id.
135. Id.
137. Id. at 273-75, 462 A.2d at 251-52. Unlike outrageous, intentional torts, interspousal immunity precedent barred negligence actions between spouses; therefore, the court would have to overrule that precedent. Id.
138. See, e.g., id. at 269-73, 462 A.2d at 519-21 (examining scholarly criticism of interspousal immunity, such as those of Dean Foss and the Restatement (Second) of Torts).
139. Id. at 272, 462 A.2d at 521.
The Court of Appeals, therefore, stated that it agreed with the majority of jurisdictions that interspousal immunity no longer had a place in the modern context posed by the facts of Boblitz. While still respecting the principles of *stare decisis*, the court held that given present circumstances it was not bound to uphold the rule, which it considered merely a remnant of the past with no valid use. Nonetheless the court constrained its abrogation to negligence cases, given that *stare decisis* principles mandated that decisions of abrogation should be made on a case-by-case basis. After Boblitz, Maryland no longer barred actions brought by one spouse against the other for claims of outrageous, intentional torts, or for negligence.

3. The Court's Reasoning.—In Bozman v. Bozman, the Court of Appeals of Maryland abrogated interspousal immunity for intentional torts, and thus continued the trend of *Lusby* and *Boblitz*. The high court reversed the Court of Special Appeals' decision to dismiss Count I of Mr. Bozman's second amended complaint, malicious prosecution, and did not reach Ms. Bozman's issue on appeal regarding the refusal to dismiss the count of malicious prosecution that was filed after the divorce.

The Court of Appeals began by examining the common law roots of interspousal immunity and the historical reasons for implementing the doctrine. First, the court recognized that the judicially created doctrine formed a part of the common law of Maryland, and indeed had developed in an ancient context. The court then traced the historical arguments formulated in defense of the doctrine, including the fictional, legal identity of the husband and wife at common law and the husband's traditional authority, both practically and legally, over his wife. Next, the court addressed the enactment of the Married Women's Acts. Although these acts redefined the legal rights of women in society, the court recognized that they were interpreted by the Supreme Court in *Thompson* and by the Court of Appeals itself in

140. *Id.* at 273, 462 A.2d at 521.
141. *Id.* at 274, 462 A.2d at 522.
142. *Id.* at 275, 462 A.2d at 522.
143. *Id.*
144. 376 Md. 461, 496-97, 830 A.2d 450, 471 (2003).
145. *Id.* at 468, 830 A.2d at 454. Chief Judge Bell issued the unanimous opinion of the court. *Id.* at 462, 830 A.2d at 450.
146. *Id.* at 468-69, 830 A.2d at 454-55.
147. *Id.*
148. *Id.; see supra* notes 45-53 and accompanying text (discussing treatment at common law of the legal rights of married women).
Furstenburg as leaving intact interspousal immunity.\textsuperscript{149} The court noted that even though it continually barred interspousal tort claims, it nonetheless continued to doubt the validity of the rule’s underlying support.\textsuperscript{150} Despite these criticisms of the rule, however, the court noted that it continued to apply interspousal immunity because of \textit{stare decisis} and because the legislature had not taken action.\textsuperscript{151}

Furthermore, the Court of Appeals examined the two judicial abrogations of interspousal immunity in Maryland in \textit{Lusby} and \textit{Boblitz}.\textsuperscript{152} The court recognized the careful analysis performed in these cases of the state of the law both in Maryland and throughout the country.\textsuperscript{153} It then stated that the holdings of those cases resulted in a paradoxical situation where a married person’s ability to recover for an injury caused by a spouse depended on whether or not that injury could be classified into one of two opposite types of harm—that caused by negligence or that caused by an outrageous, intentional tort.\textsuperscript{154} The court then questioned whether modern times demand this paradoxical situation to change to allow all spouses, regardless of whether injured by negligence, a simple intentional tort, or an outrageous, intentional tort, to recover damages for those injuries.\textsuperscript{155} The court stated that whether or not the reasons for supporting interspousal immunity remained valid in this modern context, and whether or not these arguments could rationally justify the denial of otherwise recoverable tort claims, would influence the court’s decision.\textsuperscript{156}

\begin{thebibliography}{9}
\bibitem{149} Bozman, 376 Md. at 471-73, 830 A.2d at 456-57; see supra notes 72-76 and accompanying text (discussing Maryland’s interpretation of the Married Women’s Act).
\bibitem{150} Bozman, 376 Md. at 472-73, 830 A.2d at 457.
\bibitem{151} Id. at 473-74, 830 A.2d at 457 (“Our reluctance to change the common law and, thus, our continued adherence to the interspousal immunity doctrine, was in deference to the Legislature.”).
\bibitem{152} Id. at 474, 830 A.2d at 457-58.
\bibitem{153} Id. The court stated that in \textit{Boblitz} it had:
\begin{quote}
arrived at that holding only after conducting a thorough and exhaustive review of the doctrine of interspousal immunity, including its history and rationale, the impact and effect of the doctrine on women and women’s rights, the Maryland cases applying the doctrine and the foundation on which they rested, the application and acceptance of the doctrine in our sister states, and, in particular, the change that has occurred over time in the acceptance of the doctrine by the courts of those States, the views of the legal scholars and the academic community as to the continued viability of the doctrine, and the impact of abrogating the doctrine in negligence cases.
\end{quote}
\bibitem{154} Id. at 479, 830 A.2d at 461.
\bibitem{155} Id. at 486, 830 A.2d at 465.
\bibitem{156} Id.
\end{thebibliography}
To begin, the court conducted another survey, as it had in *Lusby* and *Boblitz*, of the law of interspousal immunity throughout the country.\(^{157}\) Of the thirty-five states that had abrogated interspousal immunity either fully or partially by 1983, the court observed that another nine had abrogated the doctrine fully through judicial action.\(^{158}\) Moreover, the court noted that Hawaii abrogated interspousal immunity through statute, and the two remaining states, Delaware and Georgia, had abrogated it partially.\(^{159}\) Considering this status, the Court of Appeals concluded that its view in *Boblitz*, that most jurisdictions felt interspousal immunity to be an outdated doctrine serving little use for society today, had only been strengthened by the continuing trend towards abrogation.\(^{160}\)

The Court of Appeals then focused on each of the arguments Ms. Bozman presented in support of interspousal immunity, and it rejected each in turn.\(^{161}\) The court rejected Ms. Bozman's first argument that, while interspousal immunity does in fact treat married individuals differently and bars only their recovery, such unequal treatment of the married is acceptable, as well as prevalent, in other areas of the law.\(^{162}\) Although the Court of Appeals conceded the point, it did not find this argument persuasive against abrogation, and it did not consider it sufficient grounds for upholding an otherwise flawed doctrine.\(^{163}\)

The court did not accept any of Ms. Bozman's other arguments against abrogation.\(^{164}\) In response to her second argument that other jurisdictions' decisions should not influence Maryland courts, the court recognized that the status of the law in other states could serve as persuasive authority and may be considered, even though it would never bind a Maryland court.\(^{165}\) The Court of Appeals then flatly rejected Ms. Bozman's third argument that alternate remedies exist to

157. *Id.* at 486-87, 830 A.2d at 465-66.
158. *Id.*, 830 A.2d at 465.
159. *Id.* at 487, 830 A.2d at 465.
160. *Id.* at 488, 830 A.2d at 466.
161. *Id.* Interestingly, all of Ms. Bozman's arguments in favor of interspousal immunity were in fact arguments against abrogation; she could offer no rationales that affirmatively asserted that interspousal immunity itself was a valuable, useful, or just law. See *id*.
162. *Id.* at 488-89, 830 A.2d at 466-67. "[V]estiges of the common law," Ms. Bozman maintained, still existed in the law's special treatment of married couples, as evidenced by doctrines such as the tenancy by the entirety from the Real Property Article, spousal inheritance in the Estates and Trusts Article, the ability to file joint tax returns, and various provisions from family law, including alimony and divorce. *Id*.
163. *Id*.
164. *Id.* at 488, 830 A.2d at 466.
165. *Id.* at 490, 830 A.2d at 467.
protect spouses who could not sue for tort; although other actions may be available to stop, prevent, or punish tortious conduct, the court noted that no remedies other than a civil suit for intentional tort can provide actual compensation for injuries suffered.\textsuperscript{166}

The court finally rejected Ms. Bozman’s reliance on the principles of \textit{stare decisis}, which had for decades served as the primary argument sustaining interspousal immunity against calls for abrogation.\textsuperscript{167} The Court of Appeals stated that it had already dealt with this issue in \textit{Boblitz}, and in assessing Ms. Bozman’s argument it relied heavily on the reasoning applied in that judicial abrogation.\textsuperscript{168} As stated there, the court reasoned that it was not bound by a principle that no longer applied to modern circumstances, or by a rule that had been decided wrongly in a previous case.\textsuperscript{169} Finally, the court did not find persuasive the argument that unintended consequences would surely flow from any abrogation, and that the court should defer to the legislature’s judgment of whether abrogation should occur.\textsuperscript{170} With the underlying reasons supporting interspousal immunity discredited or inapplicable due to time and change of circumstance, the Court of Appeals, now following what it called “[t]he overwhelming weight of authority,” did not feel bound to apply the rule.\textsuperscript{171} As such, it abrogated interspousal immunity as to all intentional torts.\textsuperscript{172}

4. Analysis.—In \textit{Bozman}, the Court of Appeals struck interspousal immunity from the laws of Maryland and allowed a husband to sue his wife for malicious prosecution. The decision in \textit{Bozman} demonstrates that the Court of Appeals remains willing to overturn legal doctrines that it considers unjust and which have been outdated by the progression of society’s customs and norms. By abrogating interspousal immunity, the Court of Appeals correctly held that the rationale for the rule could not support its unjust effects. After \textit{Bozman},

\begin{itemize}
\item \textsuperscript{166} \textit{Id.} at 490-91, 830 A.2d at 467-68.
\item \textsuperscript{167} \textit{Id.} at 491-92, 830 A.2d at 468; see \textit{supra} notes 111-120 and accompanying text (discussing the role of \textit{stare decisis} in the courts’ treatment of interspousal immunity). Ms. Bozman technically argued two “\textit{stare decisis}” points: first that it should be the legislature’s role to determine the policy of Maryland, and secondly that “\textit{Boblitz} [s]hould [n]ot [b]e a [s]pringboard” to full abrogation of interspousal immunity. Respondent’s and Cross-Petitioner’s Brief at 8-15, \textit{Bozman v. Bozman}, 376 Md. 461, 830 A.2d 450 (2003) (No. 105).
\item \textsuperscript{168} \textit{Bozman}, 376 Md. at 495, 830 A.2d at 470; see \textit{supra} notes 141-143 and accompanying text (examining the Court of Appeals’ application of \textit{stare decisis} in \textit{Boblitz}).
\item \textsuperscript{169} \textit{Bozman}, 376 Md. at 494, 830 A.2d at 470. The court stated \textit{stare decisis} would not control if “the applicable guiding law had been decided incorrectly.” \textit{Id.} The court cited the Supreme Court decision of \textit{Brown v. Board of Education} as an example. \textit{Id.}
\item \textsuperscript{170} \textit{Id.} at 495-96, 830 A.2d at 470-71.
\item \textsuperscript{171} \textit{Id.} at 496, 830 A.2d at 471.
\item \textsuperscript{172} \textit{Id.} at 496-97, 830 A.2d at 471.
\end{itemize}
the married and unmarried alike will finally be treated equally by the law of Maryland with respect to the ability to bring an action for intentional torts.

Nevertheless, Bozman shows how prevalent outmoded doctrines, like interspousal immunity, remain in Maryland law, and which continue to be applied despite the court's fervent criticism. This stems from the court's deference to the legislative role and its respect for stare decisis principles. At the same time the decision to abrogate in the way the court chose reflects the great deference owed to the legislature, whose role it is to determine the public policy of Maryland. Bozman demonstrates, however, that the Court of Appeals will not remain forever silent in the face of an unjust or arbitrary doctrine that has no place in modern society, and it will overrule precedent, despite legislative inaction. One question that remains after Bozman, however, is the status of the court's legitimacy. Because of the fairness of the abrogation, as well as the obvious respect still given by the court to precedent and the legislature, this legitimacy remains intact.

a. Underlying Support for Interspousal Immunity is No Longer Persuasive.—As the justifications for interspousal immunity gradually weakened, so too did the use and need of the doctrine, and the Court of Appeals was correct in rejecting Ms. Bozman's arguments for retaining it. First, courts have long discarded the majority of the factors purporting to hold interspousal immunity as a logical or useful principle of law—such as the legal identity of husband and wife, the prevention of discord and disharmony in the marriage, and the alternative remedies argument. The two main arguments left for interspousal immunity—preventing fraud and collusion, and bringing a flurry of trivial or undesirable claims into the courtroom—were also

173. See supra notes 111-120 and accompanying text (discussing the role of stare decisis in interspousal immunity cases).

174. See infra notes 191-208 and accompanying text (arguing that the Court of Appeals' piecemeal abrogation exhibits such deference).

175. See infra notes 229-259 and accompanying text (discussing how the Court of Appeals' decision to abrogate, despite no statement on the issue from the legislature, affects its legitimacy).

176. Id.

177. See supra notes 161-172 and accompanying text (outlining Ms. Bozman's arguments and explaining the court's reasons for rejecting them).

178. See Gregg v. Gregg, 199 Md. 662, 666, 87 A.2d 581, 582-83 (1952) (calling both the legal identity of the marriage argument and the protection against marital discord argument "artificial"); see also supra note 166 (explaining that the alternative remedies argument was no longer accepted).
deficient. By using these inadequate and outdated factors as the basis for her argument, Ms. Bozman could point to no evidence that any undesirable consequences would in fact occur from repudiation of the rule.

By contrast, decisions from jurisdictions such as Delaware suggest the opposite. The Delaware Supreme Court in *Beattie v. Beattie* explained that empirical evidence had demonstrated that no rise in marital disharmony or insurance fraud had occurred when interspousal immunity was abrogated in other jurisdictions. Moreover, a number of states abrogated interspousal immunity for intentional torts at the beginning of the twentieth century, and these jurisdictions did not experience the grave problems predicted. Likewise, Maryland courts survived twenty years of partial abrogation with no disastrous consequences stemming from the increased ability of spouses to litigate with one another.

Even if problematic consequences would follow from abrogation of intentional torts, notions of fundamental fairness favor abrogation. Interspousal immunity operates to bar otherwise valid claims, and it prevents, for example, a battered spouse from recovering any monetary compensation for his or her injuries. Logically a court should bar these meritorious claims only in the face of compelling evidence that abrogation would produce an increase in fraudulent claims, and thereby an increase in insurance premiums.

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179. Ms. Bozman did not argue these points as such because insurance concerns are irrelevant as few people have insurance coverage for an intentional tort such as malicious prosecution. Respondent's and Cross-Petitioner's Brief, at 11-15, *Bozman* (No. 105).

180. Id.; see also Bozman, 376 Md. at 496, 830 A.2d at 471 ("[R]espondent has not provided any demonstrative evidence that any of the questions or problems she posits as possible and, indeed, 'undoubtedly will arise' have arisen [in any jurisdiction that has abrogated interspousal immunity].")

181. 630 A.2d 1096, 1099 n.7 (Del. 1993). For support, the court cited an *amicus curiae* brief submitted by the Delaware Trial Lawyers Association, which cited evidence finding that abrogation did not result in a rise in fraudulent claims, and thereby an increase in insurance premiums. *Id.*

182. The Court of Appeals in *Bozman* wisely inferred that the states had not faced the problems of abrogation given that none of the states had reverted to the common law rule, which they were free to do by legislative action. 376 Md. at 496, 830 A.2d at 471.

183. Had there been problems, of course, the legislature could have addressed this and reverted to the common law rule.

184. Klein v. Klein, 376 P.2d 70, 72 (Cal. 1962) (holding that a fundamental principle of tort law is that every person injured by another should, absent compelling policy reasons, receive compensation); Brown v. Brown, 89 A. 889, 892 (Conn. 1914) ("Courts are established and maintained to enforce remedies for every wrong upon the theory that it is for the public interest that personal differences should thus be adjusted rather than that the parties should be left to settle them according to the law of nature.").

185. In *Brown*, the Connecticut Supreme Court of Errors held that in the context of the marriage it was especially dangerous to bar suits for tortious injury, especially *intentional* tortious injury. 89 A. at 892. The court reasoned that without the ability of courts to provide compensation to injured spouses, those spouses would exact their own private re-
circumstances—a fear of fraudulent or trivial claims, however, is not compelling.\textsuperscript{186}

First, as noted in \textit{Klein}, the possibility of fraud exists in many situations outside of marriage, and were the fear of fraud to take precedence over the right of an injured person to recover, all causes of action could potentially be barred.\textsuperscript{187} In the average negligence action, where the chance of fraud undoubtedly exists, the courts have developed useful tools for eliminating trivial claims and for uncovering fraudulent ones, and any fair system of justice should not bar claims simply because that system does not provide an effective process.\textsuperscript{188} A similar response can be applied to the argument that abrogation will inundate the courts with increased, vexatious litigation. A system that denies hearing claims because it cannot handle their number cannot be said to promote any sense of justice.\textsuperscript{189} Ending this situation through abrogation, therefore, achieved a just result, as it removed an artificial bar to recovery for otherwise compensable tortious injury.\textsuperscript{190}

\textbf{b. Married and Unmarried Will Be Treated Alike for Tort Claims.—} \textit{Bozman} serves as a necessary change for Maryland law. It removes an arbitrary rule whose effect discriminated against married individuals, and especially married women, and now the married and unmarried will be treated equally when pursuing tort claims.\textsuperscript{191} Because interspousal immunity distinguished between married and unmarried people, it gave certain individuals drastically different

\footnotesize{venge, thereby leading the marriage relationship even further toward disharmony and disrupting the public well-being. \textit{Id.}}

\textsuperscript{186} \textit{Klein}, 376 P.2d at 72-73.

\textsuperscript{187} \textit{Id.} at 73.

\textsuperscript{188} See \textit{id}. In this regard the California Supreme Court stated:

\textit{It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled simply because in some future case a litigant may be guilty of fraud or collusion. Once that concept were accepted, then all causes of action should be abolished. Our legal system is not that ineffectual.}

\textit{Id.; see also} Coffindaffer v. Coffindaffer, 244 S.E.2d 338, 343 (W. Va. 1978) (noting that the adversary system, especially when in the hands of skilled insurance defense lawyers, is very effective at discovering fraud).

\textsuperscript{189} \textit{Klein}, 376 P.2d at 72 ("The argument about inundating the courts with trifling suits is palpably unsound.").

\textsuperscript{190} The paradoxical nature of partial abrogation further shows the arbitrariness of the rule—only some interspousal tort suits are barred. \textit{Id.} at 71 (recognizing that "there is no logical or legal reason for drawing a distinction" between intentional and negligent torts for the purposes of abrogating interspousal immunity).

\textsuperscript{191} \textit{Bozman}, 376 Md. at 486, 830 A.2d at 465.
remedies for receiving the same injuries.\textsuperscript{192} One individual who suffered a battery at the hands of a stranger could receive full compensation for those injuries, while another individual who received identical injuries at the hands of a spouse could recover nothing.\textsuperscript{193} Not only does the law require equal treatment, but unequal treatment has a denigrating effect on those it singles out, as society shows equal respect for all citizens by equally applying the law.\textsuperscript{194}

Thus, interspousal immunity not only operated unfairly in that it denied compensation, but also in that it expressed denigration to those whom it denied by communicating to them that they are unworthy of the rights and remedies given to others.\textsuperscript{195} Although the Court of Appeals in \textit{Bozman} accepted that married individuals may be treated differently by the law, the court nevertheless suggested there must be a viable reason for different treatment.\textsuperscript{196} If a classification has discriminatory effects on certain people and there is no good reason for having it, the classification can, and should, be struck down.\textsuperscript{197}

As discussed above, the Court of Appeals admitted in \textit{Bozman} that the reasons supporting interspousal immunity no longer had merit, and the classification was therefore arbitrary.\textsuperscript{198} Interspousal immunity, furthermore, not only discriminated against married couples by barring certain tort claims, but the Court of Appeals recognized in \textit{Boblitz} that the doctrine discriminated particularly against married

\begin{itemize}
\item \textsuperscript{192} See id. (pointing out that not only are married and unmarried individuals treated differently, but some \textit{married} individuals can recover while others cannot, based on whether they sustained an "outrageous, intentional tort" or merely an intentional one).
\item \textsuperscript{193} Arguably the individual suffering injury at the hands of a spouse has sustained greater injury, given the personal, intimate relationship that individual has with the batterer. See id. (noting that the \textit{classification of the injury} as outrageous or not also determined the ability to sue a spouse).
\item \textsuperscript{195} Id. at 475.
\item \textsuperscript{196} \textit{Bozman}, 376 Md. at 489-90, 830 A.2d at 467.
\item \textsuperscript{197} Id. at 489, 830 A.2d at 467 ("[T]he fact that married persons are in a different status from others is not sufficient to conceal interspousal immunity from judicial scrutiny.") (internal quotation marks omitted).
\item \textsuperscript{198} See supra notes 178-180 and accompanying text (discussing the invalidity of the reasons for retaining interspousal immunity).
\end{itemize}
women.\textsuperscript{199} Although the Court of Appeals in \textit{Bozman} did not specifically address this issue, the sexist bend to the doctrine and the arbitrary classifications it created should have signaled a heightened level of judicial scrutiny required by the courts.\textsuperscript{200}

A remaining issue for interspousal immunity that was never addressed in \textit{Bozman} is whether the rule withstands increased scrutiny, especially if the rule discriminates against married women. For example, statistics show that men commit domestic violence and intentional torts, such as battery, much more frequently than women.\textsuperscript{201} Men also tend to be the driver when riding in a car with a spouse, and they are also the cause of most household accidents.\textsuperscript{202} Because these actions—domestic violence and household and automobile accidents—most often occur in situations when the actor and the victim are married, \textit{married women} are the usual victims of male tortious conduct.\textsuperscript{203} With interspousal immunity in place, these women are barred from suing for their injuries.\textsuperscript{204} Married men, however, while equally barred from suing a spouse, are not as adversely affected by interspousal immunity because their wives statistically commit tortious injury much less frequently.\textsuperscript{205} Therefore, it can be argued that interspousal immunity promotes a hierarchical situation in which married women are prevented from asserting similar rights as their husbands.\textsuperscript{206}

Due to the potential discriminatory hierarchy promoted by interspousal immunity, the Court of Appeals in \textit{Boblitz} hinted that a lurking question underlying the doctrine was whether it violates Maryland’s Declaration of Rights, which prohibits abridging or denying the equality of rights based on sex.\textsuperscript{207} The Court of Appeals did not address

\begin{itemize}
    \item \textsuperscript{199} See \textit{supra} notes 169, 171 and accompanying text (examining the Court of Appeals suggestion that interspousal immunity discriminates particularly against women).
    \item \textsuperscript{200} \textit{Boblitz} v. \textit{Boblitz}, 296 Md. 242, 245, 463 A.2d 506, 507 (1983) ("Application of the words \textit{interspousal immunity} to this ancient rule of law borders on mockery. It would more aptly be called a rule in derogation of married women.").
    \item \textsuperscript{201} Tobias, \textit{supra} note 194, at 475.
    \item \textsuperscript{202} \textit{Id}.
    \item \textsuperscript{203} \textit{Id}.
    \item \textsuperscript{204} \textit{Id}.
    \item \textsuperscript{205} \textit{Id}.
    \item \textsuperscript{206} \textit{Id}. Tobias asserts that this situation is particularly denigrating in the context of intentional torts, as married women cannot hold their husbands publicly accountable for their actions, and because the immunity privatizes, and often worsens, spousal abuse. \textit{Id}. In many ways this situation perpetuates the eighteenth century perspective on marriage into modern times, for in a real way husbands can be allowed, with the law’s sanction, to beat their wives. See \textit{supra} notes 49-50 and accompanying text (discussing husband’s legal right at common law to punish his wife).
    \item \textsuperscript{207} MD. DECL. OF RTS. art. 46 (2003).
\end{itemize}
this issue in Bozman because of the factual situation in which the husband sought to sue his wife for an intentional tort, and because the issue was not raised in the litigation.\textsuperscript{208} Regardless of the equal protection doctrine, interspousal immunity undeniably has a negative impact primarily on the rights of married women. The court demonstrated that the rule had an arbitrary basis in the law, and justice required that the court abrogate it. The problem remained of how the court should go about deconstructing the doctrine, in spite of precedent, and legislative inaction.

c. The Continuing Influence of Common Law Doctrine in Maryland.—Bozman illustrated the lingering effects that doctrines formulated at common law continue to have on Maryland's legal structure. Interspousal immunity, for example, dates from eighteenth century English society, where married women had no independent legal rights and were subservient to their husbands.\textsuperscript{209} Such subservience continued, under the guise of the legal identity of husband and wife, as the fundamental reason to subsume interspousal immunity into Maryland law.\textsuperscript{210} Even though the Maryland courts throughout the twentieth century criticized interspousal immunity and one by one rejected every affirmative reason to apply it, the court had constrained itself by its own decision in Furstenburg.\textsuperscript{211}

The Court of Appeals later suggested, however, that it had decided Furstenburg incorrectly.\textsuperscript{212} The Furstenburg court relied heavily on the majority opinion in Thompson when it narrowly construed Maryland's Married Women's Act and held, like Thompson, that the

\textsuperscript{208} Bozman, 376 Md. at 462, 830 A.2d at 450 (failing to address whether interspousal immunity violates the Maryland Declaration of Rights). In addition, several federal courts have ruled on the constitutional issue of whether interspousal immunity, as it disproportionately affects women, violates equal protection under the Fourteenth Amendment to the U.S. Constitution. \textit{E.g.}, Paiewonsky v. Paiewonsky, 446 F.2d 178, 181-82 (3d Cir. 1971). Although the court in that case held that interspousal immunity did not violate the equal protection clause, the court decided the case in 1971, and at that time it felt that the doctrine continued to have "substantial vitality," and that it reasonably related to a compelling government interest. \textit{Id.} at 182. There might be a different outcome today given that most government interests in maintaining the doctrine are not compelling, and in many jurisdictions it has no 'vitality' whatsoever. \textit{See} Bozman, 376 Md. at 497-500, 830 A.2d at 471-74 (listing the present status of the interspousal immunity rule throughout the United States).

\textsuperscript{209} Barton v. Barton, 32 Md. 214, 224 (1870).

\textsuperscript{210} \textit{Id.}

\textsuperscript{211} \textit{See} Gregg v. Gregg, 199 Md. 662, 666-68, 87 A.2d 581, 583 (1952) (criticizing the rationale for interspousal immunity, but holding that without an express legislative mandate the court could not abrogate it).

language of the act did not permit interspousal tort suits.\textsuperscript{213} Thus, it rejected the reasoning of Justice Harlan’s dissent in \textit{Thompson}, which stated that the clear language did in fact permit tort suits between spouses.\textsuperscript{214} Later, the Court of Appeals in \textit{Lusby} stated that much of Justice Harlan’s arguments could actually be applied to Maryland’s Married Women’s Act.\textsuperscript{215} The court correctly noted that a literal reading of the Married Women’s Act would in fact permit an interspousal tort suit.\textsuperscript{216} The Court of Appeals in \textit{Lusby} then stated, as an afterthought, that it sensed in the majority’s opinion in \textit{Thompson} a conservative pull against recognizing the change in societal norms and the expansion of women’s rights, and the court praised the reputation of the dissenting Justices.\textsuperscript{217} This suggests the \textit{Furstenburg} court erred in relying on the \textit{Thompson} majority; had it not done so, interspousal immunity could have been abrogated in 1927.\textsuperscript{218} Instead, the court’s rigid deference to precedent, as well as to the legislature, produced a long line of decisions that inappropriately applied interspousal immunity, and incorrectly and unjustly prevented the recovery of a certain class of people with valid tort claims.\textsuperscript{219}

d. \textit{The Strict Deference Given to the Legislature by the Court of Appeals.}\textemdash The counterpart to the proposition that Maryland law still retains influences from the common law is the great deference shown by the Court of Appeals to the legislature, or at least to legislative silence. The Court of Appeals recognized interspousal immunity as a common law doctrine created entirely from judicial opinions, but it held that it would not judicially destroy it.\textsuperscript{220} Even though the court recognized the fading validity of interspousal immunity throughout the twentieth

\begin{thebibliography}{9}
\bibitem{214} \textit{Id.}
\bibitem{215} \textit{Lusby}, 283 Md. at 357, 390 A.2d at 88.
\bibitem{216} \textit{Id.} The court had previously acknowledged that a literal reading of the act did allow interspousal tort suits. Fernandez v. Fernandez, 214 Md. 519, 524, 135 A.2d 886, 889 (1957).
\bibitem{217} \textit{Lusby}, 283 Md. at 357, 390 A.2d at 88. Moreover, the Supreme Court decided \textit{Thompson} seventeen years before \textit{Furstenburg}; if the Supreme Court’s opinion could be seen as resisting change in 1910, then that opinion certainly must have been outdated by 1927, \textit{after} society’s norms had evolved even further with such events as the passage of the Nineteenth Amendment to the United States Constitution, which granted women the right to vote. \textit{Id.}
\bibitem{218} \textit{Id.}
\bibitem{219} Ironically, it was the Court of Appeals itself that finally corrected this unjust situation and overruled precedent in \textit{Lusby}, \textit{Boblitz}, and eventually \textit{Bozman}, after so many decades of waiting for the legislature. \textit{Id.}; \textit{Boblitz} v. \textit{Boblitz}, 296 Md. 242, 462 A.2d 506 (1983); \textit{Bozman}, 376 Md. at 462, 890 A.2d at 451.
\bibitem{220} \textit{Boblitz}, 296 Md. at 244, 462 A.2d at 507.
\end{thebibliography}
century, the Court of Appeals refused to abrogate the doctrine because abrogation is a question of public policy, within the legislature's realm. As Ms. Bozman argued, abrogation of interspousal immunity implicates public policy because the decision to do so requires a careful weighing of competing interests: fairness to those whose claims are barred; the interest in reducing fraud and collusion; the potential complications for divorce and other family law provisions; and the possible rise in increasingly complex litigation, with intimate family disputes aired in court.

Judge Couch stressed the public policy concern in his dissent in *Boblitz*, where the Court of Appeals abrogated interspousal immunity for negligence cases. Citing the Court of Appeals' decisions in other contexts, Judge Couch asserted not only that abrogation of interspousal immunity implicated public policy, but also that the court traditionally believed such changes to public policy should be implemented by the legislature. With its ability to undertake testimony, for example, the General Assembly has more access to information than the court, and thus can make more educated, expert decisions. As the politically accountable branch of government, the General Assembly will make decisions that reflect the popular will, and therefore a non-elected judiciary should not overturn such decisions lightly. With great hesitation to abrogate interspousal immunity, the Court of Appeals followed the legislative precedent and

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221. See, e.g., Ennis v. Donovan, 222 Md. 536, 543, 161 A.2d 698, 702 (1960) (noting that authorization for a married woman to sue her husband in tort must come from the legislature).


223. 296 Md. at 282, 462 A.2d at 524 (Couch, J., dissenting).

224. *Id.* Judge Couch pointed out that between 1959 and 1983 the General Assembly in Maryland had considered abrogating legislation seven times, but had failed to enact it each time; for him, then, the legislature had considered the public policy involved, and for whatever reason, ruled against it. *Id.* at 287, 462 A.2d at 527 (Couch, J., dissenting).

225. See Brawner v. Brawner, 327 S.W.2d 808, 813 (Mo. 1959) ("Obviously, the general assembly is not only better equipped than this court to investigate and develop the facts pertinent to a determination of this phase of public policy but also has greater authority to deal with the particular problem and at the same time the related ones.").

226. *Id.* With political accountability, so too comes special interest influences; while the democratic process necessarily survives on the accountability of government with the populace, an independent judiciary is also vital to safeguarding the rights of all citizens equally from the desires of the majority (or a powerful, vocal minority). One must wonder why, given the deficient support for interspousal immunity, the Maryland General Assembly never removed it; Chief Judge Gilbert's statement suggests this might stem from insurance interests. Linton v. Linton, 46 Md. App. 660, 661 n.2, 420 A.2d 1249, 1250 n.2 (1980); see also *Brawner*, 327 S.W.2d at 813 (noting that "the insurance business is affected with a public interest in Missouri").
showed great deference to the legislature. At the same time, however, the General Assembly refused to undertake the careful analysis called for by the Court of Appeals; the legislature did not state clearly the public policy of Maryland, and interspousal immunity remained the default public policy for most of the twentieth century.

e. The Legitimacy of the Court After Abrogation.—Bozman correctly abrogated interspousal immunity, thus demonstrating that the Court of Appeals will not defer to the legislature, or ill-decided precedent, indefinitely. When a court undertakes the extreme action of encroaching on the legislature’s role and overruling precedent, questions of the court’s legitimacy arise. Because, in Bozman, the court removed from the legal structure an outmoded principle that served only to promote injustice by denying equal recovery without good reason, the court’s legitimacy remained intact. Moreover, had the court continued to remain inactive, as did the legislature, the court’s legitimacy would have been further threatened.

Although stare decisis does mandate respect and deference for precedent, the court retains the power and authority to overrule outdated laws. In both Boblitz and Bozman, the Court of Appeals quoted its opinion in Harrison v. Montgomery County Board of Education, which reasoned that the court had never held that stare decisis prohibited it from changing a common law principle when the circumstances of society had also changed, making the principle outdated and ill-suited to current norms. The vitality of the common law comes with its ability to evolve, and the courts should always be looking for new ways to achieve fair solutions for society’s problems. At the same time, policy decisions should remain with the legislature,


229. Id. at 496-97, 830 A.2d at 471.


231. See infra notes 244-258 and accompanying text (arguing that abrogation did not threaten the court’s legitimacy).

232. See infra note 259 and accompanying text (explaining that the failure to abrogate and promote fairness would threaten the court’s legitimacy).


234. Id. at 459, 456 A.2d at 903.

235. Id. at 460, 456 A.2d at 903.
and thus the court should hesitate to abrogate the common law if doing so would violate another public policy mandate, as expressed by the legislature.\textsuperscript{236}

Therefore, interspousal immunity certainly qualified for judicial abrogation. Although there was arguably legislative support for the doctrine by negative implication only, the courts had heavily criticized the doctrine, and time and again it was held "a vestige of the past," with no viable, compelling argument supporting its continued application.\textsuperscript{237} The Court of Appeals in Bozman recognized that interspousal immunity not only contravenes current social norms and no longer serves any benefit, but that it had instead become a "pressing societal problem" itself, necessitating judicial abrogation.\textsuperscript{238} Not only was the doctrine based on rampantly sexist notions from over two centuries ago, but it also had the practical effect of discriminating in particular against married women.\textsuperscript{239}

In addressing this unjust situation on its own, the court's action raises questions of legitimacy.\textsuperscript{240} The court not only repeated in case after case that it was the legislative function to decide to end interspousal immunity, but it also repeatedly and openly called for the legislature to act.\textsuperscript{241} As the dissenting Judge Couch recognized in Boblitz, the General Assembly had considered abrogating legislation over seven times between 1959 and 1983, and had failed to enact any new statute.\textsuperscript{242} Although it cannot be inferred conclusively that this failure equates to a legislative statement in favor of interspousal immunity, the

\textsuperscript{236} Id. In Harrison, the Court of Appeals did not decide the policy issue at stake in the case (judicial abrogation of contributory negligence), given that not only had the legislature done nothing, but courts in Maryland had not particularly criticized the doctrine, and abrogation of contributory negligence would have required the court to pick from three options to replace it. Id. at 463, 456 A.2d at 905. The court concluded that society had not yet outgrown contributory negligence enough for it to be considered "a vestige of the past" requiring judicial abrogation. Id.


\textsuperscript{238} 376 Md. at 467, 850 A.2d at 454.

\textsuperscript{239} Id. at 470-71, 830 A.2d at 455-56.

\textsuperscript{240} See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 865-67 (1992) (holding that \textit{stare decisis} prohibited overruling precedent in this case given the threat to the Court's legitimacy created by overturning a prior decision); see also id. at 979 (Scalia, J., concurring in the judgment in part and dissenting in part) (arguing that the Court's role in deciding complicated public policy issues and removing these from the province of the state legislatures' threatened the Court's legitimacy more than adhering strictly to precedent).

\textsuperscript{241} E.g., Lusby, 283 Md. at 357, 390 A.2d at 88 ("The General Assembly has not heeded the suggestions by this Court that a new statute be enacted.").

\textsuperscript{242} 296 Md. at 287, 462 A.2d at 527 (Couch, J., dissenting).
survival of the doctrine in the face of legislative attempts to change it does question the appropriateness of its abrogation by the judiciary.\textsuperscript{243}

Nonetheless the Court of Appeals did act, and the decision in \textit{Bozman} does not unduly threaten its legitimacy for three main reasons. First, the court did show deference to the legislature, and it abrogated interspousal immunity with extreme hesitation. The doctrine began to erode in 1978, twenty-six years after the Court of Appeals issued its first harsh criticism of the rule and appealed to the legislature for a statutory change.\textsuperscript{244} In 1978, the Court of Appeals abrogated the doctrine partially, as it did again in 1983.\textsuperscript{245} This piecemeal abrogation destroyed the doctrine in a way that showed a great deal of caution; the court safeguarded against unruly and unforeseen consequences by allowing only certain suits between spouses to proceed.\textsuperscript{246} Furthermore, if such consequences had ensued or the citizens had reacted negatively to abrogation, thus signaling that the Court of Appeals had indeed misread public policy, the legislature was always free to reenact the rule.\textsuperscript{247}

Finally, the Court of Appeals couched each decision with lengthy reviews of the status of interspousal immunity in Maryland as well as other states.\textsuperscript{248} As noted above, this review included in-depth consideration of the usefulness of the doctrine in present society and the reasons that other jurisdictions, or previous Maryland courts, favored abrogation.\textsuperscript{249} The review, therefore, provided a great deal of support for the abrogation, and thus enhanced the perceived legitimacy of the court by showing that it was not embarking on an unusual, or unjust, course of action.\textsuperscript{250}

\begin{itemize}
\item \textsuperscript{243} See id. ("This history suggests to [Judge Couch] that this [failure to abrogate by statute] is not simply a circumstance of non-action by the legislature but, indeed, one of positive action, i.e., rejection, for whatever reason, of efforts to abrogate the immunity rule.").
\item \textsuperscript{244} See supra note 227 (discussing the chronology of abrogation in Maryland).
\item \textsuperscript{245} See supra note 227.
\item \textsuperscript{246} See Boblitz, 296 Md. at 275, 462 A.2d at 522 ("Decision[s] in such cases necessarily will be determined on a case to case basis.").
\item \textsuperscript{247} See Klein v. Klein, 376 P.2d 70, 74 (Cal. 1962) (Schauer, J., dissenting) (pointing out that the California legislature had re-enacted common law doctrines that had been abrogated judicially).
\item \textsuperscript{248} See supra note 157 and accompanying text (discussing review of the status of interspousal immunity in \textit{Bozman}).
\item \textsuperscript{249} See supra note 157 and accompanying text.
\item \textsuperscript{250} The analysis of \textit{Lusby}, for example, helped "to inform the decision" on whether to abrogate partially, while the \textit{Boblitz} review aided the court as it sought "to determine why the interspousal immunity doctrine, once the long-standing majority rule, was no longer widely favored and why those states applying it were, in fact, now in the minority." \textit{Bozman}, 376 Md. at 475, 480, 830 A.2d at 458, 462.
\end{itemize}
The second way in which the \textit{Bozman} decision did not threaten the Court of Appeals' legitimacy is that its decision was justified. The court had held previously that no bar to abrogation existed if an outdated law no longer suited modern society, and instead operated to promote injustice.\textsuperscript{251} Unlike \textit{Harrison}, in which the court refused to abrogate contributory negligence judicially, interspousal immunity did present a compelling case for removal.\textsuperscript{252} As opposed to contributory negligence, Maryland courts had long criticized interspousal immunity, and the court had been confronted with claims of an urgent societal need for abrogation.\textsuperscript{253} Finally, the solution to the problems presented by interspousal immunity could be solved with a single choice—abrogation—unlike contributory negligence, which called for a choice among new systems of comparative fault.\textsuperscript{254} The Court of Appeals' decision was therefore easy and correct; given that interspousal immunity served little use in modern times and instead perpetuated an unjust denial of certain people's right to tort recovery, the court's legitimacy did not suffer with abrogation.

The final reason the court's legitimacy remained intact is that it was the court itself that decided \textit{Furstenberg} incorrectly, and thereby began a precedent that would confine it for most of the twentieth century.\textsuperscript{255} While those such as Ms. Bozman argued that the Married Women's Act codified interspousal immunity, the Court of Appeals rejected this reasoning and held that the legislature in fact had never spoken clearly on the status of the rule.\textsuperscript{256} Instead, it was the Court of Appeals itself that interpreted, perhaps incorrectly, that the Married Women's Act did not expand married women's rights to include the right to sue a spouse in tort.\textsuperscript{257} While the court necessarily overruled its own precedent through abrogation, it did not usurp the legislative role if in fact it was the court that created the doctrine in the first


\textsuperscript{252} \textit{Id}. at 463, 456 A.2d at 905; \textit{Bozman}, 376 Md. at 469-72, 830 A.2d at 455-56.

\textsuperscript{253} \textit{Bozman}, 376 Md. at 472-84, 830 A.2d at 457-63.

\textsuperscript{254} \textit{Harrison}, 295 Md. at 462, 456 A.2d at 904; \textit{Bozman}, 376 Md. at 496-97, 830 A.2d at 471.

\textsuperscript{255} \textit{See supra} note 217 and accompanying text (arguing that the Court of Appeals suggests that it decided \textit{Furstenberg} incorrectly).

\textsuperscript{256} \textit{Bozman}, 376 Md. at 495, 830 A.2d at 470. The Court of Appeals stated that \textit{Boblitz} implicitly rejected the claim that the Married Women's Act codified interspousal immunity when the court held there was "no legislative barrier to abrogation." \textit{Id}; see \textit{Boblitz} v. \textit{Boblitz}, 296 Md. 242, 274, 462 A.2d 506, 522 (1983).

\textsuperscript{257} \textit{See supra} notes 72-79 and accompanying text (discussing \textit{Furstenberg}).
Therefore, the court’s legitimacy did not suffer through abrogation. That legitimacy might have suffered more, in fact, if the court had refused to abrogate a doctrine that it created, that the General Assembly refused to destroy, and that had not only outlived its usefulness, but continued to permit the unjust denial of certain citizens’ rights.

5. Conclusion.—The Court of Appeals in Bozman, by fully abrogating the common law doctrine of interspousal immunity, permitted a husband to sue his wife for the intentional tort of malicious prosecution. In so holding, Bozman resulted in the removal of arbitrary classifications that barred certain individuals from recovering in tort, solely because of marital status. The fact that such a law remained dominant in Maryland until 2003, however, reflects the general prevalence the common law still has in this state. This results from the Court of Appeals’ deference to precedent, even when precedent may have been decided incorrectly, and the court’s clear hesitance to act when the General Assembly refuses. In so doing, it removed a bar that prevented all citizens from recovering equally for a tortious injury regardless of marital status, and it formally removed the remaining traces of the “disabilities” assigned to married women at common law. The court’s decisions showed both due respect to precedent and action when justice finally required a response to the legislature’s inaction. As such, the court removed an unjust, outmoded principle of law which had for so long acted as a bar to Maryland citizens receiving equal compensation for their injuries.

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258. See, e.g., Boblitz, 296 Md. at 244, 462 A.2d at 507 (stating that interspousal immunity “is a creature of the common law that resulted exclusively from judicial decisions”).

259. Bozman, 376 Md. at 494, 830 A.2d at 470 (noting, of the Supreme Court’s decision in Brown v. Board of Education, 347 U.S. 483 (1954), that if the Court had deferred to Congress, “it would have been powerless to end segregation in public education,” a doctrine itself created by a previous judicial decision).

260. See supra notes 191-208 and accompanying text.

261. See supra notes 209-219 and accompanying text.

262. See supra notes 209-219 and accompanying text.

IV. INSURANCE LAW

A. A Missed Opportunity to Safely Circumnavigate the Serbonian Bog
and Decisively Settle a Conflict in Maryland Accident Law

In MAMSI Life & Health Insurance Co. v. Callaway, the Court of Appeals of Maryland considered whether an insurance company properly withheld accidental death benefits from an Insured who died while engaging in an act of autoerotic asphyxiation. The court held that the insurance company’s refusal to pay the accidental death benefits was proper because the policy excluded recovery of benefits for a loss that was caused in any way by a “self-inflicted injury.” The court reasoned that partial asphyxiation was an injury because a layperson would understand it to be an injury, and because asphyxiation would be an injury if someone else were to have partially asphyxiated the Insured. While this analysis is well-reasoned and consistent with other courts, the Court of Appeals nevertheless missed an opportunity to settle an area of law in which Maryland has conflicting precedent. The court had the opportunity to overrule the means-results test, which has become a dated and inflexible standard for determining what constitutes an accident. Additionally, the court could have

1. JOHN MILTON, PARADISE LOST, BK. 2, 1.592 (1667); see infra note 79 (explaining the concept of the Serbonian Bog).
3. Id. at 280, 825 A.2d at 1006.
4. Id. at 267, 825 A.2d at 998. The policy specifically stated that no benefit would be paid if the injury was caused “directly, indirectly, wholly or partly” by an intentional self-injury. Id.
5. Id. at 283, 825 A.2d at 1007.
8. MAMSI, 375 Md. at 274, 825 A.2d at 1002. Under the means-results test, a distinction is drawn between accidental means and accidental results; as such, an injury caused by accidental means is an accident for purposes of an insurance policy, while an injury that is the accidental result of intentional means is not an accidental injury for purposes of an insurance policy. Id.
9. The newer, two-pronged test inquires into the subjective and objective expectations of the Insured. Cole, 359 Md. at 315, 753 A.2d at 543. The first prong asks whether the Insured expected the result of his actions. Id. If the subjective expectations of the Insured are impossible to determine, the second prong of the test inquires whether a reasonable
adopted the flexible and well-reasoned two-prong approach\textsuperscript{10} that serves as a better proxy for our intuitive understanding of what an "accident" truly is.\textsuperscript{11} Instead of decisively settling an area of conflicting law in favor of the better-reasoned standard, the court's inaction perpetuates the ambiguity and confusion created by the existence of two conflicting standards for determining whether an injury is an accident under Maryland law.\textsuperscript{12}

1. The Case.—On July 5, 2000, David B. Callaway was found dead in his home.\textsuperscript{13} The Wicomico County resident was nude except for a plastic grocery bag over his head that was secured at his neck with a belt.\textsuperscript{14} Ropes bound his hands behind his back and his ankles together.\textsuperscript{15} The wall facing Callaway was papered with magazine pictures of nude women.\textsuperscript{16} The belt around Callaway's neck was attached by a rope to a 25-pound weight that hung at the other side of the room; this rope that connected the belt to the weight was strung through two pulleys attached to the ceiling.\textsuperscript{17} One end of a second rope was attached to the first rope at a point between the pulleys; the other end of this second rope was tied loosely around Callaway's hands and secured by a clothespin.\textsuperscript{18} This second rope apparently was

person with similar experiences to that of the Insured, should have expected the injury. \textit{Id.} Applied to autoerotic asphyxiation cases, the two-pronged test virtually always proceeds to the second prong because the decedent has engaged in the behavior many times before and subjectively expects to live through the experience. \textit{See} Bennett v. Am. Int'l Life Assurance Co. of N.Y., 956 F. Supp. 201, 212 (N.D.N.Y. 1997) (noting that it was highly likely that the Insured had engaged in the behavior on many previous occasions). Under the second prong of the test, the autoerotic asphyxiation death would not be an accident if the decedent should have expected his behavior, based on his past experiences, to cause his death. \textit{Cole}, 359 Md. at 315, 753 A.2d at 543.

10. \textit{See infra} notes 232-278 and accompanying text (arguing that the Court of Appeals could have overturned \textit{Gordon} in favor of the two-pronged test in \textit{Cole} because the parties placed the cases at issue, and \textit{Cole} is consistent with Maryland precedent).


12. \textit{See infra} notes 290-310 and accompanying text (explaining the benefits of the two-prong test).


14. \textit{Id.} at E-44.

15. \textit{Id.} at E-40. The Sheriff's Office report also shows that the rope binding Callaway's feet was attached to the floor by a U-shaped nail, and that a larger rope was inside of the binding rope, providing a type of cushion to prevent the ankles from being cut. \textit{Id.}

16. \textit{Id.}

17. \textit{Id.} at 4.

18. \textit{Id.} Pulling on this rope would lift the weight and release the tension in the rope around Callaway's neck, thus loosening his noose and allowing him to breathe. \textit{Id.}
meant to function as a safety device so that the pressure on the belt could be alleviated before total asphyxiation.\textsuperscript{19}

Callaway was engaged in an act of autoerotic asphyxiation when he died.\textsuperscript{20} Autoerotic asphyxiation is a mental disorder whereby the individual cuts off his oxygen supply with a mask, rope, plastic bag, or by means of chemicals to heighten his sexual arousal.\textsuperscript{21} The lack of oxygen causes a state of asphyxia that stimulates nerve centers in the brain by increasing the carbon dioxide and decreasing the oxygen in the blood stream, which heightens the intensity of sexual gratification.\textsuperscript{22} While most who engage in autoerotic asphyxiation employ some sort of release or escape mechanism, the mechanisms sometimes fail,\textsuperscript{23} as Callaway’s did in this instance.\textsuperscript{24}

The Assistant Medical Examiner conducted an autopsy the day after Callaway’s body was discovered and confirmed that the immediate cause of death was asphyxiation.\textsuperscript{25} The Medical Examiner also observed that the asphyxiation mechanism Callaway used was common for this kind of sexual activity, and confirmed the Assistant Medical Examiner’s conclusion that Callaway’s death was caused by accidental asphyxiation.\textsuperscript{26}

Callaway owned a MAMSI life insurance policy that promised to pay death benefits if he died from “an injury caused by an accident.”\textsuperscript{27} However, this provision contained certain exclusions that would preclude the recovery of any benefits.\textsuperscript{28} Specifically, the policy stated that “[n]o benefit will be paid for any loss that results from or is caused directly, indirectly, wholly or partly by: intentional self-injury, suicide or attempted suicide, while sane or insane.”\textsuperscript{29} After Callaway’s death, MAMSI refused to pay the benefit amount because it concluded that Callaway’s death was not an accident, but rather the result of a self-inflicted injury.\textsuperscript{30} John W. Callaway, John CallawayJR., and Bennett J.

\textsuperscript{19} Id. at 4-5.
\textsuperscript{20} Id. at 3. Callaway’s use of both a plastic bag to cover his head and a belt around his neck is one of the more severe forms of autoerotic asphyxiation. Id. at 4.
\textsuperscript{21} MAMSI, 375 Md. at 264, 825 A.2d at 996.
\textsuperscript{22} Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1125 (9th Cir. 2002).
\textsuperscript{23} See, e.g., Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1450 (5th Cir. 1995) (noting that the decedent had designed his system of ligatures to loosen if he lost consciousness, but that system appeared to have failed, causing his death).
\textsuperscript{24} MAMSI, 375 Md. at 266, 825 A.2d at 997.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
\textsuperscript{27} Id., 825 A.2d at 998.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 267, 825 A.2d at 998 (alteration in original).
\textsuperscript{30} Id. at 266, 825 A.2d at 998.
Callaway, Callaway's brother and nephews, respectively, were the named beneficiaries of the policy.31

The Beneficiaries filed suit against MAMSI for breach of insurance contract in the Circuit Court for Wicomico County on October 16, 2000.32 MAMSI filed a motion to dismiss or, in the alternative, a motion for summary judgment, asserting that Callaway injured himself by depriving his brain of oxygen and that the oxygen deprivation caused his death.33 MAMSI argued that recovery was barred because the insurance policy excluded recovery for losses caused by a self-inflicted injury such as asphyxiation.34

The Beneficiaries responded to MAMSI's motion with their own motion for summary judgment, arguing that the existence of the escape mechanism evidenced Callaway's lack of intent to injure himself.35 Thus, the Beneficiaries argued that the death resulted from an accidental injury, not a self-inflicted injury.36 As such, the Beneficiaries concluded that the life insurance policy provided coverage.37

At a hearing before the Circuit Court of Wicomico County on the two parties' motions in February 2001, the parties stipulated that the policy was unambiguous and that there was no dispute of material facts.38 The trial court found that because Callaway intended to cut off his air supply and the resulting lack of air caused his death, Callaway's death was not an accident.39 Rather, the trial court reasoned that the death was caused accidentally by an injury that was inflicted intentionally.40 The trial court found that this intentional infliction of the injury prevented Callaway's death from being classified as an accident under the policy.41 Additionally, the court stated that the asphyxiation was an injury, and therefore, even if the death were accidental, the self-inflicted injury exclusion precluded recovery.42

31. Id. Callaway's brother and nephews will hereinafter be referred to as the "Beneficiaries."

32. Id. at 267, 825 A.2d at 998.
33. Id.
34. Id.
35. Id.
36. Id.
37. Id.
38. Id. at 267-68, 825 A.2d at 998.
39. Id. at 268, 825 A.2d at 999.
40. Id.
41. Id.
42. Id. at 269, 825 A.2d at 999.
The Beneficiaries appealed to the Court of Special Appeals. They argued that the trial court failed to view the facts in the light most favorable to the Beneficiaries and failed to draw reasonable inferences in their favor from the undisputed facts. In the Beneficiaries' opinion, the trial court did not give sufficient weight to the determination of law enforcement personnel and the Medical Examiner who concluded that the death was an accident. Additionally, the Beneficiaries argued that Callaway's death was, under the policy, the result of an injury caused by an accident and not the result of a self-inflicted injury. MAMSI again responded that the death was the result of an intentional injury, and thus was not accidental. Furthermore, MAMSI argued, even if the court decided that the death was accidental under the terms of the policy, recovery was precluded because the death was the result of a self-inflicted injury.

The Court of Special Appeals agreed with the Beneficiaries and overruled the trial court's decision. Writing for a unanimous court, Judge Hollander rejected both of MAMSI's arguments, finding that the death was an accident and that intentionally restricting the flow of blood to the brain was not an injury under the self-inflicted injury exclusion. Judge Hollander drew an analogy between autoerotic asphyxiation and skydiving, arguing that both are activities that contain inherent risk of severe injury if the preventive measures malfunction. According to Judge Hollander, a skydiver's voluntary jump from a plane does not prevent any subsequent fatal injury from being considered an accident. Likewise, she reasoned that the voluntary behavior of autoerotic asphyxiation, though foolish, does not determinatively render any subsequent fatal injury non-accidental.

44. Id. at 583, 806 A.2d at 283. When ruling on a motion for summary judgment, "all inferences are drawn in favor of the non-moving party." Id. at 580, 806 A.2d at 281 (citing Southland Corp. v. Griffith, 332 Md. 704, 712, 633 A.2d 84, 87 (1993)).
45. MAMSI, 375 Md. at 269, 825 A.2d at 999. The Medical Examiner stated in the autopsy report that the immediate cause of death was asphyxiation and the manner of death was accident. Callaway, 145 Md. App. at 572, 806 A.2d at 277.
46. See Callaway, 145 Md. App. at 585, 806 A.2d at 284 (noting that Beneficiaries argued that the Insured did not intend to injure himself in such a way that was likely to lead to his death).
47. Id.
48. Id.
49. Id. at 604, 806 A.2d at 296.
50. Id.
51. Id.
52. Id.
53. Id.
MAMSI appealed the decision to the Court of Appeals, arguing four main issues. First, MAMSI questioned whether the Court of Special Appeals erred in its conclusion that the terms “injury” and “accident” should be given their ordinary meanings on the ground that the insurance policy was ambiguous. Second, MAMSI challenged whether the Insured’s death from autoerotic asphyxiation was an “accident” under the policy. Third, MAMSI argued that even if the death were an accident, the act of autoerotic asphyxiation was a self-inflicted injury that excluded recovery for an accidental death under the terms of the policy. Finally, MAMSI questioned whether the two-prong inquiry of *Cole v. State Farm Mutual Insurance Co.* applied to all cases involving death by accident, and if so, whether *Gordon v. Metropolitan Life Insurance Co.* was overruled, thus preventing Maryland Courts from recognizing the distinction between accidental means and accidental results.

2. Legal Background.—Though we may intuitively understand what an accident is, the law has had a great deal of difficulty defining what constitutes an accident. Whether the cause of an injury was an “accident” has been decided in the past by drawing a distinction between injuries caused by accidental means, and injuries that are the accidental result of purposeful means. However, a dissenting opinion by Justice Cardozo in *Landress v. Phoenix Mutual Life Insurance Co.* began a movement to abolish this means-results test in favor of tests that are more in line with our intuitive understanding of what constitutes an accident. State courts first abolished the distinction, and

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54. MAMSI, 375 Md. at 272-73, 825 A.2d at 1002. Additionally, MAMSI asked the Court of Appeals to decide whether the case should have been remanded to the circuit court to allow MAMSI to introduce the meanings of the words, if they were found ambiguous. *Id.* at 273, 825 A.2d at 1002.

55. *Id.*

56. *Id.*

57. 359 Md. 298, 314, 753 A.2d 533, 542 (2000); see supra note 9 (explaining the two-prong approach in *Cole*).

58. 256 Md. 320, 323, 260 A.2d 338, 339 (1970). The *Gordon* court explicitly reaffirmed its adherence to the means-results test. *Id.; see supra note 8 (explaining the means-results test).*

59. MAMSI, 375 Md. at 274, 825 A.2d at 1002.


61. 291 U.S. 491 (1934).

62. *Id.* at 499. Instead of examining whether the man’s death was caused by accidental means or was the accidental result of intentional means, Justice Cardozo stated that “[w]hen a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means. So courts of high authority have held.” *Id.*

some federal courts followed in kind. The United States Court of Appeals for the First Circuit developed a two-prong test that has supplanted the means-results test in many other jurisdictions. This two-prong approach also has been used by many courts in cases of death by autoerotic asphyxiation to determine the nature of the decedent’s death. Although Maryland precedent specifically embraces the means-results test, many Maryland courts have decided whether an occurrence is an accident without employing the means-results test. Additionally, the Court of Appeals has adopted the two-prong test, although no Maryland court has yet employed the test in an autoerotic asphyxiation case.

a. Justice Cardozo Creates a Fork in the Road of Accident Law.—In *Landress v. Phoenix Mutual Life Insurance Co.*, the Supreme Court determined if a man’s unexpected death was accidental. The Insured died from sunstroke while playing golf. The two insurance policies of the Insured provided benefits so long as the death was not “caused directly, indirectly, wholly or partly by: intentional self-injury, suicide or attempted suicide.” The insurance companies that wrote these policies maintained that the death was not accidental and withheld benefits, prompting the beneficiaries to file suit to recover the benefits. Justice Stone’s majority opinion embraced precedent and held that under the relevant insurance policies, a death from sunstroke was not compensable as an accidental death because the death was the accidental result of intentional means and not the result of

66. See, e.g., Padfield, 290 F.3d at 1126-27 (following the two-prong test articulated in Wickman); Todd, 47 F.3d at 1456 (same).
70. 291 U.S. 491 (1934).
71. *Id.* at 496.
72. *Id.* at 494.
73. *Id.* at 495 (emphasis added).
74. *Id.* at 494.
accidental means. The court reasoned that the bodily injury from the sun was not an accidental injury because the Insured voluntarily exposed himself to the sun’s rays, which caused the Insured’s death. The court concluded that the death by sunstroke was the accidental result of intentional means and found that the insurance company had correctly withheld accidental death benefits from the beneficiaries.

Justice Cardozo, in a strongly worded dissent, chastised the majority for adhering to what he viewed as an ineffective and needlessly cryptic standard. Justice Cardozo warned that continued adherence to the distinction between accidental means and accidental results would “plunge this branch of the law into a Serbonian Bog.” Justice Cardozo contended that the artificial distinction had no meaning, for if an occurrence was an accident at the beginning, it was an accident throughout. He advocated an abrogation of the means-results test in favor of a common language standard such that “[w]hen a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means.”

Justice Cardozo’s dissent has since divided judicial scholars on that which constitutes an “accident,” with two competing standards emerging across the country.

b. Many States Soon Followed Justice Cardozo’s Directive and Abrogated the “Means-Results” Test.—Not long after Justice Cardozo’s dissent in Landress, many state courts followed Justice Cardozo’s path and

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75. Id. at 496. The policy read that accidental death benefits would be paid if death resulted “directly and independently of all other causes from bodily injuries effected through external, violent and accidental means.” Id. at 495.

76. Id. at 496.

77. Id.

78. Id. at 499.

79. Id. The reference to the Serbonian Bog comes from John Milton’s Paradise Lost:

Beyond this flood a frozen Continent Lies dark and wilde, beat with perpetual storms Of Whirlwind and dire Hail, which on firm land Thaws not, but gathers heap, and ruin seems Of ancient pile; all else deep snow and ice, A gulf profound as that Serbonian Bog Betwixt Damiata and Mount Casius old, Where Armies whole have sunk.

JOHN MILTON, PARADISE LOST, BK. 2, 1.592 (1667).


81. Id. at 499.

82. See Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1085 (1st Cir. 1990) (surveying state judicial interpretations of what is accidental and concluding that there are two approaches to determine whether an injury is accidental); Lamb v. Northwestern Nat'l Life Ins. Co., 56 Md. App. 125, 129, 467 A.2d 182, 184-85 (1983) (noting that two opposing standards for determining if an injury is an accident have emerged, just as Justice Cardozo predicted).
abolished the means-results test. Courts that abolished the test often cited Justice Cardozo's dissent, specifically his recognition of the unnecessary and artificial distinction between accidental means and accidental results. State courts that abolished this distinction have applied various tests in an attempt to mirror Justice Cardozo's logic. The trend towards accepting Justice Cardozo's position in his dissenting opinion in *Landress* began in the 1940s in New York.

New York was one of the first states to follow Justice Cardozo's directive and abrogate the distinction between accidental means and accidental results. Just twelve years after *Landress*, the Court of Appeals of New York, in *Burr v. Commercial Travelers Mutual Accident Association*, decided that the distinction between accidental means and accidental results would no longer be recognized in New York. Justice Conway's opinion focused heavily on the cause of the Insured's death, noting that the chain of causation between the accident and the Insured's death was unbroken. Though the New York high court did not cite Justice Cardozo's dissent in *Landress*, the court's rejection of the means-results test and its use of a common-sense definition of an "accident" accords with the logic and spirit of Justice Cardozo's dissent. Just as Justice Cardozo encouraged, the New York court guided its reasoning from the expectations of an ordinary person. The court recognized that life insurance policies are written for the common man and that the common man does not draw a distinction between accidental means and accidental results; rather, he is guided by his common sense.


85. Compare *Burr*, 67 N.E.2d at 251-54 (utilizing a common sense standard and noting that a common man would consider the death an accident because the chain of causation was begun by an automobile accident), with *Gaskins*, 104 So. 2d at 177 (inquiring whether the average man would regard the loss as unforeseen, unexpected, and extraordinary).

86. See, e.g., *Burr*, 67 N.E.2d at 252 (abrogating the use of the accidental means and results distinction in New York).
87. 67 N.E.2d 248 (N.Y. 1946).
88. *Id.* at 252.
89. The Insured died when he slipped and hit his head while attempting to fix his car on the side of a mountain road in a snowstorm. *Id.* at 250.
90. *Id.* at 253-54.
91. See *Landress v. Phoenix Mut. Life Ins. Co.*, 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting) (advocating a definition of "accident" that is in line with the common man's understanding of what an accident is).
93. *Id.* at 252.
The Supreme Court of Louisiana also abrogated the distinction between accidental means and accidental results, echoing the logic in *Burr* and approving Justice Cardozo's view in *Landress*. In *Gaskins v. New York Life Insurance Co.*, accidental death insurance benefits were withheld from a patient who died from anaphylactic shock induced by a blood transfusion during surgery. In its decision, the *Gaskins* court disregarded the Supreme Court precedent established in *Landress* as well as a similar Louisiana decision, *Parker v. Provident Life & Accident Insurance Co.* The *Gaskins* court rejected the *Parker* test because it was confusing and susceptible to manipulation to the point that it was meaningless. The *Gaskins* court instead decided to determine whether a death was an accident by asking whether an average man would understand the death to be an accident. After citing Justice Cardozo's dissent in *Landress* approvingly, the court held that an accident is an event that an average man regards as being so unforeseen, unexpected, and extraordinary that he would consider it an accident.

Pennsylvania soon joined New York and Louisiana in abandoning the means-results test. The conclusion by the Supreme Court of Pennsylvania in *Beckham v. Travelers Insurance Co.* resembled that of the Supreme Court of Louisiana in *Gaskins*. Justice Roberts' opinion abrogated the distinction between accidental means and accidental results on the ground that a failure to do so would have allowed ambiguity in an area of the law where Pennsylvania courts had previously insisted on clarity and specificity. The motivation for such a move was in part a recognition of the national judicial trend away from the means-results test and in part an admission that Pennsylvania jurisprudence on the issue was mired in the Serbonian Bog.

95. *Id.* at 172.
96. *Id.* at 175.
97. 152 So. 583, 586 (La. 1934).
98. *Gaskins*, 104 So. 2d at 175. In disregarding the Louisiana precedent, the *Gaskins* court noted the similarities between *Parker* and the majority's opinion in *Landress*. *Id.*
99. *Id.* at 177.
100. *Id.*
102. *Id.* at 535.
103. *Id.*
104. *Id.* The court noted that "Our own cases have also confirmed Cardozo's prediction about plunging this branch of law into a Serbonian bog." *Id.* The court continued by noting cases where accidental death benefits were denied under the means-results test, although in the view of the court, common sense and prudence indicated that the injuries clearly were accidental. *Id.*
place of the means-results test, the court substituted Justice Cardozo's
common sense standard set forth in *Landress*.

In *Republic National Life Insurance Co. v. Heyward*, the Supreme Court of Texas similarly rescued the Texas courts from the Serbonian Bog by holding that Texas no longer recognized the difference between accidental death and death by accidental means. Like the courts discussed above, the court was persuaded by Justice Cardozo's dissent in *Landress*, but the Supreme Court of Texas applied a somewhat different definition of the term "accident." The court applied a test that would evolve into the modern two-prong test used by those jurisdictions embracing Cardozo's position. In applying this test, the court looked at the occurrence from the viewpoint of the Insured, and held that an occurrence is an accident if the injury reasonably could not have been anticipated by the Insured from the actions that caused the injury.

c. Courts Faced with Deaths by Autoerotic Asphyxiation Have Declined to Apply the Distinction Between Accidental Means and Accidental Results When Deciding Whether the Death Was an Accident.—Similar to the state courts that abrogated the means-results test, many courts faced with deaths resulting from autoerotic asphyxiation have declined to use the means-results test. These cases typically involve a refusal by an insurance company to pay accidental death benefits because of the voluntary nature of the behavior that caused the death. In declining to apply the means-results test, the courts have recognized that the distinction between accidental means and results is a poor measure of whether a death was accidental when faced with these autoerotic asphyxiation fact patterns that are strikingly similar to each other. While the courts consistently have declined to examine the distinction between accidental means and results in favor of Justice Cardozo's

105. Id. at 537.
106. 536 S.W.2d 549 (Tex. 1976).
107. Id. at 557.
108. Id.
109. See id. (abrogating the means-results test and examining the death of the insured from the subjective expectations of the insured); Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077 (1st Cir. 1990) (citing *Republic* in establishing the two-prong test that was later adopted in many state and federal courts).
110. *Republic*, 536 S.W.2d at 557.
111. E.g., Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1450 (5th Cir. 1995).
112. See, e.g., Conn. Gen. Life Ins. Co. v. Tommie, 619 S.W.2d 199, 202 (Tex. Civ. App. 1981) (describing a typical autoerotic asphyxiation fact pattern: the Insured was found dead, with rope around his neck, inadvertently having been strangled to death while engaging in an autoerotic act).
common sense standard, the tests that the courts initially applied were
guile and inconsistent, resulting in inconsistent outcomes.\textsuperscript{113}

In \textit{Connecticut General Life Insurance Co. v. Tommie,\textsuperscript{114}} the Court of
Civil Appeals of Texas was faced with an autoerotic asphyxiation
case.\textsuperscript{115} The Insured was found dead in his bedroom, inadvertently
asphyxiated during an autoerotic act.\textsuperscript{116} The Texas Court of Civil Ap-
peals gave the term "accident" its usual and ordinary meaning and
upheld a jury decision that the death was accidental because the activity
was not the type of activity that would cause the Insured reasonably
to expect that he would die, even though the act was both foolish and
risky.\textsuperscript{117} The life insurance policy contained an exclusion for death
caused by self-inflicted injury that the court found did not exclude
recovery.\textsuperscript{118} In finding that the self-inflicted injury exclusion did not
preclude recovery, the court reasoned that autoerotic asphyxiation is
not included in the usual and ordinary understanding of the word
"injury."\textsuperscript{119} Thus, the court found that recovery under the insurance
policy was appropriate because death from autoerotic asphyxiation is
an accident, not a self-inflicted injury that would exclude recovery for
the beneficiaries of the insurance policy in question.\textsuperscript{120}

In \textit{Sigler v. Mutual Benefit Life Insurance Co.},\textsuperscript{121} the United States
District Court for the Southern District of Iowa was faced with a case
factual analogy to \textit{Tommie}, but concluded the contrary by finding
that the Insured's death was not an accident and that autoerotic as-
phyxiation was a self-inflicted injury.\textsuperscript{122} The court similarly aban-
doned the distinction between accidental means and accidental
results in one of the first autoerotic asphyxiation cases in federal court
but reached an opposite conclusion as had the court in \textit{Tommie}.\textsuperscript{123}
The Insured was found dead in his hotel room, asphyxiated in an

\begin{itemize}
\item \textsuperscript{113} Compare \textit{id.} at 202-03 (holding that an autoerotic asphyxiation death was an acci-
dent, because while the behavior was "fraught with substantial risk of injury or death," the
behavior was not "of such a nature that the [I]nsured should have reasonably known that it
542, 544 (S.D. Iowa 1981)} (holding that an autoerotic asphyxiation death was not an acci-
dent because a "reasonable person would have recognized that his actions could result in
his death").
\item \textsuperscript{114} 619 S.W.2d 199 (Tex. Civ. App. 1981).
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Id.} at 201.
\item \textsuperscript{117} \textit{Id.} at 202-03.
\item \textsuperscript{118} \textit{Id.} at 203.
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{121} 506 F. Supp. 542 (S.D. Iowa 1981).
\item \textsuperscript{122} \textit{Id.} at 545.
\item \textsuperscript{123} \textit{Id.} at 544-45.
\end{itemize}
autoerotic act. The district court agreed with the insurance company that the death was not accidental because "a reasonable person would have recognized that his actions could result in his death." Like the insurance policy in Tommie, this policy contained an exclusion for self-inflicted injuries. However, unlike the Tommie court, the Sigler court held that partial asphyxiation was an injury because it would have been an injury if someone else had partially asphyxiated the Insured. Therefore, not only did the Sigler court find that autoerotic asphyxiation was not an accident, but it also found that autoerotic asphyxiation was an injury that precluded recovery of accidental death benefits under the insurance policy.

In Kennedy v. Washington National Insurance Co., the Court of Appeals of Wisconsin declined to use the means-results test in an autoerotic asphyxiation death. With no discussion of the distinction between accidental means and results, the Kennedy court applied what it referred to as the "average man" test in interpreting whether an autoerotic asphyxiation death was an accident and found that the Insured's death was an accident. Under this test, the court gave the word "accident" its ordinary and everyday meaning and held that the customary expectation of a policy holder is that a death is accidental if the policyholder reasonably believes that his conduct does not make death an expected result. This "average man test" is very similar to the common sense test for which Justice Cardozo advocated in his dissenting opinion in Landress. Applying the test, the court concluded that the Insured's death was an accident because there was no evidence that the Insured's death was highly probable, expected, or the natural result of his actions. The court rejected the insurance company's attempt to analogize the Insured's death to the death of someone engaged in Russian Roulette. This insurance policy did not

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124. Id. at 543.
125. Id. at 544.
126. Id. at 545.
127. Id.
128. Id. at 544-45.
129. 401 N.W.2d 842 (Wis. Ct. App. 1987).
130. The Insured was found dead, hanging by a rope from a shower head, inadvertently asphyxiated during an autoerotic act. Id. at 844.
131. Id. at 845-46.
132. Id. at 846.
133. See Landress v. Phoenix Mut. Life Ins. Co., 291 U.S. 491, 499 (1934) (Cardozo, J., dissenting) (arguing that "when a man has died in such a way that his death is spoken of as an accident, he has died because of an accident, and hence by accidental means").
134. Kennedy, 401 N.W.2d at 846.
135. Id. at 845. Russian Roulette is an act of bravado consisting of spinning the cylinder of a revolver loaded with one cartridge, pointing the muzzle at one's head, and pulling the
include an exclusion for self-inflicted injuries, prompting the court to note that the insurance company could have protected itself from the adverse outcome of this case through the language of the contract by excluding the voluntary exposure to this type of unnecessary danger from the accidental death coverage.\textsuperscript{136}

d. Federal and State Courts Have Begun to Apply a Two-Prong Test in Determining Whether Autoerotic Asphyxiation Deaths Are Accidental.—In Wickman v. Northwestern National Insurance Co.,\textsuperscript{137} the First Circuit articulated a two-prong test for determining if an injury was caused by an accident; this test has provided consistency in decisions for both federal and state courts faced with autoerotic asphyxiation cases.\textsuperscript{138} The First Circuit abandoned the distinction between means and results, explicitly embraced the principles of Justice Cardozo's dissent in Landress, and established a comprehensive test to examine the subjective expectations and, if necessary, the objective expectations of the Insured.\textsuperscript{139} While this standard did not arise in an autoerotic asphyxiation case, it has been applied in many such cases, affording consistency to the analysis in autoerotic asphyxiation cases.\textsuperscript{140} In Wickman, the First Circuit was faced with an Insured who died after a fall from a bridge.\textsuperscript{141} The Insured intentionally climbed over the guardrail to the edge of the bridge and fell to the ground after hanging from the bridge by only one hand.\textsuperscript{142} He died later at the hospital from cardiac arrest.\textsuperscript{143} The insurance company withheld payment of accidental death benefits, claiming the death was not an accident under its policy.\textsuperscript{144}

Judge Rosenn's opinion recognized that two competing standards existed in the country for determining whether an injury was an accident.\textsuperscript{145} In rejecting the means-results test and its distinction between accidental means and accidental results, the court cited Justice

\textsuperscript{136} Kennedy, 401 N.W.2d at 846.
\textsuperscript{137} 908 F.2d 1077 (1st Cir. 1990).
\textsuperscript{138} Id. at 1086.
\textsuperscript{139} Id. at 1085-88.
\textsuperscript{140} See, e.g., Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995) (following the two-prong test).
\textsuperscript{141} 908 F.2d at 1080. The case was heard in federal court because it dealt with issues arising under ERISA, the Employee Retirement Income Security Program. Id. at 1079 n.1.
\textsuperscript{142} Id. at 1080.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 1081.
\textsuperscript{145} Id. at 1085.
Cardozo's dissent in *Landress* approvingly, and noted that recently, "courts consistently have rejected the distinction between accidental means and accidental results."146 After deciding that such a rejection was the result of better reasoning, the court engaged in a two-prong analysis.147 In the first prong of this analysis, the court asked whether the Insured either expected the injury he suffered or reasonably should have expected the injury he suffered.148 The court then reasoned that should a fact-finder conclude that the evidence is not sufficient to determine the Insured's subjective expectations, the court should then proceed to the second prong of the test.149 In the second prong, the objective prong, the court asks if a reasonable person, similar in background and experience to the Insured, would have thought that the injury was highly likely to occur as a result of the Insured's voluntary conduct.150

The *Wickman* two-prong test has been used in numerous autoerotic asphyxiation cases arising in federal courts. In *Todd v. AIG Life Insurance Co.*, the Fifth Circuit explicitly embraced the application of the *Wickman* two-prong test to a death by autoerotic asphyxiation.152 The Insured in *Todd* was found strangled on his hotel bed, with a dog collar around his neck and a system of dog leashes that allowed him to regulate the amount of oxygen that he received.153 The circuit court found that the *Wickman* test was appropriate because it recognized that the Insured did not expect to die and that the behavior was not of such a nature that he was likely to die.154 The court also noted that the first prong of the *Wickman* test requires that the Insured's expectations be reasonable; the subjective expectation of the Insured, if unreasonable, is not enough to warrant coverage.155

In *Padfield v. AIG Life Insurance Co.*, the United States Court of Appeals for the Ninth Circuit adopted the reasoning in *Todd* and also applied the two-prong test in an autoerotic asphyxiation death.157

146. *Id.* at 1086.
147. *Id.* at 1089-90.
148. *Id.* at 1088.
149. *Id.*
150. *Id.*
151. 47 F.3d 1448 (5th Cir. 1995).
152. *Id.* at 1456.
153. *Id.* at 1450.
154. *Id.* at 1456-57.
155. *Id.* at 1456. Additionally, the court noted that the expectation of death must reach a "substantial certainty" but stated that this was the equivalent of the "highly likely to occur" standard used in *Wickman*. *Id.* (internal quotation marks omitted).
156. 290 F.3d 1121 (9th Cir. 2002).
157. *Id.* at 1126.
adopting the *Wickman* test, the court noted that the utility of the test rested in objectively predicting the expectation of the decedent when determining the actual expectation is not possible. In *Padfield*, the Court of Appeals was faced with a slightly different autoerotic asphyxiation fact pattern. The Insured was found asphyxiated in the back of his van, with a necktie tied around his neck at one end and the van’s sliding door hinge at the other. This situation was different from most autoerotic asphyxiation deaths because the Insured also used an industrial solvent, chlorohexanol, to heighten the effect of the asphyxiation.

Like many other courts, the Ninth Circuit determined that the death was accidental using the *Wickman* test. Unlike other courts, however, the Ninth Circuit found that partial asphyxiation was not an injury that would trigger the self-inflicted injury exclusion and preclude recovery of benefits.

e. *Maryland State Precedent Still Acknowledges the Means-Results Test, Although Maryland Courts Also Have Adopted the Wickman Two-Prong Test.*—Accident law has evolved differently in Maryland than it has around the rest of the country. Maryland still recognizes the means-results test, but Maryland courts also have adopted the two-prong test as well. Compounding the problem is that the means-results test is seldom used, and the courts that adopted the two-prong test never explicitly overruled the means-results test. Therefore, Maryland has two competing and contradictory standards for determining what constitutes an accident.

The Court of Appeals of Maryland explicitly reaffirmed the distinction between accidental means and accidental results in *Gordon v. Metropolitan Life Insurance Co.* In *Gordon*, the Insured died from an unexpected reaction to an intentionally self-injected dose of heroin; as a result, his insurance company withheld accidental death benefits. The court refused to overrule *John Hancock Mutual Life Insur-

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158. See *id.* at 1127 (noting that the requirement that death not be substantially certain to occur makes the objective inquiry a reliable proxy for subjective expectation).
159. *Id.*
160. *Id.* at 1125.
161. *Id.* at 1126-27.
162. *Id.* at 1130.
164. See, e.g., *id.* (explicitly embracing the *Wickman* two-prong test, but not specifically overruling *Gordon* and the means-results test).
166. *Id.* at 321-22, 260 A.2d at 338-39. The court reasoned that when an Insured injects himself with a dangerous drug and nothing unusual happens in the actual injection, but
ance Co. v. Plummer and abrogate the distinction between accidental means and accidental results. Though the court recognized that many jurisdictions have declined to distinguish between accidental means and accidental results, Judge Digges refused to follow Justice Cardozo's reasoning because he thought that abandoning the distinction would not prevent Maryland courts from plunging into the morass that Justice Cardozo feared.

While Gordon stands as state precedent, it is a rarely cited case, and recent Maryland decisions have not embraced the means-results test. In fact, Maryland courts have declined to use the means-results test both before and after Gordon was decided. Harleysville Mutual Casualty Co. v. Harris & Brooks, Inc. was decided three years before Gordon, and the Court of Appeals did not use the means-results test in deciding if an occurrence was an accident. In Harleysville, an excavating company sought coverage from its insurance company for damage the company caused when it burned large piles of trees in a neighborhood, causing smoke damage to some of the homes. The insurance company refused subrogation of the judgment against the excavation company, claiming the original damage was not accidental.

In Harleysville, an excavating company sought coverage from its insurance company for damage the company caused when it burned large piles of trees in a neighborhood, causing smoke damage to some of the homes. The insurance company refused subrogation of the judgment against the excavation company, claiming the original damage was not accidental.

the Insured dies from the injection, there is no reason to ignore the distinction between accidental means and accidental results so that the Insured can recover under his insurance policy. Id. at 324, 260 A.2d at 340. The means of the death are intentional; it is only the result of those means that is accidental. Id. Consequently, there was no coverage. Id. at 325, 260 A.2d at 340.

167. 181 Md. 140, 28 A.2d 856 (1942). In Plummer, an insurance company withheld accidental death benefits when the Insured died from anesthetic administered during a dentistry procedure. Id. at 141, 28 A.2d at 857. The court followed the “weight of authority” in finding that the death from anesthesia was a death from an accidental result, not a death by accidental means. Id. at 143, 28 A.2d at 858.

168. Gordon, 256 Md. at 323, 260 A.2d at 339.

169. Id. at 323-25, 260 A.2d at 339-41. In Judge Digges’ view, the ‘Serbonian Bog’ encompasses more than just the distinction between means and results; rather, it encompasses the entire field of accident law. Id. at 325, 260 A.2d at 340.

170. According to Westlaw, Gordon has been cited only three times by Maryland courts since 1970.


172. See Sheets, 342 Md. at 652, 679 A.2d at 548 (deciding if an occurrence was an accident without using the means-results test, twenty-six years after Gordon); Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc., 248 Md. 148, 151, 235 A.2d 556, 558 (1967) (deciding if an occurrence was an accident without using the means-results test, three years before Gordon).


174. Id. at 151, 235 A.2d at 558.

175. Id. at 149-50, 235 A.2d at 556-57.
The court engaged in a brief analysis with no mention of Gordon, reasoning that the damage was an accident because it was unexpected and unforeseeable. Sheets v. Brethren Mutual Insurance Co. is another case where the Court of Appeals did not apply the means-results test. In that case, decided twenty-six years after Gordon, the Court of Appeals determined whether negligent misrepresentation could be an accident under an insurance contract. The buyers of a house sued the sellers of the house, claiming that the sellers never disclosed that the house had a defective septic system that caused substantial flooding. The sellers sought indemnification for any liability stemming from the suit from their insurance company, pursuant to their insurance coverage for accidental property damage. In deciding if the property damage was indeed an accident under the policy, the court's inquiry centered on the subjective expectation of the Insured. The Insured sellers of the house allegedly were negligent in not discovering the defective septic system; it was this non-discovery that qualified the damage as an accident. Though the sellers allegedly were negligent, they did not foresee or expect the damage; therefore, the court found that the damage was accidental under the policy. This analysis is consistent with the previous Court of Appeals decisions in Glens Falls Insurance Co. v. American Oil Co. and Harleysville, both of which decided if an occurrence was an accident with no mention of the distinction between accidental means and accidental results.

Maryland courts not only have declined to apply the means-results test in numerous cases, but the Court of Appeals has also adopted the two-prong test. In Cole v. State Farm Mutual Insurance

176. Id. at 150-51, 235 A.2d at 557.
177. Id. at 151, 235 A.2d at 558.
179. Id. at 652, 679 A.2d at 548.
180. Id. at 646, 679 A.2d at 545.
181. Id. at 637, 679 A.2d at 541.
182. Id. at 638, 646, 679 A.2d at 542, 545.
183. Id. at 652, 679 A.2d at 548.
184. Id.
185. Id. at 658, 679 A.2d at 551.
186. 254 Md. 120, 254 A.2d 658 (1969). In Glens Falls, the Insured drove his car into a gas station intentionally. Id. at 122, 254 A.2d at 660. In examining whether the crash was an accident, the court embraced Harleysville and the principle that whether an occurrence is an accident turns on the foresight and expectation of the Insured. Id. at 127-28, 254 A.2d at 662-63.
Co., the Court of Appeals adopted the two-prong test to determine if an intentional tort was an accident under an insurance policy. In Cole, the Insured was shot and killed as she sat in her car. The insurance company refused to pay accidental death benefits because it did not believe that the Insured’s injuries resulted from an accident. The court reasoned that the two-prong test, used most often in federal courts, was appropriate under Maryland law because it was a more detailed version of the analysis in Sheets. According to the Court of Appeals, the two-prong test was appropriate not only because it mirrored the analysis in Sheets, but also because it conformed to the court’s prior holdings concerning Maryland accident law.

3. The Court’s Reasoning.—In MAMSI Life & Health Insurance Co. v. Callaway, the Court of Appeals overruled the Court of Special Appeals by a 5-2 vote, and held that the Circuit Court for Wicomico County had properly granted summary judgment for MAMSI, thus withholding accidental death benefits from Callaway’s beneficiaries. Judge Harrell’s majority opinion stated that the appeal raised four specific questions for the court’s consideration. The first issue the majority focused on was whether the Court of Special Appeals erred in its conclusion that the terms “injury” and “accident” should be given their ordinary meanings because the insurance policy was ambiguous. Second, the court examined whether the Insured’s death from autoerotic asphyxiation was an “accidental” death under the policy. Third, the court considered whether autoerotic asphyxiation was a self-inflicted injury under the terms of the policy. Finally, the court considered whether the two-prong inquiry of Cole applied to all cases involving death by accident, and if so, whether Gordon was overruled, preventing Maryland courts from recognizing

188. 359 Md. 298, 753 A.2d 533 (2000).
189. Id. at 315, 753 A.2d at 542-43.
190. Id. at 301-02, 753 A.2d at 535.
191. Id. at 502, 753 A.2d at 535.
192. Id. at 315, 753 A.2d at 542. In Sheets, the court examined the subjective expectation of the Insured to determine if the Insured expected or foresaw the damage. 342 Md. 634, 652, 679 A.2d 540, 548 (1996).
194. MAMSI, 375 Md. at 283, 825 A.2d at 1008.
195. Judges Eldridge, Raker, Wilner, and Cathell joined the opinion. Id. at 264, 825 A.2d at 996.
196. Id. at 272-74, 825 A.2d at 1002.
197. Id. at 272-73, 825 A.2d at 1002.
198. Id. at 273, 825 A.2d at 1002.
199. Id.
the distinction between accidental means and accidental results. The court found the third issue, whether or not autoerotic asphyxiation is a self-inflicted injury under the terms of the policy, to be dispositive and therefore declined to address the remaining three questions.

Because this case came to the Court of Appeals from a trial court order of summary judgment, the court reviewed the judgment de novo. The court engaged in a brief discussion of contract interpretation under Maryland law, as well as Maryland law concerning ambiguous contract terms. However, after this discussion, the court continued with no further mention of contract interpretation, interpreting the term "injury" in the manner that "a layperson would understand." In framing the argument, Judge Harrell stated that because the insurance policy clearly limited recovery if the death was the result of a self-inflicted injury, the court must examine if the Insured intended to cause the injury that ultimately led to his death, as well as whether asphyxiation is an "injury" within the terms of the policy. Judge Harrell elaborated further, citing disagreement with the Court of Special Appeals' attempt to consolidate the analysis of the terms "accident" and "injury" to a single issue because the two terms require separate and unique inquiries under the terms of the policy. After illuminating the two main issues, Judge Harrell reasoned that the question of whether there was a self-inflicted injury was dispositive because recovery would be precluded if autoerotic asphyxiation is a self-inflicted injury even if the death were an accident.

200. Id. at 274, 825 A.2d at 1002.
201. Id.
202. Id. at 278, 825 A.2d at 1005. On appeal from a grant of summary judgment, the reviewing court has the same facts before it and considers the same issues of law as the trial court; its role is to determine whether the trial court's grant of summary judgment was correct as a matter of law. Tyma v. Montgomery Co., 369 Md. 497, 504, 801 A.2d 148, 152 (2002).
203. MAMSI, 375 Md. at 279-80, 825 A.2d at 1005-06.
204. Id. at 283, 825 A.2d at 1007. Though the court did not state specifically the standard of contract interpretation that it employed, the use of the meaning that "a layperson would understand" implies that the court found the term "injury" not to be ambiguous. Id. Maryland law states that courts should give non-ambiguous words their customary, ordinary, and accepted meaning; using the understanding of a layperson is consistent with this standard and is evidence that the court did not find the term "injury" to be ambiguous. Id. at 279, 283, 825 A.2d at 1005, 1007. The court would have been required to examine outside sources to determine the meaning of the terms had the court found the term to be ambiguous. Id. at 279, 825 A.2d at 1005.
205. Id. at 280, 825 A.2d at 1006.
206. Id.
207. Id.
The court’s reasoning focused on the relative consistency of the outcome in out-of-state autoerotic asphyxiation cases where the insurance policy provided an exclusion for self-inflicted injuries. The opinion observed that the majority of similar autoerotic asphyxiation cases from other jurisdictions concluded that autoerotic asphyxiation is a self-inflicted injury and that denial of benefits is proper. The court detailed analogous cases from other circuits involving insurance policies with similar self-inflicted injury exclusions where the courts found that autoerotic asphyxiation was an injury, and thus denied benefits.

The court referenced Sims v. Monumental General Insurance Co., where the Fifth Circuit denied accidental death benefits in a case of autoerotic asphyxiation because of a policy exclusion for self-inflicted injuries. The court noted that the Fifth Circuit relied on evidence that strangulation causes tissue damage in the neck and prevents the brain from obtaining the oxygen in concluding that autoerotic asphyxiation was an injury under the definition of the policy.

The Court of Appeals elaborated further on the plain language interpretation of the term “injury” by referencing two analogous cases where New York courts found that autoerotic asphyxiation was a self-inflicted injury and denied accidental death benefits. One such case that the Court of Appeals discussed favorably was Cronin v. Zurich American Insurance Co., where the District Court for the Southern District of New York detailed the physical injury caused by the partial strangulation of autoerotic asphyxiation. Judge Harrell highlighted that the Cronin court also examined whether asphyxiation was an injury from the aspect of the physical effects of asphyxiation. Specifically, the Court of Appeals noted that “[t]he effect on the brain produced by this activity is abnormal; the higher cerebral functions of thought, consciousness and awareness are compromised; and a dangerous loss of coordination and self-control results. Temporary cell damage results, and reduced brain activity occurs.”

208. Id. at 280-81, 825 A.2d at 1006-07.
209. Id. at 280, 825 A.2d at 1006.
210. Id. at 280-81, 825 A.2d at 1006-07.
211. 960 F.2d 478, 481 (5th Cir. 1992).
212. MAMS, 375 Md. at 280-81, 825 A.2d at 1006.
213. Id. at 281, 825 A.2d at 1006-07.
215. MAMS, 375 Md. at 281, 825 A.2d at 1006.
216. Id. (quoting Cronin, 189 F. Supp. 2d at 38).
The Court of Appeals also noted *Critchlow v. First UNUM Life Insurance Co. of America*,217 where the United States District Court for the Western District of New York focused on the effect of asphyxiation on the respiratory system in its analysis of whether asphyxiation was a self-inflicted injury.218 The Court of Appeals mentioned the *Critchlow* court’s observation that while partial asphyxiation may be done without more lasting injury, the partial asphyxiation itself is still an injury.219

After discussing these cases, the Court of Appeals specified that it disagreed with the Court of Special Appeals on the issue of whether self-inflicted asphyxiation is a self-inflicted injury under the terms of the insurance policy.220 After outlining the reasoning of the Court of Special Appeals and its reliance on the Ninth Circuit’s reasoning in *Padfield*, the Court of Appeals stated that it disagreed with the Court of Special Appeals’ interpretation of how a layperson would construe the contract terms.221 The court disagreed because it concluded that a layperson would understand partial strangulation to be an injury.222

The court supported its interpretation of a layperson’s understanding with three points. First, the court employed a transitive argument, reasoning that if someone else had partially strangled the Insured, it would be certain that the Insured was injured.223 Next, the court reiterated its main point, that a layperson would consider the lack of oxygen that results from partial strangulation to be an injury whether or not any permanent marks are left on the body.224 Lastly, the court stated that even though this type of harm may be temporary when performed correctly, the Insured had nonetheless injured his brain by preventing its ability to function by depriving it of oxygen.225 Therefore, the Court of Appeals reversed the Court of Special Appeals and upheld the circuit court’s grant of summary judgment to MAMSI, holding that the insurance company properly withheld accidental death benefits from the Beneficiaries.226

218. Id. at 323.
219. MAMSI, 375 Md. at 281, 825 A.2d at 1007.
220. Id. at 283, 825 A.2d at 1007.
221. Id. at 282-83, 825 A.2d at 1007.
222. Id. at 283, 825 A.2d at 1007. The Court of Special Appeals reached the opposite conclusion, finding that “the term ‘injury’ would commonly be understood by a layperson to mean physical damage or harm to the body, whether permanent or temporary.” *Calaway v. MAMSI Life & Health Ins. Co.*, 145 Md. App. 567, 603, 806 A.2d 274, 295 (2002).
223. MAMSI, 375 Md. at 283, 825 A.2d at 1007.
224. Id.
225. Id.
226. Id. at 283, 825 A.2d at 1008.
4. Analysis.—In MAMSI, the Court of Appeals of Maryland correctly decided that the Beneficiaries were not due accidental death benefits because Callaway's death was caused by a self-inflicted injury.\(^{227}\) However, the court missed an opportunity to settle a disputed area of Maryland law by overruling Gordon and establishing the two-part Cole test as the Maryland standard for determining whether an occurrence is an accident. The court had the opportunity to make such a ruling because the parties placed the two cases at issue.\(^{228}\) The court could have overruled Gordon because the two-prong test of Cole is consistent with Maryland precedent.\(^{229}\) Additionally, the court should have used the opportunity in MAMSI to settle the conflicting precedents in Gordon and Cole.\(^{230}\) Finally, the court should have overruled Gordon because the two-prong test of Cole is a better reasoned standard for determining if an occurrence is an accident.\(^{231}\)

a. The Court Had the Opportunity to Overrule Gordon, as the Parties Placed the Conflicting Cases at Issue.—The parties in MAMSI positioned the conflicting precedents of Gordon and Cole as a central issue for the court to decide.\(^{232}\) MAMSI argued that the Cole two-part test was not applicable to the case at bar.\(^{233}\) In support of this argument, MAMSI first maintained that the case at bar was not factually analogous to Cole because the Insured in Cole did not cause the injury.\(^{234}\) MAMSI further argued that Cole was not applicable because it was inconsistent with the court's decision in Gordon.\(^{235}\)

By contrast, the Beneficiaries argued for application of the Cole two-prong test.\(^{236}\) They argued that the two-prong test has drawn widespread acceptance in circuits across the country and that the only Fourth Circuit precedent rejecting the two-prong test occurred when

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227. Id.
228. Appellant's Brief at 14-28, MAMSI (No. 98), Appellee's Brief at 16-22, MAMSI (No. 98).
230. See infra notes 307-310 and accompanying text (arguing that the Court of Appeals should have overruled Gordon in favor of Cole because Cole is a better-reasoned standard and consistent with Maryland precedent).
231. See infra notes 290-310 and accompanying text (arguing that the two-pronged test is a better-reasoned standard).
232. Appellant's Brief at 14-28, MAMSI (No. 98), Appellee's Brief at 16-22, MAMSI (No. 98).
233. Appellant's Brief at 20, MAMSI (No. 98).
234. Id. at 18.
235. Id. at 20.
236. Appellee's Brief at 16, MAMSI (No. 98).
the court was obliged to apply law “peculiar” to Virginia. In their most compelling argument, the Beneficiaries pointed out that the Court of Special Appeals found the two-prong test, as applied in Padfield, to be consistent with Cole, Harleysville, and Glens Falls.

The Court of Appeals recognized this conflict in Maryland law and inquired as to whether the two-part test of Cole should be applied, and if so, whether Gordon should be overruled so that Maryland law would no longer distinguish accidental means from accidental results. However, the court never reached this issue because it decided that Callaway’s act of autoerotic asphyxiation was a self-inflicted injury, and that recovery of benefits was thus barred. Nonetheless, the court had the opportunity to overrule Gordon to settle the conflict in Maryland’s accident jurisprudence because the parties placed the two standards at issue.

b. The Court of Appeals Could Have Overruled Gordon Because Cole’s Two-Prong Test is Consistent with Maryland Precedent.—The Court of Appeals also could have overruled Gordon and embraced Cole because the two-prong test in Cole is consistent with Maryland precedent. Adopting the two-prong test would not have represented a sea change in Maryland law because the Court of Appeals already had decided many cases without using the means-results test.

The court’s previous decisions in Harleysville and Glens Falls support acceptance of the Cole two-prong test. This line of Maryland cases differs from Gordon because the Harleysville and Glens Falls courts decided whether an occurrence was an accident without examining distinctions between accidental means and accidental results. Without explicitly abrogating the means-results test and without mention-

237. Id. at 17.
238. Id. at 21.
239. MAMSI, 375 Md. at 274, 825 A.2d at 1002.
240. Id.
241. Id.
244. Appellee’s Brief at 21, MAMSI (No. 98) (noting the consistency of these cases with Cole).
245. See Glens Falls Ins. Co. v. Am. Oil Co., 254 Md. 120, 127-28, 254 A.2d 658, 662-63 (1969) (deciding whether an occurrence is an accident without examining the distinction between accidental means and accidental results); Harleysville, 248 Md. at 151, 235 A.2d at 558 (same).
ing Gordon, Harleysville, and Glens Falls instead determined if an occurrence was an accident based on what was expected and foreseeable by the Insured. These cases were decided both before and after Gordon; as such, the failure to follow Gordon undermines the strength of the case.

In Harleysville, the Court of Appeals plainly stated that "the fact that an injury is caused by an intentional act does not preclude it from being caused by accident if in that act, something unforeseen, unusual and unexpected occurs which produces the result." This assertion, re-affirmed two years later in Glens Falls, shows that the Court of Appeals recognized that even if some part of an act is intentional, the result of the act still can be accidental. This recognition suggests that the means-results test in Gordon is inconsistent with Harleysville because it is impossible under the means-results test for an accident to result from an intentional act. Supporting the Harleysville court, the Court of Appeals held in Sheets that the negligent actions of homeowners produced an accidental result under the insurance policy. The court based its determination on the reasoning in Harleysville, particularly the Harleysville court's reliance on the Insured's expectation and foresight.

These principles of foresight and expectation reaffirmed in Sheets are at the heart of the Cole two-prong test. In adopting the two-prong test in Cole, Judge Harrell was influenced by the similarity between the two-prong test in Lincoln National Life Insurance Co. v. Evans and existing Maryland law. Judge Harrell properly recognized that Maryland law determines if an occurrence is an accident based on the subjective expectations and the foresight of the Insured.

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246. See, e.g., Harleysville, 248 Md. at 151, 235 A.2d at 558 (holding that the damage was accidental because it was unexpected and unforeseeable).
247. See supra note 170 (noting that Gordon is a rarely cited case).
248. 248 Md. at 151-52, 235 A.2d at 558.
249. Id.
250. See Gordon v. Metro. Life Ins. Co., 256 Md. 320, 324, 260 A.2d 338, 340 (1970) (drawing a distinction between accidental means, which would warrant coverage under the policy, and intentional means, which would not warrant coverage under the policy).
252. Id. The Sheets court stated directly that "when a negligent act causes damage that is unforeseen or unexpected by the [I]nsured, the act is an 'accident' under a general liability policy." Id.
255. Cole, 359 Md. at 315, 753 A.2d at 542.
sured. The lynchpin of Judge Harrell's acceptance of the two-prong test was the close conformity of the Lincoln court's reasoning with Maryland precedent.

The argument that Maryland law supports abrogation of the means-results test is further supported by Judge Harrell's statement in Cole that the two-prong test is essentially a restatement of the Court of Appeals' reasoning in Sheets. MAMSI argued in its brief that Cole is applicable only when the Insured is not the one that causes the injury, but this narrow reading ignores the dicta in Cole that the nature of a supposed accident is most appropriately examined from the perspective of the Insured. The Cole court recognized that the Insured is the one that is protected from accidental loss under any accidental injury insurance policy, so the important inquiry is whether the act that caused his loss was an accident to him.

This reasoning is at the heart of the two-prong test in Cole. The first prong of that test asks whether the Insured expected an injury similar to the one that he suffered. This subjective analysis is an excellent measure of our understanding of what an accident is. The average person would typically understand an accident to be an occurrence that one does not expect or foresee. The two-prong test would be useful in the typical autoerotic asphyxiation case, but the Insured has usually kept the behavior a secret. Consequently, determining the subjective expectation of the Insured is nearly impossible; thus, the second prong of the test becomes particularly help-

256. Id. at 314, 753 A.2d at 542.
257. Id. at 315, 753 A.2d at 542 (noting that the Lincoln court adopted the Wickman test).
258. Id. In Sheets, the court's reasoning centered on the foreseeability of the occurrence sought to be characterized as an accident. 342 Md. 634, 652, 679 A.2d 540, 548 (1996).
259. Cole, 359 Md. at 315, 753 A.2d at 542.
260. Id.
261. Id. at 314, 753 A.2d at 542.
262. Id. The specific language of the Cole test is relevant to an injury on the Insured by another party. Id. When applying the test to a self-inflicted injury, the courts have asked "if the [I]nsured actually expected an injury similar in type or kind to that suffered." Lincoln Nat'l Life Ins. Co. v. Evans, 943 F. Supp. 943 F. Supp. 564, 568 (D. Md. 1996).
263. See Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1088 (1st Cir. 1990) (noting that the subjective inquiry is the proper starting point in determining whether an accident occurred).
264. See id. at 1086-88 (noting that the means and results distinction is not in harmony with the understanding of the common man, then adopting a test centered on the expectations of the Insured).
265. See, e.g., Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1124 (9th Cir. 2002) (noting that though a wife knew of her deceased husband's former habit of autoerotic asphyxiation, he had concealed his recent resumption of the practice).
This second prong serves as an accurate proxy for the subjective expectations of the Insured by asking what a person with similar experiences as the Insured would have expected. Thus, the court can determine whether an occurrence was an accident, in line with our common sense understanding of what is accidental, without having actual knowledge of the expectations of the Insured.

The ability of the two-prong test to approximate a person's common sense understanding of an accident is also essential to Maryland contract law, which is used to interpret insurance contracts. Judge Hollander, in her opinion for the Court of Special Appeals, noted that Maryland law calls for courts to interpret insurance contracts that are unambiguous as a matter of law. In interpreting the contract, the court analyzes the plain language of the contract according to the ordinary and accepted meanings of that language. The Cole two-prong test is well-suited to that task. The value of the test is its approximation of what we intuitively understand an accident to be: an occurrence that we did not foresee or expect. A person's intuitive understanding of what an accident is accords with the word's accepted and ordinary meaning, which is the meaning that must be used under Maryland law in interpreting insurance policies such as the one at bar. In comparison, the means-results test often will lead to determinations that occurrences that we understand to be accidents are by law not accidents.

The Wickman two-prong test is an attempt to create a definition of an accident that responded to "Cardozo's tautology that an accident is

266. See Lincoln, 943 F. Supp. at 570 (applying the second prong of the Wickman test because the actual expectation of the Insured could not be determined).

267. See Wickman, 908 F.2d at 1088 (noting that the utility of the two-prong test is that using both prongs allows a fact finder to approximate what the Insured expected even if the actual expectations could not be discerned).


269. Callaway, 145 Md. App. at 582, 806 A.2d at 282.

270. Id. at 581, 806 A.2d at 282.

271. Cf Republic Nat'l Life Ins. Co. v. Heyward, 536 S.W.2d 549, 557 (Tex. 1976) (stating that accidental injury provisions in insurance contracts should be given their ordinary meaning, which is in line with the understanding of the average man).


what the public calls an accident." The Wickman court, in its genesis of the two-prong test, indicated that the objective prong of the test was to be reached only when the subjective intent of the Insured cannot be determined. The Court of Appeals adopted this test and the reasoning behind it in Cole. The two-prong test is not only consistent with Maryland law, but it is also the natural next step in the evolution of Maryland law that recognizes the need to determine the nature of an accident from the subjective viewpoint of the Insured.

c. The Court of Appeals Should Have Decided What Precedent Represents Maryland Law Because the Two Precedents Directly Conflict with Each Other.—The high court is the ultimate authority on questions of conflicting state law, and as such should have decided whether Gordon or Cole represents Maryland law because application of the two tests leads to two different conclusions on the nature of the accident. Applying the means-results test from Gordon to Callaway's death leads to the conclusion that the death was not an accident. In a situation such as Callaway's, the means that caused the death clearly were intended; it was only the result of those intentional means that was accidental. A finding that Callaway's death was not an accident is counterintuitive; Callaway had clearly engaged in this behavior before, and he employed multiple safety mechanisms to prevent death. Because these...


276. Wickman, 908 F.2d at 1087-88.


278. See id. at 312-15, 753 A.2d at 541-42 (reconciling the Harleysville accident standard of unforeseen and unexpected with the two-prong test of Wickman).

279. See MAMSI, 375 Md. at 274, 825 A.2d at 1002 (recognizing that the tests in Gordon and Cole are mutually exclusive; the acceptance of one necessitates overruling the other).

280. See, e.g., Runge v. Metro. Life Ins. Co., 537 F.2d 1157, 1159 (4th Cir. 1976) (holding that an autoerotic asphyxiation death was not the result of accidental means and therefore not an accident).

281. MAMSI, 375 Md. at 267, 825 A.2d at 998. Callaway clearly intended to tie the rope around his neck, but there is no indication whatsoever that Callaway intended to kill himself. Id.

safety mechanisms were present, the average man would understand the death to be accidental.283

In contrast to the result under the Gordon test, application of the Cole test leads to the conclusion that Callaway's death was an accident.284 This result is consistent with our understanding of what an accident is; with all of the safety devices that Callaway had, one necessarily concludes that Callaway did not want to die and that he expected to prevent death, and so we understand his death to be an accident.285 In the case at bar, this finding would not have changed the ultimate outcome because of the self-inflicted injury exclusion, but settling this conflict in Maryland law would have been beneficial for two reasons. First, by leaving the question unanswered, the court likely will have to hear a similar case and once again consider whether Gordon or Cole properly states Maryland law. Should a case arise where the insurance policy does not contain the "self-inflicted injury" exclusion that was dispositive in this case, the court will be compelled to decide whether Gordon or Cole is the appropriate Maryland precedent.286 In the interests of judicial economy and efficiency, the court should have settled the question when it had the chance.287

The second reason that the court should have decided what accident standard is correct is that the question of whether an occurrence is an accident arises in many other cases aside from autoerotic asphyxiation cases.288 While insurance companies can word their contracts

283. See, e.g., Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1987) (holding that an autoerotic asphyxiation death was accidental under the state's "average man" test, which examines the understanding of a common man).

284. Callaway, 145 Md. at 602, 806 A.2d at 294.

285. The Court of Special Appeals found that the first prong of the Cole test could not be determined because Callaway was dead and did not communicate his expectations to anyone while he was alive. Id. The court then applied the second, objective, prong of the test that left no doubt that Callaway "would not have considered the fatal injury highly likely to occur." Id.

286. Because the court found that Callaway's death was the result of a self-inflicted injury, the court did not have to decide whether Cole or Gordon controls. MAMSI, 375 Md. at 274, 825 A.2d at 1002. Without the presence of this exclusion, the court would have had no choice but to overrule either Gordon or Cole. Id.

287. Settling the question during the case at bar would have prevented this same issue from being relitigated by the Court of Appeals, any other Maryland court, or any federal court, sitting in diversity and applying Maryland law. Relitigation will cost two limited and precious resources: taxpayer money and the court's time. See Jed I. Bergman, Putting Precedent in its Place: Stare Decisis and Federal Predictions of State Law, 96 COLUM. L. REV. 969, 985 (1996) (noting the importance of stare decisis in limiting the agenda of courts by preventing redundant cases from being litigated).

to avoid liability in autoerotic asphyxiation deaths, many other instances of accidental injuries and losses will require a decisive standard of how to determine if the injury or loss was an accident.\textsuperscript{289} The court could have provided that standard by overruling \textit{Gordon}.

d. \textit{The Two-Prong Test Is a Better Reasoned Standard for Determining if an Occurrence Is an Accident}.—The main thrust of Justice Cardozo's dissent in \textit{Landress} is best characterized as an appeal to common sense.\textsuperscript{290} Justice Cardozo properly recognized that the distinction between accidental means and accidental results of the means-results test was artificial; the attempt to reconcile this artificial distinction with a person's common sense view of what is accidental is what created the metaphorical Serbonian Bog.\textsuperscript{291} While the means-results test may have been useful for courts to reason through doubts about the nature of a supposed accident, it is by no means a tenet of American law that must withstand the emergence of a more carefully considered analysis.\textsuperscript{292} Insurance policies, particularly life insurance policies, are taken out to safeguard against accidents and unforeseen events.\textsuperscript{293} As such, these contracts must be understood and interpreted in line with the understanding of a common man.\textsuperscript{294} To give the word "accident" a technical meaning, as the means-results test attempts to do, is "not in harmony with the understanding of the common man."\textsuperscript{295} Courts employing the two-prong test often have done

\textsuperscript{289} See Kennedy v. Wash. Nat'l Ins. Co., 401 N.W.2d 842, 846 (Wis. Ct. App. 1987) (noting that insurance companies can easily insulate themselves from having to pay for autoerotic asphyxiation deaths by writing exclusions into their policies).


\textsuperscript{291} Id.

\textsuperscript{292} The distinction between accidental means and accidental results is a construct of insurance companies in an attempt to reduce payments for non-fatal injuries and emerged during the latter half of the nineteenth century in England, long after the states adopted the British common law. See generally Adam F. Scales, \textit{Man, God and the Serbonian Bog: The Evolution of Accidental Death Insurance}, 86 IOWA L. REV. 173 (2003). The first use of the distinction in a court did not appear until 1886, in \textit{Southard v. Railway Passengers Assurance Co.}, and thus the standard was only a forty-eight-year-old precedent when Justice Cardozo dissented against its use. \textit{Landress}, 291 U.S. at 499 (Cardozo, J., dissenting).

\textsuperscript{293} Landress, 291 U.S. at 499 (Cardozo, J., dissenting) (noting that common man is convinced that accidents happen, so he takes out accident insurance); see also Burr v. Commercial Travelers Mut. Accident Ass'n of Am., 67 N.E.2d 248, 251 (N.Y. 1946) (stating that when interpreting whether an occurrence was an accident under an insurance policy, "[o]ur guide must be the reasonable expectation and purpose of the ordinary business man when making an insurance contract").

\textsuperscript{294} Burr, 67 N.E.2d at 251.

\textsuperscript{295} Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1086 (1st Cir. 1990) (citation omitted). Additionally, one of the first courts to abrogate the distinction between accidental means and results questioned the validity of the distinction finding validity in
so because the test accords with the common man's understanding of an accident and its unexpected nature.\textsuperscript{296} An average person purchases insurance not for what he intends to do but rather to protect himself from his own "foibles and imperfections."\textsuperscript{297}

A benefit of the two-prong test is that the test examines the subjective intent of the Insured, but does not encourage reckless or risky behaviors in which a deluded individual may engage because it requires that the expectations of the Insured be reasonable.\textsuperscript{298} As pointed out by the \textit{Todd} court, it is not enough under the two-prong test that the Insured expected to live through his autoerotic asphyxiation.\textsuperscript{299} Though the test is subjective, the test requires that the subjective belief of the Insured be reasonable, injecting a measure of restraint and control into the test.\textsuperscript{300} The individuals that engage in autoerotic asphyxiation often do so because of a mental disorder, and it is possible that their behavior is motivated by a variety of reasons.\textsuperscript{301} It would not be just for those who engage in autoerotic asphyxiation, a high risk behavior, to receive coverage simply because they entertained unreasonable and deluded expectations.\textsuperscript{302}

\begin{itemize}
\item the layman's understanding of what an accident is. Gaskins v. N.Y. Life Ins. Co., 104 So. 2d 171, 176 (La. 1958).
\item 296. Bennett v. Am. Int'l Life Assurance Co. of New York, 956 F. Supp. 201, 205-06 (N.D.N.Y. 1997) (stating the importance of Justice Cardozo's dissent in \textit{Landress} and his call for a common man standard); \textit{see also} Swisher, supra note 275, at 380 (noting that the Wickman test is "a very persuasive and realistic interpretive approach").
\item 298. Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1456 (5th Cir. 1995).
\item 299. Id.
\item 300. Id. \textit{Compare id.} (holding that the risk of death must be "substantially certain" for the Insured's subjective expectation of survival to be unreasonable), and Padfield v. AIG Life Ins. Co., 290 F.3d 1121, 1127 (9th Cir. 2002) (accepting the "substantially certain" test, as in \textit{Todd}), with Wickman, 908 F.2d at 1088-89 (requiring that death be substantially likely to occur as a result of the Insured's actions for the subjective expectation to be unreasonable), and Bennett, 956 F. Supp. at 211 (adhering to the "substantially likely" test of Wickman, but pointing out that while the court did not see "the two standards as entirely synonymous, they are clearly not in conflict").
\item 301. \textit{See} MAMSI, 375 Md. at 264, 825 A.2d at 996 (noting that autoerotic asphyxiation is classified as a mental disorder).
\item 302. The additional premium costs of individuals who engage in risky and reckless behavior with the unreasonable expectation of survival should not be borne by the general body of policyholders or the insurer. \textit{See} Gary Schuman, \textit{Suicide and the Life Insurance Contract: Was the Insured Sane or Insane? That is the Question—Or Is It?}, 28 TORT & INS. L.J. 745, 748 (1993) (arguing that costs caused by suicides should not be borne by policyholders or the insurers). Because autoerotic asphyxiation cases reach high courts, insurance companies are aware of the act and can include "self-inflicted injury" exclusions to prevent liability in autoerotic asphyxiation deaths. \textit{See} Todd, 47 F.3d at 1457 (stating that "[t]he life insurance companies have ample ways of avoid[ing]" adverse judgments).
\end{itemize}
The two-prong test also represents the most logical test, because in autoerotic asphyxiation cases, the Insured often has repeated the same behavior many times before without suffering serious injury and certainly without dying. Given this repeated behavior, and the reasonable expectation of survival that goes with it, it is illogical to suggest that a death is not accidental solely because the decedent committed an intentional act that ultimately caused his death.

There is a substantially low instance of death among those that engage in autoerotic asphyxiation, and those who do engage in it fully expect to live through the experience. However, the means-results test would compel courts to find that all individuals that die from autoerotic asphyxiation died a non-accidental death.

The two-prong test serves as an improved means of determining if an occurrence is an accident because it attempts to mimic a person's basic perception of what an accident is: it is something that a person does not expect to happen. To be sure, this test will not completely free this area of law from the Serbonian Bog; the caveat of the Court of Appeals in Gordon that the Bog is actually the whole field of accident law still rings true. However, accepting this more comprehensive standard in Maryland will serve to simplify one facet of the field of accident law and will further one purpose of the Court of Appeals by settling a conflict in Maryland law. This two-prong test will not disadvantage insurance companies; the advice of the Fifth Circuit that the "life insurance companies have ample ways to avoid judgments like this one" suggests that insurance companies have many ways of drafting contract language that insulates them from paying for autoerotic asphyxiation deaths. The burden to prevent having to pay benefits for this type of death should be on the insurance companies. An insurance company should not be helped by the courts in withholding

303. See Bennett, 956 F. Supp. at 212 (noting that it was highly likely that the Insured had engaged in the behavior on many previous occasions).
304. See id. (holding that the Insured reasonably expected to survive).
305. Padfield, 290 F.3d at 1127.
306. Cf Runge v. Metro. Life Ins. Co., 537 F.2d 1157, 1159 (4th Cir. 1976) (holding that, under Virginia law, an autoerotic asphyxiation death is not an accident because it is the result of intentional means).
309. Todd v. AIG Life Ins. Co., 47 F.3d 1448, 1457 (5th Cir. 1995).
310. The insurance companies have ample opportunity and right to protect against unfavorable outcomes in autoerotic asphyxiation cases. See Todd, 47 F.3d at 1457 (noting that insurance companies can word their life insurance policies in a way that avoids liability for autoerotic asphyxiation deaths). Additionally, the exclusion for self-inflicted injuries is desirable to insurance companies and policyholders because it serves to lower premiums for all policyholders by reducing payout both in cases of suicide and deaths from autoerotic
accidental death benefits when the company easily can place into the policy an exclusion from recovery if the injuries are caused by a self-inflicted injury to avoid liability in autoerotic asphyxiation deaths.

5. Conclusion.—In MAMSI, the Court of Appeals held that MAMSI properly withheld accidental death benefits from Callaway, a man who died from autoerotic asphyxiation, because self-inflicted asphyxiation was an injury that precluded recovery under the insurance contract.\(^\text{311}\) In dealing with the nature of an autoerotic asphyxiation death, the Court of Appeals properly decided that partial asphyxiation is an injury; however, the court missed an opportunity to settle conflicting precedent in Maryland accident law.\(^\text{312}\) The court had the opportunity to settle the conflict because the parties placed the precedents at issue.\(^\text{313}\) The court should have overruled Gordon's means-results test in favor of the Cole two-prong test because the two-prong test is consistent with Maryland law.\(^\text{314}\) Additionally, the court should have adopted the Cole two-prong test because it is a better reasoned standard for determining whether an occurrence is an accident—it is the best approximation of what we intuitively understand an accident to be.\(^\text{315}\)

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311. MAMSI, 375 Md. at 283, 825 A.2d at 1007-08.
312. See supra notes 232-241 and accompanying text (discussing the court's opportunity to overrule Gordon in favor of Cole because the parties placed the cases at issue).
313. See supra notes 232-241 and accompanying text.
314. See supra notes 242-278 and accompanying text (discussing the consistency of the two-prong test of Cole with Maryland precedent).
V. Property

A. Misapplication of the Doctrine of Implied Negative Reciprocal Covenants and a Missed Opportunity to Modernize the Law of Servitudes in Maryland

In Roper v. Camuso, the Court of Appeals of Maryland considered whether a property owner whose land was not expressly subject to restrictive covenants could apply the doctrine of implied negative reciprocal covenants so that she might enjoy the benefit of the restrictions and enforce them against a neighbor whose land was expressly burdened by their requirements. The court held that a property owner whose lot is found to be burdened by restrictions on the use of land under the doctrine of implied negative reciprocal covenants has threshold standing to seek enforcement of the covenants against her neighbors, notwithstanding that such a property owner already has standing under the laws of real covenants and the law of equitable servitudes. As such, the court unnecessarily extended the doctrine of implied negative reciprocal covenants beyond its existing boundaries in an effort to give Roper threshold standing under this doctrine to enforce the covenants. Furthermore, the court missed a unique oppor-

2. A restrictive covenant is an agreement, often included in or filed with a deed or lease, that restricts the use of real property. BLACK'S LAW DICTIONARY 371 (7th ed., 1999).
3. Under the doctrine of implied negative reciprocal covenants, restrictions can be enforced against land not expressly subject to them if certain criteria are met. Schoove v. Mikolasko, 356 Md. 93, 102-03, 737 A.2d 578, 583-84 (1999).
4. Roper, 376 Md. at 247, 829 A.2d at 594.
5. Id. at 273, 829 A.2d at 609.
6. A real covenant, or a covenant running with the land, is a covenant that relates to the land and therefore binds successive grantees. BLACK'S LAW DICTIONARY, supra note 2, at 371. Roper had standing under this doctrine because she was a successive grantee of land with restrictive covenants placed on it by the original grantor. Roper, 376 Md. at 243-44, 829 A.2d at 592.
7. Historically, a restriction pertaining to the use of real property could be enforced by injunction as an equitable servitude. Thruston v. Minke, 32 Md. 487, 497 (1870). Roper had standing under the law of equitable servitudes because she owned a restricted lot in a subdivision with the expectation that other lots would be similarly restricted. See Adams v. Parater, 206 Md. 224, 227-37, 111 A.2d 590, 591-96 (1955) (applying the doctrine of equitable servitudes to enforce prohibition of the sale of malt liquor against one property owner when ninety-five other property owners were also prohibited from doing so).
8. The traditional application of the doctrine of implied negative reciprocal covenants has been to hold the common grantor, or his assigns, to the same restrictions other grantees in a general plan of development are held. Roper, 376 Md. at 595, 829 A.2d at 249.
opportunity to unite the law of real covenants with the law of equitable servitudes, which, existing as separate doctrines, are confusing, complex, and archaic. The court should have adopted the unified approach set forth in the *Restatement (Third) of Property* to eliminate the confusion created by the numerous labels that have developed to describe restrictions on the use of privately owned land.

1. The Case.—The W.C. and A.N. Miller Development Company (Miller) developed Spring Meadows, a residential subdivision in Montgomery County, Maryland. To maintain open spaces and the residents' views of nearby rolling hills, Miller created covenants for Spring Meadows. The covenants restricted, among other things, the materials that may be used to enclose or divide a particular lot. They further restricted the height of such enclosures or dividers to a maximum of four feet. Each owner of a lot in Spring Meadows that was subject to the covenants had the right to enforce the covenants and take any legal or other action necessary to do so.

On August 25, 1988, Miller conveyed lot 35 in Block D of Spring Meadows to Suzanne Camuso and her husband. The deed provided that the lot was “subject to covenants and restrictions of record,” and a

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9. See *Turner v. Brocato*, 206 Md. 396, 347-48, 111 A.2d 855, 861-62 (1955) (noting the split in authority pertaining to the enforcement of restrictions on real property and pointing out that some scholars and cases urge that restrictions be enforced as contracts with assignable rights, while others urge that restrictions be connected as the land itself); see also *Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261, 1281-83 (1982) (describing the requirements governing enforcement of land restrictions as “mysterious” and describing some of the historical concerns that led to their development).


12. *Id.*


No line fence or wall, or fence or wall used for the purpose of dividing or enclosing a lot, in whole or in part, shall be placed, erected or permitted to remain on any lot, or any portion thereof, except hedge, shrubbery, stone, brick, ornamental iron, mortised post and split rail, or plank, which does not exceed four (4) feet in height, except with the written consent of the [Architectural Control] Committee.

*Id.*

14. *Id.*

15. *Id.* at 34. The enforceability section of the Spring Meadows covenants reserves to the grantor, the Architectural Control Committee, each grantee of a restricted lot within Spring Meadows, and the successors and assigns of the grantor and the grantees, the right to enforce the covenants. *Id.*

copy of the covenants was recorded with the deed. On August 18, 1992, Miller conveyed lot 36 in Block D of Spring Meadows to Elise Roper. While the deed provided that this lot was also subject to all covenants and restrictions of record, the covenants for Spring Meadows were not recorded with the deed.

In a letter dated October 5, 1992, the Vice President of Miller’s Architectural Control Committee informed Roper that a resident of Spring Meadows had expressed concern over Roper’s failure to conform with the covenants. In this letter, the Vice President offered to approve Roper’s plans for her fence and driveway lamp if they conformed with the community’s requirements. Roper did not respond to this letter or the follow-up letter dated July 1, 1993.

In 1997, Camuso planted approximately sixty-five trees along the common boundary between her property and Roper’s. By the summer of 2000 the trees, according to Roper, had grown over eight feet tall. Roper and her husband, without Camuso’s consent, pruned some of the branches—including some on the Camusos’ side of the property.

On August 30, 2000, Camuso filed trespass and destruction of property claims against Roper in district court in Montgomery County. The case was removed to the Circuit Court for Montgomery County when Roper requested a jury trial. Roper also filed a counter-claim. She sought a declaration that the trees reaching heights over four feet tall violated the covenants, an injunction requiring Camuso to comply with the covenants, and damages for malicious prosecution. The trespass and malicious prosecution claims went to trial; the jury returned a verdict in favor of Camuso on both counts.

17. Id., 829 A.2d at 592. The act of recording refers to the filing of a document that affects title to land at the location designated by the county. ROGER BERNHARDT & ANN M. BURKHART, REAL PROPERTY IN A NUTSHELL 332 (2000).
18. Joint Record Extract at 36, Roper (No. 01554).
20. Joint Record Extract at 38, Roper (No. 01554).
21. Id.
22. Roper, 376 Md. at 244, 829 A.2d at 592.
23. Id.
24. Id.
25. Id. at 244-45, 829 A.2d at 592.
26. Id. at 245, 829 A.2d at 592.
27. Id.
28. Id.
29. Id.
and awarded damages. Additionally, the trial court dismissed
Roper's counter-claims for declaratory and injunctive relief on the
grounds that Roper had not proven that she had standing to enforce
the covenants. Roper appealed to the Court of Special Appeals. In an unreported opinion, the intermediate appellate court agreed
that Roper lacked standing to enforce the covenants and reasoned
that the trial court could not have reasonably inferred that Roper's lot
should be burdened by the covenants. Moreover, the court held
that Roper had failed to rebut the presumption that her property was
not intended to be burdened by the covenants.

Roper petitioned to the Court of Appeals. The court granted
certiorari to consider whether, under the doctrine of implied negative
reciprocal covenants, a property owner whose land is not expressly
subject to restrictive covenants may nevertheless enforce the cove-
nants against a property owner whose land is expressly burdened.
Additionally, the court agreed to consider the type and amount of
evidence necessary to show that land not expressly burdened by re-
strictive covenants is, in fact, supposed to be subject to the
covenants.

2. Legal Background.—It is well settled in Maryland that when a
landowner sells a piece of her land, she may restrict the land she sells
to benefit the land she retains. This initial sales transaction may be
fashioned in such a way as to impose the obligation on heirs and as-
signs of the buyer and retain the benefit for heirs and assigns of the

30. Id. at 245, 829 A.2d at 592-93. Camuso was awarded $1,170 on her trespass com-
plaint. Brief for Petitioner at 3, Roper (No. 100).
31. Roper, 376 Md. at 245-46, 829 A.2d at 593.
32. Id. at 247, 829 A.2d at 594.
33. Roper v. Camuso, No. 1554, slip op. at 7-8 (Md. App. Sept. 9, 2002). The Court of Special Appeals' analysis focused on the fact, conceded by Roper, that her deed was re-
corded without the covenants and that her land was therefore not expressly burdened. Id. at 5, 7-8. The court concluded that, because most of the deeds to lots in Spring Meadows
were recorded with copies of the covenants and there was no explanation on the record of
why Roper's deed was not, her lot was not intended to be part of the general scheme. Id. at
1, 7-8.
34. Id. at 7-8. To enforce covenants against a party whose land is not expressly bur-
dened by them, the party seeking enforcement must meet a set of requirements. See infra
notes 145-150 and accompanying text (discussing the requirements for enforcement). The
Court of Special Appeals said that Roper, as the party seeking enforcement of the cove-
nants, had not successfully shown that her land was intended to be part of the general
scheme, which was the fourth requirement of the test. Roper, No. 1554, slip op. at 7-8.
35. Roper, 376 Md. at 247, 829 A.2d at 594.
36. Id.
37. Id.
grantor. Maryland courts have decided these kinds of cases, in which a grantor imposes restrictions that burden the land conveyed and benefit the land retained, either on the basis of whether the restriction constitutes a covenant running with the land or on the basis of equitable principles.

American jurisprudence concerning the running of covenants at law, or "real covenants," has evolved from a famous common law case entitled *Spencer's Case*, while cases dealing with the running of covenants in equity date back to another common law case, *Tulk v. Moxhay*. The two lines of cases have developed separately, yet similarly, although the historical reasons for their separate development have become obsolete. While the Court of Appeals has expressed a preference to decide such cases under equitable principles, both lines of cases have been incorporated into Maryland jurisprudence. The court has acknowledged the split in authority regarding the appropriate way to decide cases involving restrictions on real property and has declined to discern the "true, underlying concept of the principle" that has controlled the court's decisions.

The law of enforcing restrictions on real property has evolved in Maryland to the point that, in some cases where restrictions do not expressly apply to a particular piece of land, courts have enforced covenants on the basis of implications that arise from the conduct of the parties or the language of the deed. The doctrine of implied nega-

39. *Id.* at 270-71, 14 A. at 663.
42. 41 Eng. Rep. 1143 (Ch. 1848).
43. "When the doctrines of real covenants and equitable restrictions were first established, the provinces of law and equity were completely separate." *Richard R. Powell, Powell on Real Property* § 60.04[2], at 60-40. In England, land agreements could only be enforced at law or in equity, but American law was more pragmatic and rendered the distinctions useless. *Restatement (Third) of Property: Servitudes* § 1.4 cmt. a (1998).
44. *See Turner v. Brocato*, 206 Md. 336, 346, 111 A.2d 855, 860 (1955) (noting that the jurisdiction of equity to protect certain rights in land does not depend on such issues as whether the covenant runs with the land, which are so important at law).
45. *Id.* at 347, 111 A.2d at 861 (referencing *Bristol v. Woodward*, 167 N.E. 441 (N.Y. 1929)). In *Bristol*, the New York Court of Appeals stated,

> We do not need to choose now between these conflicting methods of approach . . . . Each of the two methods will doubtless have contributed a share to the ultimate generalization. In the end we may find that they have come together so often and in so many ways that there is no longer space between the paths, no longer choice to make between them. What began as a contractual right may be so protected by remedies, legal and equitable, that it will be indistinguishable from a real interest, a title to the land itself.

*Bristol*, 167 N.E. at 446.
tive reciprocal easements, or servitudes, as it has been called by the Court of Appeals, protects landowners who purchase restricted land with the understanding that the surrounding land would be similarly burdened from instances where the common grantor failed to expressly burden land he subsequently sells.\textsuperscript{47}

\textit{a. Covenants Running with the Land at Law in Maryland.}—A covenant is a formal agreement, usually established by a contract.\textsuperscript{48} When a covenant is made part of a conveyance of real property, the covenant can either be personal or attached to the land.\textsuperscript{49} If the original covenanting parties intend for their rights or obligations to pass to their successors, the covenant is said to run with the land.\textsuperscript{50} It is not necessary for both the rights and the obligations to pass to the parties' heirs or assigns in order for the covenant to run with the land; if only the benefit passes from the grantor to her successor, or if, alternatively, only the burden passes from the grantee to her successor, the covenant is attached to the land.\textsuperscript{51}

The English Common Law case, \textit{Spencer's Case}, is the source of much of Maryland's covenant law.\textsuperscript{52} The two main criteria for covenants to run with the land that Maryland courts have adopted from \textit{Spencer's Case} are the "touch and concern" and "in esse" requirements.\textsuperscript{53} The "in esse" test requires that, when the covenant extends to something that does not yet exist, the parties must express their intent for the benefit or burden to run with the land.\textsuperscript{54} If, on the other hand, the covenant extends to a thing "in esse," or "in existence," the covenant runs with the land and, therefore, binds the assignee.\textsuperscript{55} The "touch and concern" test requires that, for the benefit or burden to run with the land, the requirement must relate to the land.\textsuperscript{56}

\textsuperscript{47} Schovee v. Mikolasko, 356 Md. 93, 107-08, 737 A.2d 578, 587 (1999).
\textsuperscript{48} \textit{BLACK'S LAW DICTIONARY}, supra note 2, at 369.
\textsuperscript{50} \textit{Id.} Alternatively, if the original covenanting parties do not intend to pass their rights or obligations to their successors, the covenant does not run with the land and is considered to be personal. \textit{Id.} This type of covenant may also be called a covenant "in gross." \textit{RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES} § 1.3 cmt. d (1998).
\textsuperscript{51} \textit{RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES} § 1.3 cmt. d (1998).
\textsuperscript{52} \textit{Gallagher}, 69 Md. App. at 207, 516 A.2d at 1032.
\textsuperscript{53} \textit{Id.}
\textsuperscript{54} \textit{Spencer's Case}, 77 Eng. Rep. 72, 74 (K.B. 1583).
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Id.} (noting "[b]ut although the covenant be for him and his assigns, yet if the thing to be done be merely collateral to the land, and doth not touch and concern the thing demised in any sort, there the assignee shall not be charged").
In *Gallagher v. Bell*, the Court of Special Appeals traced the development of the doctrine of real covenants in Maryland from its common law roots in *Spencer's Case* up to the case at bar. Based on that review, the court concluded that the elements of a covenant running with the land at law are (1) the covenant touches and concerns the land, (2) the parties desire the covenant to run with the land, and (3) there is privity of estate.

The "touch and concern" test, the court noted, is an important one, requiring that the covenant's restriction affect the "quality, value, or mode of enjoying" the land itself. The Court of Special Appeals acknowledged that the Court of Appeals had, on several occasions, characterized the "touch and concern" requirement as whether the terms of the covenant enhance the value of the land. Observing that the high court's view dealt primarily with the benefit and not the burden of the covenant, the court considered the test proposed by Dean Harry Bigelow and adopted by Richard Powell, stating that the covenant "touches and concerns" the land if its result is that either the buyer's land becomes less valuable or the seller's land becomes more valuable.

The *Gallagher* court then listed helpful factors for determining whether a right or benefit was intended by the original covenanting parties to run with the land: "1) the retention of adjacent land by the grantor-covenantee; 2) the benefiting of retained land as a result of the agreement; and 3) the establishment of a common plan of development which includes land retained by the grantor." The court suggested that the burden or obligation was intended to run with the land if the result of the covenant was permanent in nature and was made as part of a common development plan.

The *Gallagher* court next noted that vertical privity is required for a covenant to run with the land. Vertical privity requires the person presently claiming the benefit or burden of the covenant to be a successor to the estate of the person who originally claimed the benefit or
burden of the covenant.\textsuperscript{66} While this view of the privity requirement had not been adopted formally in Maryland, the \textit{Gallagher} court found nothing in the law to preclude such adoption.\textsuperscript{67} While other types of privity\textsuperscript{68} had been mentioned by the courts, the Court of Special Appeals adopted the modern view that, when querying whether a covenant runs with the land, the focus of the privity test should be vertical privity.\textsuperscript{69}

The Court of Appeals adopted the \textit{Gallagher} court's explication of the elements of a covenant running with the land at law in \textit{Mercantile-Safe Deposit \& Trust Company v. Mayor of Baltimore}.\textsuperscript{70} There was no disagreement by the parties in \textit{Mercantile} as to whether the covenant in question was in writing or whether there was privity of contract.\textsuperscript{71} Rather, the controversy centered on whether the covenant touched and concerned the land, and whether the original covenantee intended the covenant to run with the land.\textsuperscript{72}

To determine whether the covenant in question touched and concerned the land, the court applied the "Powell-Bigelow" formulation, stating that whether or not a covenant touches and concerns the land should be considered in terms of the burdens or benefits the covenant imposes.\textsuperscript{73} Specifically, the court noted that if the restriction adds value to the interest in land of the covenantee or detracts value from the interest in land of the covenantor, then the Powell-Bigelow test is satisfied and the covenant touches and concerns the land.\textsuperscript{74}

While the touch and concern test is objective and focuses on the relationship between the performance of the covenant and the value of the land, the intent test focuses on the subjective intent of the covenanting parties.\textsuperscript{75} The court explained that the question of intent is a factual one, and that language in the writing expressly binding the

\textsuperscript{66} \textit{Id.} at 216, 516 A.2d at 1037.
\textsuperscript{67} \textit{Id.} at 217, 516 A.2d at 1037.
\textsuperscript{68} Mutual privity requires that the covenanting parties have a mutual interest in a common piece of land, and horizontal privity requires that the covenant be made in connection with the conveyance of land from one of the parties to another. \textit{Id.} at 216, 516 A.2d at 1037.
\textsuperscript{69} \textit{Id.} at 217, 516 A.2d at 1037.
\textsuperscript{70} 308 Md. 627, 632, 521 A.2d 734, 736 (1987).
\textsuperscript{71} \textit{Id.}
\textsuperscript{72} \textit{Id.}
\textsuperscript{73} \textit{Id.} at 633, 521 A.2d at 737.
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 637, 521 A.2d at 739.
successors and assigns of the covenanting parties is strong evidence of intent for the covenant to run with the land.\textsuperscript{76}

\textit{b. Covenants Enforced at Equity in Maryland.}—Covenants enforced at equity, or equitable servitudes, are private agreements restricting the use of real property.\textsuperscript{77} Equitable servitudes arose initially to protect those landowners not protected at law.\textsuperscript{78} The doctrine developed to protect the interests of landowners who buy restricted lots in subdivisions and expect neighboring lots to be similarly restricted.\textsuperscript{79}

In \textit{Tulk v. Moxhay},\textsuperscript{80} a famous English common law case, Lord Chancellor Cottenham declared that the question of whether a covenant runs with the land is irrelevant in an equity court.\textsuperscript{81} He addressed whether, after a grantor sold a plot of land with restrictions to a purchaser, the purchaser could then sell the land to a third party free of the restrictions.\textsuperscript{82} The Lord Chancellor discerned that the real question was not whether the covenant runs with the land, but whether a subsequent buyer may use land in a manner inconsistent with the contract to which his seller entered into, when the buyer had notice of the restrictions at the time of purchase.\textsuperscript{83} The court enforced the covenant by injunction, despite the fact that it would not have been enforceable at law, because the contrary result would have been inequitable.\textsuperscript{84} The resulting policy of enforcing covenants in equity when they may not be enforceable at law was adopted by Maryland courts over a century ago.\textsuperscript{85}

The Court of Appeals reiterated the policy of enforcing covenants in equity in \textit{Clem v. Valentine}.\textsuperscript{86} The court noted that generally,

\begin{itemize}
\item \textsuperscript{76} Id. at 638, 521 A.2d at 739.
\item \textsuperscript{77} \textsc{Black's Law Dictionary}, supra note 2, at 371. Equitable servitudes are also called restrictive covenants in equity, restrictive covenants, and equitable easements. \textit{Id}.
\item \textsuperscript{78} See \textit{Clem v. Valentine}, 155 Md. 19, 26, 141 A. 710, 712 (1928) (explaining that any grantee of land with an appurtenant benefit is entitled to the benefit even if the right does not rest on a covenant and even if he cannot protect the right at law).
\item \textsuperscript{79} See \textit{Adams v. Parater}, 206 Md. 224, 227-37, 111 A.2d 590, 591-96 (1955) (applying the doctrine of equitable servitudes to enforce prohibition of the sale of malt liquor against one property owner when ninety-five other property owners were subject to the prohibition).
\item \textsuperscript{80} 41 Eng. Rep. 1143 (Ch. 1848).
\item \textsuperscript{81} \textit{Id}. at 1144.
\item \textsuperscript{82} \textit{Id}.
\item \textsuperscript{83} \textit{Id}.
\item \textsuperscript{84} \textit{Id}. at 1144-45. Lord Chancellor Cottenham observed, "nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he himself had undertaken." \textit{Id}. at 1144.
\item \textsuperscript{85} \textit{Thruston v. Minke}, 32 Md. 487, 497 (1870).
\item \textsuperscript{86} 155 Md. 19, 25-26, 141 A. 710, 712 (1928).
\end{itemize}
if an agreement exists that touches and concerns the land and subsequent grantees have notice of that agreement, the agreement may be enforced in equity whether or not it could be enforced at law. The court further stated that if the positions of the parties, the surrounding circumstances, and the language of the covenant show that the covenant was entered into for the benefit of the land retained by the covenantee, then the grantee of the covenantee may enforce the restrictions. The court explained that while many cases arise where general schemes of development exist, the principle applied by the courts does not depend on the existence of a general scheme. Rather, the court explained, it depends upon the intention of the parties to make the covenant applicable to the land.

In *McKenrick v. Savings Bank of Baltimore*, the Court of Appeals summarized the law of covenants in Maryland up to 1938, reiterating the importance of the intent and the touch and concern requirements. Furthermore, the court noted that covenants should be construed in favor of freedom of the land and against the person in whose favor they are made. When an assignee is trying to enforce a covenant that is not specifically expressed, the court explained that the burden is on that party to show that the common grantor intended the covenant to affect the land retained as part of a uniform scheme of development.

In *McKenrick*, a grantee, after entering into a contract to buy a plot of land, refused to pay for the land on the grounds that it was encumbered by development restrictions and therefore did not have good and merchantable title. The court accepted as fact that the common grantor sold six different lots at six different times to six different buyers. The grantor sold two of the properties subject to identical sets of restrictions, but granted the four other properties subject to four sets of restrictions that differed in various ways from each

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87. Id.
88. Id. at 27, 141 A. at 713.
89. Id. at 28, 141 A. at 713.
90. Id.
91. 174 Md. 118, 197 A. 580 (1938).
92. See id. at 128, 197 A. 580 at 584-85 (recognizing that when a landowner grants a piece of land to another, she may impose restrictions on one piece of land for the benefit of another; that the covenants can either be personal or run with the land; and that in some cases covenants that do not run with the land can be enforced in equity).
93. Id.
94. Id.
95. Id. at 120, 197 A. 580 at 581.
96. See id. at 128-29, 197 A. 580 at 585 (describing each plot of land sold as well as the similarities and differences between restrictions on the land).
other and from the identical pair. The court held that the restrictions applied only to the land conveyed by the deeds and that the deeds were not sufficient to show the existence of a general uniform scheme of development. Having failed to prove that the common grantor intended to restrict the land at issue, the court concluded that the grantee's land was free from restrictive covenants.

In Schlicht v. Wengert, the Court of Appeals decided whether a covenant filed with a particular deed was intended to benefit other landowners in the area and was, therefore, enforceable by them. The court explained that, in the absence of a writing expressly stating that the restrictions were intended to benefit other purchasers of lots in the development, the party seeking enforcement must show that such intent can be inferred from the circumstances. The court noted that most grounds of valid inference may be considered, but despite the seeming clarity of present testimony by a developer as to the meaning and purpose of a covenant, it is questionable as to whether this particular kind of evidence may be offered. Concluding that the grantor intended the land to be part of the common scheme of development, the court made several observations. First, the court noted that one large lot was divided into several lots for sale. Second, the court found that a uniform covenant was filed with almost every deed. Third, the court observed that the covenant on its face appeared to be designed to give a particular character to the entire neighborhood. Fourth, the court noted that a uniform, general scheme of development had been adopted, and the benefits of the covenant were intended for owners of the other lots. Under the circumstances, the court asserted, the purchasers of the lots, and their successors, could enforce the covenant.

97. Id.
98. Id. at 131, 197 A. at 586.
99. See id. (affirming the lower court's decree requiring the grantee to specifically perform his contract).
100. 178 Md. 629, 15 A.2d 911 (1940).
101. Id. at 635, 15 A.2d at 913.
102. Id. at 634, 15 A.2d at 913.
103. Id.
104. Id. at 636, 15 A.2d at 913.
105. Id.
106. Id.
107. Id. at 635-36, 15 A.2d at 913.
108. Id.
109. Id. at 636-37, 15 A.2d at 914.
In *Adams v. Parater*,\(^{110}\) the court again addressed whether a property owner could enforce restrictions against another whose land was not expressly burdened by restrictions.\(^{111}\) Landowners' lots were subject to restrictions against the manufacture or sale of malt liquors.\(^{112}\) Of the ninety-nine lots in the subdivision, ninety-five lots were expressly subject to these restrictions.\(^{113}\) Parater's lot was subject to restrictions as well, but his deed also included a clause that suggested any legitimate business purpose was a proper use of the land.\(^{114}\) The court observed that, to determine whether the restrictions common to the ninety-five lots could be enforced against Parater, the court need not look only to the construction of the deed, but could also consider inferences from sources outside of the deed such as the existence of a common scheme of development.\(^{115}\)

Turning first to the deed from the common grantor to Parater, the court construed the phrase, "[subject] to the following restrictions to run with the land" to clearly establish that the grantor intended to impose restrictions on Parater's land.\(^{116}\) However, the deed included two conflicting clauses, which the court found created an ambiguity as to the intended terms.\(^{117}\) The court stated that every part of a deed is to be given effect, with the intentions of the parties prevailing.\(^{118}\) The court articulated a rule that all parts of a deed should be construed together and that specific language should prevail over general language.\(^{119}\) As such, the court concluded that the clause in Parater's deed allowing him the use of his land for "all legitimate commercial purposes" did not trump the more specific clause forbidding the manufacture, sale, or storage of malt liquors.\(^{120}\) The court remanded to the trial court so that the Chancellor could decide, based on inferences from sources outside the deed such as the existence of a common scheme of development.

\(^{110}\) 206 Md. 224, 111 A.2d 590 (1955).

\(^{111}\) Id. This case differs from the others in that Parater's grant included the restrictions common to the landowners' deeds, but it included an extra provision that appeared to negate those restrictions. *Id.* at 228, 111 A.2d at 591.

\(^{112}\) Id.

\(^{113}\) Id.

\(^{114}\) Id.

\(^{115}\) Id. at 230, 111 A.2d at 592.

\(^{116}\) Id. at 232-33, 111 A.2d at 593.

\(^{117}\) Id. at 231, 111 A.2d at 593. Clause 2 of the deed prohibited spirited or malt liquors from being made, sold, or kept for sale on the premises. *Id.* at 228, 111 A.2d at 591. Clause 4, however, stated simply: "[s]ubject to the uses thereof for all legitimate commercial purposes." *Id.* Parater proposed that the two clauses created an ambiguity that should have been resolved in favor of the free use of property. *Id.* at 231, 111 A.2d at 593.

\(^{118}\) Id.

\(^{119}\) Id. at 235-36, 111 A.2d at 595.

\(^{120}\) Id. at 236-37, 111 A.2d at 595-96.
mon scheme of development, whether the restrictions against the sale of beer could be enforced against Parater.121

c. The Doctrine of Implied Negative Reciprocal Covenants in Maryland.—In Maryland, a restrictive covenant may also arise by implication from the language of the deed or the conduct of the parties.122 If a common grantor conveys a lot with restrictions that burden the lot sold and benefit the lot or lots retained, the restriction becomes mutual and the owner of the lots retained is not permitted to do anything the owner of the conveyed lot cannot do.123 The grantor may protect himself from an implied covenant by expressly reserving to himself the right to change or release restrictions or by including language in the conveyance that states that there is no restriction upon the retained land.124

In Turner v. Brocato,125 business partners Brocato and Raymond owned a lot in Poplar Hill, a plot of land first subdivided by Charles Fenwick in 1927.126 In 1930, a plat was prepared showing 88 lots.127 All of the numbered lots were expressly restricted by covenants, with the exception of lot 86.128 There was no explanation for the lack of restrictions on lot 86, but the owners agreed that it was subject to the restrictions to the same extent as all of the other lots.129 A group of Poplar Hill homeowners sought a declaration that the partners’ lot was part of the Poplar Hill development and restricted by the covenants despite the fact that the lot was not one of the ones numbered on the plat and had been deeded free of restrictions.130

The court articulated a test to determine whether it could conclude that the restrictions were implemented for the common advantage of all buyers in a common scheme of development, thereby restricting the partners’ land.131 First, there must be proof that there is a common scheme of development in place to benefit the property.132 There must be an intent for all purchasers to enter into the

121. Id. at 237, 229, 111 A.2d at 596, 592.
123. Id.
124. Id.
126. Id. at 340, 111 A.2d at 858.
127. Id. at 341, 111 A.2d at 858.
128. Id. at 342, 111 A.2d at 859.
129. Id.
130. Id. at 339, 111 A.2d at 857.
131. Id. at 349, 111 A.2d at 862.
132. Id.
covenant as part of a general plan. Finally, each buyer must not only have notice of the general scheme but the covenant must have been part of his decision whether to purchase.

The court also reinforced the rule that, wherever possible, the intentions of the parties should be enforced. Where some lots are conveyed without restrictions, the court noted that it does not necessarily follow that there is no general comprehensive plan for development. The court, after finding that the homeowners met the burden of proof as to the existence of a general plan of development, looked not only to the language in the deed, but also to conduct, conversation, and correspondence to determine the intent of the grantor. Expressly adopting the doctrine of implied negative reciprocal covenants, the Court of Appeals found that the partners had both actual and constructive notice of the covenants binding the other lots in the subdivision and held that the partners' lot was subject to the restrictions.

The Court of Appeals set a bright line rule for determining whether there is notice of a set of restrictions in Steuart Transportation Co. v. Ashe. Quoting a student-written note about Turner, the court stated that a subsequent purchaser must not only search the records for encumbrances on the property she seeks to buy, but she must also look for express restrictions imposed by her grantor on other conveyances because, under the doctrine of implied negative reciprocal covenants, these restrictions raise the implication that the grantor intended to restrict the entire development. The court recognized that the rule was a harsh one, but that nevertheless it is well established that grantees in Maryland are constructively notified of restrictions on their property so long as the restrictions could be found using a grantor-grantee index of land records.

In Schouve v. Mikolasko, the Court of Appeals considered whether the doctrine of implied negative reciprocal covenants could overcome a presumption that a plot of land was not intended to be subject to a set of restrictions because it was notably absent from a

133. Id.
134. Id.
135. Id. at 352, 111 A.2d at 864.
136. Id.
137. Id. at 346-47, 111 A.2d at 861.
138. Id. at 355, 111 A.2d at 865.
139. 269 Md. 74, 304 A.2d 788 (1973).
140. Id. at 95-96, 304 A.2d at 800-01.
141. Id. at 96, 304 A.2d at 801.
declaration defining the property subject to the conditions. The court stressed the importance of both the function of the doctrine of implied negative reciprocal covenants and its historical context.

Without expressly accepting it as an appropriate test, the court repeated the reading of the Court of Special Appeals of Turner that, under the doctrine of implied negative reciprocal covenants, a party may enforce restrictions against land not expressly subject to them if she can prove five factors. First, a common grantor must have subdivided the property into a number of lots for sale. Second, the grantor must have intended to create a general scheme of development in which land use was restricted. Third, the majority of lots should contain restrictive covenants that reflect the general scheme. Fourth, the property against which the party seeks to enforce the covenants must have been intended to be part of the general scheme. Finally, the purchaser of the lot in question must have had notice of the restrictions.

The covenants in Schovee specifically listed the lots to which it would apply, and the lot in question was not listed. The court found no basis in the record that would overcome the inference that the lot was not to be included as part of the community. The lot in question was thus not restricted under the doctrine of implied negative reciprocal covenants. The court did not go so far as the Restatement view, which allows the application of the doctrine only when the developer does not record a general plan. Rather, the court held that a declaration recorded by the developer will ordinarily

143. Id. at 105, 737 A.2d at 583.
144. Id. at 112, 737 A.2d at 588. The court explained that the doctrine arose to protect those who purchased land in what they expected was a general development where each lot would be equally burdened and benefited. Id. at 107, 737 A.2d at 586. Grantors commonly placed restrictions in individual deeds and represented verbally to the buyers that similar restrictions would be placed in deeds to other lots. Id. at 109, 737 A.2d at 586. When the developer did not then include those restrictions in subsequent conveyances, litigation arose. Id.
145. Id. at 103, 737 A.2d at 583-84.
146. Id., 737 A.2d at 583.
147. Id.
148. Id., 737 A.2d at 583-84.
149. Id., 737 A.2d at 584.
150. Id.
151. Id. at 113, 737 A.2d at 589.
152. Id.
153. Id.
154. Id.; see also Restatement (Third) of Property: Servitudes § 2.14, cmt. i (1998) (asserting that the doctrine of implied negative reciprocal servitudes only comes into play when the common grantor does not record the common restrictions applicable to an entire subdivision).
suffice to establish both the existence of a general scheme of development and which individual properties are subject to the restrictions, and is not considered a mere piece of evidence. 155

3. The Court's Reasoning.—In Roper v. Camuso, the Court of Appeals of Maryland reversed the decision of the Court of Special Appeals and held that Roper had threshold standing to seek enforcement of the covenants at Spring Meadows. 156 To reach this holding, the court first rejected the reasoning of the Court of Special Appeals that the doctrine of implied negative reciprocal covenants does not apply to a case unless a grantee attempts to enforce covenants against a common grantor. 157 The court explained that the doctrine of implied negative reciprocal covenants originally was developed to preserve the grantor's general scheme of development. 158 The court observed that it is merely "happenstance" that the majority of cases have been brought by grantees against common grantors. 159 The underlying principles of the doctrine of implied negative reciprocal covenants, the court reasoned, are not furthered by denying Roper the opportunity to employ the doctrine to protect her expectations. 160

The court then addressed Camuso's primary argument that Roper had not met the requirements of the fourth factor of the Schoove test, which requires the property against which application of an implied negative reciprocal covenant is sought to have been intended by the common grantor to be part of the general scheme of development. 161 The court observed that extrinsic evidence may be used if the writing is insufficient to show the intent of the parties. 162 The court found the language of the deed to be ambiguous and therefore had to examine extrinsic evidence to determine whether Roper's land was intended to be part of the general scheme. 163 In characterizing the extrinsic evidence, the court observed both the actions of the

155. Schoove, 356 Md. at 113, 737 A.2d at 589.
156. Roper, 376 Md. at 273, 829 A.2d at 609.
157. See id. at 269, 829 A.2d at 606-07 (observing that the purpose of the doctrine is to preserve the uniform scheme of development intended by the common grantor, a goal which is not necessarily reached only through the enforcement of the covenants by grantees against common grantors).
158. Id. at 269, 829 A.2d at 606.
159. Id.
160. Id., 829 A.2d at 607.
161. Id. The court offered a cursory discussion of the first, second, third, and fifth factors, which were not seriously challenged, before concentrating on the fourth factor. Id. at 250, 829 A.2d at 596.
162. Id. at 272, 829 A.2d at 608.
163. Id.
grantor and the actions of the grantees. First, the court noted that Miller, the grantor, did not include the covenants with Roper's deed, but did, however, include language in Roper's deed subjecting her land to the "covenants and restrictions of record." Furthermore, the court noted that Miller's Architectural Review Committee challenged Roper's compliance with the covenants. In so doing, the court reasoned, the committee had expressed an assumption that Roper's land was subject to the covenants.

Examining the actions of the grantee, the court first reviewed Roper's testimony as to why she purchased her lot. The court concluded that Roper's interests were identical to the ones the covenants sought to protect. The court further noted that the grantees sought to assert the rights under the covenant against Roper when they alerted the Architectural Review Committee to her noncompliance with the covenants. As such, the court concluded that Roper and her neighbors believed that Roper's lot was subject to the Spring Meadows covenants.

The court next distinguished Roper from Schovee, calling attention to the express language in the sales contracts in Schovee which excluded the lot at issue from the restrictions of record. The court observed that the common grantor's recorded declaration specifically listing the lots to which the covenants would apply was held by the Schovee court to establish conclusively which lots were subject to the covenants, meaning that lots not included in the declaration were deeded free of restrictions. Reviewing the record of Roper, the court observed that there was no evidence similar to the recorded declaration on Schovee indicating that Miller had intentionally excluded Roper's lot from the general plan. The court concluded that to exempt Roper's lot from adherence to the covenants would be "con-
Concluding that the trial court erred in not finding Roper's lot subject to the covenants, the court held that the doctrine of implied negative reciprocal covenants gave Roper threshold standing to enforce the covenants.

4. Analysis.—In Roper v. Camuso, the Court of Appeals of Maryland held that a plot of land not expressly subject to restrictive covenants was nonetheless intended to be part of a subdivision and subject to its covenants. The court further concluded that the owner of the plot not expressly burdened nevertheless had threshold standing under the doctrine of implied negative reciprocal covenants to enforce the restrictions against neighboring landowners. This holding overstates the intent of the doctrine of implied negative reciprocal covenants in that it fails to recognize that the doctrine was developed to protect landowners in the unfortunate instances where they were not already protected by existing laws of real covenants or equitable servitudes. A more reflective analysis of the facts of the case as they relate to the laws of real covenants and equitable servitudes would have revealed Roper's right to enforce the covenants under both bodies of law. Moreover, such an analysis would have brought these laws' similarities to light and should have inspired the Court of Appeals to adopt a unified definition of servitudes.

a. The Court of Appeals' Extension of the Doctrine of Implied Negative Reciprocal Covenants.—The Roper court began its analysis by accurately asserting that the doctrine of implied negative reciprocal covenants does not preclude grantees from enforcing covenants against other grantees. However, the court incorrectly assumed that if the doctrine of implied negative reciprocal covenants restricted Roper's property, then she would have threshold standing to enforce the covenants against Camuso. Under this assumption, the court erroneously concluded that Roper, whose land was restricted by the

175. Id.
176. Id.
177. Id.
178. Id.
179. See id. at 269, 829 A.2d at 606 (asserting that the doctrine of implied negative reciprocal covenants is meant to preserve the uniform scheme of development originally intended by the owner).
180. See infra notes 197-216 and accompanying text.
181. See infra notes 217-233 and accompanying text (explaining how the Court of Appeals could have used Roper to adopt a unified definition of servitudes).
182. Roper, 376 Md. at 269, 829 A.2d at 606.
183. Id.
Spring Meadows covenants under the doctrine of implied negative reciprocal covenants, automatically had standing to sue Camuso.\textsuperscript{[184]}

In \textit{Roper}, the court first considered whether Roper was precluded from enforcing the covenants against Camuso on the theory that a grantee may not, under the doctrine of implied negative reciprocal covenants, enforce restrictions against another grantee.\textsuperscript{[185]} The court accurately asserted that it was not a correct statement of the law in Maryland to say that the doctrine of implied negative reciprocal servitudes could only be used by a grantee to enforce restrictions against a common grantor.\textsuperscript{[186]} The court recalled that in \textit{Turner} a group of grantees was successful in their quest to burden the land of another grantee whose lot was not expressly subject to the covenants.\textsuperscript{[187]} However, the court unconvincingly rationalized the situations in \textit{Turner} and \textit{Roper} to be similar on the grounds that the interest being protected—that of the grantee landowner—is the same in both cases.\textsuperscript{[188]} While Roper is not precluded from enforcing the covenants because of a restriction allowing the doctrine only to be enforced against a common grantor, it should not follow, as the court presumed by drawing from \textit{Turner}, that Roper automatically had standing to enforce the covenants against her neighbor. In \textit{Turner}, a grantee whose lot was expressly burdened was successful in benefiting from the restrictions by burdening the lot of another grantee under the doctrine of implied negative reciprocal covenants.\textsuperscript{[189]} The parallel situation under the \textit{Roper} facts would present itself if Camuso, as a prior purchaser of a restricted lot, tried to enforce the restrictions against Roper.\textsuperscript{[190]} Consequently, Roper, as the party whose land was not expressly restricted, is similarly situated to the parties in \textit{Turner}. The \textit{Turner} court held that the parties’ land was restricted by the covenants, but it did not hold that the parties had the right to enforce the covenants against the other landowners in the development.\textsuperscript{[191]} The court should have found it significant that Roper’s situation was analogous to the partners’ in \textit{Turner}, and not the homeowners, because by allowing Roper to enforce the restrictions, the court extended the doctrine of implied

\textsuperscript{184} \textit{Id.} at 273, 829 A.2d at 609.
\textsuperscript{186} \textit{Roper}, 376 Md. at 269, 829 A.2d at 606.
\textsuperscript{188} \textit{Roper}, 376 Md. at 269, 829 A.2d at 606-07.
\textsuperscript{189} \textit{Turner}, 206 Md. at 353, 111 A.2d at 864.
\textsuperscript{190} \textit{See supra} notes 161-176 and accompanying text (discussing the court’s application of the doctrine of implied negative reciprocal covenants to Roper’s land).
\textsuperscript{191} \textit{Turner}, 206 Md. at 353, 111 A.2d at 864.
negative reciprocal covenants to allow any landowner whose land is not expressly burdened to do the same.

While the court correctly concluded that the doctrine of implied negative reciprocal covenants subjected Roper's land to the Spring Meadows covenants, it incorrectly went on to hold that Roper had threshold standing under the doctrine of implied negative reciprocal covenants to seek enforcement of the covenants. The court, without explanation, extended this doctrine beyond its purpose—to burden land not expressly restricted by covenants—by allowing the owner of the land to enforce the benefit of the covenants on the landowners. Prior to the Roper court's holding, when a common grantor following a specific development plan sold multiple lots to multiple buyers but subject to the same restrictions, the restrictions could be enforced (1) by parties whose land was expressly restricted against the land retained by the common grantor and (2) by parties whose land was expressly restricted against the land retained by the common grantor after it is subsequently sold, even if the retained land is sold without being expressly subject to the restrictions. Under the court's holding, the restrictions may now be enforced by the subsequent grantees of the common granter, despite the failure of the grantor to expressly subject the land to the restrictions.

The only reason the court gave for this extension of the doctrine of implied negative reciprocal covenants was that the underlying purposes of the doctrine would not be furthered by denying Roper the opportunity to enforce the covenants. The court should have acknowledged the leap it was making and offered a more thoughtful explanation of that leap. Furthermore, while the court was reasonable in asserting that it would be inequitable to deny a landowner in Roper's position the opportunity to enforce the covenants to which

192. See Roper, 376 Md. at 273, 829 A.2d at 609 (noting that the trial court erred by concluding that Roper's lot was not subject to the covenants but erroneously assuming that the doctrine of implied reciprocal covenants, therefore, must also convey threshold standing to enforce the covenants).


194. See Roper, 376 Md. at 269, 829 A.2d at 606 (suggesting that the doctrine of implied negative reciprocal covenants can be used to protect grantees of burdened land against a common grantor and grantees of burdened land against other grantees, and grantees whose land is not expressly burdened against other grantees).

195. See id., 829 A.2d at 606-07 (suggesting that the doctrine of implied negative reciprocal covenants can also be used to protect grantees whose land is not expressly burdened against other grantees).

196. Id. at 273, 829 A.2d at 609. The court noted that the evidence indicated the existence of a common plan which would suffer if Roper's lot were determined to be the only lot in Spring Meadows not subject to the covenants. Id.
she would be subject to by implication, it would not have frustrated the purposes of the doctrine if Roper was allowed her redress under the laws of real covenants or equitable servitudes.

b. Enforcing Roper's Right to the Benefit Under Traditional Laws of Equity or Real Covenants.—In Roper v. Camuso, the Court of Appeals unnecessarily extended the doctrine of implied negative reciprocal covenants when it permitted Roper to enforce the covenants even though her property was not expressly burdened. The court could have reached the same result by enforcing a covenant in equity against Camuso or, alternatively, under the line of cases concerning real covenants. The Spring Meadows covenants meet the three requirements for a covenant to be enforced at equity by an assign of the original covenanter: (1) intent, (2) touches and concerns, and (3) notice.¹⁹⁷ The covenants also meet the test for a covenant to run with the land at law, which are: (1) intent, (2) touches and concerns, (3) privity, and (4) writing.¹⁹⁸

Undoubtedly, Camuso and Miller intended to enter into a covenant when Camuso bought her land.¹⁹⁹ Moreover, the language of the covenants between Miller and Camuso establishes the parties' understanding that the benefit of the covenant would run with the land.²⁰⁰ The language strongly implies an intent on Miller's part to enter into the covenants for the benefit of the land retained, and not for its own personal benefit.²⁰¹ As the covenants expressly reserve to the grantor, Miller, and its successors and assigns the right to enforce the covenants,²⁰² it seems clear that Miller intended that subsequent purchasers like Roper receive the benefit of enforcing the covenants. That Miller retained land which was benefited by the restrictions when it sold Camuso her land, and that a common scheme of development existed at the time of the conveyance, was accepted as fact by the court.²⁰³ Such factors were considered helpful by the Gallagher court

¹⁹⁹. Roper, 376 Md. at 243, 829 A.2d at 592.
²⁰⁰. See id., 829 A.2d at 591 (quoting language from the covenants which reserves the right to enforce the covenants to Miller and its assigns).
²⁰¹. See Clem v. Valentine, 155 Md. 19, 27, 141 A. 710, 713 (1928) (differentiating between covenants entered into for the benefit of the grantor, and those entered into for the benefit of the land retained). If a covenant is entered into for the benefit of the owner, it was not intended to run with the land, but if it was entered into for the benefit of the land, it was the intent of the original covenantees for it to run. Id.
²⁰². Roper, 376 Md. at 243, 829 A.2d at 591.
²⁰³. Id. at 251, 829 A.2d at 596.
in determining that a benefit was intended to run with the land.\textsuperscript{204} Thus, Roper meets the first prong of both the equitable servitudes and real covenants tests; Miller intended that Roper be permitted to enforce the covenants.

The "touch and concern" prong of the equitable servitude and real covenant tests is also met because the covenants burdened Camuso and all other purchasers of land in Spring Meadows with the restriction that they could not use certain materials in their yard, nor could they erect certain structures.\textsuperscript{205} These restrictions certainly detracted from the value of each person's land, thus satisfying the requirement for the "touch and concern" test, in that they could not necessarily use the land as they might like.\textsuperscript{206}

Furthermore, whether the parties have notice is not at issue here, as Camuso was an original party to her deed and does not dispute that her land is burdened by the covenants.\textsuperscript{207} Thus, the provisions of the deed satisfy the intent test for enforcing equitable servitudes,\textsuperscript{208} the restrictions "touch and concern" the land,\textsuperscript{209} and Camuso had notice of her obligations under the covenants.\textsuperscript{210} As an assign of Miller, Roper, therefore, meets the requirements for enforcing the covenants against Camuso at equity.

There are two more requirements that Roper must meet in order to be able to receive the benefit of the covenants at law as well: privity and writing. Because Roper bought her property directly from Miller, vertical privity existed.\textsuperscript{211} Vertical privity requires only that the person claiming the benefit be a successor in the estate of the person originally entitled to the benefit.\textsuperscript{212} According to \textit{Gallagher}, only vertical privity is required in Maryland for the benefit of a covenant to run with the land.\textsuperscript{213} Roper thus meets the privity prong of the test and,

\begin{footnotes}
\item[205] \textit{Roper}, 376 Md. at 243, 829 A.2d at 591. The purpose of the restrictions is to keep the subdivision open and more panoramic. Joint Record Extract at 9, \textit{Roper} (No. 01554). This meets the Powell-Bigelow touches and concerns test in that preserving views in a subdivision adds value to the land of the covenantee. See Mercantile-Safe Deposit & Trust Co. v. Mayor of Baltimore, 308 Md. 627, 633, 521 A.2d 734, 737 (1987) (discussing and applying the Powell-Bigelow test as to whether a covenant touches and concerns the land).
\item[206] See \textit{supra} note 205.
\item[207] \textit{Roper}, 376 Md. at 243, 829 A.2d at 592-93.
\item[208] See \textit{supra} text accompanying notes 202-204.
\item[209] See \textit{supra} note 205 and accompanying text.
\item[210] \textit{Roper}, 376 Md. at 243, 829 A.2d at 592-93.
\item[211] Id., 829 A.2d at 592; see also \textit{supra} note 66 and accompanying text (explaining that vertical privity exists with sale of land).
\item[213] Id. at 217, 516 A.2d at 1037.
\end{footnotes}
because the covenants are in writing and recorded with Camuso's deed, she meets the final writing prong as well.\textsuperscript{214} Roper, as an assign of Miller, thus meets the requirements for enforcement of a real covenant.

In order for a covenant to run at law in Maryland or be enforced as an equitable servitude, it must meet the tests for intent and "touch and concern."\textsuperscript{215} Furthermore, an equitable servitude must meet the test for notice, and a real covenant must meet the privity and writing requirements.\textsuperscript{216} As Roper meets each of the five requirements, satisfying both tests, her right to enforce the benefits of the covenants against Camuso could have been protected by either the laws of real covenants or equitable servitudes.

c. Unifying the Laws of Real Covenants and Equitable Servitudes into a Single Concept of Servitudes.—Roper would have had threshold standing to sue to enforce the covenants at Spring Meadows under either the law of real covenants or the law of equitable servitudes.\textsuperscript{217} Had the Court of Appeals analyzed the case under either of these traditional servitude laws, the antiquated distinction between the legal and equitable remedies would have been apparent, presenting the court with the opportunity to adopt the unified concept of servitudes articulated in the \textit{Restatement (Third) of Property}.\textsuperscript{218} This move would simplify the law governing restrictions on real property in Maryland by delineating a single test for courts to apply.

The \textit{Restatement (Third)} has abolished the distinction between covenants that run at law and equitable servitudes and has developed a new servitude that creates a right or obligation that runs with land or an interest in land.\textsuperscript{219} Under this formulation, not all covenants are servitudes, but a covenant becomes a servitude if the obligation or the right runs with the land.\textsuperscript{220} The requirements for creating a servitude under the \textit{Restatement (Third)} are that the owner of the property to be burdened enters into a contract or makes a conveyance with the in-

\begin{itemize}
\item \textsuperscript{214} \textit{Roper}, 376 Md. at 243, 829 A.2d at 591.
\item \textsuperscript{215} \textit{See supra} notes 197-198 and accompanying text.
\item \textsuperscript{216} \textit{See supra} notes 197-198 and accompanying text.
\item \textsuperscript{217} \textit{See supra} notes 197-216 and accompanying text.
\item \textsuperscript{218} \textit{Restatement (Third) of Property: Servitudes} § 1.4 (1998).
\item \textsuperscript{219} \textit{Id.} § 1.1. "Running with the land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs." \textit{Id.}
\item \textsuperscript{220} \textit{Id.} § 1.3.
\end{itemize}
tent to create a servitude. Intent may be express or implied, with no particular form of expression required.

When Camuso purchased her land from Miller, she entered into a contract with Miller that placed a restriction on her property. This restriction obligated Camuso to refrain from using her land in particular ways. The covenant expressly reserves to Miller, its successors and assigns, and to Camuso and her successors and assigns, the right to enforce the restrictions. Thus, Camuso and Miller had the requisite intent to create a servitude. Miller’s benefit would, therefore, transfer to Roper with the purchase of her land, giving her standing to enforce the covenants of record under the servitude articulated by the Restatement. Because Roper meets the requirements to enforce the Spring Meadows Covenants under the laws of equitable servitudes, real covenants, and the Restatement (Third) unified servitude, Roper was an ideal opportunity for the Court of Appeals to reject the antiquated real covenant and equitable servitude tests and adopt a modern, efficient, unified concept of servitudes.

Courts deciding cases about restrictions on real property in Maryland presently have to decide whether they will apply the real covenant test or the equitable servitude test. It is not uncommon for courts to devote a good deal of their energies to making this threshold decision about which test to apply. However, the historical split between the two paths of law no longer makes sense, as the only differing requirements—those of privity in the case of real covenants and notice in the case of equitable servitudes—have become relatively easy

221. Id. § 2.1.
222. Id. § 2.2.
223. Roper, 376 Md. at 243, 829 A.2d at 592.
224. Joint Record Extract at 33, Roper (No. 01554).
225. Id. at 34.
226. See id. (showing the intent of the parties for their benefits to pass to their heirs, successors, or assigns).
227. See Restatement (Third) of Property: Servitudes § 1.1 cmt. b (1998) (clarifying that, if a plot that is benefited by a servitude is transferred for any reason, the servitude transfers as well).
to meet. The outcome is that the two tests reach identical results.

The Restatement test efficiently disposes of the need to show privity or notice, but benefits from the continuity of existing legal doctrine by retaining the touches and concerns requirement and the intent requirement from equitable servitude and real covenant jurisprudence. This simpler, single determination of restrictions on land saves courts time reconciling the two paths of law and allows them to decide these cases on the basis of a descriptive and illustrated body of law. The Maryland Court of Appeals should have used Roper to adopt the Restatement view of servitudes, thereby establishing a single test for all servitudes cases and simplifying the law in Maryland.

5. Conclusion.—In Roper v. Camuso, the Court of Appeals held that a property owner whose land is not expressly burdened by restrictive covenants may nevertheless benefit from the covenants and enforce them against another property owner whose land is expressly burdened. In holding that Roper may enjoy the benefit under the doctrine of implied negative reciprocal covenants, the court unnecessarily extended the doctrine. Instead, the court should have considered the well established laws of equitable servitudes and real covenants together, taking the opportunity to adopt the Restatement's modern view that the two distinct servitudes ought to be replaced by one unified servitude.

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230. See Steuart Transp. Co. v. Ashe, 269 Md. 74, 96, 304 A.2d 788, 801 (1973) (asserting the admittedly harsh rule in Maryland that as long as express restrictions imposed by a grantor on other grantees are recorded, there is sufficient notice of restrictions on the property); Gallagher, 69 Md. App. at 216, 516 A.2d at 1037 (asserting that, for a finding of privity, it need only be proved that the person claiming the benefit or burden must be a successor to the estate of the person originally benefited or burdened).

231. See supra notes 197-216 and accompanying text (applying the real covenants test and the equitable servitudes test to the facts of Roper and reaching the same conclusions in each case).

232. See supra notes 60-62 and accompanying text (describing the touch and concern test). The Restatement defines a servitude as creating a right, obligation, or interest that runs with the land. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 1.1 (1998). These rights, obligations, or interests necessarily impact the value of the land; thus, it follows that in order for a restriction to be a servitude it must touch and concern the land.


235. See supra notes 192-196 and accompanying text.

236. See supra notes 217-233 and accompanying text.
VI. STATUTORY INTERPRETATION

A. Blurring the Advantages of Separation Agreements: The Newly Adopted Bright-Line Rule Requiring a Party to Use Specific Language to Defeat the Statutory Presumption that Alimony Terminates upon Remarriage.

In Moore v. Jacobsen, the Court of Appeals of Maryland considered whether the terms of an alimony provision in a separation agreement were sufficient to satisfy section 11-108 of the Maryland Code, which allows parties to override the statutory presumption that alimony ceases upon remarriage if the parties “agree otherwise.” Before analyzing the terms of the alimony provision, the court adopted a bright-line rule, requiring explicit mention of the word “remarriage” to defeat the statutory presumption in section 11-108. The court supported its adoption of the bright-line rule with cases from other jurisdictions reaching similar conclusions. Additionally, the court held that the alimony provision, which contained a limited term of payment of seven years and a non-modification clause, did not meet the strict standard of the bright-line rule because it failed to mention explicitly the word “remarriage.” To effectuate the bright-line rule and end the alimony obligation, the court found the non-modification clause did not pose a barrier because it concluded that “modification” is not synonymous with “termination.”

The court’s reading of “agree otherwise” as requiring an express mention of the word “remarriage” is not supported by traditional notions of statutory interpretation and is completely inapposite to the policy and purpose behind separation agreements. As a result, divorcing parties may be deterred from entering into settlement agreements because they can no longer rely on the statute’s seemingly broad language granting the power to contract out of statutory presumptions. Moreover, the court’s decision to differentiate between “modification” and “termination” of alimony to effectuate the bright-

1. 373 Md. 185, 817 A.2d 212 (2003).
3. Moore, 373 Md. at 186, 817 A.2d at 213.
4. Id. at 190, 817 A.2d at 215.
5. See id. at 192-94, 817 A.2d at 216-17 (discussing cases from Washington, Missouri, and California and citing cases from Georgia, Minnesota, and Virginia).
6. Id. at 191, 817 A.2d at 215.
7. Id., 817 A.2d at 215-16.
8. See infra notes 126-143, 171-179 and accompanying text (discussing the broad definition of “otherwise” and the effect of the bright-line rule on a party’s freedom to contract).
line rule was not consistent with prior case law and produced a troublesome precedent that severely interferes with an obligee's interest in alimony. Despite the court's effort to promote judicial economy through a bright-line rule, the ultimate effect of its decision will be an increase in litigation. Future divorcees will no longer choose to settle their differences through private agreements because of the looming uncertainty that the court will not honor the terms of the agreement and the interests of the parties.

1. The Case.—On March 13, 2000, the Circuit Court for Montgomery County granted Suzanne Gibbs Moore (Ms. Gibbs) an absolute divorce from Edwin Gibbons Moore, III (Mr. Moore). Prior to obtaining the divorce decree, both parties entered into a separation agreement, which included terms of alimony, property division, and child support. The separation agreement was incorporated but not merged into the divorce decree.

The terms of the separation agreement required Mr. Moore to pay $833.33 per month in alimony to Ms. Gibbs, providing:

The husband shall pay to the wife non-modifiable alimony in the amount of $833.33 per month commencing on April 1, 2000 and payable on the 1st day of each month thereafter for eighty-four consecutive months or until the payment due on April 1, 2007.

The parties expressly covenant and agree pursuant to Section 8-101 through Section 8-103 of the Family Law Article Annotated Code of Maryland, that no court shall have the power to modify this agreement with respect to alimony, support or maintenance of either spouse except as provided herein.

Mr. Moore met his alimony obligations for six months, but he suddenly stopped paying after Ms. Gibbs remarried on September 2, 2000. In response, Ms. Gibbs filed suit in the circuit court for a money judgment for alimony arrearages and attorney's fees. Mr. Moore defended his decision to cease payment by arguing that Ms.

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9. See infra notes 162-170 and accompanying text (discussing the negative impact on an obligee's interest in preventing the termination of alimony and cases where the terms "modification" and "termination" were used interchangeably).
11. Id. at 294, 797 A.2d at 841.
12. Id.
14. Id. at 188, 817 A.2d at 213.
15. Id.
Gibbs’ remarriage automatically terminated his obligation to pay alimony. The circuit court rejected this claim and awarded Ms. Gibbs $8,833.33, the total arrearages past due. Mr. Moore filed a timely appeal to the Court of Special Appeals.

On appeal, Mr. Moore argued that because the separation agreement was silent as to his obligation to pay alimony in the event of remarriage, the agreement failed to override Family Law Article section 11-108 of the Maryland Code. Section 11-108 requires alimony to terminate upon remarriage of the obligee spouse “[u]nless the parties agree otherwise.” Therefore, according to Mr. Moore’s interpretation of section 11-108, the terms of the separation agreement did not qualify as “agree[ing] otherwise” because there was no express mention of the event of remarriage. Mr. Moore also claimed that the non-modification clause in the separation agreement did not preclude a court from terminating alimony because “modification” and “termination” are two distinct concepts. Mr. Moore asserted that “modification” and “termination” are not the same action because they are addressed in separate sections of the Family Law Code.

The Court of Special Appeals rejected Mr. Moore’s claims and held that the separation agreement was not silent as to remarriage, but by its terms met the requirement of section 11-108 to “agree otherwise.” Relying on traditional rules of contract construction, the Court of Special Appeals interpreted the terms of the separation agreement to be “anything but silent.” Specifically, the Court of Special Appeals found the separation agreement’s inclusion of a non-modification clause and an exact date on which the payments would end indicated the parties’ intent for alimony to survive in the event of remarriage. The Court of Special Appeals also rejected Mr. Moore’s

16. Id.
17. Id. The circuit court also awarded Ms. Gibbs $750 in attorney’s fees. Id.
18. Id., 817 A.2d at 214.
20. § 11-108.
22. Id.
23. Id. Section 11-107 concerns modification of alimony, while Section 11-108 concerns termination of alimony payments. Id.
24. Id. at 306-08, 797 A.2d at 849-50. Additionally, the Court of Special Appeals reversed the circuit court’s award of attorney’s fees. Id. at 310, 797 A.2d at 851.
25. Id. at 308, 797 A.2d at 850.
26. Id.
claim that a court is not prohibited from terminating the alimony as set out in the separation agreement and authorized by Family Law Article section 8-103 because “termination” of alimony was not synonymous to “modification.” The Court of Special Appeals, relying on case law using the terms interchangeably, found that termination is a type of modification.

Mr. Moore filed a timely petition for writ of certiorari, which the Court of Appeals granted. The issue presented to the Court of Appeals was whether the alimony obligation set forth in the settlement agreement survived remarriage when it did not expressly state the effect of remarriage, but did contain a non-modification clause and a definite term of alimony of seven years.

2. Legal Background.—In Maryland, the right to receive alimony traditionally terminates upon remarriage. However, section 11-108 allows divorcing parties to contract out of this presumption. The case of Moore v. Jacobsen presented an issue of first impression concerning the extent and specificity of the language required in a private agreement to trump section 11-108’s presumption. Without guiding precedent, the Court of Appeals instead relied on various traditional rules of statutory interpretation, the history of alimony in Maryland, and case law of other jurisdictions. Consequently, it is first important to explore how the court has historically construed and interpreted statutory language to understand the court’s analysis of the meaning of the words “agree otherwise” in section 11-108. Second, the court’s jurisprudence concerning alimony is significant, including the establishment of the presumption that alimony terminates upon remarriage and a party’s ability to contract out of the presumption. Third, the court’s traditional acceptance of separation agreements as

27. Id.
28. Id. Specifically, the Court of Special Appeals relied on Bauer v. Votta, 104 Md. App. 565, 657 A.2d 358 (1995), a case where the petitioner filed a modification of alimony seeking either termination or a reduction of alimony. Id.
29. Moore, 373 Md. at 188, 817 A.2d at 214.
30. Id. at 187, 817 A.2d at 213.
31. E.g., Emerson v. Emerson, 120 Md. 584, 596, 87 A. 1033, 1038 (1913).
34. Moore, 373 Md. at 190-94, 817 A.2d at 215-17.
35. See infra notes 40-54 and accompanying text (discussing the rules of statutory interpretation and various Maryland cases construing the word “otherwise”).
36. See infra notes 55-64 and accompanying text (discussing the history of alimony and the establishment of the rule that alimony terminates upon remarriage of the obligee spouse).
a valid method to contract out of the statutory presumption that alimony terminates upon remarriage must be considered. Fourth, the court's historical application of the objective law of contract interpretation to separation agreements is important. Additionally, results reached by other jurisdictions when applying similar interpretation rules to alimony provisions that do not explicitly mention the effect of remarriage is also significant. Finally, the court's historical use of the terms "modification" and "termination" as evidenced in Maryland case law is necessary to consider.

a. Maryland Rules of Statutory Construction.—The essential goal of statutory interpretation is to discern and effectuate the intention of the legislature. To discern legislative intent, a court must first look to the words of the statute. If the words used in the statute are unambiguous, a court's interpretation of legislative intent usually begins and ends with the application of a word's ordinary meaning. In determining a word's ordinary meaning, a court may take into consideration the context or general purpose of the statute as a whole. However, a court may not add or delete words to effectuate a meaning not evident in the words chosen by the legislature. A court is also prevented from expanding or limiting a statute's meaning by adding or deleting words from the statutory language. Moreover, statutory construction cannot be used to restrict a word's meaning that would "subvert the purposes of the statute."

Although there is no case law interpreting section 11-108's language or the words "agree otherwise," there is case law indicating that in a statute the words "other" and "otherwise" should be construed broadly. In *Vytar Associates v. Mayor of Annapolis*, the Court of Appeals rejected the interpretation that the language "other fees or

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37. See infra notes 65-73 and accompanying text (discussing the validity of separation agreements in Maryland).
38. See infra notes 74-86 and accompanying text (discussing the rules of contract interpretation as applied to separation agreements in Maryland and other jurisdictions).
39. See infra notes 87-95 and accompanying text (discussing cases that use the terms "modification" and "termination" interchangeably).
40. E.g., Powell v. State, 179 Md. 399, 401, 18 A.2d 587, 589 (1941).
42. Id. at 145-46, 626 A.2d at 950.
43. Id. at 146, 626 A.2d at 950.
44. Id. at 145, 626 A.2d at 950.
45. Id.
charges" present in the Revenue and Taxes statute did not include license fees. The Court of Appeals, relying on *Latrobe Brewing Co. v. Comptroller of the Treasury*, reasoned that the word "other" is an "uncompromising" word to be construed broadly. Similarly, the United States District Court for the District of Maryland rejected the narrow construction of the word "otherwise" as contained in an insurance policy excluding double indemnity for death resulting from inhalation of gas whether "voluntary or otherwise." In *Safe Deposit & Trust Co. of Baltimore v. New York Life Insurance Co.*, the district court held the meaning of the term "otherwise" was broad and encompassed more than the direct antithesis of a term. The district court rejected the plaintiff's construction of "otherwise" as being overly narrow and held the language "voluntary or otherwise" included not only the term involuntary, but also the terms "consciously," "unconsciously," "intentionally," or "unintentionally."

b. The Statutory Presumption that an Alimony Obligation Terminates upon Remarriage.—In Maryland, alimony serves as a rehabilitative mechanism which enables the obligee spouse to become self-sufficient. It is a well-established rule in Maryland that alimony obligations cease upon remarriage of the obligee spouse. In *Emerson v. Emerson*, the Court of Appeals of Maryland faced an issue of first impression of whether an alimony provision should be discarded from a

48. The Court of Appeals was interpreting Article 81, section 215 of the Maryland Code, which was repealed in 1988. *Id.* at 560, 483 A.2d at 1264; *Md. Code Ann. art. 81, repealed by* 1988 Md. Laws 110, § 2 and 1996 Md. Laws 10, § 15.

49. *Vytar Assocs.*, 301 Md. at 564, 483 A.2d at 1266.

50. 232 Md. 64, 192 A.2d 101 (1963). The Court of Appeals, in interpreting the language of Article 81, section 215 of the Maryland Code, which states that "any special taxes which were erroneously or illegally assessed or collected," found tax on beer to be included. *Id.* at 68, 192 A.2d at 103. The Court of Appeals found the word "any" of "any special tax" to be broad and "uncompromising." *Id.* at 70, 192 A.2d 101, 103-04 (internal quotation marks omitted).

51. *Vytar Assocs.*, 301 Md. at 564 n.4, 483 A.2d at 1266 n.4.


53. *Id.* at 726.

54. *Id.* (internal quotation marks omitted).

55. See *Rosenberg v. Rosenberg*, 64 Md. App. 487, 531, 497 A.2d 485, 507 (1985) (explaining that since the enactment of Article 16, section 1 of the Maryland Code in 1980, alimony's principal function is to rehabilitate the obligee spouse until he becomes self-supporting, whereas prior to 1980 the common law defined alimony as a lifetime obligation subject to modification upon a material change in circumstances or the remarriage of the obligee spouse).

56. See, e.g., *Emerson v. Emerson*, 120 Md. 584, 596, 87 A. 1033, 1038 (1913) (finding the policy behind Maryland law requires relieving a former husband of the obligation to pay alimony upon his ex-wife's remarriage).
decree because of the wife's remarriage or whether remarriage should be viewed as a factor to consider in modifying or reducing alimony.\textsuperscript{57} The court chose the former view, noting it was more reasonable to conclude that the law did not intend for a woman to receive support from two men.\textsuperscript{58} Subsequently, the rule established in \textit{Emerson} that alimony terminates upon remarriage was codified in the Maryland Code at Family Law section 11-108.\textsuperscript{59}

Although section 11-108 continues the tradition of terminating alimony upon remarriage of the obligee spouse, its language explicitly grants parties the freedom to contract out of its requirements.\textsuperscript{60} A party may, in an alimony provision of a separation agreement, contract for alimony to continue past remarriage of the obligee spouse.\textsuperscript{61} In \textit{Campitelli v. Johnston}, the Maryland Court of Special Appeals held that a separation agreement containing a provision that alimony was to continue regardless of the remarriage of the recipient spouse was not void as contrary to public policy.\textsuperscript{62} The court began its analysis by noting the language "[u]nless the parties agree otherwise" contained in section 11-108 "specifically left room for parties to create their own contracts according to their own unique situations."\textsuperscript{63} The court opted to uphold the freedom to contract granted by section 11-108 because it did not find any public policy preventing the extension of alimony past remarriage.\textsuperscript{64}

\textit{c. Separation Agreements Are Contracts that Are Recognized as Valid and Enforceable Mechanisms to Settle a Divorce Dispute.}—Although the courts possess the power to award alimony upon a bill of complaint or as part of a divorce decree,\textsuperscript{65} Maryland recognizes a party's

\textsuperscript{57} \textit{Id.} at 588, 594-95, 87 A. at 1035, 1037.
\textsuperscript{58} \textit{Id.} at 595, 87 A. at 1037.
\textsuperscript{59} \textit{MD. CODE ANN., FAM. LAW} § 11-108 (1999). Section 11-108 states that "[u]nless the parties agree otherwise, alimony terminates: (1) on the death of either party; (2) on the marriage of the recipient; or (3) if the court finds that termination is necessary to avoid a harsh and inequitable result." \textit{Id.}
\textsuperscript{60} \textit{See} \textit{Campitelli v. Johnston}, 134 Md. App. 689, 698, 761 A.2d 369, 373 (2000) (stating that by including the phrase "[u]nless the parties otherwise agree" in section 11-108, the Maryland General Assembly specifically left room for parties to create their own contracts that may continue alimony payment even after the remarriage of the obligee spouse).
\textsuperscript{61} \textit{Id.}
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Id.}
\textsuperscript{65} \textit{See} \textit{MD. CODE ANN., FAM. LAW} § 11-101 (1999) (stating "[t]he court may award alimony: (1) on a bill of complaint for alimony; or (2) as a part of a decree that grants: (i) an annulment; (ii) a limited divorce; or (iii) an absolute divorce").
ability to contract privately to terms of alimony. 66 An agreement reached between two parties concerning alimony has long been upheld by Maryland courts 67 and its validity is now codified in the Maryland Code at Family Law section 8-101. 68 Courts now encourage settlement agreements between divorcing parties as a peaceful way of ending "marital strife and discord." 69

A separation agreement may either be merged or incorporated into a court's divorce decree. 70 If the separation agreement is incorporated, the court may enforce the provisions of the agreement either through its contempt power or as an independent contract. 71 If the agreement is enforced as an independent contract, the terms and construction of the agreement are analyzed by a court according to the accepted rules of contracts. 72 Thus, under Maryland law, a separation agreement is viewed according to the objective law of contracts. 73

d. The Objective Law of Contracts as Applied to Non-Ambiguous Terms in a Separation Agreement.—In analyzing terms of a contract that are deemed unambiguous, the court's main function is to ascertain the parties' intentions as evidenced by the terms of the contract. 74 In so doing, a court must apply the "ordinary and usual meaning" of a term in a contract while taking into account the context in which the


67. See, e.g., Dickey v. Dickey, 154 Md. 675, 677, 141 A. 387, 388 (1928) (recognizing an agreement between the parties for permanent alimony of $25 per week that was made during the divorce proceeding).

68. Md. Code Ann., Fam. Law § 8-101 (1999). Section 8-101 states that "A husband and wife may make a valid and enforceable deed or agreement that relates to alimony, support, property rights, or personal rights." Id.


70. See Campitelli v. Johnston, 134 Md. App. 689, 694, 761 A.2d 369, 371 (2000) (explaining a court's power to modify a separation agreement when the agreement is either merged or incorporated with a divorce decree).


72. See Goldberg v. Goldberg, 290 Md. 204, 212, 428 A.2d 469, 474 (1981) (stating that property settlement agreements, like all other contracts, are to be analyzed according to the contract law of Maryland).

73. See id., 428 A.2d at 474-75 (applying the Maryland principles of objective construction to a separation agreement).

contract was created. A court may also look to the contract as a whole in assessing the intent of the parties.

Objective contract interpretation precludes a court from looking to the actual intent of the parties. Rather, a court may only effectuate intent from the contract’s terms themselves by deciding what a reasonable person in the parties’ position would have meant at the time of contracting. Therefore, terms of the contract, irrespective of the parties’ intent at the time of contracting, will determine the liabilities of the parties.

e. Other Jurisdictions Have Found Terms of a Separation Agreement to Indicate an Intent to Continue Alimony Beyond Remarriage Despite the Failure to Mention Explicitly the Word “Remarriage” or the Effect of “Remarriage.”—In Maine, the Supreme Judicial Court interpreted a settlement agreement in Raymond v. Raymond to provide for a continuation of alimony past remarriage despite the agreement’s failure to mention explicitly the word “remarriage” or its effect on the alimony obligation. Focusing on two provisions in the agreement, the court found an intent by the parties to continue the obligation despite the wife’s possible remarriage in the future. Specifically, the agreement required alimony to terminate after five years or upon the death of the obligee, whichever occurred first. The court concluded that the parties’ confinement of alimony to a definite period of five years indicated an intent for alimony to continue during this period regardless of any other occurring event. Similarly, both Pennsylvania and Minnesota courts have found limiting provisions, such as a fixed term of years or specific terminable events (other than marriage), to indicate an intent for alimony to continue beyond the obligee’s remarriage. Neither of the agreements in Pennsylvania or

77. Taylor, 365 Md. At 179, 776 A.2d at 653 (quoting General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 261, 492 A.2d 1306, 1310 (1985)).
78. Id.
79. Id.
80. 447 A.2d 70 (Me. 1982).
81. Id. at 71.
82. Id.
83. Id.
84. Id. at 71-72.
85. See McMahon v. McMahon, 612 A.2d 1360, 1364 (Pa. Super. Ct. 1992) (holding that provisions indicating alimony would terminate when the “youngest living child reaches the age of twenty-one, is emancipated or finishes college whichever occurs last” evinced an intent to continue alimony despite the remarriage of the obligee spouse); Telma v. Telma, 474 N.W.2d 322, 323 (Minn. 1991) (holding that a separation agreement
Minnesota specifically mentioned the word "remarriage" or the effect of remarriage on the alimony obligation.\textsuperscript{86}

\textit{f. Use of the Terms "Modification" and "Termination" in Maryland Case Law Pertaining to Alimony Obligations.}—In Maryland, the terms "modification" and "termination" have been used interchangeably both in motions by an alimony obligor and by courts. In \textit{Bauer v. Votta},\textsuperscript{87} the Court of Special Appeals confronted the issue of whether a trial court erred in reducing an alimony obligation by $200 due to a change in the financial circumstances of the obligee.\textsuperscript{88} The obligee's income had increased 150\% from $9,000 to $22,000 since the original alimony award.\textsuperscript{89} Due to the increase, the obligor filed a Petition for Modification of Alimony in the Circuit Court for Baltimore County.\textsuperscript{90} Under the Petition for Modification, the obligor sought either termination or reduction of the alimony due to the increase in income of the obligee.\textsuperscript{91}

In \textit{Young v. Young},\textsuperscript{92} the Court of Special Appeals determined whether newly enacted alimony laws applied to an alimony order entered prior to the enactment, once a motion regarding the order was filed after the enactment.\textsuperscript{93} Below, the trial court applied the newly enacted law, and under an Order of Modification, it ordered alimony to terminate at a prospective date.\textsuperscript{94} In overruling the trial court's improper application of the new law, the Court of Special Appeals stated "[t]he chancellor erroneously applied the post-July 1, 1980, alimony law to achieve the modification."\textsuperscript{95} Thus, the court described the trial court's termination of alimony as a modification.

\textsuperscript{86} In \textit{McMahon}, the terms of the separation agreement required alimony to terminate when the youngest child reached the age of 21, became emancipated, or finished college, whichever event occurred last. \textit{McMahon}, 612 A.2d at 1364. In \textit{Telma}, the separation agreement provided that the alimony obligation would continue for five years or until the obligee's adjusted gross income was in excess of $30,000 per year. \textit{Telma}, 474 N.W.2d at 323.


\textsuperscript{88} \textit{Id.} at 573, 657 A.2d at 362. The court also faced the issue of whether a pension waiver provision in the parties' separation agreement precluded the trial court from considering the obligor's pension in his income when calculating alimony. \textit{Id.} at 570, 657 A.2d at 360.

\textsuperscript{89} \textit{Id.} at 572-73, 657 A.2d at 361.

\textsuperscript{90} \textit{Id.} at 568, 657 A.2d at 359.

\textsuperscript{91} \textit{Id.}

\textsuperscript{92} 61 Md. App. 103, 484 A.2d 1054 (1984).

\textsuperscript{93} \textit{Id.} at 105-06, 484 A.2d at 1056.

\textsuperscript{94} \textit{Id.}

\textsuperscript{95} \textit{Id.} at 109, 484 A.2d at 1058 (emphasis added).
3. The Court's Reasoning.—The Court of Appeals, in reviewing this case of first impression, held that a separation agreement must expressly state that alimony survives remarriage in order to override section 11-108's automatic termination of alimony upon remarriage of the obligee spouse.96 The court rejected Ms. Gibbs' argument that the terms of the alimony provision were equivalent to "agreeing otherwise" as permitted by section 11-108 so as to override the presumption.97 Furthermore, the court found that the non-modification clause had no bearing on its ability to terminate the alimony obligation because it defined termination as a separate and distinct concept from modification.98

The Court of Appeals began its analysis by adopting a bright-line rule requiring parties to insert an explicit provision in a separation agreement stating that an alimony obligation survives remarriage.99 The court concluded that if this provision is not found in a separation agreement, Maryland courts must find that the obligation terminates automatically upon remarriage of the obligee spouse.100 Because the issue was of first impression, the court looked to the language and the public policy underlying section 11-108.101 In analyzing section 11-108's language "[u]nless the parties agree otherwise," the court admitted that the statute did not provide whether the agreement "otherwise" needed to be expressly stated in the separation agreement.102 The court examined the public policy behind section 11-108 and found it very clear that alimony was not intended to survive the remarriage of the recipient.103 Based on the "clear" aim of section 11-108, the court concluded that any exception to the goal of section 11-108 of terminating alimony upon remarriage must be equally as clear.104 The court rationalized its adoption of a rule requiring an express assertion of survival past remarriage by noting the positive effect on judicial economy.105 Lastly, the court declared that a bright-line rule would increase predictability and reduce litigation and ambiguity.106

96. Moore, 373 Md. at 187, 817 A.2d at 213.
97. See id. at 191, 817 A.2d at 215 ("We do not construe the language contained in 8.0 of the agreement before us to evidence an intent of the parties that petitioner was required to continue to pay alimony to respondent for seven years, even if she remarries.").
98. Id., 817 A.2d at 215-16.
99. Id. at 190, 817 A.2d at 215.
100. Id. at 189-90, 817 A.2d at 214.
102. Id. at 189, 817 A.2d at 214.
103. Id., 817 A.2d at 214.
104. Id.
105. Id.
106. Id.
Using the newly adopted bright-line rule, the court analyzed the alimony provision of the separation agreement and concluded neither the non-modification clause nor the definite end period of payment met the standard of clarity as required by the bright-line rule. The court rejected Ms. Gibbs’ argument that the non-modifiability clause was akin to “agreeing otherwise” as permitted by section 11-108 because the clause did not actually bar termination of alimony but only prohibited modification by a court. Therefore, the court reasoned that inserting the clause was not equivalent to the actual use of the word “remarriage” in the agreement.

To further support its holding, the court cited a number of cases from sister states that adopted similar bright-line rules in response to statutes that terminated alimony upon remarriage unless the parties agreed otherwise. The court emphasized the Washington Supreme Court’s holding that a party must specifically mention remarriage in order to defeat the automatic termination of alimony upon remarriage as required by Washington law. The Moore court noted that in In re Marriage of Williams, the Washington Supreme Court found the terms of an alimony provision, which included a non-modifiability clause and required the husband to pay alimony “until [the wife] completes her bachelor’s degree or until 4 years pass, whichever comes first” did not satisfy the “agreed otherwise” requirement of the statute. The court also pointed to the Missouri Supreme Court’s holding in Glenn v. Snider that a separation agreement must specifically mention the effect of remarriage on alimony obligations to override the presumption of the Missouri statute that alimony terminates automatically upon remarriage. Finally, the court noted the California Court of Appeal’s conclusion in Glasser v. Glasser that a separation agreement containing a non-modifiability clause and a definite term

107. Id. at 190-191, 817 A.2d at 215.
108. Id. at 191, 817 A.2d at 215-216. The court concluded the words “termination” and “modification” are not synonymous because Black’s Law Dictionary defines modify as “[t]o alter; to change in incidental or subordinate features” and terminate as “[t]o put an end to; to make to cease; to end.” Id. (citing BLACK’S LAW DICTIONARY 1004, 1471 (6th ed. 1990)). The court also noted that Maryland Family Law statutes deal with termination of alimony and modification of alimony in two separate sections; section 11-108 deals with termination, and section 11-107 deals with modification. Id. at 191, 817 A.2d at 216.
109. Id. at 191, 817 A.2d at 216.
110. Id. at 192, 817 A.2d at 216.
111. Id. at 192-93, 817 A.2d at 216-17.
112. 796 P.2d 421, 425 (Wash. 1990) (en banc).
113. 852 S.W.2d 841 (Mo. 1993) (en banc).
114. Moore, 378 Md. at 193, 817 A.2d at 217.
of four years payment of alimony was not specific enough to indicate the parties intended for the obligation to survive remarriage.\textsuperscript{116} Although the California court noted that no specific language was required to extend alimony past remarriage, the Court of Appeals found the \textit{Glasser} court's conclusion persuasive that silence and a non-modification clause were insufficient to defeat the statutory presumption.\textsuperscript{117}

Finally, the court supported its adoption of a bright-line rule with a brief mention of various commentators in the field of family law.\textsuperscript{118} The court noted that the commentators "appear to assume" specific language is required in order to override a statute that mandates automatic termination of alimony upon remarriage.\textsuperscript{119} Furthermore, the court highlighted that certain commentators encourage practitioners to be specific in drafting separation agreements because of the statutory presumption that alimony terminates upon remarriage.\textsuperscript{120}

4. \textit{Analysis}.—In \textit{Moore v. Jacobsen}, the Court of Appeals of Maryland, on first impression, considered whether a separation agreement containing a non-modification clause and a definite term of payment were enough to override the statutory presumption that alimony ceases upon remarriage of the obligee spouse.\textsuperscript{121} The Court of Appeals adopted a bright-line rule and held that only an express mention of the word "remarriage" and its effect on the obligation of alimony could defeat the statutory presumption.\textsuperscript{122} The Court of Appeals' bright-line rule improperly restricts the common meaning of the word "otherwise" found in the statute and is inapposite with the policy and purpose of separation agreements. Moreover, the Court of Appeals' manipulation of the non-modification clause, to effectuate the bright-line rule, severely undermines an obligee's interest in alimony.

The Court of Appeals' decision is problematic for a number of reasons. First, the court's quick adoption of the bright-line rule, without first applying the rules of statutory construction, allowed it to gloss over the true meaning of the word "otherwise" and apply an overly restrictive reading. Second, if the court applied the broad, common

\textsuperscript{116} \textit{Moore}, 373 Md. at 194, 817 A.2d at 217.
\textsuperscript{117} See \textit{id.} (noting the \textit{Glasser} court's discussion of silence and non-modification clauses).
\textsuperscript{118} \textit{id.} at 194-95, 817 A.2d at 217-18.
\textsuperscript{119} \textit{id.} at 194, 817 A.2d at 217.
\textsuperscript{120} \textit{id.} at 194-95, 817 A.2d at 218.
\textsuperscript{121} \textit{id.} at 189, 817 A.2d at 214.
\textsuperscript{122} \textit{id.} at 195, 817 A.2d at 218.
meaning of “otherwise,” the terms of the separation agreement would indicate an intent to continue the alimony obligation past remarriage under Maryland rules of contract construction.\(^{123}\) Third, the court’s disregard of the purpose of non-modification clauses in order to effectuate the bright-line rule is also problematic because it undermines an obligee’s ability to contractually protect his alimony interest.\(^{124}\) Finally, the court’s interpretation of section 11-108 and the non-modification clause is inconsistent with the purpose and policy behind separation agreements and may discourage future divorcees from settling their differences through private agreements.\(^{125}\)

a. The Court’s Narrow Reading of “Agree Otherwise” Is Not Consistent with the Ordinary Meaning of “Otherwise” and Is Not Supported by Language Used Throughout the Maryland Code.—The court failed to properly effectuate the legislature’s intent by disregarding Maryland’s traditional rules of statutory interpretation by ignoring the ordinary meaning of the word “otherwise.” *Webster’s Dictionary* defines “otherwise” as 1. “in a different way or manner,” 2. “in different circumstances,” 3. “in other respects.”\(^{126}\) The *Oxford English Dictionary* defines “otherwise” as “[i]n another way, or in other ways; in a different manner, or by other means; differently.”\(^{127}\) Both dictionaries attribute a broad common meaning to the word “otherwise.” There is nothing in the definitions indicating that to “agree otherwise” a person must specifically state the exact opposite of the provision around which he is contracting. In fact, the phrases “in other respects” and

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123. See Safe Deposit & Trust Co. of Balt. v. N.Y. Life Ins. Co., 14 F. Supp. 721, 726 (D. Md. 1936) (holding the meaning of “otherwise” is broader than a term’s exact antithesis or exact opposite). According to this definition of “otherwise” a party is not confined when it “agrees otherwise” to use the specific term “remarriage” as required by the Court of Appeals’ bright-line rule.

124. The Court of Appeals’ decision that the non-modification clause does not prohibit a court from terminating alimony leaves an obligee with no protection from the worst possible outcome—that of complete eradication of his interest in alimony. See infra notes 162-165 and accompanying text (discussing the impact of the court’s interpretation of the words “termination” and “modification” on an obligee’s interest in receiving alimony). In contrast, the court’s interpretation of the non-modification clause still protects the obligor’s interest of protecting against the increase of his alimony obligation because increasing alimony is a modification.

125. See infra notes 171-179 and accompanying text (discussing the public policy rationale behind separation agreements, including judicial economy, private negotiation, and efficient resolution of difficult issues).


“in other ways” are plural, indicating that more than one method may satisfy the statutory term “otherwise.”

Moreover, the Court of Appeals and the District Court for the District of Maryland have found the words “other” and “otherwise,” respectively, as having broad meanings. In Vytar, the Court of Appeals compared the word “other” to the word “any” and found both terms were “uncompromising” words to be construed broadly. Also, in Safe Deposit, the district court, although not interpreting language of a statute, found the common meaning of “otherwise” to be broad. The district court held the meaning of “otherwise” was not confined to the exact opposite of the connective term. The district court explained that to read the term “otherwise” as found in the language “involuntary or otherwise” as only referring to the term “voluntary” is too narrow a construction of the common meaning. Therefore, according to Vytar and Safe Deposit, the Court of Appeals’ construction of the language “agree otherwise” is inappropriately narrow. The common meaning of “otherwise” does not indicate that the direct antithesis of “alimony terminates upon remarriage”—that alimony does not terminate upon remarriage—is required in the separation agreement. Nor is the broad meaning of “otherwise” confined to the use of the specific word “remarriage.” Rather, according to its common meaning, “otherwise” provides broad discretion for contracting parties to defeat the statutory presumption.

The Court of Appeals’ narrow reading of “agree otherwise” is also not supported by language used throughout the Maryland Code. Where the legislature has required the use of specific language in an agreement, it has expressed this intention through more limiting lan-

128. See Safe Deposit & Trust Co. of Balt., 14 F. Supp. at 726 (looking to the definition of “otherwise” in Webster’s New International Dictionary and concluding that “otherwise” is not limited to the direct contrast of a specific word, but rather is broad and carries the meaning “in any other manner”).
129. Vytar Assocs. v. Mayor of Annapolis, 301 Md. 558, 564 n.4, 483 A.2d 1265, 1266 n.4 (1984); Safe Deposit & Trust Co. of Balt., 14 F. Supp. at 726.
130. Vytar Assocs., 301 Md. at 564 n.4, 483 A.2d at 1266 n.4.
131. See Safe Deposit & Trust Co. of Balt., 14 F. Supp. at 726 (rejecting the limited construction of “otherwise” to include the mere antithesis of the term and adopting a broad meaning encompassing “in any other manner”).
132. Id.
133. Id.
134. See Moore, 373 Md. at 195, 817 A.2d at 218 (holding that to agree otherwise a party must explicitly mention remarriage).
135. See Safe Deposit & Trust Co. of Balt., 14 F. Supp. at 726 (holding the meaning of “otherwise” is broader than a term’s exact antithesis or exact opposite).
136. See id. (emphasizing that the broad meaning of the term “otherwise” encompasses a number of relevant terms).
There is nothing in section 11-108 to indicate specific language is needed when parties "agree otherwise" to override the statutory presumption. In Family Law section 1-203 of the Maryland Code, the legislature, in defining the powers of an equity court in matters of alimony, annulment, and divorce, states that "[u]nless the court expressly provides otherwise, the filing of an action for an annulment, a limited divorce, or an absolute divorce does not constitute lis pendens" with respect to any property of a party. In the section of the Maryland Code on Estates and Trusts the legislature repeatedly requires that "[u]nless a contrary intent is expressly indicated in the will" certain presumptions apply. As the preceding examples illustrate, where the legislature did not require that an intent be expressly indicated it used language such as "[u]nless the will otherwise provides" to imply a lesser degree of precision in contract language.

As evidenced by the language used commonly throughout the Maryland Code, when the legislature intended for specific language to be required in an agreement it used language such as "expressly" to limit the term "otherwise." Arguably, when the legislature chose to use the words "agree otherwise" in section 11-108 over more specific language, which would have emphasized the need for an express term to be present in an agreement, it gave contracting parties more leeway in their choice of terms. Therefore, the court interpreted the language of section 11-108 too narrowly and incorrectly adopted a bright-line rule requiring specific mention of the word "remarriage" in order to defeat the statutory presumption that alimony terminates upon the remarriage of the obligee spouse.

b. If the Court Applied the Broad Meaning of "Otherwise" and Allowed the Parties the Appropriate Room to Contract According to Their Own Terms, the Court Could Have Found the Terms of the Alimony Provisions Suf-

137. See, e.g., Md. Code Ann., Fam. Law § 8-103(c) ("The court may modify any provision of a deed, agreement, or settlement...regardless of how the provision is stated, unless there is: (1) an express waiver of alimony or spousal support; or (2) a provision that specifically states that the provisions with respect to alimony or spousal support are not subject to any court modification.") (emphasis added).

138. Id. § 11-108.

139. Lis pendens is the "jurisdiction, power, or control acquired by a court over property while a legal action is pending." Black's Law Dictionary 942 (7th ed. 1999).

140. Id. § 1-203 (emphasis added).


142. Id. § 4-412(b); see also id. § 4-411(c) (stating "[u]nless the will provides otherwise").

143. See id. §§ 4-404 to -406, 4-408, 4-410 (using language such as "[u]nless a contrary intent is expressly indicated").
icient to Defeat the Statutory Presumption.—The seven-year duration of alimony payments and the lack of any contingencies limiting these payments indicate the parties’ intent for alimony to continue through the specified period regardless of the event of remarriage. In analyzing the terms of the separation agreement under principles of contract law as followed in Maryland, the language of the alimony provision limiting alimony to “$833.33 per month commencing on April 1, 2000 and payable on the 1st day of each month thereafter for eighty-four consecutive months or until the final payment due on April 1, 2007” indicates to a reasonable person that alimony must continue during this period with no limitation or exceptions. A conclusion similar to this one has been determined and upheld in a number of Maryland’s sister states.

In Raymond v. Raymond, the Supreme Court of Maine held that a separation agreement that was silent on the issue of remarriage but provided that alimony terminated after five years or at the death of the obligee, whichever occurred first, evidenced intent to continue alimony past remarriage. The Raymond court focused on the fixed period of alimony finding that if the parties “took the trouble to limit the duration of the payments... they would have expressly provided for any further limitation in the duration of the payments such as the remarriage of the wife, had the parties so intended.” Similarly, the terms of the separation agreement in Moore limited the alimony obligation to seven years. Mr. Moore and Ms. Gibbs “took the trouble” to limit the obligation to a specified period and not list any other terminating factors during this period; thus, the terms indicate an intent for alimony to continue during the seven years regardless of the occurrence of any other event.

Similarly in McMahon v. McMahon, the Superior Court of Pennsylvania found that the terms of a separation agreement gave no indi-

145. Because the terms of the alimony provision are not ambiguous, the court must give effect to the “plain meaning” of the terms. Sy-Lene of Washington, Inc. v. Starwood Urban Retail II, 376 Md. 157, 167, 829 A.2d 540, 546 (2003). The terms must be observed from the view of a reasonable person in the position of the party at the time of contracting. See id. (quoting Calomiris v. Woods, 353 Md. 425, 436, 727 A.2d 358, 363 (1999)).
146. Moore, 373 Md. at 187, 817 A.2d at 213.
147. 447 A.2d 70, 71 (Me. 1982).
148. Id. at 71-72 (quoting Sprentall v. Smallridge, 347 N.Y.S.2d 659, 661 (1973)).
149. See Moore, 144 Md. App. at 308, 797 A.2d at 850 (specifying April 1, 2007 as the date that alimony payments would stop).
150. See Raymond, 447 A.2d at 71 (accepting that an agreement for a specific date for termination of alimony with no additional conditions should be regarded as having no additional conditions).
cation that the parties intended for alimony to terminate upon remarriage of the obligee spouse.\textsuperscript{151} The superior court analyzed the separation agreement as an independent contract under principles similar to those required in Maryland.\textsuperscript{152} The separation agreement in \textit{McMahon} provided that alimony would terminate when the "youngest living child reaches the age of twenty-one, is emancipated or finishes college[,] whichever occurs last."\textsuperscript{153} Similar to the reasoning in \textit{Raymond}, the Superior Court of Pennsylvania focused on the fact that both parties had the ability, at the time of contracting, to add provisions to the agreement specifying when the alimony obligation should terminate.\textsuperscript{154} Likewise, in \textit{Moore} the only event that terminated the alimony obligation was the end of the seven-year period.\textsuperscript{155} During negotiations, Mr. Moore could have required additional factors to be listed as terminating events or he could have refused to sign the agreement as drafted.\textsuperscript{156}

Even the case that the Court of Appeals cited as support for its adoption of the bright-line rule allows room for parties to contract in a separation agreement to continue alimony past remarriage without express mention of remarriage.\textsuperscript{157} In \textit{Telma v. Telma}, the Supreme Court of Minnesota reversed an appellate court's termination of a husband's alimony obligation.\textsuperscript{158} Minnesota Statute section 518.64 is almost identical to section 11-108 and provides termination of alimony upon remarriage unless otherwise agreed by the contracting parties.\textsuperscript{159} The court interpreted the terms of the agreement as being unambiguous and thus the only inquiry that remained was to look at the actual language of the agreement and effectuate the parties' intent. \textit{Id.}; see \textit{Wells v. Chevy Chase Bank}, 363 Md. 232, 251, 768 A.2d 620, 630 (2001) (explaining that Maryland courts follow the principles of objective contract interpretation and when language in a contract is unambiguous the court is to effectuate the contract's meaning according to its terms).

\textsuperscript{152} \textit{Id.}
\textsuperscript{153} \textit{McMahon}, 612 A.2d at 1364.
\textsuperscript{154} \textit{Id.}
\textsuperscript{155} \textit{See Moore v. Moore}, 144 Md. App. 288, 308, 797 A.2d 839, 850 (2002) (noting the significance of the end date for alimony payments provided by the separation agreement).
\textsuperscript{156} Arguably, Ms. Gibbs could have also required more specific language in the alimony provision. However, this lack of specificity regarding the effect of remarriage indicated both Ms. Gibbs' and Mr. Moore's assumption that specific language was not needed to continue the alimony obligation for the seven-year period regardless of remarriage. Whereas, when the parties thought specific language was needed and when they intended for an obligation to terminate upon marriage, they explicitly stated so. For example, in the child support provision, the separation agreement specifically provides that the obligation terminates upon the child's marriage. Appellant's Brief at 32, \textit{Moore} (No. 55).
\textsuperscript{157} \textit{Telma v. Telma}, 474 N.W.2d 322, 323 (Minn. 1991). The \textit{Moore} court cites \textit{Telma} in support of its conclusion that other states apply a bright-line rule similar to the rule the \textit{Moore} court decided to adopt. \textit{Moore}, 373 Md. at 192, 817 A.2d at 216.
\textsuperscript{158} \textit{Telma}, 474 N.W.2d at 323.
The terms of the separation agreement required the obligee spouse to receive alimony of $1200 per month for five years or until the obligee's adjusted gross income exceeded $30,000 per year. Although prior precedent required that remarriage be expressly stated to override the statutory presumption, the Telma court affirmed the trial court's interpretation that alimony terminated "on the occurrence of either of two specific events, neither of which was [the obligee's] remarriage." Therefore, even a jurisdiction that had a preexisting rule requiring explicit mention of remarriage found that specific mention of a terminating event, like the date provided in Mr. Moore's and Ms. Gibbs' separation agreement, evidenced the parties' intent for alimony to continue.

c. The Court of Appeals' Manipulation of the Non-Modification Clause by Differentiating "Modification" and "Termination" of Alimony to Effectuate its Bright-Line Rule Severely Undermines an Obligee's Right to Protect his Alimony Interest.—The Court of Appeals' differentiation between the words "modification" and "termination" will detract from the purpose of settlement agreements by unjustly limiting an obligee's right to alimony, making it impossible to protect alimony interests from judicial interference. The conclusion that a non-modification clause prohibits a court from modifying alimony but not from terminating alimony unfairly maintains the interest of the obligor, as it prohibits an increase of alimony by the court. This conclusion, however, leaves the obligee's primary interest in alimony vulnerable to

159. Id. at 322. Minnesota Statute section 518.64 states: "Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance." MNN. STAT. ANN. § 518.64(3) (West 1990).

160. Telma, 474 N.W.2d at 323.

161. Id. The separation agreement also contained a waiver of rights by the obligor, similar to the non-modification clause present in the agreement. Id. The waiver clause contained in the separation agreement provided that the obligor waived "any right he may have under Minn. Stat. § 518.64(3) and applicable case law to petition this Court for modification of his obligation to pay maintenance, either as to amount or duration or termination." Id.

162. See 2 ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 65.02 (2d ed. 2002) (listing drafting considerations for practicing attorneys when inserting modification clauses into separation agreements, including the different interests of the parties).

judicial order. Therefore, while the primary interest of the obligor is protected—that the alimony award should not be increased—the primary interest of the obligee—to receive alimony at all—is at risk. The Moore court's distinction between the two terms produced an inequitable result that favors the obligor and makes vulnerable separation agreements that may not contain the precise language the court now requires. Therefore, obligors can easily be relieved of their support obligation despite the obligee's understanding that the non-modification clause prohibited judicial interference into a privately contracted alimony decision.

The court's distinction between “modification” and “termination” is also not supported by the use of the terms in prior case law. In fact, the opposite conclusion is reached because the courts often use the terms interchangeably. For example, in Bauer v. Votta, the petitioner filed a modification of alimony “seeking either termination or reduction of the alimony” based upon a change in circumstances. The petitioner’s relief of either termination or reduction was filed under one broad petition for modification of alimony. Likewise, in Young v. Young, the petitioner filed for a modification of an alimony award order “requesting several changes including termination of the alimony.” Also, the Young court in its opinion used the terms “modification” and “termination” interchangeably. Therefore, the distinction between what is a modification and a termination is not as rigid as the court in Moore asserts.

d. The Court’s Adoption of a Bright-Line Rule and Manipulation of the Non-Modification Clause Undermines the Purpose and Policy of Separation Agreements by Hindering Divorcing Parties’ Freedom to Contract.—The

164. The obligee also has an interest in preventing the decrease of alimony, but securing against the termination of alimony all together is arguably of higher priority.
165. See Quarles v. Quarles, 62 Md. App. 394, 405, 489 A.2d 559, 565 (1985) (differentiating between child support payments, which are always modifiable by a court to protect the interests of the children, and alimony payments, which can be non-modifiable if the parties decide that it is in their best interests).
166. Moore, 144 Md. App. at 308, 797 A.2d at 850; see also Moore, 373 Md. at 195-196, 817 A.2d at 218 (Battaglia, J., dissenting) (expressing a problem with the majority's stretching of the traditional meanings of the words “modification” and “termination” to reach its conclusion).
168. Id.
170. See id. at 112, 484 A.2d at 1059 (using case law which held “modification must be based on a present change in circumstances, not on speculation that there will be a change in circumstances” to support overruling a chancellor's decision to terminate the alimony obligation at a future date).
court's manipulation of the non-modification clause and adoption of a bright-line rule undermine the public policy of separation agreements by limiting a party's ability to settle disputes outside the courtroom.\textsuperscript{171} Separation agreements are "indispensable tools" in resolving complex issues surrounding the dissolution of a marriage.\textsuperscript{172} Separation agreements allow parties to avoid the litigation process and personally negotiate family matters.\textsuperscript{173} Avoiding litigation by privately resolving matters of custody, visitation, support, and distribution of property saves the parties time, money, and emotional trauma.\textsuperscript{174} Separation agreements are also favored by courts because they relieve the court of resolving usually difficult issues.\textsuperscript{175}

The policy reasons behind separation agreements are now frustrated because of the court's restriction of the parties' contractual freedom by mandating specific language.\textsuperscript{176} In the future, parties may not be willing to solve their issues privately if, at any given time, the court can refuse contractual language seemingly allowed by the broad language of the statute, but not in favor with judicial economy.\textsuperscript{177} Moreover, support obligees may be less willing to contract for alimony if the non-modification clause does not protect them from termination by the court.\textsuperscript{178} The result of the court's bright-line rule may in fact discourage judicial economy by forcing divorcing parties to endure unending litigation to resolve their private matters.\textsuperscript{179}

5. Conclusion.—In Moore v. Jacobson, the Court of Appeals adopted a bright-line rule and held that only an express mention of


\textsuperscript{172} Morris Ploscowe et al., Family Law Cases and Materials 792 (2d ed. 1972).

\textsuperscript{173} Id.

\textsuperscript{174} Id.

\textsuperscript{175} Id.

\textsuperscript{176} See Moore, 373 Md. at 190, 817, A.2d at 215 (holding a party must mention the word "remarriage" in order to meet the bright-line rule and defeat the statutory presumption that alimony terminates upon remarriage).

\textsuperscript{177} See Doris Del Tosto Brogan, Divorce Settlement Agreements: The Problem of Merger or Incorporation and the Status of the Agreement in Relation to the Decree, 67 Neb. L. Rev. 235, 239 (1988) (noting that when parties participate in the bargaining process based on a certain understanding of the law, but then later discover that "the presumptions upon which they had negotiated were illusory" because of judicial interpretation, the parties and their lawyers are driven to avoid settlement).

\textsuperscript{178} See id. (stating that lawyers and lay persons are discouraged from settlements when they cannot determine whether or how to make an agreement non-modifiable).

\textsuperscript{179} See Ploscowe et al., supra note 172, at 792 (describing litigation as unsatisfactory and negotiation as a better means of resolving alimony issues despite the difficulty of reaching compromises).
"remarriage" and its effect on the obligation of alimony could trump the statutory presumption of section 11-108 that alimony terminates upon remarriage.\textsuperscript{180} The Court of Appeals' bright-line rule is problematic because it improperly restricts the common meaning of the word "otherwise" found in the statute and is inapposite with the policy and purpose of separation agreements.\textsuperscript{181} Moreover, the Court of Appeals' manipulation of the non-modification clause, to effectuate the bright-line rule, severely undermines an obligee's right to secure his alimony interest and may discourage parties from negotiating in the future.\textsuperscript{182}

\textbf{Amber N. Csaszar}

\begin{footnotesize}
\begin{enumerate}
\item[180.] 373 Md. at 195, 817 A.2d at 218.
\item[181.] \textit{See supra} notes 126-143, 171-179 and accompanying text (discussing the broad meaning of the word "otherwise" and the purposes of settlement agreements).
\item[182.] \textit{See supra} notes 162-170 and accompanying text (discussing the impact of the court's interpretation of the words "termination" and "modification" on an obligee's interest in receiving alimony).
\end{enumerate}
\end{footnotesize}
VII. TORTS

A. A Changing Relationship: The Court Rightfully Expands a Landlord's Duty to His Tenants

In Hemmings v. Pelham Wood L.L.L.P., the Court of Appeals of Maryland addressed the duty of a landlord to protect his tenants from the criminal activities of third parties. Specifically, the court examined "whether a landlord has a duty to [fix] a known dangerous or defective condition [in] his control to prevent a foreseeable . . . criminal attack [by a third party] within the leased [premises]." The court answered this question in the affirmative, holding that a landlord's duty to provide a reasonable amount of security in common areas extends to preventing foreseeable injuries within the leased premises as well. In reaching this conclusion, the court relied heavily on its holdings in previous cases involving property damage, even though this case involved personal injury. The court's reliance on property damage cases was misplaced because Hemmings, which involves a third party criminal attack, is factually dissimilar from a property damage case, and raises unique causation issues. Instead of relying on property damage cases, the court should have relied on more factually similar cases that address a landlord's duty to prevent physical attacks on tenants. In addition, the court could have cited policy considerations to strengthen its holding. Thus, even though the holding in Hemmings is consistent with prior tenant injury cases, the court employed a problematic route in arriving at its conclusion by relying solely on property damage cases in order to rightfully expand the liability of landlords.

1. The Case.—On June 13, 1998, an unidentified, armed intruder entered Pelham Wood and broke into Howard and Suzette

2. Id. at 526, 826 A.2d at 445-46.
3. Id.
4. Id. at 543, 826 A.2d at 455.
5. Id.
6. See infra notes 143-146 and accompanying text (discussing the different factual and legal issues in Hemmings as compared to the property damage cases on which the majority relied for support).
7. See infra notes 149-178 and accompanying text (demonstrating that the holding in Hemmings follows logically from the holdings in Matthews and Scott, two personal injury cases).
8. See infra notes 179-192 and accompanying text (describing how various policy concerns support the court's expansion of a landlord's liability).
Hemmings' second floor apartment through the sliding glass door on the balcony. The intruder encountered Mr. Hemmings in the apartment. The intruder then shot Mr. Hemmings, who later died from his injuries at the University of Maryland Shock Trauma Center.

Before this incident, the Hemmings had entered into a lease for the apartment in Pelham Wood on November 25, 1997. The lease provided that "[the] Landlord has the right to enter the [apartment] at any time by master key or by force, if necessary, to inspect the Premises, to make repair/alterations in the [apartment]...". The lease also stated "[t]hat... [the] Landlord shall be responsible for repairs to the [apartment], its equipment and appliances furnished by [the] Landlord...". The lease specified that the Landlord agreed that "the [apartment] will be made available such that it will not contain conditions that constitute, or if not properly corrected would constitute, a fire hazard or a serious and substantial threat to the life, health or safety of occupants." Finally, the lease stated that the tenant agreed that the Landlord "shall not be liable for an injury, damage or loss to person or property caused by other tenants or other persons... unless the same is exclusively due to the omission, fault, negligence or other misconduct of [the] Landlord."

At the time of the burglary, there were several security measures in place at Pelham Wood, including exterior lighting surrounding the complex, dead bolts on the front doors of the apartments, alarm systems on ground level apartments, and "Charlie Bars" for units with sliding glass doors. The contractor who was hired to repair the sliding glass door following the burglary in the Hemmings' apartment, however, did not find a Charlie Bar in the apartment.

In addition, several Pelham Wood residents testified about the insufficiency of the exterior lighting at the complex. The resident who lived directly below the Hemmings claimed that the area behind

9. Hemmings, 375 Md. at 528, 826 A.2d at 447.
10. Id.
11. Id.
12. Id. at 526, 826 A.2d at 446.
13. Id. at 527, 826 A.2d at 446 (alterations in original).
14. Id. (alterations in original).
15. Id. (alteration in original).
16. Id.
17. Id. at 528, 826 A.2d at 446. A "Charlie Bar" is a horizontally mounted bar that is wedged into a sliding door to prevent it from being opened. Id.
18. Id. at 529, 826 A.2d at 447. The contractor stated that he believed a Charlie Bar had been on the door at some point because the frame in which the bar is mounted was present. Id.
19. Id. at 529-30, 826 A.2d at 447.
the apartment building was "[p]itch dark."\textsuperscript{20} Another tenant testified that there was not a light fixture outside the Hemmings' apartment.\textsuperscript{21} A third tenant stated that the area behind the building was dark until the Landlord added lighting after the burglary at the Hemmings' apartment.\textsuperscript{22}

In the two years prior to the Hemmings' break-in, there were two armed robberies at Pelham Wood, as well as twenty-nine burglaries or attempted burglaries filed with the police department.\textsuperscript{23} The burglar used the sliding glass door to gain entry to the apartment in five of these burglaries.\textsuperscript{24} On October 3, 1996, an intruder entered through the sliding glass door and burglarized the same unit that the Hemmings leased one year later.\textsuperscript{25} The Landlord's corporate designee stated that the police notified the rental office of such criminal activity and requested the Landlord's assistance in watching for suspected criminal activity at the complex.\textsuperscript{26}

On June 14, 1999, in the Circuit Court for Baltimore County, Ms. Hemmings filed wrongful death and survival claims against the Landlord of Pelham Wood.\textsuperscript{27} Among these allegations, Ms. Hemmings contended that the Landlord had not exercised reasonable care in preventing harm to the Hemmings and had been negligent in permitting a dangerous condition to remain unfixed in the Hemmings' home.\textsuperscript{28} Following discovery, both parties moved for summary judgment.\textsuperscript{29} On July 30, 2001, the circuit court heard arguments on the motions and granted the Landlord's request for summary judgment.\textsuperscript{30} The circuit court found that by furnishing working locks for the apart-

\textsuperscript{20} \textit{Id.} at 529, 826 A.2d at 447. The same resident also stated, "You can't see anything. Even if I would look outside, I couldn't identify anyone in that area because it is really dark." \textit{Id.}

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.} at 529-30, 826 A.2d at 447.

\textsuperscript{23} \textit{Id.} at 530, 826 A.2d at 448.

\textsuperscript{24} \textit{Id.} There were forty reports of burglaries during the two-year period. \textit{Id.} at 530 n.2, 826 A.2d at 448 n.2. In addition, there were reports of violent crimes including first- and second-degree assault, kidnapping, rape, and armed robbery. \textit{Id.} at 530, 826 A.2d at 448.

\textsuperscript{25} \textit{Id.} at 531, 826 A.2d at 448.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 532, 826 A.2d at 449.

\textsuperscript{28} \textit{Id.}

\textsuperscript{29} \textit{Id.} The Landlord argued that he had no duty to protect Mr. Hemmings from an attack within his apartment, and that he had maintained all of the security devices that he provided to the residents of Pelham Wood. \textit{Id.} Mrs. Hemmings argued that, as a matter of law, the Landlord had a duty to adequately secure the Hemmings' apartment, as well as provide sufficient exterior lighting. \textit{Id.}

\textsuperscript{30} \textit{Id.}
ment doors, the Landlord had met his duty of reasonable care and thus was not negligent.\textsuperscript{31}

Ms. Hemmings noted a timely appeal to the Court of Special Appeals, which affirmed summary judgment for the Landlord on May 6, 2002.\textsuperscript{32} The court reasoned that the Landlord did not have a duty to protect tenants from criminal activities occurring within the leased premises.\textsuperscript{33} The court did recognize that a landlord has a duty to provide a reasonable amount of security in common areas to protect tenants from crime.\textsuperscript{34} The court refused, however, to extend this duty to the leased premises.\textsuperscript{35}

The Court of Appeals granted certiorari to consider whether a landlord has a duty to repair a known defective condition within a leased premises if he has control over the condition, and the repair may prevent a foreseeable attack by a third party.\textsuperscript{36} The court also considered whether there was sufficient evidence of such a defective condition in the Hemmings' case to make summary judgment for the Landlord inappropriate.\textsuperscript{37}

2. **Legal Background.**—To state a negligence claim, a plaintiff must show that (1) the defendant had a duty to protect the plaintiff, (2) the defendant breached this duty, (3) the plaintiff was injured, and (4) the defendant's breach was the proximate cause of the plaintiff's injury.\textsuperscript{38} In general, the question of whether a duty exists is a matter of law.\textsuperscript{39} The Court of Appeals of Maryland has adopted an evolving standard for determining duty in the specific context of the landlord-tenant relationship.\textsuperscript{40} In earlier cases that dealt primarily

\textsuperscript{31} Id. The circuit court judge reasoned that the Landlord had fulfilled his duty of reasonable care because the apartment was secure such that the intruder had to forcibly enter the apartment. Id.


\textsuperscript{33} Id. at 323, 797 A.2d at 858.

\textsuperscript{34} Id. at 318, 797 A.2d at 855-56.

\textsuperscript{35} Id. at 317 n.4, 797 A.2d at 855 n.4.

\textsuperscript{36} Hemmings, 375 Md. at 533, 826 A.2d at 449-50.

\textsuperscript{37} Id., 826 A.2d at 450.


\textsuperscript{39} Todd, 373 Md. at 155, 816 A.2d at 933.

\textsuperscript{40} See, e.g., Kinnier v. J.R.M. Adams, Inc., 142 Md. 305, 307, 120 A. 838, 839 (1923) (holding a landlord liable for property damage resulting from a defective condition in the common area); Matthews, 351 Md. at 570, 719 A.2d at 131-32 (stating that the jury was justified in holding the landlord liable where, among other factors, the harm to persons and property was foreseeable).
with property damage, the court found that the landlord had a duty to remedy defective conditions over which he maintained control.  

The court, considering cases of personal injury, gradually expanded the landlord’s duty to repair dangerous conditions of which he had knowledge.  

Finally, the court further expanded the landlord’s duty to protect tenants from foreseeable harm resulting from dangerous conditions.

\[4\]

\[a.\] The Landlord’s Control Over the Defective or Dangerous Condition.—A fundamental part of a landlord’s duty to his tenants is the notion that a landlord is ultimately responsible for the maintenance of areas which he continues to control.  

\[4\]

\[4\] In 2310 Madison Avenue, Inc. v. Allied Bedding Manufacturing Co., the Court of Appeals held that there was ample evidence to let a jury determine a landlord’s liability for flood damage to an apartment due to clogged drains.  

\[4\] The court stated that a tenant may maintain a negligence action against a landlord if the landlord has contracted to make the repairs, and the tenant has provided notice of the defect and given the landlord a reasonable amount of time to make the repairs. The court added that this claim would be subject to considerations of proximate causation and possible contributory negligence.  

\[4\] The court went a step further to conclude that even if a landlord does not contract to make certain repairs, an implied duty to repair exists where the landlord has retained control of a certain area available for common use by all tenants.

\[4\]

\[4\] See, e.g., 2310 Madison Ave., Inc. v. Allied Bedding Mfg. Co., 209 Md. 399, 411-12, 121 A.2d 203, 210 (1956) (stating that the landlord is liable when injury results from conditions under which the landlord has control).

42. See, e.g., Langley Park Apts., Sec. H., Inc. v. Lund Adm’r, 234 Md. 402, 403, 199 A.2d 620, 620-21 (1964) (emphasizing the landlord’s obvious knowledge of the dangerous condition).

43. See, e.g., Scott v. Watson, 278 Md. 160, 169, 359 A.2d 548, 554 (1976) (applying the landlord’s duty to exercise reasonable care in providing safety for his tenants in common areas to cases of criminal activity).

44. See, e.g., 2310 Madison Ave., Inc., 209 Md. at 407, 121 A.2d at 208 (stating that it is well-settled law in Maryland that a landlord may be held liable where, among other factors, the landlord has contracted to repair the defect) (citations omitted).


46. Id. at 406, 121 A.2d at 207.

47. Id. at 407, 121 A.2d at 208 (citations omitted).

48. Id.

49. Id. at 408, 121 A.2d at 208. The court reviewed several earlier cases that supported the proposition that a landlord has a duty to maintain common areas, ensuring that they are in a safe condition.  

Id., 121 A.2d at 209. In Kinnier v. J.R.M. Adams, Inc., the court adopted the view that the landlord is liable to tenants or other lawful guests for injuries caused by improper management of, or failure to fix defects in, the common areas.  

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The court limited a landlord's duty in *Elmar Gardens, Inc. v. Odell,* stating that owning a property does not render a landlord liable for injuries occurring on that property. The court did not find a landlord liable for injuries to a tenant's hand when the tenant contended that the landlord had negligently installed the glass door on which he injured his hand. In this case, the tenant stuck his hand through the glass door in an effort to stop the door from closing on his infant son. Despite finding no liability, the court did note that a landlord has a duty to keep the property reasonably safe by exercising ordinary care. Furthermore, the court explained, when a landlord has leased parts of the property separately, and has retained control over common areas, it is only obligated to maintain the common areas in a reasonably safe condition. In this case, although the landlord had replaced the glass on which the tenant cut his hand just a few days prior to the accident, the court concluded that there was insufficient evidence that the landlord had been negligent.

b. The Landlord's Knowledge of the Defective or Dangerous Condition.—After *Elmar Gardens,* the court began to expand a landlord's liability to situations where it knew, or should have known, about a harmful condition on the premises. In *Langley Park Apartments, Sec. H., Inc. v. Lund, Administrator,* the Court of Appeals held a landlord liable for injuries sustained by a tenant who slipped on a patch of ice on a walkway under the landlord's control. The court used policy considerations to support its holding, stating that it would be unreasonable and impractical to make tenants responsible for maintaining the common walkways. In addition, the court found significant that the ice on the walkway that presented a dangerous condition was obvi-

Md. 305, 307, 120 A. 838, 839 (1923). In *Kinnier,* the court held the landlord liable for damages caused by leaking pipes. Id. at 308-09, 120 A. at 840. The Court of Appeals reaffirmed this holding in *Commercial Realty Co. v. National Distillers Products Corp.,* another case involving an overflowing water pipe. 196 Md. 274, 279, 76 A.2d 155, 157 (1950).

50. 227 Md. 454, 177 A.2d 263 (1962).
51. Id. at 457, 177 A.2d at 265.
52. Id. at 458, 177 A.2d at 266.
53. Id. at 456, 177 A.2d at 264.
54. Id.
55. Id.
56. Id. at 459, 177 A.2d at 266.
58. 234 Md. 402, 199 A.2d 620 (1964).
59. Id. at 410, 199 A.2d at 624.
60. Id. at 408, 199 A.2d at 623.
ous to the landlord. The court was careful to restrict its holding, however, emphasizing that the landlord will not automatically be found liable if it has snowed, but rather if he knew, or should have known, of the dangerous conditions created by the snow.

In *Macke Laundry Service Co. v. Weber*, the Court of Appeals held a landlord liable for injuries a three-year-old boy sustained when he placed his hand in the drive mechanism of a clothes dryer in an attempt to stop the dryer. The court stated that although a landlord generally does not owe a greater duty of care to children, the landlord in this case should have known that children frequently visited the laundry room, which was made available to all the tenants. Based on these facts, the court concluded that the landlord breached its duty of reasonable care to the child by failing to replace the shield on the dryer's drive mechanism.

c. The Harm Resulting from the Defective or Dangerous Condition Must Be Reasonably Foreseeable.—In 1976, the Court of Appeals first considered a landlord's liability for a third party attack on a resident tenant in *Scott v. Watson*. In *Scott*, the daughter of a tenant who was murdered in his apartment's underground parking garage brought a wrongful death suit against the landlord of the apartment complex. The court considered the extensive record of crime in and near the apartment complex in the year prior to Scott's murder. The court reaffirmed its holding in *Macke* by reiterating that a landlord is not liable for injuries to tenants merely because he owns a building; rather, the landlord has a duty to exercise reasonable care in maintaining the safety of areas set aside for common usage by all tenants. The court noted that this duty has evolved under Maryland law primarily in response to injuries resulting from defective property. The court went further, in *Scott*, and broadened the scope of a landlord's

61. *Id.* at 409, 199 A.2d at 624.
62. *Id.* at 409-10, 199 A.2d at 624.
63. 267 Md. 426, 298 A.2d 27 (1972).
64. *Id.* at 427-28, 298 A.2d at 28.
65. *Id.* at 432-33, 298 A.2d at 31.
66. *Id.* at 433, 298 A.2d at 31.
68. *Id.* at 161-62, 359 A.2d at 549-50.
69. *Id.* at 163-64, 359 A.2d at 551. The court noted that, despite the high volume of crime, the defendants were not aware that any tenants had been subject to violent crimes in the parking garage or other common areas of the complex before Scott's murder. *Id.* at 164, 359 A.2d at 551.
70. *Id.* at 165, 359 A.2d at 552.
71. *Id.*
liability by stating explicitly that the landlord's liability should also extend to injuries resulting from criminal acts by third parties in the common areas.\(^\text{72}\) The court made clear, however, that this holding did not impose a special duty on landlords to protect tenants from criminal acts on the landlord's property.\(^\text{73}\)

The court considered separately the question of whether this duty is imposed on the landlord when he has knowledge of substantial criminal activity on or near the property.\(^\text{74}\) The court concluded that if the landlord knew, or should have known, of substantial criminal activity in the common areas, then the landlord has a duty to take appropriate measures to eliminate conditions facilitating or contributing to such activity.\(^\text{75}\)

Finally, the court in \textit{Scott} explained that determining proximate cause is essential to stating a claim in negligence, noting that Maryland cases have failed to address the issue of causation in cases with similar factual contexts.\(^\text{76}\) The court commented that the approach offered by the \textit{Restatement (Second) of Torts} would be a fair solution to the issue of causation in this context.\(^\text{77}\) The \textit{Restatement} suggests that even when an actor's conduct creates a situation that allows a third party to commit a crime, the third party's criminal act is a superseding cause of harm to the victim, except where the actor knew, or should have known at the time of acting, that a situation might arise where the third party was likely to commit a crime.\(^\text{78}\) Relying on the \textit{Restatement}, the court concluded that if a landlord breaches a duty, it is only

\(^{72}\) \textit{Id.} at 165-66, 359 A.2d at 552.

\(^{73}\) \textit{Id.} at 166, 359 A.2d at 552. The court declined to accept the holding in \textit{Kline v. 1500 Massachusetts Avenue Apartment Corp.}, 439 F.2d 477 (D.C. Cir. 1970), upon which \textit{Scott} relied heavily. \textit{Scott}, 278 Md. at 167, 359 A.2d at 553. In \textit{Kline}, the majority found that the landlord had both a specific duty to protect tenants from crimes on the premises and a contractual obligation to properly maintain the security devices that the landlord had installed. 439 F.2d at 477.

\(^{74}\) \textit{Scott}, 278 Md. at 168, 359 A.2d at 553.

\(^{75}\) \textit{Id.} at 169, 359 A.2d at 554. The court noted that this duty arises from criminal activity on the property rather than in the neighborhood or the surrounding area. \textit{Id.} In the three months prior to Scott's murder, there were two apartment burglaries, a car theft from the garage, and a rape and robbery in one of the stores on the ground level of the apartment complex. \textit{Id.} at 170, 359 A.2d at 554. The court found these activities were sufficient evidence that the landlord knew, or should have known, of substantial criminal activity on the property. \textit{Id.}

\(^{76}\) \textit{Id.} at 171, 359 A.2d at 555. The court noted that other jurisdictions were split on the issue of causation in this context. \textit{Id.}

\(^{77}\) \textit{Id.} at 172-73, 359 A.2d at 556.

\(^{78}\) \textit{Id.} (quoting \textit{RESTATEMENT (SECOND) OF TORTS} § 488 (1965)).
liable for the breach if its actions increase the likelihood of crime by a third party.\textsuperscript{79}

Since \textit{Scott}, there have been several subsequent cases defining the scope of a landlord's duty to its tenants. In \textit{Shields v. Wagman},\textsuperscript{80} the court held a landlord of a commercial area liable for the injuries sustained by a tenant and a customer when they were attacked by another tenant's pit bull.\textsuperscript{81} Both victims were attacked in the parking lot of the strip mall, after the pit bull escaped from its owner's shop.\textsuperscript{82} There was sufficient evidence that the landlord was aware the tenant owned a pit bull and kept it at his shop.\textsuperscript{83} The court reasoned that the landlord was liable because he knew of the potential danger presented by the pit bull and had the ability to eliminate the risk it posed to others.\textsuperscript{84} The court explicitly stated that it was refraining from deciding whether or not such a rule applies to injuries occurring in the leased premises, rather than the common area.\textsuperscript{85}

In \textit{Matthews v. Amberwood Associates Limited Partnership},\textsuperscript{86} the court held a landlord liable for the death of a tenant's guest, which occurred in the tenant's leased premises and was caused by the tenant's pit bull.\textsuperscript{87} The court specifically stated that although a landlord is not generally liable for injuries that occur due to dangerous conditions in the leased premises after a tenant has taken control, this rule is not without exceptions.\textsuperscript{88} The court concluded that the jury was justified in finding the landlord had breached a duty based on four factors.\textsuperscript{89} First, the landlord retained control in the lease over the matter of animals in tenants' apartments.\textsuperscript{90} The lease contained a clause prohibiting tenants from having pets on the premises, a breach of which would result in defaulting on the lease.\textsuperscript{91} Second, pit bulls have a propensity for dangerousness.\textsuperscript{92} Third, the landlord had knowledge

\begin{itemize}
  \item Id. at 173, 359 A.2d at 556.
  \item 350 Md. 666, 714 A.2d 881 (1998).
  \item Id. at 690, 714 A.2d at 892-93.
  \item Id. at 671-72, 714 A.2d at 883.
  \item Id. at 687, 714 A.2d at 891.
  \item Id.
  \item Id. at 690, 714 A.2d at 893.
  \item 351 Md. 544, 719 A.2d 119 (1998).
  \item Id. at 544, 548, 719 A.2d at 119, 120.
  \item Id. at 555, 719 A.2d at 124.
  \item Id. at 570, 719 A.2d at 131-32.
  \item Id.
  \item Id. at 558, 719 A.2d at 125-26. Such a provision would have allowed the landlord legally to evict the tenant for breach of lease if she failed to get rid of the dog. \textit{Id.}
  \item Id. at 570, 719 A.2d at 131-32. The court cited several opinions recognizing the excessive dangerousness of pit bulls. \textit{Id.} at 561-63, 719 A.2d at 127-28.
\end{itemize}
of the pit bull's past vicious behavior. The court reasoned that the maintenance workers' testimonies established that the dog's attack was clearly foreseeable. This case, therefore, expanded the potential liability of landlords for damages within leased premises, emphasizing the foreseeability of the harm and the landlord's control over the harm.

3. The Court's Reasoning.—In Hemmings, the court held that "a landlord has a duty to repair a known dangerous or defective condition" to protect a tenant from a third party attack within the leased premises, provided that the condition is under the landlord's control, and the attack was reasonably foreseeable. Writing for the majority, Judge Battaglia first explained that a landlord's duty in a particular case depends on the following factors developed through case law: (1) the landlord's control over the defective or dangerous condition, (2) the landlord's knowledge of the condition, and (3) the foreseeability that the particular harm would have resulted from the condition.

The court reasoned that the amount of control that a landlord possess over a condition has always been a crucial factor in evaluating a landlord's liability. Typically in cases where the landlord has been held liable, the court observed that the landlord has retained control over an area either because the area is a common space for all tenants, or because the landlord has specified control through a clause in the lease. If a landlord has relinquished control of an area, however, the court noted that the landlord generally is not responsible for maintaining the area. The court observed that the landlord's liability includes a tenant's injuries that occur in common areas, whether due to defective property or third party criminal at-
tacks, because the landlord has the ability to prevent or rectify such conditions. 103

The court then analyzed the second factor in determining a landlord's duty, stating that if a landlord knows, or should know, about criminal activity taking place on the property, it has a duty to ameliorate the conditions facilitating such activity. 104

Finally, the court established a standard for the foreseeability factor of assessing a landlord's liability. 105 The court reasoned that a harm is foreseeable if an ordinary and reasonable person, who knew of the dangerous or defective condition, should have foreseen the harmful results. 106 Specifically, in the context of the landlord-tenant relationship, the court determined that this standard requires a landlord to evaluate the kind of criminal activity known to have taken place on the premises and to act to prevent the kind of harms that an ordinary person would associate with such activity. 107

The court then addressed the Court of Special Appeals' argument that its holding in Scott should not apply to the current case because the criminal activity at issue took place inside the leased premises instead of common area. 108 The court found persuasive Hemmings' argument that Scott should apply because the court has previously held that a landlord can be liable for foreseeable injuries that occur in the leased premises that are caused by the landlord's negligent maintenance of the common areas. 109 The court reasoned that its holding in 2310 Madison Avenue and Kinnier justified the conclusion that a landlord's duty to maintain reasonably safe common areas to protect tenants from criminal activity also extends to injuries from such criminal activity that might occur within the leased premises. 110 In other words, the court concluded that a landlord's liability

103. Id. at 538-39, 826 A.2d at 453.
104. Id. at 540-41, 826 A.2d at 454. Quoting Scott, the court explained that a landlord's duty arises from knowledge of criminal activity taking place on the premises, and not from general knowledge of crime in the surrounding neighborhood. Id. at 540, 826 A.2d at 454 (citation omitted).
105. Id. at 541, 826 A.2d at 454.
106. Id.
107. Id.
108. Id. at 541-42, 826 A.2d at 454-55.
109. Id. at 542, 826 A.2d at 455.
110. Id. at 543, 826 A.2d at 455. In 2310 Madison Avenue, Inc. v. Allied Bedding Manufacturing Co., the court held the landlord liable for water damage to a tenant's apartment even though the injury occurred within the leased premises. 209 Md. 399, 408-10, 121 A.2d 203, 209-10 (1956). The drainage system that leaked, however, was part of the water system employed by the whole building. Id. In Kinnier v. J.R.M. Adams, Inc., the court held that a jury should decide if the landlord was negligent when a pipe burst and damaged items in the tenant's apartment. 142 Md. 305, 309, 120 A. 838, 840 (1923).
is not precluded solely because the injury took place in the leased premises.\textsuperscript{111}

The court also defined the landlord's duty by reasoning that once a landlord undertakes to provide certain security devices, it must maintain these devices in reasonable condition.\textsuperscript{112} The court applied this basic principle of tort law here as it had in \textit{Scott}, stating that a duty arises if a landlord voluntarily acts to initiate security measures.\textsuperscript{113} Even if a duty does not exist to actually initiate these measures, the court reasoned, once a landlord does so, it has a continuing duty to ensure that the measures are taken.\textsuperscript{114} The court stated that for a landlord to fulfill this duty, it must regularly inspect and maintain the security measures, using ordinary care and diligence.\textsuperscript{115} The court found this duty analogous to the duty to keep the areas under the landlord's control in a reasonably safe condition.\textsuperscript{116} As applied to \textit{Hemmings}, the court concluded that the landlord had a duty to maintain the exterior lighting at Pelham Wood.\textsuperscript{117}

The court disagreed with the trial judge's ruling that the Landlord fulfilled its duty to the Hemmings by providing a working lock on the sliding glass door.\textsuperscript{118} The court stated that the trial court's conclusion that the Landlord had fulfilled his duty was the result of insufficient analysis.\textsuperscript{119} In contrast to the trial court, the Court of Appeals found that the Landlord had a duty to maintain the outdoor lighting,  

\begin{itemize}
  \item \textsuperscript{111} \textit{Hemmings}, 375 Md. at 543, 826 A.2d at 455.
  \item \textsuperscript{112} \textit{Id.} at 546-47, 826 A.2d at 457-58.
  \item \textsuperscript{113} \textit{Id.} at 546, 826 A.2d at 457 (quoting \textit{Scott v. Watson}, 278 Md. 160, 171, 359 A.2d 548, 555 (1976)).
  \item \textsuperscript{114} \textit{Id.} at 547, 826 A.2d at 458.
  \item \textsuperscript{115} \textit{Id.}
  \item \textsuperscript{116} \textit{Id.} (quoting \textit{Langley Park Apts., Sec. H., Inc. v. Lund Adm'r}, 234 Md. 402, 407, 199 A.2d 620, 623 (1964)).
  \item \textsuperscript{117} \textit{Id.} at 548, 826 A.2d at 458. The court refuted the Landlord's argument that other jurisdictions support a finding that the Landlord fulfilled its duty to the Hemmings. \textit{Id.} at 549-44, 826 A.2d at 456. The court reasoned that although the facts of \textit{Cramer v. Balcour Property Management}, 441 S.E.2d 317 (S.C. 1994), were almost identical to \textit{Hemmings}, the law in Maryland holds landlords to a different standard than the law of South Carolina. \textit{Hemmings}, 375 Md. at 544, 826 A.2d at 455. The court noted that in South Carolina, a landlord is not liable for the criminal acts of third parties, even if such attacks occur in common areas. \textit{Id.} at 543-44, 826 A.2d at 455.
  \item The court went on to distinguish several cases from other jurisdictions that the Court of Special Appeals cited approvingly in support of its conclusion that the Hemmings' landlord was not liable. \textit{Id.} at 545, 826 A.2d at 457. In rebuttal, the court offered several cases from other jurisdictions supporting the proposition that a landlord may be held liable for injuries that occur within the leased premises, but result from the landlord's failure to adequately maintain the common areas. \textit{Id.} at 545-57, 826 A.2d at 457.
  \item \textsuperscript{118} \textit{Id.} at 548, 826 A.2d at 458.
  \item \textsuperscript{119} \textit{Id.} The trial court's conclusion that the Landlord fulfilled his duty was based solely on the fact that the Landlord provided a functioning lock on the patio door. \textit{Id.}
which it provided as a crime deterrent. Accordingly, the court remanded the case for a closer evaluation of whether the Landlord had breached its duty to properly maintain existing security devices.

In her dissent, Judge Raker focused on the Landlord’s inability to exercise control over a tenant’s apartment once it has been leased. First, Judge Raker emphasized that there was no evidence that the Landlord had notice that the exterior lighting was defective, because it had not received any complaints. Judge Raker reasoned that no general duty exists to protect another person from crime, and the court has not imposed a special duty on landlords. Furthermore, even if the Landlord had a duty to maintain this lighting, Judge Raker argued that it was illogical to extend this duty to include protecting tenants from injury within the leased premises. Judge Raker also argued that the majority should not have applied Scott to the present case, because in Scott the murder occurred in the common area of the premises. Finally, Judge Raker contended that it was problematic and unsupported for the majority to reach its conclusion by combining two different lines of case law: cases where a landlord was held liable for physical harm suffered by tenants in the common area and cases where a landlord was held liable for property damage within a leased premises that was caused by a condition in the common area.

4. Analysis.—The court in Hemmings held that “a landlord has a duty to repair a known dangerous and defective condition” to protect a tenant from a third party attack within the leased premises, provided

Court of Appeals found that this analysis failed to consider other relevant factors in determining the scope of the Landlord’s liability. Id. 120. Id. 121. Id. at 546-48, 826 A.2d at 457-59. 122. Id. at 549, 826 A.2d at 459 (Raker, J., dissenting). Judges Cathell and Harrell joined in the dissent. Id. 123. Id. at 550, 826 A.2d at 459-60. 124. Id. at 551-52, 826 A.2d at 460-61. In addition, Judge Raker found the majority’s argument that the Landlord in the present case voluntarily assumed a duty of protection unpersuasive. Id. at 553, 826 A.2d at 461. According to Judge Raker, the installation of a light in the rear of the building was insufficient to constitute a voluntary undertaking of security within the apartment. Id. Furthermore, she reasoned that the failure to maintain the outside lighting did not make it foreseeable that a murder would occur within a tenant’s apartment. Id. at 561, 826 A.2d at 466. 125. Id. at 551-54, 826 A.2d at 460-62. 126. Id. at 554-55, 826 A.2d at 462-63. 127. Id. at 556-57, 826 A.2d at 463. In a separate dissent, Judge Cathell remarked that the majority’s decision effectively makes a landlord an insurer against crime. Id. at 562, 826 A.2d at 467 (Cathell, J., dissenting). To support this argument, Judge Cathell cited the reasons set forth in the dissenting opinion of Matthews. Id.
that the condition is under the landlord's control, and the attack was reasonably foreseeable. This conclusion is consistent with Maryland case law and follows logically from the court's holdings in Matthews and Scott. In reaching this decision, however, the majority relied too heavily on its holdings in 2310 Madison Avenue and Kinnier, both of which held a landlord liable for property damage within a leased premises. As Judge Raker noted in her dissent, this reasoning is problematic because the majority is applying rules for property damage to a situation involving physical harm to a tenant, without any support. The majority could have reached the same conclusion and avoided this problematic reasoning by relying more heavily on Matthews and Scott. The majority should have shown that the conclusion in Hemmings follows logically from the holdings in these two cases, which contain more similar fact patterns to Hemmings and are more recent decisions of the court. In addition, there are several policy arguments that support the majority's holding and offset the policy concerns raised by the dissent.

a. Misplaced Reliance on Property Damage Cases.—The majority relied heavily on the court's previous holdings in 2310 Madison Avenue and Kinnier to reach the conclusion that a landlord can be held liable for a tenant's injury that occurs within the leased premises. The distinctive element in Hemmings is that the injury to the tenant occurred within the leased premises, rather than in the common area. If Hemmings had been murdered in a common area at Pelham Wood, the court could have simply applied the standard of duty for a landlord determined in Scott and concluded that the landlord breached

128. Id. at 533, 826 A.2d at 450.
129. See Matthews v. Amberwood Assocs. Ltd. P'ship, 351 Md. 544, 570, 719 A.2d 119, 131-32 (1998) (holding that a landlord can be held liable for a dangerous condition in the leased premises when the landlord knew of the condition and could have reasonably foreseen the harm); Scott v. Watson, 278 Md. 160, 165, 359 A.2d 548, 552 (1976) (holding that a landlord can be liable for reasonably foreseeable crimes that occur in a common area).
131. Hemmings, 375 Md. at 556-57, 826 A.2d at 463 (Raker, J., dissenting).
132. See Matthews, 351 Md. at 548, 719 A.2d at 120 (involving a wrongful death suit for a social guest killed by a tenant's pit bull); Scott, 278 Md. 160, 161, 359 A.2d 548, 549-50 (involving a wrongful death action for the murder of a tenant).
133. See Matthews, 351 Md. at 550, 719 A.2d at 121-22 (where victim was attacked within the tenant's apartment); Scott, 278 Md. at 162-63, 359 A.2d at 550 (where tenant was murdered by an unknown third party).
134. Hemmings, 375 Md. at 542-43, 826 A.2d at 455.
135. Id. at 522, 826 A.2d at 443.
his duty to provide a reasonable amount of security in the common areas. Because Hemmings' murder occurred within the leased premises, however, the court had to expand the Landlord's duty under current Maryland law to find the Landlord liable. The court justified this expansion of duty by using its holdings in 2310 Madison Avenue and Kinnier to support its contention that the landlord's liability is not necessarily precluded solely because the injury occurred within the leased premises, rather than in the common area. The landlord can be held liable for injuries occurring in the leased premises, if the injuries resulted from the landlord's failure to correct a defect in the common area, over which it had control. Although these cases deal with water damage, the majority argued that it follows from these cases that a landlord's duty to provide a reasonable level of security in the common areas, as set forth in Scott, also extends to preventing injuries that occur in the leased premises. Furthermore, the majority stated that the holdings in these cases support the application of Scott to Hemmings, even though the attack occurred within the leased premises. The majority offered no other support for expanding the Landlord's duty, but relied solely on 2310 Madison Avenue and Kinnier to justify holding a landlord liable when the criminal attack occurred within the leased premises, rather than in the common area.

This comparison represents a logical inconsistency, which the majority failed to address. Cases involving property damage and cases involving physical harm as a result of a third party criminal attack have vast factual dissimilarities, as well as different legal implications. As Judge Raker stated in her dissenting opinion, there is no authority or case in the country that supports the majority's combination of two different lines of cases. In both 2310 Madison Avenue and Kinnier,
on which the majority relies, the property damage resulted from maintenance problems, and there was no crime involved.\footnote{145} In \textit{Hemmings}, however, a tenant was murdered by a third-party criminal.\footnote{146} Third-party criminal attacks raise unique causation issues, which are not present in the property damage cases.\footnote{147} The majority does not address the inadequacy of applying cases that deal solely with property damage to a wrongful death case, such as \textit{Hemmings}, nor does it offer additional support for this expansion of a landlord's duty.\footnote{148}

\textit{b. Adequate Support Available in Matthews and Scott.}—Rather than making this unqualified jump, the majority could have shown how holding the landlord liable in \textit{Hemmings} follows directly from \textit{Matthews} and \textit{Scott}. In \textit{Matthews}, the court explicitly stated that a landlord's ability to control a condition may render it liable for defective or dangerous conditions within the leased premises.\footnote{149} A "common thread" in the cases where the court has found the landlord liable is the landlord's ability to exercise control over the condition and prevent harm from occurring.\footnote{150} The distinction between a common area and a leased premises, therefore, is important because of the policy considerations behind the distinction, namely that it would be unfair to hold a landlord responsible for injuries resulting from conditions over which it had no control.\footnote{151} The common-area distinction acts as a guideline, rather than a bright-line rule, for ensuring that the landlord will not be held liable for matters out of his control.\footnote{152}

Judge Raker's concerns in dissent do not diminish the applicability of \textit{Matthews}. Judge Raker asserted that \textit{Matthews} offers no support

\begin{itemize}
\item \footnote{145} See supra notes 42-45 and accompanying text (describing the facts of 2310 Madison Avenue and Kinnier).
\item \footnote{146} See supra note 11 and accompanying text (describing Hemmings's murder).
\item \footnote{147} See \textit{Scott}, 278 Md. at 171-72, 359 A.2d at 555 (exploring the split authority on the issue of whether third party criminal attacks constitute a superseding cause, thereby relieving a landlord's liability).
\item \footnote{148} See \textit{Hemmings}, 375 Md. at 542-43, 826 A.2d at 455 (offering no discussion of the factual differences between injury to property and injury to persons).
\item \footnote{149} Matthews v. Amberwood Assocs. Ltd. P'ship, 351 Md. 544, 557, 719 A.2d 119, 125 (1998).
\item \footnote{150} Id. at 556-57, 719 A.2d at 125.
\item \footnote{151} See id. (stating that the principal reason that landlords are not normally held liable for injuries that occur within the leased premises is that the landlord has parted with control (quoting Marshall v. Price, 162 Md. 687, 689, 161 A. 171, 172 (1932))).
\item \footnote{152} See id. at 555, 719 A.2d at 124 (asserting that there are exceptions to the general principle that a landlord should not be held liable for damages that occur within the leased premises).
\end{itemize}
for Hemmings' case. Judge Raker argued that in Matthews, the landlord was aware that a tenant violated the lease that contained a clause prohibiting pets. This clause illustrated that the landlord clearly retained control over the condition in question. Judge Raker oversimplified the holding in Matthews. The court in Matthews specified that there is no simple formula for determining whether a landlord is liable; rather, a court must balance many factors depending on the particular circumstances of the case. In determining a landlord’s duty, the court should consider policy concerns relevant to whether the plaintiff should be protected by law from the defendant’s conduct.

Scott, a powerful precedent because of its extensive factual similarities to Hemmings, also emphasized that the common area-leased premises distinction is merely a means for measuring the landlord’s control over the defect. In Scott, the court held that if the landlord knows or should know of criminal activity in the common areas, he has a duty to take reasonable measures to eliminate conditions that might foster such activity. Although the tenant in Scott was murdered in the common area, the reasoning behind the holding can also logically be applied to situations where the injury occurs within the leased premises, as long as the dangerous or defective condition is under the landlord’s control. The reasoning extends because the court in Scott repeatedly emphasized the importance of the landlord’s control over a dangerous condition, and not simply the location of this condition. Thus, as long as the landlord has control over a dangerous condition, his liability should not be precluded solely because this condition is not within the common area of the property.

153. Hemmings, 375 Md. at 555, 826 A.2d at 463.
154. Id. at 555-56, 826 A.2d at 463.
155. Matthews, 351 Md. at 565, 719 A.2d at 129.
156. See id. (specifying that the court was not holding that the landlord is liable solely because he retained, in the lease, control over certain matters within the leased premises).
157. Id. at 565-66, 719 A.2d at 129.
158. Id. at 566, 719 A.2d at 129 (quoting Rosenblatt v. Exxon, 335 Md. 58, 77, 642 A.2d 180, 189 (1994)).
159. See Scott v. Watson, 278 Md. 160, 165-66, 169, 359 A.2d 548, 552, 554 (1976) (asserting repeatedly that a landlord may be held liable for criminal activity occurring in common areas under the landlord's control) (emphasis added).
160. Id. at 169, 359 A.2d at 554.
161. See id. (emphasizing the landlord’s ability to control the situation because he knew of the crime and could control the situation).
162. See id. at 168-73, 359 A.2d at 553-56 (discussing the common area distinction in conjunction with the landlord's control over the condition).
163. See id. at 169, 359 A.2d at 554 (reasoning that a landlord's duty to exercise reasonable care to ensure safety within the common areas under his control is flexible enough so
The majority should have reasoned, based on the facts, that holding the Landlord in *Hemmings* liable follows logically from the reasoning behind the common area-leased premises distinction. Although Hemmings was murdered in his apartment, the intruder entered through the rear of the building. Among the security devices implemented by the Landlord were exterior lights around the property and a roof light in the back of the building. Although there is contestation over the effectiveness of the lighting, there is no question that the Landlord attempted to provide some exterior lighting, and that it had exclusive control over the lighting in the rear area of the building, which is a common area. In dissent, Judge Raker recognized that many courts have held that where a landlord retains control over a security device, it faces potential liability if a reasonable person could have seen that the failure to act would render tenants susceptible to crime. A reasonable person could foresee that the failure to maintain, or perhaps expand, the security devices at Pelham Wood could render the tenants susceptible to crime. The Landlord in *Hemmings* was fully aware of criminal activity on the premises. In addition to complaints from tenants, the police department, on more than one occasion, asked the Landlord for assistance in monitoring crime. In *Scott*, where the court held the landlord liable for a tenant’s murder, the only evidence of the landlord’s knowledge of criminal activity was that it recently learned of five or six illegal entries into tenants’ apartments. The landlord in *Scott* had no knowledge of crime involving harm to persons in the common areas before the murder of the tenant’s daughter. The Landlord in

as not to make landlords general insurers against crime). The *Scott* court also reasoned that, according to Maryland law, landlords have a duty to exercise reasonable care for their tenant’s safety, although they do not have a special duty to protect tenants from crime. *Id.* at 167, 359 A.2d at 553. The court found that this duty should be analyzed according to traditional principles of negligence, such as proximate cause, in order to determine liability for a breach. *Id.*

164. *Hemmings*, 375 Md. at 528, 826 A.2d at 447.
165. *Id.* at 528-30, 826 A.2d at 447-48.
166. See *id.* at 528, 826 A.2d at 446-47 (describing exterior lighting as one of the security devices implemented by the Landlord).
168. See *id.* at 529-30, 826 A.2d at 447-48 (detailing the extensive tenant complaints about crime at Pelham Wood).
169. See *id.* at 531, 826 A.2d at 448 (stating that the Landlord maintained files of tenant complaints on the premises, including complaints about armed robbery, robbery, threats at gunpoint, and theft within apartment units).
170. *Id.*
172. *Id.*
In addition to general knowledge of criminal activity on the premises, the Landlord should have realized that the Hemmings' specific unit could be targeted. Multiple testimonies from other tenants revealed that the rear of the building behind the Hemmings' apartment was quite dark. The Hemmings' apartment unit had been burglarized before their occupancy, and the intruder entered through the same sliding glass door. After Mr. Hemmings' murder, the Landlord installed additional lighting in the rear of the building, according to one tenant. In totality, these facts indicate that the majority could have applied Matthews and Scott directly to Hemmings in order to reach its conclusion, thereby avoiding the illogical connection of two separate lines of cases. Considering that Scott and Matthews both emphasized that the landlord's ability to control a dangerous condition may make him liable for injuries resulting from such a condition, the court could have argued for the Landlord's liability based on his control over the security devices at Pelham Wood. His control over the security devices on the premises put him in a better position than the tenants to maintain these devices and avoid criminal activity.

c. Policy Considerations Support the Landlord's Liability.—In Hemmings, the majority did not cite any policy reasons to justify its decision to extend a landlord's liability to tenants for criminal activity occurring within the leased premises. In contrast, Judge Raker identified several serious policy concerns in her dissenting opinion.

First, Judge Raker stated repeatedly that a landlord does not have a general duty to ensure that tenants are safe. Second, Judge Raker introduced the possibility that holding a landlord liable for security measures that it has voluntarily installed might have the effect of dis-

173. Hemmings, 375 Md. at 531, 826 A.2d at 448.
174. See supra notes 25-26 and accompanying text (stating that the unit that the Hemmings leased was burglarized before their occupancy).
176. Id. at 531, 826 A.2d at 448.
177. Id. at 529-30, 826 A.2d at 447.
178. See supra notes 132, 142 and accompanying text (discussing the importance of the landlord's level of control).
180. Id. at 549-62, 826 A.2d at 459-66.
181. Id. at 550-52, 826 A.2d at 459-60.
Courting landlords from increasing security. Judge Raker offered support from treaties and other jurisdictions for the proposition that it is unfair, for public policy reasons, to hold landlords liable for criminal attacks within the leased premises. Judge Raker specifically referred to the reasons set forth in Kline, which explain why such liability is unfair: it is often difficult to determine when crimes are foreseeable; a criminal attack by a third party typically constitutes a superseding cause; the economic consequences of imposing this duty on landlords; the conflict with assigning private persons the duty to protect citizens from crime, as opposed to the government.

Although the majority did not directly refute these concerns, the court has employed policy arguments in past opinions that would strengthen the result in Hemmings. Although Judge Raker has a legitimate concern that holding the Landlord in Hemmings liable would impose an affirmative duty on landlords, this policy consideration should not be determinative of the issue. On the other hand, a landlord is in a better position to promote security on the premises than individual tenants. The tenant has a limited ability to protect himself, because he has partially submitted to the control of the landlord. By virtue of this control, a duty should be imposed on the landlord to take reasonable precautionary measures against criminal attacks. In addition, the majority should have shown that although Judge Raker argued that holding a landlord liable would provide dis-

182. Id. at 558-59, 826 A.2d at 464-65 (quoting Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 675 (Minn. 2001)).
183. Id. at 559-60, 826 A.2d at 465. Judge Raker cited Bartley v. Sweetser, 890 S.W.2d 250, 251 (Ark. 1994), which stated that courts have generally held that it is unfair to impose a duty to protect on landlords, and ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT 217 (1980), which suggested that the traditional view is that it is unfair to assign landlords a duty to protect. Id.
184. Id. at 559, 826 A.2d at 465.
185. See Matthews v. Amberwood Assocs. Ltd. P'ship, 351 Md. 544, 570, 719 A.2d 119, 132 (1998) (stating that one incentive for imposing liability is to provide incentive to other defendants to act in order to avoid such liability); Langley Park Apts., Sec. H., Inc. v. Lund Adm'r, 234 Md. 402, 408, 199 A.2d 620, 623 (1964) (concluding that it would be impractical to hold the tenants responsible for clearing the common walkways in the event of snow, as most tenants would not be able to perform the task).
186. See Matthews, 351 Md. at 566, 719 A.2d at 129 (asserting that various policy considerations should be weighed against each other in determining a landlord's liability).
188. See id. at 483 (stating that the tenant's ability to protect himself has been limited as a result of partially submitting to the landlord's control).
189. See id. (asserting that where the landlord is on notice of crime, and has the power to act preventatively, it is fair to impose on him the duty to do so).
incentive, evidence exists to the contrary. Holding a landlord liable in a case like *Hemnings* provides strong incentive for other landlords to rectify dangerous conditions on their premises, thereby promoting safety. Furthermore, it would be impractical to assign the tenants the duty to maintain the exterior lighting of the building because the average tenant would not have the resources to perform such a responsibility.

5. Conclusion.—In *Hemnings v. Pelham Wood L.L.L.P.*, the Court of Appeals considered whether a landlord has a duty to fix a dangerous or defective condition of which the landlord knows and is able to control to prevent a foreseeable third party criminal attack within the leased premises. In holding that a landlord’s duty to provide a reasonable amount of security in the common areas extends to preventing foreseeable injuries within the leased premises as well, the court extended landlord liability. Although this extension was justifiable and consistent with precedent, the court’s argument was weakened by logical inconsistencies. In reaching this conclusion, the court relied heavily on its holdings in previous cases involving property damage, and should have relied on more relevant cases that address a landlord’s liability to prevent physical attacks on tenants. In addition, developing policy considerations to support its holding would have strengthened the court’s argument for this compelling conclusion.

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190. See *Matthews*, 351 Md. at 570, 719 A.2d at 132 (quoting *Prosser and Keeton on The Law of Torts* § 4, at 25-26 (5th ed. 1984) and stating that when defendants realize through court decisions that they are in danger of being held liable, there is a strong incentive to prevent such liability).

191. Id.

192. See *Langley Park Apts.*, Sec. H., Inc. v. Lund Adm’r, 234 Md. 402, 408, 199 A.2d 620, 623 (1964) (concluding that it would be unreasonable to hold the tenants responsible for clearing the common walkways in the event of snow, as most tenants would not be able to perform the task).

193. *Hemnings*, 375 Md. at 526, 826 A.2d at 445-46.

194. Id. at 543, 826 A.2d at 455.

195. See supra notes 142-148 and accompanying text (discussing the problems with relying on property damage cases for support).

196. See supra notes 149-178 and accompanying text (illustrating how the expansion of a landlord’s liability follows logically from *Matthews* and *Scott*).

197. See supra notes 179-192 and accompanying text (describing how various policy considerations support the court’s holding).
B. Attainment of Legal Age: An Interpretation of the Statute of Limitations

In *Mason v. Board of Education of Baltimore County*, the Court of Appeals of Maryland considered whether, for the purposes of the statute of limitations, a minor becomes an adult on the day before the minor's eighteenth birthday or on the day of the minor's eighteenth birthday. The court decided that the common law coming of age rule was the appropriate method of determining a person's age. As such, the court held that Mason, a minor, became an adult the day before her eighteenth birthday. Consequently, although the three-year statute of limitations does not begin to run until the minor turns eighteen for causes of action that accrue when a person is a minor, the court concluded that Mason's suit was barred by the statute of limitations because the coming of age rule required her to file the suit on the day before her twenty-first birthday. The court based its decision on the policy arguments promoted by the coming of age rule. However, the court's decision is not consistent with the rationale underlying the statute of limitations. Additionally, the decision does not accord with the court's own precedent favoring a flexible application of the statute of limitations in cases where the plaintiff has contin-

2. Id. at 506, 826 A.2d at 433-34.
3. The coming of age rule is the common law rule for computing a person's age. Id. at 506, 826 A.2d at 434. Age calculation according to the rule includes the day the person is born; therefore, a person "attains a given age on the day preceding the anniversary of their birth." Id.
4. Id.
5. Id.
6. Id. at 514, 826 A.2d at 438; see Md. Code Ann., Cts. & Jud. Proc. § 5-201 (2002) ("When a cause of action . . . accrues in favor of a minor . . . that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed.").
7. Mason, 375 Md. at 509, 826 A.2d at 435-36. The majority stated that the coming of age rule was a legal fiction created to further expediency and uniform interpretation of the law. Id. at 508, 826 A.2d at 435. In addition, it offered a mathematical justification for adopting the rule, stating that "[b]ecause a person is in existence on the day of his birth . . . he has lived one year and one day on the first anniversary of his birth." Id. at 510, 826 A.2d at 436. Adopting the rule in light of this observation made sense because the common law did not recognize fractions of days, and Maryland has never required mathematical exactitude in computing time. Id. The court also bolstered its argument with an equitable policy justification to protect minors by not allowing them to "lose part of their adulthood to a legal fiction." Id.
8. See infra notes 69-94 and accompanying text (describing the policy justifications behind the statute of limitations).
uously and diligently pursued the lawsuit. Finally, the court’s decision contradicts the equitable justification for the coming of age rule.

1. The Case.—In 1993, Shelley Mason was fourteen years old and a special education student at a public school in Baltimore County. For three months, Mason was sexually harassed by male classmates who touched her inappropriately and made sexual comments to her. As a result, Mason became terrified of going to school. When Mason’s mother reported the abuse to Mason’s teacher, the principal, and the Director of Middle Schools for the Region, each promised to resolve the situation. However, when the boys involved in the abuse returned from a discussion with the principal, they announced to the class that Mason had told the principal they had sexually harassed her. In response, the teacher scolded Mason for reporting the abuse but said nothing when one of the boys called Mason a “liar” and a “snitch” in front of the entire class.

As a result of the harassment, Mason suffered emotional trauma and was unable to attend class regularly. Mason filed a negligence suit in the Circuit Court for Baltimore County on April 4, 2000, naming the Board of Education of Baltimore County, Mason’s middle school principal, and her teacher as defendants. The complaint alleged that Mason suffered “emotional injury” as a result of negligent supervision by her teacher and principal.

The defendants filed a motion for summary judgment, arguing that the statute of limitations barred Mason’s claim. To determine

9. See Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 76, 394 A.2d 300, 302 (1978) (finding that a rigid application of the statute of limitations would harm a reasonably diligent plaintiff because a person who develops a disease years after exposure “cannot have known the existence of the tort until some injury manifests itself”); see also infra notes 75-94 and accompanying text (explaining situations in which Maryland courts have flexibly applied the statute of limitations where the plaintiff has diligently pursued her claim).

10. See supra note 7 and accompanying text.


12. Id.

13. Id.

14. Id.

15. Id. at 5.

16. Id.

17. Id.


19. Id. at 508-09, 795 A.2d at 212.

20. Id. at 509, 795 A.2d at 212. Mason was allegedly injured while she was a minor. Id. As a result, she could not file a lawsuit on her own behalf until she attained the age of majority, which is eighteen. Id. Therefore, the statute of limitations for Mason’s claim
whether the statute of limitations precluded Mason’s claim, the circuit court applied the coming of age rule, which holds that a person attains a given age on the day preceding his birthday.\textsuperscript{21} According to the coming of age rule, the court reasoned that Mason attained the age of majority on April 3, 1997, even though she was born on April 4, 1979.\textsuperscript{22} As a result, the circuit court held that the three-year statute of limitations barred Mason’s claim because she had filed it on her twenty-first birthday—April 4, 2000—which was one day too late.\textsuperscript{23}

On appeal, the Court of Special Appeals affirmed the circuit court’s decision that the statute of limitations barred Mason’s claim, holding that Mason attained eighteen years of age on April 3, 1997, the day before her birthday.\textsuperscript{24} The court reasoned that the Age of Majority Act and Maryland Rule 1-203, which describes the general method for computing time, did not answer the question of when a minor becomes an adult for the purpose of removing the disability of infancy.\textsuperscript{25} However, the court explained that at common law an exception to the general method for computing time applied when the time being computed was an individual’s age.\textsuperscript{26} Under the coming of age exception, the court noted that age was calculated by including the day of birth in the computation.\textsuperscript{27} As a result, the court concluded that a person attained his legal age at the earliest moment of the day before his birthday.\textsuperscript{28}

In its opinion, the Court of Special Appeals noted that Maryland adopted English common law and that the Court of Appeals had recognized the coming of age rule for calculating age in \textit{Carolina Freight Carriers Corp. v. Keane}.\textsuperscript{29} In addition, the court cited a Maryland regulation, COMAR 10.09.24.05(C)(3), that determines eligibility for Med-
ical Assistance benefits as a statutory use of the coming of age rule.\(^{30}\) Although the court appeared hesitant to apply the coming of age rule, the court ultimately decided to follow it, opining that it is normally the province of the legislature to change “long-established common law rules.”\(^{31}\)

Mason appealed the decision to the Court of Appeals.\(^{32}\) The court granted certiorari to determine whether a minor becomes an adult on the day of his eighteenth birthday or on the day before his eighteenth birthday for the purpose of determining when the disability of infancy is removed.\(^{33}\)

2. Legal Background.—At common law, calculating a person’s legal age followed the coming of age rule, which was an exception to the general method of computing time.\(^{34}\) While the General Assembly has codified the common law rule for general time computation, it has not expressly adopted the coming of age rule for determining a person’s age.\(^{35}\) Furthermore, case law has mentioned the coming of age rule only once but has never applied it.\(^{36}\) However, a trend has emerged among various states to refuse to apply the coming of age rule because the rule is contrary to common understanding.\(^{37}\) The trend rejecting the coming of age rule is supported further by the rationales underlying the existence of statutes of limitations, which militate towards applying the general method of time computation.\(^{38}\)

a. Common Law Computation of Time.—Under the English common law, the method of computing time was based on the maxim that a day is an indivisible point in time.\(^{39}\) The common law estab-

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30. Id. at 513, 795 A.2d at 214.
31. Id. at 515, 795 A.2d at 215.
32. Mason, 375 Md. at 506, 826 A.2d at 433.
33. Id., 826 A.2d at 433-34.
36. Carolina Freight Carriers, 311 Md. at 345, 534 A.2d at 1342.
37. See, e.g., Velazquez v. State, 648 So. 2d 302, 304 (Fla. App. 1995) (acknowledging the trend that states are declining to adopt the coming of age rule for computing age).
38. See infra note 72 and accompanying text (stating that the purposes of statutes of limitations include: (1) saving the courts from needing to litigate stale claims and (2) sparing the citizen from having to defend a case after “memories have faded, witnesses have died or disappeared, and evidence has been lost”).
39. See Fitzwilliam’s Case, 77 Eng. Rep. 300, 302 (K.B. 1604) (noting the difficulty of computing time in a case involving the interpretation of a will which granted different interests in an estate according to the language used in the will).
lished this principle to bring ease and simplicity to time calculations.\textsuperscript{40} Pursuant to this maxim, the rule for computing time excluded the first day or the day upon which the cause of action accrued.\textsuperscript{41} Thus, under the general method of time computation, a person would attain his legal age on his birthday.\textsuperscript{42}

However, because every person was born at a particular moment in time, the period of time that a person lives on the day of his birth—beginning at birth and terminating at the end of the same day—constituted a fraction of a day.\textsuperscript{43} As a result, the common law developed an exception to the method of general time computation for the purpose of calculating age.\textsuperscript{44} Under the exception, the law considered a person born at 3 a.m. to be born at 12 a.m. on that same day, which would have been the first moment of the day of her birth.\textsuperscript{45} Although this person would only be alive for twenty-one hours at the end of the day he was born, the law considered him to be one day old.\textsuperscript{46} Thus,

\begin{itemize}
  \item \textsuperscript{40} See Aultman & Taylor Co. v. Syme, 57 N.E. 168, 169-70 (N.Y. 1900) ("All rules for computing time are purely arbitrary. If it were not for the terms of the statute, and the rights which have become fixed by virtue thereof, one rule would, perhaps, be as good as another.").
  \item \textsuperscript{41} United States v. Tucker, 407 A.2d 1067, 1070 (D.C. App. 1979) (noting that the general rule of the common law for computing time "excluded the first day and included the last").
  \item \textsuperscript{42} See id. at 1070-71 (noting that the general rule for time computation, if applied to computing ages, would mean that a person attains an age legally on the day of his birthday, instead of the day before).
  \item \textsuperscript{43} See Herbert v. Turball, 83 Eng. Rep. 1129, 1129 (K.B. 1663) (describing a situation in which a man created a will and died on the day before his twenty-first birthday). In constructing the will the court noted that, although the young man died in one instant on the day before his twenty-first birthday, the effectiveness of the will was contingent on whether his death was legally valid on the day before or the day of his twenty-first birthday. \textit{Id.}
  \item \textsuperscript{44} Although the origin of the coming of age rule is unknown, the rule was discussed in the seventeenth century case \textit{Nicols v. Ramsel}, 86 Eng. Rep. 1072 (K.B. 1677). In \textit{Nicols}, the court of common pleas applied the coming of age rule, stating:
    So in a devise the question was, whether the testator was of age of not? And the evidence was, that he was born the first day of January in the afternoon of that day, and died in the morning on the last day of December: and it was held by all the Judges that he was of full age; for there shall be no fraction of a day. \textit{Id.} at 1073. The earlier case most likely being referred to in the \textit{Nichols} opinion is \textit{Herbert v. Turball}. In \textit{Herbert}, a testator made a will while he was a minor, but he died the day before his twenty-first birthday. 83 Eng. Rep. at 1129. The court ruled that the will was valid, stating that "whatever hour he were born is not material, there being no fractions of days." \textit{Id.}
  \item \textsuperscript{45} See Oregon v. Hansen, 743 P.2d 157, 158 (Or. 1987) (stating that the effect of the exception to the general rule for calculating time was that "a person reached a given age in years at the first moment of the day before the person's birthday").
  \item \textsuperscript{46} \textit{Id.}
\end{itemize}
under this exception—the coming of age rule—a person attains his legal age on the day before his birthday. 47

The common law introduced this legal fiction to protect minors. 48 If a minor did not legally attain the age of majority on the day before her birthday, she would lose the benefit of being alive for a fraction of time on her birthday because that fraction would not be calculated in determining her age. 49 Instead of penalizing minors, the common law decided to award them the benefit of living on the day of their birth and thus included the full day of their birth in the age calculation. In particular, because attaining the age of majority entitles adults to certain rights, the coming of age rule ensured that a minor would not lose part of the rights accompanying adulthood to a legal fiction. 50 Accordingly, a person would become an adult the day before his birthday and, therefore, be permitted to exercise a right like voting one day earlier than he would under the general method used to compute time. 51

b. Common Law Computation of Time in Maryland.—Maryland adopted the English common law through the Maryland Declaration of Rights. 52 Accordingly, Maryland embraced the common law principle that the law does not recognize fractions of days. 53 The Maryland Legislature codified this common law maxim in Rule 1-203, creating a

47. Id.
48. See United States v. Tucker, 407 A.2d 1067, 1070 (D.C. App. 1979) (noting that the rule was “originally established to aid persons who would experience hardship or loss by virtue of the general rule of computation” and citing cases in which a minor was protected by the rule).
49. In In re Richardson, Judge Story stated in the dictum of a bankruptcy case that:

[I]f a man should be born on the first day of February, at 11 o’clock at night, and should live to the 31st day of January, twenty-one years after, and should at one o’clock of the morning of that day make his will, and afterwards die by six o’clock in the evening of the same day, he will be held to be of age, and his will adjudged good. Here the rule is applied in favor of the party, to put a termination to the incapacity of infancy.

In re Richardson, 2 Story 571, 20 Fed. Cas. 699, 701, No. 11777 (Mass. Cir. Ct. 1843); see also Tucker, 407 A.2d at 1070 (citing cases where parties would have lost the right to vote and lost the entitlement to the proceeds of a trust if their ages had been calculated by the general common law rule).

50. See Tucker, 407 A.2d at 1070 (explaining the legal fiction that the coming of age rule represents).
51. See id. (citing cases in which the right to vote would be lost if age were computed according to the general method of time calculation).
52. MD. DECL. OF RTS. art. 5 (a) (2002); see, e.g., Denison v. Denison, 35 Md. 361, 378 (1872) (stating that “[i]t is true the common law of England has been adopted by the people of this State; but only so far as it could be made to fit and adjust itself to our local circumstances and peculiar institutions”).
general rule for time computation.\textsuperscript{54} Under Maryland Rule 1-203, to compute time, “the day of the act, event, or default after which the designated period of time begins to run is not included” and “[t]he last day of the period so computed is included.”\textsuperscript{55} According to Maryland Rule 1-203, a person attains his legal age on his birthday.

In 1988, the Court of Appeals mentioned the coming of age rule, the exception to the general method for time calculation, in Carolina Freight Carriers Corp. \textit{v.} Keane.\textsuperscript{56} In \textit{Keane}, the court decided a wrongful death action in favor of the parents of a son who died when he was 21 years, 7 months, and 28 days old.\textsuperscript{57} Under the Maryland Wrongful Death Act, the parents could only recover \textit{solatium} damages\textsuperscript{58} if their son died when he was “21 years old or younger.”\textsuperscript{59} The court noted, without specifically mentioning the coming of age rule per se, that a person attains his given age the day before his birthday.\textsuperscript{60} However, the court reasoned that if it embraced this rule, the term “twenty-one years old” would only include people who were within 24 hours of their twenty-first birthday.\textsuperscript{61} To avoid this absurd result, the court ultimately adopted the more common and traditional meaning of the term, holding that “21 years old” referred to the time between a person’s twenty-first birthday up to the eve of the person’s twenty-second birthday.\textsuperscript{62} Under the court’s decision, a person became twenty-one years old on the day of his twenty-first birthday.\textsuperscript{63} The court believed its conclusion was justified because the common definition gave the statute a meaning that was consistent with grammar and legislative purpose because normally a person is considered to be 21 years old throughout the entire birthday year.\textsuperscript{64}

c. \textit{The Trend Rejecting the Common Law Coming of Age Rule to Compute a Person’s Age.}—A state trend of calculating age based on the general time computation method, now referred to as the birthday

\begin{itemize}
  \item \textsuperscript{54} See Md. R. 1-203(a) (2003).
  \item \textsuperscript{55} \textit{Id}.
  \item \textsuperscript{56} 311 Md. 335, 534 A.2d 1337 (1988).
  \item \textsuperscript{57} \textit{Id}. at 336-37, 534 A.2d at 1338.
  \item \textsuperscript{58} \textit{Solatium} damages may include “damages for mental anguish, emotional pain and suffering, loss of society, companionship, comfort, protection, care, attention, advice, counsel, training, or guidance where applicable.” \textit{Id}. at 337 n.2, 534 A.2d at 1338-39 n.2.
  \item \textsuperscript{59} \textit{Id}. (citing Md. Code Ann., Cts. & Jud. Proc. §§ 3-901 to 3-904 (1984)).
  \item \textsuperscript{60} \textit{Id}. at 344, 534 A.2d at 1342.
  \item \textsuperscript{61} \textit{Id}. at 345, 534 A.2d at 1342.
  \item \textsuperscript{62} \textit{Id}. at 346, 534 A.2d at 1343.
  \item \textsuperscript{63} See \textit{id} at 346, 534 A.2d at 1343 (stating that the phrase “21 years old” refers “to one who has not yet reached the twenty-second birthday but is over 21”).
  \item \textsuperscript{64} \textit{Id}.
\end{itemize}
rule, has begun to develop. Under the birthday rule, a person "attains a certain age on that person's corresponding birthday." State courts have begun to prefer the birthday rule over the coming of age rule to calculate the tolling period for the statute of limitations and to determine jurisdiction over criminal juveniles. States following the trend prefer the birthday rule because it is consistent with common

66. Fields v. Fairbanks North Star Borough, 818 P.2d 658 (Alaska 1991). In Fields, the plaintiff claimed she was injured as a minor. Id. at 659. As a result, the two-year statute of limitations governing her tort claim did not begin to run until the plaintiff became an adult at the age of eighteen. Id. The plaintiff filed her claim on the "first business day following her twentieth birthday," therefore, the court was required to determine when the plaintiff legally became eighteen to decide whether her claim was still actionable. Id. If the court had applied the coming of age rule, the plaintiff would have legally become an adult on the day before her eighteenth birthday. Id. at 660. If the statute of limitations began running on the day before the plaintiff's eighteenth birthday, the period to file a claim would have expired two years later on the day before the plaintiff's twentieth birthday. Id. Thus, under the coming of age rule the plaintiff would lose her cause of action. Id. The Fields court decided not to apply the coming of age rule because it was "contrary to the popular understanding of birthdate" and did not follow the normal method used to compute time. Id. at 661. The court applied the birthday rule, finding that the plaintiff became an adult on the day of her birthday. Id. As a result, the two year statute of limitations period expired on the day of her twentieth birthday, saving her cause of action. Id.

Furthermore, in Patterson v. Monmouth Regional High School Board of Education, 537 A.2d 696 (N.J. Super. 1987), the plaintiff brought a claim for an injury which occurred while he was a minor participating in a gymnastics meet. Id. at 696. Because the plaintiff was injured as a minor, the two year statute of limitations governing his claim began to run when he became an adult at age eighteen. Id. at 697. The plaintiff filed his claim on the day of his twenty-first birthday, requiring the court to determine when he legally became eighteen, marking the start of the statute of limitations period. Id. If the coming of age rule were applied, the plaintiff would attain the legal age of eighteen on the day before his eighteenth birthday. Id. As a result, the statute of limitations would begin on that day and expire on the day before the plaintiff's twenty-first birthday. Id. Since the plaintiff filed his claim on the actual day of his twenty-first birthday, his claim would have been filed one day too late and the claim would have been barred. Id. However, the Patterson court rejected the coming of age rule because it was not consistent with the familiar method of time computation and the rule, which was created to protect minors, did not do so in this case. Id. at 698-99. The court held that age, for the purposes of the statute of limitations, should be calculated according to the birthday rule. Id. at 699. Applying the birthday rule, the plaintiff attained the age of eighteen on the day of his eighteenth birthday. Id. Accordingly, the two year statute of limitations period expired on the day of the plaintiff's twenty-first birthday saving his claim. Id.

67. See, e.g., Commonwealth v. Iafrate, 594 A.2d 293, 295 (Pa. 1991) (rejecting the coming of age exception to determine the age of a defendant accused of aggravated assault). In Iafrate, a minor was arrested for aggravated assault on the night before his eighteenth birthday. Id. at 294. The prosecution wanted to try the minor as an adult, forcing the court to determine when the minor legally became eighteen years old. Id. at 294. If the court applied the coming of age rule, the defendant would legally become an adult on the day before his eighteenth birthday. Id. at 295. As a result, the defendant would face a longer sentence, possible "disqualification for public employment and military service, and loss of civil rights." Id. at 296. The court decided to apply the birthday rule in the context of juvenile crimes because it was more consistent with common conception and conformed
knowledge, maintains the common law principle that there are no fractions of days, and more accurately represents the intent of the state legislatures.  

d. The Policy Underlying Statutes of Limitations.—Statutes of limitations represent a legislative policy decision about the timeframe in which a reasonable person may pursue a claim. The statutes are designed for necessity, convenience, and expediency. Statutes of limitations “are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or a voidable and unavoidable delay.” The purposes of statutes of limitations are to (1) assure fairness to the defendant by setting a time limit to ensure that witnesses and evidence are still available, (2) prevent unfairness to plaintiffs who exercise reasonable diligence in pursuing a claim by assuring a reasonable period of time in which claims can be adjudicated, and (3) promote judicial efficiency by denying stale claims. As a result of these underlying policies, Maryland has created exceptions to the rigid application of the statute of limitations in cases where the plaintiff diligently pursues his claim. Maryland courts al-

68. See, e.g., Iafrate, 594 A.2d at 295 (rejecting the coming of age exception because the rule did not represent common usage, promote justice, or accurately reflect legislative intent). In Iafrate, the court found that the coming of age rule more accurately reflected the legislature’s intent because the rule is consistent with the common conception that a person attains a given age on his birthday. Id. at 295. The court reasoned that the legislature was likely aware of this common method of age calculation when they enacted the Juvenile Act. Id. In addition, the Juvenile Act was enacted to provide protection for juveniles so they could potentially be rehabilitated. Id. Following the birthday rule would permit the defendant to receive protection under the Act until the day of his eighteenth birthday. Id. The court concluded that the extension of the Act’s protection under the birthday rule better promoted justice. Id.


71. Id.

72. Id. at 210, 378 A.2d at 1102 (noting that statutes of limitation are “devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost”) (citation omitted).

73. See Harig, 284 Md. at 80, 394 A.2d at 305 (finding that a rigid application of the statute of limitations would harm a reasonably diligent plaintiff because a person who develops a disease years after exposure “cannot have known the existence of the tort until some injury manifests itself”).
low flexibility in applying the statute of limitations in certain tort law cases and in cases where equitable tolling is justified.\textsuperscript{74}

In tort law cases, the Court of Appeals first adopted a more flexible approach in applying the statute of limitations in \textit{Hahn v. Claybrook}, a medical malpractice case.\textsuperscript{75} In \textit{Hahn}, a doctor prescribed medicine to his patient for a stomach ailment.\textsuperscript{76} Years later, the patient began experiencing discoloration of her skin caused by the medication and brought suit against the doctor for malpractice.\textsuperscript{77} The court decided that the statute of limitations began to run when the plaintiff noticed the discoloration of her skin and not when the physician committed the negligent act of prescribing the medicine.\textsuperscript{78} Although the court held that the plaintiff's cause of action was barred by the statute of limitations, the court recognized that the statute began to run when the plaintiff noticed the discoloration of her skin.\textsuperscript{79}

The Court of Appeals reaffirmed this principle in \textit{Waldman v. Rohrbaugh}.\textsuperscript{80} In \textit{Waldman}, a patient sued his former doctor for malpractice, alleging that the doctor was negligent during an operation to fix the patient's broken ankle.\textsuperscript{81} In its opinion, the court discussed the harsh consequences that often result from strictly applying the statute of limitations beginning on the day of the negligent act, noting that blameless victims often would be left without a remedy.\textsuperscript{82} Ultimately, the court decided to make an exception to this general rule, and held that the statute of limitations begins to run when the patient knows or should know he has suffered an injury.\textsuperscript{83} Subsequently, this approach to the statute of limitations has been extended to all cases of professional malpractice.\textsuperscript{84}

The court has since extended this flexible approach to the statute of limitations to latent disease cases. In \textit{Harig v. Johns-Manville Products Corp.},\textsuperscript{85} the court held that a patient's claim was not barred by the

\begin{footnotesize}
\begin{enumerate}
\item See infra note 84 and accompanying text.\textsuperscript{74}
\item 130 Md. 179, 100 A. 83 (1917).\textsuperscript{75}
\item \textit{id}. at 185, 100 A. at 85.\textsuperscript{76}
\item \textit{id}.\textsuperscript{77}
\item \textit{id}. at 180, 100 A. at 83.\textsuperscript{78}
\item \textit{id}. at 187, 100 A. at 86.\textsuperscript{79}
\item 241 Md. 137, 215 A.2d 825 (1966).\textsuperscript{80}
\item \textit{id}. at 138, 215 A.2d at 826.\textsuperscript{81}
\item \textit{id}. at 140, 215 A.2d at 827.\textsuperscript{82}
\item \textit{id}. at 145, 215 A.2d at 830.\textsuperscript{83}
\item 284 Md. 70, 394 A.2d 299 (1978).\textsuperscript{85}
\end{enumerate}
\end{footnotesize}
statute of limitations, referencing the policy rationale underlying the statute of limitations.\(^{86}\)
The court reasoned that a patient who develops a latent disease cannot know that a tort was committed against him until the disease manifests itself.\(^{87}\)
As a result, the patient could not be charged with "slumbering on his rights," and a rigid application of the statute of limitations would result in harming a reasonably diligent plaintiff.\(^{88}\)
By deciding that the plaintiff's cause of action accrued when he discovered the latent disease, the court flexibly applied the statute of limitations.\(^{89}\)
In so holding, the court reasoned that avoiding possible injustice to a diligent plaintiff outweighed the other rationales behind the statute of limitations.\(^{90}\)

Maryland courts have not only flexibly applied the statute of limitations in a number of tort cases, but have also tolled statutes of limitations for equitable reasons as well. Generally, equitable tolling is permitted when a plaintiff has diligently pursued her claim.\(^{91}\)
Although Maryland has not expressly adopted the federal equitable tolling standard, the Court of Special Appeals applied the equitable tolling framework in \textit{Furst v. Isom}.\(^{92}\)
Under that framework, a statute of limitations should be tolled when three factors are present: (1) the plaintiff has timely notified the defendant of the first claim, (2) the defendant is not prejudiced in defending against a second claim, and (3) the plaintiff acts in reasonable and good faith.\(^{93}\)
Applying this framework, the \textit{Furst} court held that the plaintiff's claim was not barred because to do so would allow the statute of limitations to be used as an unjust shield and would not be in accord with the purpose of the statute of limitations.\(^{94}\)
Moreover, Maryland courts have flexibly applied the statute of limitations where the rationale behind the

\(^{86}\) \textit{Id.} at 75, 394 A.2d at 302.

\(^{87}\) \textit{Id.} at 80, 394 A.2d at 305.

\(^{88}\) \textit{Id.}

\(^{89}\) \textit{Id.} at 83, 394 A.2d at 306.

\(^{90}\) \textit{Id.}

\(^{91}\) \textit{See Walko Corp. v. Burger Chef Sys., Inc.}, 281 Md. 207, 215, 378 A.2d 1100, 1104 (1977) (noting that "ordinary diligence [is] required of one seeking to toll the statute of limitations") (internal quotation marks omitted); \textit{see also Bennett v. Baskin & Sears}, 77 Md. App. 56, 76-77, 549 A.2d 393, 402-03 (1988) (holding that a party seeking to toll the statute of limitations must exercise ordinary diligence in bringing his claim).

\(^{92}\) 85 Md. App. 407, 584 A.2d 108 (1991). In \textit{Furst}, the court relied on \textit{Burnett v. N.Y. Cent. R.R. Co.}, 380 U.S. 424 (1965), where the Supreme Court described the theory of federal equitable tolling as being that a plaintiff should not be barred from suit when "no policy underlying the statute of limitations is served by barring the suit." \textit{Id.} at 417, 584 A.2d at 113.

\(^{93}\) \textit{Id.} at 418, 584 A.2d at 113.

\(^{94}\) \textit{Id.} at 420, 584 A.2d at 114.
statute supports the result of the adaptable, and not the rigid, approach.

3. The Court's Reasoning.—In Mason v. Board of Education of Baltimore County, the plaintiff was injured as a minor. As a result, the three-year statute of limitations began to run when the plaintiff attained the age of majority at eighteen years of age. However, because the plaintiff filed her claim on the day of her twenty-first birthday, the Maryland Court of Appeals was forced to determine when the plaintiff became eighteen years old, beginning the statute of limitations period. The Court applied the coming of age rule to hold that a person attains a given age on the day preceding his birthday. As a result, Mason's cause of action for negligence was barred by the statute of limitations because she filed on her twenty-first birthday, which was one day too late.

Writing for the majority, Judge Raker examined the statute of limitations governing Mason's cause of action, noting that the statute tolled for three years after the date that Mason attained the age of majority because she was a minor at the time of the alleged incident. As a result, the majority concluded that it first had to determine when Mason attained the age of majority, thus removing the disability of infancy and starting the statute of limitations period.

Next, the majority compared the general common law method of computing time with the coming of age rule used to compute a person's age. The court noted that under the general rule, Mason attained the age of majority on her eighteenth birthday; however, according to the coming of age rule, she became eighteen the day before her eighteenth birthday. The court noted that the coming of age rule was created as a legal fiction to further expediency and uniform interpretation of the law. The court also observed that the

96. Id. at 507, 826 A.2d at 434.
97. Id.
98. Id. at 506, 826 A.2d at 434.
99. Id. at 515, 826 A.2d at 439.
100. The following judges joined in the majority opinion: Wilner, Cathell, Harrell, and Battaglia. See id. at 506, 826 A.2d at 433.
101. Id. at 506, 826 A.2d at 434; see Md. CODE ANN., CTS. & JUD. PROC. § 5-201 (2002) ("When a cause of action ... accrues in favor of a minor ... that person shall file his action within the lesser of three years or the applicable period of limitations after the date the disability is removed.").
102. Mason, 375 Md. at 507, 826 A.2d at 434.
103. Id.
104. Id. at 506-09, 826 A.2d at 434-35.
105. Id. at 508, 826 A.2d at 435.
The coming of age rule was constructed according to the common law principle that the law does not recognize fractions of a day.\textsuperscript{106} The court emphasized that Maryland follows this principle because it has adopted English common law both in the Maryland Declaration of Rights and in case law.\textsuperscript{107}

The majority also supported the adoption of the coming of age rule with mathematical and equitable justifications.\textsuperscript{108} The court justified the coming of age rule through mathematical reasoning, stating that, "[b]ecause a person is in existence on the day of his birth, . . . he has lived one year and one day on the first anniversary of his birth."\textsuperscript{109} In addition, the court noted that Maryland has never required mathematical exactitude in computing time.\textsuperscript{110} The court also cited the equitable justification for the coming of age rule: to protect minors who may be harmed by the principle that the law does not recognize fractions of days.\textsuperscript{111} The court observed that when a minor reaches the age of majority he is entitled to benefits, such as the right to vote.\textsuperscript{112} Thus, the court reasoned, permitting a person to attain his legal age on the day before his birthday ensures that he will not lose part of his adulthood to a legal fiction.\textsuperscript{113}

In addition, the court emphasized that the coming of age rule has "achieved a status of its own" because the rule has existed for a long period of time.\textsuperscript{114} The court also noted that, although the coming of age rule had not been applied in Maryland, the court identified the rule in Carolina Freight Carriers Corp. v. Keane.\textsuperscript{115}

Ultimately, the court countered the states that had rejected the coming of age rule by stating that the exception remained in effect in the majority of jurisdictions that adopted the general common law rule.\textsuperscript{116} The majority argued that the coming of age rule applied in Maryland because a "departure from the common law was solely the domain of the state legislature."\textsuperscript{117} The court opined that applying the coming of age rule only reduced the extension of the three-year statute of limitations by one day and, therefore, did not thwart timely

\textsuperscript{106} Id.
\textsuperscript{107} Id. at 509, 826 A.2d at 435.
\textsuperscript{108} Id. at 510-11, 826 A.2d at 436-37.
\textsuperscript{109} Id.
\textsuperscript{110} Id. at 510, 826 A.2d at 436.
\textsuperscript{111} Id.
\textsuperscript{112} Id.
\textsuperscript{113} Id.
\textsuperscript{114} Id. at 511, 826 A.2d at 437.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} Id. at 514, 826 A.2d at 438.
filing. As a result, the court concluded that Mason attained the age of majority on April 3, 1997, and her action, filed on April 4, 2000, was one day too late.

Judge Eldridge, joined by Chief Judge Bell, dissented, alleging that the majority's conclusion was not mandated by existing law. Judge Eldridge pointed to clear statutory language adopting the general time computation rule to establish the current method of calculating time in Maryland. He also noted the lack of statutory language adopting the common law coming of age rule. Judge Eldridge doubted that the adoption of the rule effectuated the majority's justifications of expediency and uniformity of interpretation. In addition, Judge Eldridge argued that it is the province of the Maryland Legislature to amend, revise, or repeal common law. Judge Eldridge concluded that the court's application of the coming of age rule defied common sense and lead to an unfavorable result for Mason, the person who was supposed to benefit from the statute of limitations.

4. Analysis.—In Mason v. Board of Education of Baltimore County, the Court of Appeals of Maryland held that the coming of age rule mandated that a person attains his legal age on the day before his birthday. The court based its decision on the mathematical and equitable justifications behind the common law rule, and ultimately concluded that a departure from the common law was the domain of the Maryland Legislature. However, in its decision, the court failed to examine the rationale behind the statute of limitations and determine whether applying the coming of age rule would produce a result

118. Id.
119. Id.
120. Id. at 516, 826 A.2d at 440 (Eldridge, J., dissenting).
121. Id. at 519, 826 A.2d at 442.
122. Id. Judge Eldridge reasoned that the application of the coming of age rule was not supported by the justifications provided in the majority's opinion. Id. at 521, 826 A.2d at 442-43. He noted that the mathematical justification, the principle that the law recognizes no fractions of days, is recognized by both the statutory general rule for computing time and the coming of age rule. Id. In addition, he noted that applying the coming of age rule in the case at bar leads to an unfavorable result for a beneficiary of the statute, which is contrary to the equitable justification cited by the majority. Id.
123. Id. Judge Eldridge opined that uniformity will hardly be achieved by adopting an exception to the general rule for computing time, which is only applied in certain instances. Id. at 518-19, 826 A.2d at 441. He noted that the General Assembly has abrogated the coming of age exception by statute in a vast number of instances. Id.
124. Id. at 520, 826 A.2d at 442.
125. Id. at 522, 826 A.2d at 443.
126. Id. at 506, 826 A.2d at 434.
127. Id. at 510-12, 826 A.2d at 436-37.
consistent with that rationale. Furthermore, the court did not consider Maryland precedent that permits a more flexible application of the statute of limitations in cases where the plaintiff has diligently pursued his claim. The court's decision produced a result that defies common sense and does not reflect the underlying policy of the statute of limitations, which is to (1) assure fairness to the defendant, (2) prevent unfairness to plaintiffs who exercise reasonable diligence in pursuing a claim, and (3) promote judicial efficiency.

a. The Result in Mason Is Not Supported by the Equitable Justifications Behind the Coming of Age Rule.—The equitable justifications for the coming of age rule conflict with the result in Mason. The coming of age rule is a legal fiction manufactured by common law to protect minors who would otherwise be deprived of certain rights of adulthood by one day. Many states have refused to adopt the coming of age rule, particularly when the rule works to the disadvantage of minors, a result inconsistent with the original reasons for the rule. States have found that minors are especially prejudiced in cases where the plaintiff's cause of action for an injury suffered while a minor would be barred and where a juvenile defendant would be prosecuted as an adult as a result of the rule. Applying the coming of age rule to Mason's case harms the person whom the rule was created to protect, contradicting both the equitable reason for the rule and the state trend against applying it to disadvantage minors.

Mason allegedly suffered emotional injury when she was sexually harassed by male students at the age of fourteen. As a result, the statute of limitations on her claim was tolled until she reached the age

128. See supra notes 69-72 and accompanying text (describing the purpose of the statute of limitations as establishing a time period in which a reasonable person should pursue a claim).
129. See supra notes 73-94 and accompanying text (describing situations in which Maryland courts have flexibly applied the statute of limitations where plaintiffs have diligently pursued their claims).
130. See infra notes 140-168 and accompanying text (explaining that the court's decision in Mason is not consistent with the policy behind the statute of limitations because Mason diligently pursued her claim and allowing the law suit to continue would not prejudice the defendant).
131. See supra notes 48-51 and accompanying text (describing the equitable justification for establishing the coming of age rule as protecting minors).
132. See supra notes 66-67 and accompanying text (describing states that refuse to apply the coming of age rule to the disadvantage of minors).
133. See supra notes 66-67 and accompanying text (listing states choosing not to apply the coming of age rule in the context of a plaintiff who was injured while still a minor and in the context of determining criminal status for juveniles).
134. Mason, 375 Md. at 521, 826 A.2d at 443 (Eldridge, J., dissenting).
135. Id. at 506, 826 A.2d at 434.
of majority in order to preserve her rights. Under the majority's coming of age rule, Mason completely lost her cause of action and, thus, has no redress for her childhood injury. If the coming of age rule were designed to protect minors, it clearly has the opposite effect in this case. The course of action consistent with the equitable justification behind the rule would be to allow Mason to pursue her cause of action for a childhood injury and not permit her to lose her right because of a legal fiction.

b. The Application of the Coming of Age Rule Is Unsupported by the Rationale Underlying the Statute of Limitations.—The application of the coming of age rule in this case is not justified by the rationale behind the statute of limitations. In Mason, the Court of Appeals interpreted a three-year statute of limitations, which was tolled when Mason turned eighteen because she was a minor at the time of the injury. In deciding when Mason attained the age of eighteen, the court was also deciding whether Mason's claim would be barred by the statute of limitations. Accordingly, the court should have considered the rationale behind the statute of limitations before holding that the coming of age rule barred Mason's claim.

Under the coming of age rule, Mason attained the age of eighteen the day prior to her birthday, which was April 3, 1979; thus, Mason's claim filed on April 4, 2000, was barred by the statute of limitations. The purpose of the statute of limitations is to (1) assure fairness to the defendant, (2) prevent unfairness to plaintiffs who exercise reasonable diligence in pursuing a claim, and (3) promote judicial efficiency. The court's application of the coming of age rule, therefore, is not supported by the rationale underlying the statute of limitations because, in this case, a plaintiff who exercised rea-
The three-year statute of limitations at issue in this case represents an arbitrary policy decision by the Maryland Legislature. For this reason, the Court of Appeals should follow the more flexible application of the statute of limitations as it has employed in cases involving equitable tolling, medical malpractice, and latent disease.

According to those cases, the Court of Appeals should interpret the statute to avoid injustice, the purpose for which the statute came into being. In Mason, the result produced by applying the coming of age rule does not support the policy behind the statute of limitations. The court's decision is unfair to Mason because she exercised reasonable diligence by filing her suit on her twenty-first birthday, which is the common understanding of when the three-year statute of limitations period would end. The outcome the Court of Appeals reached by applying the coming of age rule in this case, therefore, does not reflect the policy underlying the statute of limitations.

On the other hand, an application of the contrary rule, the birthdate rule, does not conflict with the policy underlying the statute of limitations. Under the birthdate rule, Mason attained the age of majority on her eighteenth birthday, April 4, 1979; thus, her action, filed on April 4, 2000, would not be barred by the three-year statute of limi-

144. See generally Record Extract, Mason (No. 0412). In 1993 and 1994, the plaintiff and her mother began investigating the sexual harassment incident, causing a number inquiries and interviews with the school to be conducted. Id. at 92-94, 95-96, 145-47. Additionally, the plaintiff's mother filed a sexual harassment claim on behalf of her minor daughter on January 3, 1994. Id. at 112-21. The sexual harassment claim cites the Baltimore County Public School System as a defendant and is based on the same factual incidents pursued in the present claim. Id. Also, the attorney representing the plaintiff in the sexual harassment case, John H. Morris, Jr., remains the plaintiff's attorney in the case at issue. Id. It is evident that both the plaintiff and her mother have been committed to reaching a satisfactory resolution of the incidents since they occurred, and have continued their efforts through the filing of the current case.

145. See supra notes 69-71 and accompanying text (stating that the statute of limitations is a legislative policy decision).

146. See supra notes 73-94 and accompanying text (explaining the flexible application of the statute of limitations in cases where equitable tolling is justified and in causes of action concerning professional malpractice and latent disease).

147. See supra note 72 and accompanying text (explaining that statutes of limitation exist to protect plaintiffs, defendants, and courts from having to litigate stale claims).

148. See supra note 72 and accompanying text (explaining that the statute of limitations was created to ensure fairness to all parties involved in the litigation).

149. See supra note 72 and accompanying text (explaining that the statute of limitations functions to ensure that a plaintiff diligently pursues her claims).
Applying the birthday rule in Mason's case does not erode any of the justifications for the statute of limitations because the result is fair to both the defendant and the plaintiff. Permitting Mason to pursue her cause of action is fair to the Board of Education because the memories of those involved have not faded, witnesses are still available, and the rule did not affect the Board of Education's ability to plan for the future. The one day difference between the two rules could not have severely disadvantaged the Board of Education because it could not have relied on a rule that had never been applied by the Court of Appeals and is not supported by common knowledge. Thus, permitting Mason to pursue her claim by applying the birthday rule is in accord with the statute of limitations rationale because it is fair to both Mason and the Board of Education.

Maryland's willingness to extend the statute of limitations in tort cases where the plaintiff has diligently pursued his claim and in circumstances where equity requires tolling provides additional support for permitting Mason to retain her cause of action. Mason's situation is similar to those tort cases in which the statute of limitations has been flexibly applied because Mason exercised diligence in pursuing her claim by beginning an investigation in 1993, pursuing a sexual harassment claim against the school in 1994, and having the same attorney represent her interests from 1994 until the present. Like the

150. See Mason, 375 Md. at 507, 826 A.2d at 434 (noting Mason's argument that she reached eighteen years on the anniversary of her birth); see also supra note 65 (defining the birthday rule).

151. See supra note 72 (enumerating (1) fairness to the defendant, (2) preventing unfairness to a plaintiff who diligently pursues his claim, and (3) promoting judicial efficiency as the policy rationales underlying the statute of limitations).

152. It is clear that the main witnesses, the plaintiff and the defendants, are still available because they have all at one point been a party to the current lawsuit. Record Extract at 13-38, Mason (No. 0412). In addition, the plaintiff's complaints and the actions of the defendants were well documented and those documents are included in the record.

153. See Pierce v. Johns-Manville Sales Corp., 296 Md. 656, 665, 464 A.2d 1020, 1026 (1983) (explaining that assuring fairness to the defendant is "accomplished by encouraging promptness in prosecuting actions; suppressing stale or fraudulent claims; avoiding inconvenience that may stem from delay, such as loss of evidence, fading of memories, and disappearance of witnesses; and providing the ability to plan for the future without the uncertainty inherent in potential liability").

154. Prior to Mason, the Court of Appeals of Maryland had never addressed the application of the coming of age rule. Mason, 375 Md. at 511, 826 A.2d at 437; see also supra note 68 (reasoning that the states which have rejected the coming of age rule have done so because the rule is contrary to common knowledge).

155. See supra note 72 (noting that the policy behind the statute of limitations is fairness to both the plaintiff and the defendant).

156. See supra notes 69-94 and accompanying text (describing the extension of the statute of limitations in the context of tort cases and under the equitable tolling framework).

157. See Record Extract at 92-96, 14-147, Mason (No. 0412).
tort plaintiffs, Mason did not slumber on her rights and, therefore, the statute of limitations should be flexibly applied in her case. According to common knowledge, Mason became an adult on her eighteenth birthday, marking the beginning of the statute of limitations for Mason’s claim. Consequently, Mason exercised reasonable diligence because she filed her claim before the statute of limitations period expired. Although, in tort cases, the discovery of the injury triggered the cause of action, the rationale for allowing a flexible application of the statute of limitations applies equally to Mason’s case because the courts allowed a flexible application when reasonably diligent plaintiffs would otherwise be harmed.

In addition, the rationale for equitable tolling is satisfied by the facts in Mason’s case. Under the equitable tolling framework, a statute of limitations may be extended when there has been (1) timely notice to the defendant, (2) lack of prejudice to the defendant in gathering evidence to defend, and (3) diligence and good faith conduct by the plaintiff. The Board of Education received timely notice of the claim. In addition, the Board of Education would not be prejudiced in gathering information for its defense if Mason were allowed to pursue her claim because application of the birthday rule would have only extended the statute of limitations period by one day. If the Board of Education would be expected to defend Mason’s claim on the day before Mason’s birthday, it should similarly be prepared to present a defense on the following day. Mason made a good faith effort to diligently file her claim because it was not reasonable for her to consider the coming of age rule as it is unknown, un-

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158. See, e.g., Harig v. Johns-Manville Prods. Corp., 284 Md. 70, 80, 394 A.2d 299, 304 (1978) (noting that if the statute of limitations was rigidly applied to the plaintiff’s latent disease claim “a person of ordinary diligence would have an inadequate period of time to pursue his claim”) (internal quotation marks omitted).

159. See Carolina Freight Carriers Corp. v. Keane, 311 Md. 335, 346, 534 A.2d 1337, 1343 (1988) (explaining that the common or traditional understanding of “21 years old” refers to “one who has not yet reached the twenty-second birthday but is over 21”).

160. Mason, 375 Md. at 506-07, 826 A.2d at 434.

161. See supra notes 73-94 and accompanying text (describing tort cases in which Maryland courts have flexibly applied the statute of limitations because a rigid application would harm a diligent plaintiff); see also supra note 144 and accompanying text (noting that Mason has diligently pursued her claim).


163. The Board of Education never contested service of process or mentioned it in a pre-answer motion or as part of their answer. Md. R. 2-322 (a) (4) (2004) (explaining that a defendant waives his right to contest service of process if he does not do so in a pre-answer motion or as part of his answer). See Record Extract at 13-15, Mason (No. 0412).

164. See Mason, 375 Md. at 521-22, 826 A.2d at 443 (Eldridge, J., dissenting).
precedented, and defies common logic. As a result, Mason’s situation justifies equitable tolling, and she should have been permitted to retain her cause of action.

Applying the coming of age rule to Mason’s case results in the regrettable loss of her cause of action. The rationale underlying the statute of limitations and the Maryland precedent extending the statute of limitations when the plaintiff has diligently pursued her claim do not support this result. The lack of policy and precedential support, combined with the fact that the coming of age rule has never been applied in Maryland and is contrary to common knowledge, demonstrate that depriving Mason of her cause of action is unjust.

c. Application of the Coming of Age Rule Is Not Mandated.—In Mason, the Court of Appeals ultimately decided to apply the coming of age rule because it asserted that changing the common law is the domain of the Legislature; however, such deference is not mandated by Maryland law. The common law has been subject to change from the day it was adopted by the State of Maryland. The same Maryland Declaration of Rights that the majority used to prove the common law applicable to Mason’s claim also provides that the Legislature may change the common law. With respect to the coming of age rule, the Legislature abrogated the common law when it codified the general time computation method, but it failed to do the same for

165. The Court of Appeals had previously identified the coming of age rule but had not applied it. Mason, 375 Md. at 511-12, 826 A.2d at 437; see supra note 68 (describing the state trend against the adoption of the coming of age rule because it is contrary to common knowledge).

166. Mason, 375 Md. at 521-22, 826 A.2d at 443 (Eldridge, J., dissenting) (stating that “[e]ven though the exception affects only one day in a three year period, the effect is draconian: complete loss of the plaintiff’s cause of action”).

167. See supra note 72 and accompanying text (outlining the underlying rationale of the statute of limitations); see also supra notes 73-94 and accompanying text (explaining Maryland precedent extending the statute of limitations for tort cases and in situations where equitable tolling is permitted).

168. Mason, 375 Md. at 511, 826 A.2d at 437 (noting that the Court of Appeals had not previously considered applying the coming of age rule); id. at 516, 826 A.2d at 440 (Eldridge, J., dissenting) (stating that the coming of age rule defies common sense).

169. Id. at 514, 826 A.2d at 438; see also Felder v. Butler, 292 Md. 174, 183, 438 A.2d 494, 499 (1981) (pointing out that Maryland common law is subject to change by judicial decision).

170. In Article 5, the Maryland Declaration of Rights provides that the common law adopted is “subject, nevertheless, to the revision of, and amendment or repeal by, the Legislature of the State.” Md. Decl. of Rts. art. 5 (a) (2002).

171. Id.; see also Mason, 375 Md. at 509, 826 A.2d at 435 (articulating that Maryland adopted the common law through the Maryland Declaration of Rights).
the coming of age rule.\textsuperscript{172} If the Maryland Legislature preferred the coming of age rule for age calculation, it could have codified the rule, as it did for general time computation.\textsuperscript{173} Abrogation of the coming of age rule is further supported by the multitude of Maryland statutes which specifically adopt the "birthday rule."\textsuperscript{174}

The statutes enacted by the Maryland Legislature that change the common law in terms of age calculation do not suggest that the Legislature knows when to apply the coming of age rule and when to depart from it. This assertion suggests that the Legislature independently chose the language of every statute depending on whether it desired the age requirement to take effect on a person's birthday or on the day before.\textsuperscript{175} For example, section 16-206 of the Courts and Judicial Proceedings Article of the Maryland Code provides that if a child breaks the law and the punishment is suspension of his driver's license, but that child does not have a license, (i) "If the child is at least 16 years old on the date of the disposition," the suspension will commence on the date of the disposition; or (ii) "If the child is younger than 16 years of age on the date of the disposition," the suspension will commence on the date the child reaches his 16th


\textsuperscript{173} Id.

\textsuperscript{174} The Maryland Legislature has abrogated the coming of age rule by using the word "birthday" in numerous provisions of the Maryland Code. See Md. Code Ann., Cts. & Jud. Proc. § 3-8A-06 (2002) (providing that if a child "has not reached his 15th birthday," a juvenile court may waive jurisdiction); Md. Code Ann., Educ. § 15-106.1 (2002) (providing that a "foster care recipient" is based upon residence in a foster care home "on the individual's 14th birthday"); Md. Code Ann., Est. & Trusts § 13-207 (2002) (explaining that the person nominated by a minor "after his 16th birthday" receives priority in appointment as guardian for that minor); Md. Code Ann., Fam. Law § 5-1006 (2002) (noting that paternity proceedings must happen "before the child's eighteenth birthday"); Md. Code Ann., Ins. § 16-508 (2002) (providing that the maturity date of an annuity contract is limited to not later than "the later of the contract anniversary immediately following the annuitant's 70th birthday or the tenth anniversary of the contract"); Md. Code Ann., Nat. Res. I § 5-418 (2002) (providing that an applicant must have "attained his eighteenth birthday" to be eligible for a "tree expert" license); Md. Code Ann., State Pers. & PENS. § 29-303 (2002) (explaining that state employees' and teachers' pensions shall begin "on the first day of the month following the member's 55th birthday"); Md. Code Ann., Transp. II § 16-114.1 (2002) (noting that a corrected photo license will expire either "on the birth date of the licensee in the fifth year following the issuance of the license," or "60 days after the driver's 21st birthday"); Md. Ann. Code art. 88A, § 3 (2002) (stating that child welfare services provided by the State Department "to persons under the age of 18 may continue after their eighteenth birthday but not beyond their twenty-first birthday").

\textsuperscript{175} Mason, 375 Md. at 519 n.3, 826 A.2d at 442 n.3 (Eldridge, J., dissenting) ("Much will depend on the wording in the codes: if the code states 'age of 18,' the coming of age exception will apply, but if the code states '18th birthday,' the statutory general rule applies.").
birthday. Applying the coming of age rule, (i) if the disposition is on the day before the child’s sixteenth birthday, suspension begins on that date, but (ii) if the child is younger than sixteen on the date of the disposition, the suspension will begin on the child’s 16th birthday. This interpretation leaves a group of children that potentially fall under both alternatives of the statute when the disposition is on the day before the child’s sixteenth birthday. Under part (i) of the statute, the child will be sixteen and the suspension will begin on that date. However, under part (ii) of the statute, for the child who has not reached his sixteenth birthday, the suspension will not begin until the following day. The legislature probably did not imagine or intend this bizarre result.

Common knowledge dictates that a person attains his age on the day of his birthday. The common law rule that changes this method of age calculation has not been applied by a Maryland court in more than 150 years. Even the Court of Appeals itself chose to interpret the statute at issue in Carolina Freight Carriers Corp. v. Keane according to common knowledge, instead of applying the coming of age rule. These reasons, combined with the specific statutes utilizing the “birthday rule,” support the intent of the Maryland Legislature to abrogate the coming of age rule.

Additionally, the majority’s strict deference to the Legislature to change the common law is not mandated by Maryland case law. The common law may be changed by judicial decision when “in light of changing conditions or increased knowledge this court finds that it is a vestige of the past, no longer suitable to the circumstances of our people.” If a child went to the Motor Vehicle Administration (MVA) on the day before his sixteenth birthday and tried to get a

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177. See supra notes 43-47 and accompanying text (describing the coming of age rule).
178. See Carolina Freight Carriers Corp. v. Keane, 311 Md. 335, 346, 534 A.2d 1337, 1343 (1988) (interpreting a statute leading to a similar bizarre result and questioning whether “the legislature [could] reasonably have intended the set of people ‘21 years old’—to include only a day’s group of people, or only a moment’s group”).
179. See Mason, 375 Md. at 516, 826 A.2d at 440 (Eldridge, J., dissenting) (relating that the general method of time computation codified by the Maryland Legislature is the common sense approach).
180. Id. at 511, 826 A.2d at 437 (stating that “[t]his Court has yet to address the application of the coming of age rule”).
183. Id.
driver's license, he would be denied. A bar owner would not permit a person to drink at her bar on the day before the person's twenty-first birthday. A person may not register to vote when the upcoming election is the day before her eighteenth birthday. For these reasons, the coming of age rule simply defies common sense. Furthermore, the Court of Special Appeals was tempted to change the common law rule because common knowledge dictated that a person attains his age on the anniversary of his birth and invited the Court of Appeals to change the common law rule in Mason. The coming of age rule is a "vestige of the past" as demonstrated by the Legislature's failure to make the exception statutory law, their outright abrogation of the rule, and the rule's inconsistence with common knowledge. Accordingly, the Court of Appeals was not bound by deference to the Legislature and could have disposed of the old coming of age rule in favor of a rule that fits common experience.

5. Conclusion.—In Mason v. Board of Education of Baltimore County, the Court of Appeals decided to apply the coming of age rule to deny Mason's claim that was filed on the day of her twenty-first birthday. According to the coming of age rule, Mason became an adult on the day before her eighteenth birthday, beginning the statute of limitations. As a result, the statute of limitations expired on the day before Mason's twenty-first birthday, barring her claim because it was filed one day too late. By deciding to apply this archaic common law rule, the court produced a result that contradicts the equitable

184. See Md. Code Ann., Transp. II § 16-103 (2002) (stating that the MVA "may not issue a provisional license to any individual who has not reached the age of 16 years, 1 month").

185. See Md. Code Ann. art. 2B, § 12-108 (2002) (stating that "[a] licensee licensed under this article, or any employee of the licensee, may not sell or furnish any alcoholic beverages at any time to a person under 21 years of age").

186. See Md. Code Ann., Transp. I § 3-102 (2002) (requiring that an individual "is at least 18 years old or will be 18 years old on or before the day of the next succeeding general or special election" in order to vote).

187. See Mason, 375 Md. at 522, 826 A.2d at 443 (Eldrige, J., dissenting) ("I see little difference in a statute that is based on an individual reaching the 'age of 18' and one based on an individual who has reached his or her '18th birthday,' and I doubt that the vast majority of people would see any difference.").

188. Mason v. Bd. of Educ., 143 Md. App. 507, 514, 795 A.2d 211, 215 (2002); see also Brief for Appellant at 9, Mason, (No. 44) (discussing the idea that the Court of Special Appeals expressly invited the Court of Appeals to consider changing the common law rule).

189. Mason, 375 Md. at 506, 826 A.2d at 434.

190. Id.

191. Id. at 514, 826 A.2d at 438.
reasons for the rule's creation.\textsuperscript{192} The coming of age rule was created to protect minors; however, the court's application of the rule in Mason bars a minor's claim entirely.\textsuperscript{193} In addition, the court did not consider the policy rationales of (1) fairness to the defendant, (2) preventing unfairness to a diligent plaintiff, and (3) judicial efficiency that underlie the statute of limitations governing Mason's claim.\textsuperscript{194} By employing a common law rule that has never been applied in Maryland and is not consistent with common knowledge, the court barred a diligent plaintiff from pursuing her claim. This result is not consistent with the policy rationale for the statute of limitations and is a use of the coming of age rule that contradicts the purpose for which the rule was created. As a result, the court should have adopted the "birthday rule" because it represents the common understanding of age calculation, is supported by the policies underlying the statute of limitations, and is consistent with Maryland statutes and case law.

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\textsuperscript{192} See supra notes 131-139 (describing how the court's application of the coming of age rule conflicts with the equitable reason for its creation: the protection of minors).

\textsuperscript{193} See supra notes 39-51 and accompanying text (explaining that the coming of age rule was created to protect minors to make sure that they would not lose any legal rights as a result of time calculation and that the decision in Mason has the opposite effect).

\textsuperscript{194} See supra notes 140-168 and accompanying text (discussing that the coming of age rule is unsupported by the policy rationales underlying the statute of limitations because permitting Mason to bring her claim is fair to the defendant and the plaintiff).
A. Undermining Statutory Purpose: Broadening the Class of Drivers Held to a Higher Minimum Point Level for License Suspension Jeopardizes Public Safety and Adds Subjectivity to the Suspension Process

In *Toler v. Motor Vehicle Administration*, the Court of Appeals of Maryland considered whether section 16-405(b) of the Maryland Transportation Law Article, which allows a driver “required to drive a motor vehicle in the course of his regular employment” to accrue sixteen points on his drivers license before it is suspended, applies to a licensee whose driving is incidental to his employment. The court held that a driver “required to drive a motor vehicle in the course of his regular employment” under section 16-405(b) includes not only professional drivers, defined as a person whose “driving constitutes their employment” (e.g., taxi drivers), but also licensees such as Toler, who was employed as a salesman. As such, the court found that Toler could accrue sixteen points—rather than the standard eight points—before his license could be suspended. The court misinterpreted the statute as one that granted the Motor Vehicle Administration (MVA) leeway in considering the adverse effects license suspension could have on a driver’s employment. In so doing, the court created a broad exception that could swallow the rule by allowing all licensees who drive incidental to their employment to qualify for the elevated point level before their license can be suspended. Thus, the court undermined the dual purposes of the statute—enhancing public safety and eliminating subjectivity from the license suspension pro-

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2. Md. Code Ann., Transp. II § 16-405(b)(1) (2002). If a licensee is “required to drive a motor vehicle in the course of his regular employment,” sixteen points must accrue before the license can be suspended. *Id.*
3. See infra notes 35-50 and accompanying text (discussing the structure of Maryland’s point system).
5. *Id.*
6. *Id.* at 228, 817 A.2d at 238. Section 16-404(a)(3)(i) provides that a licensee who is not required to drive a motor vehicle in the course of his regular employment can have his license suspended after he accumulates eight points. Md. Code Ann., Transp. II § 16-404(a)(3)(i) (2002).
7. See infra notes 149-170 (discussing the majority’s misinterpretation of section 16-405(b) as a statute that allows the MVA to consider any negative consequences a license suspension may have on the licensee’s employment).
8. See infra notes 178-179 and accompanying text (exploring the possibility of the wide range of individuals that may drive incidentally to their employment).
The majority failed to uphold the underlying purposes behind the statute by strictly following the general rule of statutory construction that two different terms in the same statute generally have two different meanings. The court should have adopted a reasonable interpretation of the statute by finding that it only applied to "professional drivers," thereby maintaining the historical distinction between driving that is merely incidental to employment and driving that actually constitutes the employment.

1. The Case.—Christopher Toler committed his first speeding offense in 1982 at the age of sixteen. Over the next seventeen years, he compiled an extensive driving record. Most notably, in 1999, Toler received five points on his driver's license for exceeding the speed limit by thirty miles per hour, and in December of 2000, he received an additional three points for failing to reduce speed to avoid an accident. On May 1, 2001, the MVA sent notice to Toler that his license would be suspended pursuant to section 16-404(a)(3)(i) of the Maryland Code, which gives the MVA the authority to suspend the license of a person who accumulates eight points. In response, Toler re-

9. See infra notes 181-184 and accompanying text (discussing the legislature's intent for the suspension provisions to protect the public from potentially dangerous drivers and to ensure objectivity in the suspension process through enacting the point system).

10. See infra notes 189-219 and accompanying text (criticizing the majority's decision that "professional driver," used in section 16-404(a), and "required to drive a motor vehicle in the course of his regular employment," used in section 16-405(b), could not have the same meaning).

11. See infra notes 220-231 and accompanying text (illustrating the manner in which the majority's decision violated the general rule of statutory construction that statutes should not be interpreted contrary to common sense).

12. Toler, 373 Md. at 217, 817 A.2d at 231.

13. Id. at 217-19, 817 A.2d at 231-32. In 1986, Toler received his first warning letter after accumulating four points in a three-month period. Id. at 217, 817 A.2d at 231. After two more speeding convictions in 1986, Toler received his first point system conference notice and was given an official reprimand in July of 1987. Id. In December of 1987, he was again convicted of speeding, which led to a second warning letter. Id. at 218, 817 A.2d at 231. After an additional speeding violation in August of 1989, Toler received his third warning letter. Id. Three days before the letter was issued, Toler was again convicted of speeding, which led to his second conference and reprimand in June of 1990. Id. In 1990, Toler was convicted twice for speeding and once for failing to drive in the designated lane. Id. Even though he had accumulated eight points, Toler's license was not suspended; instead, he received his third reprimand. Id. Toler collected three points in 1991 and 1992 for speeding and failing to obey a traffic signal, and he was then issued his fourth warning letter in 1998 for accruing four points for speeding convictions that occurred in the two prior years. Id.

14. Id. at 218, 817 A.2d at 231.

quested an administrative hearing before an administrative law judge (ALJ).\textsuperscript{16}

At the hearing, Toler argued that he was not guilty of either offense and that he was a "safe" driver, despite his record.\textsuperscript{17} After explaining to the ALJ that he owned and operated a door and window manufacturing and installation company and that his primary role was in sales, Toler testified that his job required him to drive 100 to 200 miles a day to visit job sites and make sales calls.\textsuperscript{18} The ALJ found that Toler's arguments were irrelevant to the validity of the tickets.\textsuperscript{19} As such, the ALJ found that the tickets were valid and were already included on Toler's record.\textsuperscript{20} After considering Toler's accumulation of eight points in a two-year period, as well as his prior driving record, the ALJ suspended Toler's license for thirty days.\textsuperscript{21} However, the ALJ also ordered the MVA to issue Toler a restricted license that would allow him to drive only as required by his job.\textsuperscript{22}

Following the ALJ's ruling, Toler argued for the first time that he was "required to drive a motor vehicle in the course of his regular employment" and thus fell within the exception of section 16-405(b), which increased the minimum point requirement to sixteen before the MVA could suspend his license.\textsuperscript{23} The ALJ rejected this argument, stating that the exception of section 16-405(b) applied to "professional drivers," which did not include Toler.\textsuperscript{24} Toler received the restricted license that allowed him to drive only for work purposes, and he sought review of the ALJ's decision that he was not covered by the section 16-405(b) exception.\textsuperscript{25}

\textsuperscript{16} Toler, 373 Md. at 218, 817 A.2d at 232.
\textsuperscript{17} Brief of Respondent at 4, Toler v. MVA, 373 Md. 214, 817 A.2d 229 (2003) (No. 21).
\textsuperscript{18} Toler, 373 Md. at 218, 817 A.2d at 232.
\textsuperscript{19} Record Extract at 27, Toler v. MVA, 373 Md. 214, 817 A.2d 229 (2003) (No. 21).
\textsuperscript{20} Id.
\textsuperscript{21} Id. at 28.
\textsuperscript{22} Id. The MVA has the authority to issue a restricted license under section 16-404(c)(4), which states that "[t]his subsection does not limit the authority of the [MVA] to issue a restrictive license or modify a suspension imposed under this subsection." Md. Code Ann., Transp. II § 16-404(c)(4) (2002). Section 16-113 governs the issuances of restricted licenses and allows the MVA to impose any "restrictions applicable to the licensee that the [MVA] determines appropriate to assure the safe driving of a motor vehicle by the licensee." Id. § 16-113(a)(iii).
\textsuperscript{23} Toler, 373 Md. at 219, 817 A.2d at 232; Record Extract at 27-29, Toler (No. 21).
\textsuperscript{24} Record Extract at 29, Toler (No. 21). The ALJ stated, "what [section 16-405(b)] relates to, we've always ruled, [is] people who have to drive a bus or a taxi or something like that as part of their job, driving is their job." Id.
\textsuperscript{25} Toler, 373 Md. at 219, 817 A.2d at 232.
The Circuit Court for Prince George's County affirmed the ALJ's decision, finding that there was no clear error or abuse of discretion by the ALJ.26 The court stated that the optimal word of the statute was "required" and that Toler was not "required" to drive in order to carry out his home improvement business.27 Judge Jackson reasoned that Toler would still be able to do the home improvements by having someone else drive him to work, whereas a taxi driver could not have someone else drive for him in the course of his employment.28

The Court of Appeals of Maryland granted certiorari to consider whether the exception set forth in section 16-405(b), which allows a licensee who is required to drive a motor vehicle in the course of his regular employment to accumulate sixteen points before his license is suspended, covers driving that is incidental to employment in addition to driving that constitutes the actual job.29

2. Legal Background.—To consider whether the Legislature intended to limit the application of the elevated point level to "professional drivers," it is important to understand the origin of Maryland's point system and suspension policy, the Maryland courts' interpretation of this policy, and the policies and interpretations of other jurisdictions. At the time the point system was implemented, Maryland categorized its drivers by occupation; only drivers holding a chauffeur's license were permitted to receive payment for transportation, and thus a statute setting out an exception that referenced a driver's employment only could have applied to chauffeurs.30 Maryland case law has historically upheld the legislative intent to distinguish between

26. Brief of Respondent at Apx. 18, Toler (No. 21).

27. Id. at Apx. 9. Judge Jackson stated, "the operative word in the Court's view is, required, to do the job. I haven't heard how, if a man does home improvement, he has to drive. Someone else could drive him, and he could do home improvements." Id.

28. Id.

29. Toler, 373 Md. at 219, 817 A.2d at 232. Toler appealed the Circuit Court's decision directly to the Court of Appeals and the court granted certiorari under Section 12-305 of the Maryland Code. MD. ANN. CODE, CTS. & JUD. PROC. § 12-305 (2002). The provision enables the Court of Appeals to review a decision directly from the Circuit Court in the event that:

a circuit court . . . has rendered a final judgment on appeal from an administrative decision under Title 16 of the Transportation Article [and] it appears to the Court of Appeals, upon petition of a party that: (1) Review is necessary to secure uniformity of decision, as where the same statute has been construed differently by two or more judges; or (2) There are other special circumstances rendering it desirable and in the public interest that the decision be reviewed.

30. See infra notes 34-37 and accompanying text (discussing the origin of the point system in Maryland).
classes of drivers, professional and nonprofessional. Furthermore, an analysis of the suspension provisions of other states illustrates that using exceptions to the point system to accommodate a driver's employment needs is unique to Maryland. Lastly, an analysis of the general rules of statutory construction illustrates that upholding the purpose underlying the statute is foremost in the application of any canon of statutory interpretation.

a. The Origin of Maryland's Point System and Driver's License Suspension Policies.—The Maryland Legislature has often recognized that the goal of the license suspension system is to further public safety on the highways. In 1959, Maryland enacted its point system to make the driver's license suspension process, which aims to protect the public's safety, more objective. The point system established point values for specific offenses and provided for warnings, conferences, suspensions, and revocations of an operator or a chauffeur's license after accumulating certain minimum point totals. When the point system was enacted, drivers were licensed by occupation, rather than classified by vehicle type, which is the basis of the system today. Two categories of licenses were issued: drivers who were paid to transport people or property were issued a chauffeur's license, and all other drivers were issued an operator's license. A driver without a chauffeur's license could not receive payment for transportation.

The original point system set the minimum point limit at three points

31. See infra notes 51-61 and accompanying text (discussing the legislative intent behind Maryland's point system and suspension policy).

32. See infra note 62-70 and accompanying text (discussing the point systems and suspension policies of other states).

33. See infra notes 71-107 and accompanying text (discussing statutory interpretation).

34. See, e.g., Ferguson v. Gathright, 485 F.2d 504, 508 (4th Cir. 1973) (finding that public safety is the legislative purpose behind license revocation policies).

35. 1959 Md. Laws 736. These provisions were later codified as sections 16-405 and 16-406 in the Transportation Article of the Maryland Code.

36. Id.

37. Md. Code Ann., Transp. II § 16-104 (2002). Today's categorical classification system distinguishes drivers based on the type of vehicle driven. Id. Class A, B, C, and D licenses entitle the driver to operate various combinations of cars, trucks, and buses. Id. A Class E license entitles the driver to operate a motorcycle. Id.

38. Md. Ann. Code art. 661/2, § 2(a)(4) (1957) (defining "chauffeur" as "[e]very person who is employed for the purpose of operating a motor vehicle and every person who operates a motor vehicle while in use as a public or common carrier of persons or property, or for hire").

39. Id. § 86(a).

40. See id. § 86 (noting that the term "chauffer" means anyone paid primarily to drive a motor vehicle).
for warning letters and five points for conferences.\textsuperscript{41} It also established an eight-point minimum for suspension and a twelve-point minimum for revocation.\textsuperscript{42} Both of these limits were subject to an exception that granted the hearing officer the option not to impose a suspension or revocation if it would "adversely affect" a licensee's employment.\textsuperscript{43} An additional part of the exception provided an enhanced minimum point level for a driver "required to drive in the course of his regular employment"—the minimum point level was fifteen points for suspension and eighteen points for revocation.\textsuperscript{44} Furthermore, because chauffeurs were the only drivers permitted to drive in the course of their regular employment, it was implicit that the exception only applied to chauffeurs.\textsuperscript{45}

In 1970, the Legislature changed the basis of the license classification system from occupation to type of vehicle.\textsuperscript{46} Thus, the chauffeur distinction was no longer implicit in the point accumulation section of the statute, and the Legislature explicitly reinforced this distinction by adding the term "professional drivers" to the statute.\textsuperscript{47} The Legislature made an exception to the minimum number of points required for a conference—a licensee accumulating five points should be called in for a conference unless he submits acceptable evidence that he is a "professional driver."\textsuperscript{48} The elevated point levels for suspension and revocation were also increased to sixteen and nineteen points respectively, but the Legislature chose to retain the "required to drive a motor vehicle during the course of his regular employment" language already present in the statute.\textsuperscript{49} These provisions have remained unchanged for the last thirty-three years.\textsuperscript{50}

\textsuperscript{41} 1959 Md. Laws 736.
\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} MD. ANN. CODE art. 661/2, § 6-102.2 (1970).
\textsuperscript{47} 1970 Md. Laws 534.
\textsuperscript{48} Id. The statute is currently codified at MD. CODE ANN., TRANSP. II § 16-404(a)(2) (2002).
\textsuperscript{49} 1970 Md. Laws 534.
\textsuperscript{50} These provisions are currently codified at MD. ANN. CODE, TRANSP. II §§ 16-404(a)(2), 16-405(b) (2002). Section 16-404, titled "Effect of accumulated points," states: (a) Action by Administration.—The Administration shall take the following actions for points accumulated within any 2-year period: (1) Send a warning letter to each individual who accumulates 3 points; (2) Require attendance at a conference by each individual who accumulates 5 points, except that a Class A, B, or C licensee who submits evidence acceptable to the Administration that he is a professional driver may not be called in until he accumulates 8 points; and (3) Except as provided in § 16-405 of this subtitle: (i) Suspend the license of each
b. The Maryland Judiciary's Application of the Point System and Suspension Policies of Other Jurisdictions.—In examining the legislative intent behind the language “required to drive a motor vehicle in the course of his regular employment,” it is helpful to consider the interpretation of this provision by Maryland courts, as well as the interpretation of similar suspension policies by other states.

(1) Maryland.—The Court of Appeals has interpreted the language in the Maryland Code that grants exceptions for “professional drivers.”\(^{51}\) In 1938, in *State v. Depew*, Depew was a state auditor, and he was required to drive to make his assignments.\(^{52}\) Depew, who had a valid operator's license, was pulled over while returning to Baltimore City from a business trip to Frederick.\(^{53}\) He was charged for driving without a chauffeur's license, found guilty, and sentenced to pay a fine.\(^{54}\) The Court of Appeals found that Depew was not required to have a chauffeur’s license because his driving was “purely incidental to the purposes of his employment” and reversed his conviction.\(^{55}\) The court endorsed the narrow definition of “chauffeur” set forth by the Supreme Court of Iowa, which only included an employee paid to drive an automobile and explicitly excluded an employee paid for anything other than operating a motor vehicle, even if driving was incidental to that position.\(^{56}\)

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individual who accumulates 8 points; and (ii) Revoke the license of each individual who accumulates 12 points.

Section 16-405, titled “Adverse effects on employment of licensee,” states:

(a) **Hearing officer authorized not to order suspension or revocation.**—Except as provided in §§ 16-205(e) and 16-205.1 of this title, if the suspension or revocation of a license would affect adversely the employment for opportunity or employment of a licensee, the hearing officer may: (1) Decline to order the suspension or revocation; or (2) Cancel or modify the suspension or revocation. (b) **Point requirement increased for licensee.**—For purposes of § 16-404 of this subtitle, if a licensee is required to drive a motor vehicle in the course of his regular employment:

(1) Suspension requires 16 points; and (2) Revocation requires 19 points.

52. *Id.*  
53. *Id.* at 275-76, 1 A.2d at 627.  
54. *Id.* at 276, 1 A.2d at 627.  
55. *Id.*  
56. *Id.* at 277, 1 A.2d at 627 (citing *Des Moines Rug Cleaning Co. v. Auto. Underwriters*, 245 N.W. 215, 218 (Iowa 1932)). The Supreme Court of Iowa found that the employee was not required to have a chauffeur’s license because the task of delivering carpets was only incidental to his position, which consisted mainly of making rugs and cleaning carpets. *Des Moines Rug Cleaning Co.*, 245 N.W. at 218. The Iowa court defined chauffeur as a person who is employed and paid by the owner of a motor vehicle to drive and attend to the car; and does not include operators who are not employed and paid for operating the motor vehicle, and therefore does not include an employee who receives his compensation for services rendered other than the operation of
For the next thirty-five years, Maryland appellate courts did not interpret the "professional driver" exception of section 16-405(b). In 1973, three years after the elimination of the occupation-based license classification system, the Maryland Court of Special Appeals in *General Valet Service, Inc. v. Curley*,57 found that the exceptions set forth for point accumulation in section 16-405(b) distinguished between operators and chauffeurs.58 The court recognized that drivers holding an operator's license were subject to suspension after accumulating eight points, while drivers with a chauffeur's license did not face suspension until they accrued fifteen points.59

On appeal, the Court of Appeals, reversed the Court of Special Appeals on other grounds,60 but explicitly endorsed the lower court's interpretation of section 16-405(b) as it reproduced the text of the decision verbatim: "suspension of an operator's license is imposed only after the holder is charged with 8 points, and suspension of a chauffeur's license is imposed only after the holder is charged with 15 points."61

(2) *Other Jurisdictions.*—No other Maryland cases have interpreted the exceptions to the license suspension provisions; consequently, it is helpful to examine the exceptions to the suspension policies of other states. The different methods of licensure and suspension vary greatly among jurisdictions. A number of states still retain the distinction between operators and chauffeurs in their

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58. *Id.* at 470, 298 A.2d at 199.
59. *Id.* The court found that General Valet was not liable for injuries to Curley that were caused by an employee of General Valet who was engaged in personal business while using a company van. *Id.* at 470-71, 298 A.2d at 199. The court held that there was not sufficient evidence to allow the jury to decide that the employer was negligent in entrusting the vehicle to the employee. *Id.* at 471, 298 A.2d at 199. Even though the employer knew that the employee sometimes used the vehicle for personal errands, the court found that the employer was entitled to rely on the public policy that a driver who had not been charged with fifteen points against his license was not unfit to drive. *Id.*
60. Curley v. Gen. Valet Serv., Inc., 270 Md. 248, 267, 311 A.2d 231, 241 (1973). The court rejected the argument that because the driver had less than fifteen points, General Valet's permitting him to drive was *per se* reasonable. *Id.* Rather, the court held that although the employee's driving record of multiple past violations had not amounted to fifteen points, General Valet knew about the record, and thus the case was properly submitted to the jury. *Id.*
61. *Id.* at 257, 311 A.2d at 236.
licensing provisions. Colorado’s suspension procedures mirror Maryland’s suspension system. Colorado’s motor vehicle provisions subject drivers to suspension if they accumulate twelve points within a year or eighteen points within twenty-four months. The minimum point levels are explicitly greater for chauffeurs who accrue points in the course of employment. Colorado courts have consistently reasoned that for the higher minimum point levels of the chauffeur exception to apply, the driver must have obtained all the points while in the course of employment.

The majority of other states have developed point systems that do not grant “professional drivers” special exceptions. These states reason that the main purpose behind the statute is public safety, which can best be attained if all drivers abide by the same standards. Courts in the District of Columbia and Utah have explicitly upheld statutes applying one minimum point level to all drivers against constitutional challenges. North Carolina, South Carolina, and Virginia have similar point systems that hold all drivers to the same minimum point standards. Most states give their motor vehicle administrations the flexibility to alleviate adverse effects on employment caused by suspension by granting them the authority to issue restricted licenses that allow the licensee to drive for purposes of work during the suspension.

64. Id.
65. Id. The Colorado statute contains the following exception:
the accumulation of points causing the suspension of the license of a chauffeur who, in the course of employment, has as a principal duty the operation of a motor vehicle shall be sixteen points in one year, twenty-four points in two years, or twenty-eight points in four years, if all the points are accumulated while said chauffeur is in the course of employment.
66. See, e.g., Edwards v. Motor Vehicle Div. Colo. Dep’t of Revenue, 520 P.2d 598, 599 (Colo. Ct. App. 1974) (finding that the sixteen point exception for chauffeurs was not applicable, because even though the plaintiff was a chauffeur he did not accumulate all of his points while driving in the course of his employment).
67. See, e.g., Glenn v. Comm’rs of D.C., 146 A.2d 575, 576-577 (D.C. 1958) (upholding the District of Columbia’s point system against a discrimination challenge in finding that applying the same minimum point level to both “professional drivers” and “average drivers” is permissible when the purpose of the point system is to protect the public).
68. Id. at 576-77; Barney v. Cox, 588 P.2d 696, 697 (Utah 1978) (finding that the point system which held “professional” and “non-professional” drivers to the same minimum point level was constitutional because the purpose of the statute is not to punish the driver but to protect the public).
69. N.C. GEN. STAT. § 20-16 (a)(5) (2001); S.C. CODE ANN. § 56-1-740 (Law Co-op. 2002); VA. CODE ANN. § 46.2-506 (B) (Michie 2002).
Thus, using exceptions to the point-system suspension provisions to accommodate a driver’s employment needs is unique to Maryland.

c. Canons of Statutory Interpretation.—The main goal of statutory interpretation is to effectuate legislative intent. Many general rules of statutory construction aid the judiciary’s task of discerning the legislative intent. The interpretation of a statutory provision should be consistent with the meanings of surrounding provisions and statutes, should be compatible with common sense, and should not render words of the provision meaningless. In addition, it is assumed that the Legislature generally intends that different words of a statute have different meanings and that the same word used multiple times in a statute should have the same meaning. The general rules of statutory interpretation are not to be followed when strict adherence to the rule will fail to effectuate the legislative purpose behind the statute.

If the legislative intent is not discernable from the language of a statute, the court will deem the statute ambiguous. When the language of the statute is unambiguous, the court will not look beyond the plain meaning of the text in interpreting the meaning of the statute. However, when the language is ambiguous the court will look

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70. S.C. CODE ANN. § 56-1-740(B)(1) (Law. Co-op. 2002) (providing for the suspension of a license when various point totals are accumulated, although allowing for the application for a restricted license for employed persons). In Florida, one may be granted a restricted license if he can prove that the suspension amounts to a serious hardship and prevents the person from performing his normal employment duties, which are necessary to support himself or his family. FLA. STAT. ANN. § 322.271(2)(a) (West 2001).


73. Whiting-Turner Contracting Co., 366 Md. at 302, 783 A.2d at 671.


75. Cf. Whack v. State, 338 Md. 665, 673, 659 A.2d 1347, 1350 (1995) (recognizing a presumption that the same words in the same statute have the same meaning, and therefore different words are presumed to have different meanings).


77. See, e.g., Whack, 338 Md. at 673, 675, 659 A.2d at 1350 (refusing to follow the general rule that the same word will have the same meaning throughout the same section of a statute, the court found that “conviction” had two different meanings throughout the statute in order to effectuate the legislative purpose behind the statute).

78. Whiting-Turner Contracting Co., 366 Md. at 302, 783 A.2d at 670-71 (“Only if the words of the statute are ambiguous need we seek the Legislature’s intent in the legislative history or other extraneous sources.”).
to the legislative history, the context of the statute, and the purpose of
the statute in order to ascertain the Legislature's intent.\footnote{79} 

\textit{Western Correctional Institution v. Geiger} illustrates the importance
placed on legislative intent when the court interprets an ambiguous
statute.\footnote{80} In \textit{Western Correctional Institution}, the court deemed
ambiguous section 11-106 of the State Personnel Management System Reform
Act, which prescribed a thirty-day time limit for imposing disciplinary
action on state employees.\footnote{81} It was not clear under the statute
whether the thirty-day period began when the appointing authority
was first informed of the alleged misconduct or when the appointing
authority was informed of the results of an investigation that substanti-
ated the allegations.\footnote{82} In analyzing the legislative history of the stat-
ute, the court found that the purpose behind the legislation was to
achieve a consistent application of the policies affecting the personnel
and to place a limit on the amount of time in which disciplinary ac-
tion could be taken.\footnote{83} The court held that to reach these goals, the
thirty-day period must begin when the management is first informed
of the action.\footnote{84} 

In ascertaining the legislative intent through the legislative his-
tory, the court follows the common rules of statutory interpretation.\footnote{85} 
However, there are exceptions to all these rules that allow for depar-
ture from the rule if adhering to the general rule would undermine
the purpose of the statute.\footnote{86} First, it is presumed that the Legislature
intends its enactments to be read consistently and that various provi-
sions will operate in harmony with each other.\footnote{87} In \textit{Western Correctional
Institution}, the court analyzed the larger context of the phrase in ques-

\footnotesize{80. Id. at 143, 807 A.2d at 43.}
\footnotesize{81. Id.}
\footnotesize{82. Id. at 129, 807 A.2d at 34.}
\footnotesize{83. Id. at 145, 807 A.2d at 44.}
\footnotesize{84. Id. at 144-45, 807 A.2d at 44.}
\footnotesize{85. See infra notes 90-99 and accompanying text (explaining the rules of statutory
interpretation).}
\footnotesize{86. See Atl. Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) (“It is not
unusual for the same word to be used with different meanings in the same act, and there is
no rule of statutory construction which precludes the courts from giving to the word the
meaning which the legislature intended it should have in each instance.”); see also Whack v.
Maryland, 338 Md. 665, 675, 659 A.2d 1547, 1551 (1995) (finding that the meaning of
“conviction” may vary within a statute depending on the context of the specific provisions);
State v. Knowles, 90 Md. 646, 654, 45 A. 877, 878 (1900) (construing “may” as “shall” in one
part of a statute, and using it in its permissive sense in a latter part of the same section of
the statute in order to effectuate the legislative intent behind the statute).}
\footnotesize{87. State v. Ghajari, 346 Md. 101, 115, 695 A.2d 143, 149 (1997).}
tion that set a time sequence for disciplinary action. For the sequence to make sense the court inferred that the time period begins when the management is first informed of the alleged misconduct.

A second general rule requires the interpretation of the statute to be reasonable and compatible with common sense. In State v. Brantner, the defendant deleted the text from a letter a judge wrote to the defendant’s attorney and inserted text stating that the defendant had been cleared of the criminal charges filed against him, when in fact he had not. As a result of this action, the State charged the defendant with the willful and unauthorized alteration of a public document under the fraud statute, but the court found that this conduct did not fall within the fraud statute. The court reasoned that interpreting the definition of “public records” to include all copies generated by an official or agency in line with the duties of the official or agency so that the alteration of any one of those copies would constitute fraud defied common sense.

Another general rule that courts follow in interpreting a statute requires that words of the statute are not rendered useless by the interpretation. Consequently, the presence of two different words in the same statute creates an inference that the Legislature meant two different things. In Parkinson v. State, the court relied on the presumption that different words in the same sentence generally have two different meanings and found that “give” and “sell” did not have the same meaning. The presumption may be rebutted when the

89. Id. at 144-45, 807 A.2d at 43-44.
90. See, e.g., Whiting-Turner Contracting Co. v. Fitzpatrick, 366 Md. 295, 302, 783 A.2d 667, 671 (2001) (stating that “a statute is to be given a reasonable interpretation, not one that is illogical or incompatible with common sense”).
91. 360 Md. 314, 316-17, 758 A.2d 84, 86 (2000).
92. Id. at 323, 758 A.2d at 89; see also Md. Ann. Code art. 27, § 45 (1957) (prohibiting the willful and unauthorized alteration of a public document).
93. Brantner, 360 Md. at 323, 758 A.2d at 89.
94. See, e.g., Taylor v. Nationsbank, 365 Md. 166, 181, 776 A.2d 645, 654-55 (2001) (stating that “the statute should be read so that no word, clause, sentence or phrase is rendered superfluous or nugatory”).
95. See Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 736 (D. Md. 1996) (interpreting the Americans with Disabilities Act, the court relied on Fourth Circuit precedent that created an inference that the legislature intended different words to have different meanings in order to support its decision that “reasonable accommodation” and “undue hardship” entail different things).
96. 14 Md. 184 (1859).
97. Id. at 194. The court upheld the constitutionality of a statute against a challenge that it violated Article 3d, section 17 of the Maryland Constitution, which stated that “every law enacted by the Legislature shall embrace but one subject, and that shall be described in the title.” Id. at 193. The Act of 1858, chapter 55 prohibited both selling and giving
The statutory purpose and legislative history illustrate that a Legislature intended for the words to have the same meaning. The corollary rule is that when a word with one or more meanings is repeated throughout a statute it is presumed that the word holds the same meaning throughout the statute, unless it is apparent that a legislature intended for the words to have different meanings. In Whack v. State, the court found that the term “convicted” had one meaning in one part of a statute and a different meaning in a latter part of the same section of the statute. The court recognized that the purpose of the statute was to impose greater penalties on repeat offenders. To achieve this goal, the court concluded that the second use of the term “convicted” must encompass convictions pending appeal, while the first use could take the usual meaning of “the establishment of guilt prior to, and independent of, the judgment of the court.”

State v. Knowles provided an example of the contrary situation where the same interpretation of one word used multiple times in the statute would contradict the purpose of the statute. The Court of Appeals, therefore, found that the same word had different meanings in two parts of the statute. The court determined that the word “may” was to be construed as “shall” or “must” in one part of a statute and then used in its permissive sense in another part of the same section. The court found that the purpose of the statute was to protect the public, and in order to achieve this goal, the first “may” was to be

liquor to a minor, while the title of the statute only prohibited the sale of liquor. Id. at 194. In following the common rule of statutory construction, the court effectuated the legislative intent and found that the overall purpose of the statute was designed to prevent liquor procurement by minors, which is one subject and poses no constitutional violation. Id. at 195.


99. See Ad. Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932) (“It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance.”).

100. 338 Md. at 675, 659 A.2d at 1351.
101. Id. at 679, 659 A.2d at 1353.
102. Id. at 675, 659 A.2d at 1351.
103. 90 Md. 646, 45 A. 877 (1900).
104. Id. at 655-56, 45 A. at 878.
105. Id. at 653, 45 A. at 877. The Act of 1869, chapter 378, section 5 provided that the qualifications of a person with a dental diploma “may be examined” by the State Board of Dental Examiners and after passing an examination his or her name shall be registered with the Board and a certificate should be issued. Id. A latter clause of the same Act stated that, at the Board’s discretion, a person with a dental diploma “may . . . be registered without being subjected to an examination.” Id.
interpreted as "must." Thus, in both Whack and Knowles, the court interpreted the statutes contrary to the common rule of statutory construction in order to achieve the statutory purpose underlying the statute.

3. The Court's Reasoning.—In Toler v. Motor Vehicle Administration, the Court of Appeals of Maryland held that section 16-405(b), which allows drivers who are "required to drive a motor vehicle in the course of his regular employment" to accrue an elevated level of points before license suspension is considered, is not limited to "professional drivers," but includes those who drive incidental to their employment. In a 4-3 decision, Judge Wilner, writing for the majority, first examined the language of section 16-405(b) and found that the statute did not clearly indicate the Legislature's intent. The court reasoned that the statute could be construed in a broad sense, as Toler argued, to include people who are required to drive incidentally to their employment, including sales people and repair people. In addition, the court observed that the statute could be interpreted in line with the MVA's argument that section 16-405(b) is restricted to "professional drivers"—people whose driving actually constitutes their employment, such as taxi drivers and truck drivers. Because each of these interpretations was plausible, the court concluded that the statute was ambiguous.

To interpret the legislative intent of the ambiguous statute, the court first noted that section 16-405(b) is part of a comprehensive statute and must be analyzed as such. Examining the various provisions that set guidelines for the administration of the point system, the court recognized that the Legislature gave the MVA flexibility to consider adverse effects on a driver's employment when making suspension decisions. The court grouped section 16-405(b) with

106. Id. at 655, 45 A. at 878.
107. Whack, 338 Md. at 674, 659 A.2d at 1351; Knowles, 90 Md. at 655, 45 A. at 878.
108. 373 Md. at 228, 817 A.2d at 238.
109. Chief Judge Bell along with Judges Eldridge and Cathell joined the majority opinion. Id. at 216, 817 A.2d at 230.
110. Id. at 221, 817 A.2d at 233.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id. at 221-22, 817 A.2d at 233-34.
provisions of the Maryland Code that allow flexibility in enforcing suspension.\textsuperscript{116} The court then reasoned that the phrase "required to drive a motor vehicle in the course of his regular employment" encompasses more than merely "professional drivers."\textsuperscript{117} The court relied on the general rule of statutory construction that when a legislature uses two different words in the same part of a statute the words usually have two different meanings.\textsuperscript{118} The court observed that sections 16-405(b) and 16-404(a)(2) both set forth exceptions to the minimum number of points a driver can accumulate before the MVA takes adverse action against the driver.\textsuperscript{119} Also, the court noted that section 16-404(a)(2) allows for a "professional driver" to accumulate eight points, instead of the usual five-point minimum before a licensee is called in for a conference.\textsuperscript{120} Furthermore, the court observed that section 16-405(b) increases the minimum point level from eight points to sixteen points for a driver "required to drive a motor vehicle in the course of his regular employment."\textsuperscript{121} The court followed the general rule of statutory construction that "when a legislature uses different words, especially in the same section or in a part of the statute that deals with the same subject, it usually intends different things" and found that because the legislature used the term "professional driver" in one section of the statute and "required to drive a motor vehicle in the course of his regular employment" in another, the terms were not synonymous.\textsuperscript{122}

In addition, the court analyzed the history of the licensing provisions of the Maryland Code.\textsuperscript{123} It questioned why the Legislature meant for the exception to refer to "professional drivers" if it did not use the already defined term "chauffeur" to express this meaning.

\textsuperscript{116} Id. (citing section 16-405(a), which grants the MVA discretion to suspend a license where the driver's employment or opportunity for employment would be adversely affected, and sections 16-404(c) and 16-113, which give the MVA authority to issue a restricted license during a suspension period).

\textsuperscript{117} Id. at 228, 817 A.2d at 238.

\textsuperscript{118} Id. at 223-24, 817 A.2d at 235; see supra note 95 and accompanying text (discussing the general rule of statutory construction that two different words in the same statute usually have two different meanings).

\textsuperscript{119} Toler, 373 Md. at 223, 817 A.2d at 235.

\textsuperscript{120} Id.

\textsuperscript{121} Id.

\textsuperscript{122} Id. (relying on the different word-different meaning common rule of statutory construction to support the "argument that there is some difference [in] the fact that the Legislature used different language to describe the two classes— 'professional driver' in \S 16-404(a)(2) and 'required to drive a motor vehicle in the course of... regular employment' in \S 16-405(b)").

\textsuperscript{123} Id. at 224, 817 A.2d at 235.
when establishing the point system in 1959.\textsuperscript{124} The court answered its own question by prefacing the discussion with an examination of the evolution of the term "chauffeur," and this examination showed that from the time "chauffeur" first appeared in the Maryland Code in 1906 it had undergone a variety of changes.\textsuperscript{125} The court observed that the term had been eliminated from the code, reinstated, and had numerous definitions, some of which were broad and others narrow.\textsuperscript{126}

The court also questioned why in 1970, when the Legislature added the exception now codified in 16-404(a)(2) it chose to use the term "professional driver." The court observed that even though the chauffeur-operator distinction had been eliminated, "chauffeur" was still a defined term in the Maryland Code.\textsuperscript{127} The majority concluded that because the Legislature failed to use the "chauffeur" language when it was readily available each of the three times the Legislature reviewed these provisions, the Legislature did not intend for "required to drive a motor vehicle in the course of his regular employment" to have the same meaning as "chauffeur."\textsuperscript{128}

Judge Raker, writing for the dissent, agreed with the majority that the text of section 16-405(b) was ambiguous.\textsuperscript{129} She disagreed with Judge Wilner's interpretation of the legislative intent derived from the statute's history.\textsuperscript{130} The dissent focused on a different general rule of

\begin{itemize}
  \item \textsuperscript{124} Id. at 227, 817 A.2d at 237.
  \item \textsuperscript{125} Id. at 224, 817 A.2d at 235.
  \item \textsuperscript{126} Id. at 224-25, 817 A.2d at 235-36. The court noted that in 1906, the Legislature required the registration of "chauffeurs," defined as persons "operating a motor vehicle as mechanic, employee or for hire, except employees of manufacturers testing uncompleted automobiles." Id. at 224, 817 A.2d at 235. The court also recognized that in 1910, the General Assembly created the Motor Vehicles Department and provided it the authority to license drivers, but no distinction was made between operators' and chauffeurs' licenses. Id. In 1912, the court noted that the Legislature restored the distinction when it held "professional chauffeurs" licenses subject to annual renewal, while ordinary licenses were valid until suspension or revocation. Id. at 224-25, 817 A.2d at 235. The court observed that the Legislature defined "professional chauffeur" as "any person operating or running a motor vehicle for another for salary or wages, and also any person operating or running a motor vehicle, whether his own or another['']s, for hire or profit." Id. at 225, 817 A.2d at 235. The court also noted that in 1918, the Legislature changed the definition of "chauffeur" to any person "operating a motor vehicle for hire, or as an employee of the owner thereof." Id., 817 A.2d at 235-36. Finally, the court recognized that by 1959, the Legislature had narrowed the meaning of "chauffeur" to its present definition—a person "who is employed for the purpose of operating a motor vehicle . . . [or] who operates a motor vehicle while in use as a public or common carrier of persons or property, or for hire." Id. at 226, 817 A.2d at 236.
  \item \textsuperscript{127} Id. at 227-28, 817 A.2d at 237.
  \item \textsuperscript{128} Id. at 228, 817 A.2d at 237.
  \item \textsuperscript{129} Id. at 229, 817 A.2d at 238 (Raker, J., dissenting).
  \item \textsuperscript{130} Id.
statutory interpretation—a statute should "be given a reasonable interpretation, not one that is illogical or incompatible with common sense."\(^{131}\) Relying on this rule, Judge Raker argued that the majority's broad interpretation of section 16-405(b) allowed the exception to swallow the rule and thus violated common sense.\(^{132}\) The dissent reasoned that under the majority's holding the exception could feasibly encompass a vast number of people.\(^{133}\) The dissent noted that it could apply to anyone who is required to drive in order to get to work, including attorneys meeting with clients and doctors visiting patients.\(^{134}\)

Judge Raker supported her argument for a narrower meaning of section 16-405(b) with precedent.\(^{135}\) In *State v. Depew*, she noted that the Court of Appeals rejected the argument that a state auditor whose driving was incidental to his employment was a "chauffeur" within the meaning of section 16-405(b).\(^{136}\) She observed that in 1973, the court explicitly adopted the Court of Special Appeals' interpretation of section 16-405(b) that the eight-point minimum applied to those with an operator's license, while the fifteen point exception applied to "chauffeurs."\(^{137}\) Therefore, Judge Raker reasoned, if Toler's driving was merely incidental to his employment, he was not a "chauffeur" and did not qualify for the 16-405(b) exception.\(^{138}\)

Judge Raker then criticized the majority for its "inconsistent reasoning," arguing that the majority violated its own premise that different words have different meanings by unequivocally accepting the terms "chauffeur" and "professional driver" as synonymous.\(^{139}\) According to Judge Raker, central to the majority's argument was its reasoning that, because the term "chauffeur" is not in section 16-405(b), the Legislature intended for the exception to be broader than the chauffeur category.\(^{140}\) Judge Raker pointed out, however, that throughout the majority's opinion it was evident that the majority con-
sidered "professional driver" and "chauffeur" to have synonymous meanings. Judge Raker concluded by arguing that the majority's interpretation undermines the purpose of the statute in decreasing the MVA's ability to apply a clear standard and protect the public.

4. Analysis.—In Toler v. MVA, the court held that the elevated point level for a driver's license suspension, which is granted to a person "required to drive a motor vehicle in the course of his regular employment," applies to licensees whose driving is incidental to their employment. The majority's decision was flawed for multiple reasons. First, the court misinterpreted section 16-405(b) as a provision of the Motor Vehicle Code that grants the MVA discretion in considering any adverse effects the license suspension process may have on a licensee's employment. Second, the majority broadened the excepted class to include licensees whose driving is incidental to their employment, and thus failed to uphold the dual statutory purposes of ensuring public safety and maintaining objectivity in the license suspension process. Third, in applying the general rule of statutory construction that two different words in the same statute generally have two different meanings, the court failed to recognize that the rule should not be followed when its application would inhibit the statute's purpose. Finally, the court's expansion of section 16-405(b) to include driving that is merely incidental to employment could feasibly encompass a large portion of licensees and thus runs contrary to common sense because it allows the exception to swallow the rule. The majority should have maintained the historical distinction between driving that is merely incidental to employment and driving that actually constitutes the employment in holding section 16-405(b) applicable to only professional drivers.

141. Id. at 233, 817 A.2d at 240.
142. Id., 817 A.2d at 240-41.
143. Id. at 228, 817 A.2d at 238.
144. See infra notes 149-160 and accompanying text (arguing that the majority misinterpreted the license suspension scheme).
145. See infra notes 171-188 and accompanying text (arguing that the majority's interpretation defeats the legislative intent).
146. Toler, 373 Md. at 224, 817 A.2d at 235.
147. See infra notes 189-211 and accompanying text (arguing that the majority misapplied the rules of statutory interpretation).
148. See infra notes 220-231 and accompanying text (arguing that because many licensees drive incidental to their work the majority's decision creates too broad an exception to the license suspension system and renders the statute ineffective by jeopardizing the objectivity and public safety goals that underlie the suspension system).
a. A Misinterpretation of the Statutory Purpose.—

(1) The Majority Misinterpreted Section 16-405(b).—The majority misinterpreted section 16-405(b) as a provision intended to help alleviate adverse effects on a licensee’s employment from suspension.\textsuperscript{149} Even though the point system does offer the MVA discretion in imposing suspensions when the suspension would negatively affect the licensee’s employment, section 16-405(b) is not a provision under which the MVA has the flexibility to consider adverse employment effects.\textsuperscript{150} Rather, sections 16-404(c)(4) and 16-405(a) are the proper places to exercise this discretion.

Section 16-404(c)(4) grants the MVA the power to issue a restricted license during a suspension period at its discretion.\textsuperscript{151} Under section 16-113, the MVA can issue a license that allows a driver with a suspended license to drive only for work purposes.\textsuperscript{152} In addition, section 16-405(a) gives the MVA complete authority to decline to order a suspension or modify a suspension that would “affect adversely” the employment of a licensee.\textsuperscript{153} As the MVA and dissent pointed out, section 16-405(a) provides the MVA with\textsuperscript{154} broad discretion to decline to suspend a license or to modify a suspension if it adversely affects employment. If the MVA finds that a suspension will negatively affect a licensee’s employment, it has complete authority either to withhold the suspension or to provide the driver with a license that will enable him to drive to fulfill his employment requirements.\textsuperscript{155} These two broad powers provide the means for the MVA to take the licensee’s employment into consideration, just as it did in Toler’s case.\textsuperscript{156} By issuing Toler a restricted license, the MVA permitted him to drive for work purposes during the thirty-day suspension period, thus eliminating any adverse effects on his employment.\textsuperscript{157}

Although sections 16-404(c)(4) and 16-405(a) give the MVA broad authority to consider a driver’s employment needs, section 16-405(b) is a\textsuperscript{158} non-discretionary exception that applies to a specific subgroup of drivers—the class of licensees whose driving constitutes their

\begin{itemize}
  \item \textsuperscript{149} Toler, 373 Md. at 221-22, 817 A.2d at 233-34.
  \item \textsuperscript{150} Md. Code Ann., Transp. II § 16-405(b) (2002).
  \item \textsuperscript{151} Id. § 16-404(c)(4).
  \item \textsuperscript{152} Id. § 16-113(a).
  \item \textsuperscript{153} Id.
  \item \textsuperscript{154} Toler, 373 Md. at 230, 817 A.2d at 238 (Raker, J., dissenting). Section 16-405(a) provides that the hearing officer “may” consider adverse effects on employment. Md. Code Ann., Transp. II §§ 16-113(a)(iii), 16-405(a) (2002).
  \item \textsuperscript{155} §§ 16-405(a)-(b).
  \item \textsuperscript{156} Toler, 373 Md. at 218-19, 817 A.2d at 232.
  \item \textsuperscript{157} Id.
\end{itemize}
employment.\textsuperscript{158} The MVA does not have any authority under 16-405(b) to consider the negative effects a license suspension may have on a driver.\textsuperscript{159} The majority's misinterpretation of section 16-405(b) as an employment aiding provision serves no policy goals since the MVA already had the flexibility to accommodate employment through other means.\textsuperscript{160}

(2) The License Suspension Provisions of Other States Illustrate the Toler Court's Misinterpretation of the Purpose Behind Section 16-405(b) and the Scope of the Exception it Sets Forth.—An analysis of the regulations of other states illustrates the majority's misinterpretation of the purpose of section 16-405(b) as a means for the MVA to consider negative employment effects. The majority of states grant their Motor Vehicle Departments the flexibility to take adverse employment effects caused by suspension into consideration by authorizing them to issue restrictive licenses at their discretion.\textsuperscript{161} For example, South Carolina allows a driver to apply for a restricted license during the time of suspension if he is employed.\textsuperscript{162} Meanwhile, in Florida, a licensee may be granted a restricted license if the suspension prohibits the driver from engaging in his employment and the driver's employment is necessary to support himself or his family.\textsuperscript{163}

Furthermore, the vast majority of states hold all drivers subject to the same minimum point levels before remedial action can be taken.\textsuperscript{164} In North Carolina, the Division of Motor Vehicles has the authority to suspend the licenses of drivers who accumulate a minimum of twelve points within a three-year period, and drivers that accrue points within the three-year period immediately following the reinstatement of a license that was suspended or revoked are held to an eight-point minimum standard.\textsuperscript{165} South Carolina's State Highway Department may suspend a driver's license upon the accumulation of twelve points.\textsuperscript{166} Meanwhile, Virginia requires the Motor Vehicle Commissioner to suspend the license of a driver who accumulates

\begin{footnotes}
\item 158. § 16-405(b).
\item 159. Id.
\item 160. \textit{Toler}, 373 Md. at 222, 817 A.2d at 234.
\item 163. FLA. STAT. ANN. 23 § 322.271(2)(a) (West 2002).
\item 164. See, e.g., S.C. CODE ANN. § 56-1-740(A) (Law. Co-op. Supp. 2002) (holding all drivers to a twelve point minimum for license suspension).
\item 165. N.C. GEN. STAT. § 20-16 (a)(5) (2001).
\end{footnotes}
eighteen points within a year or twenty-four points overall.\textsuperscript{167} In addition, Colorado, the one other state, besides Maryland, that has different point minimums in its point system, clearly makes the exception applicable to chauffeurs only, and adds that to qualify for the exception the points must have accrued in the course of employment.\textsuperscript{168}

Before the court’s decision in \textit{Toler}, Maryland was an anomaly because it was the only state that allowed points accrued outside the course of employment to count towards a higher minimum point level for license suspension.\textsuperscript{169} By misinterpreting section 16-405(b) as granting the MVA flexibility to take a driver’s employment into consideration during the license suspension process, the Court further expanded Maryland’s already generous leeway granted to drivers in the suspension process. Maryland is now a greater anomaly because it is the only state that allows non-professional drivers to accrue an elevated level of points before risking a license suspension.\textsuperscript{170} The wide disparity between the amount of leeway Maryland will give a driver facing a possible suspension compared to other states further illustrates the court’s misinterpretation of section 16-405(b) as a provision intended to alleviate adverse effects on a licensee’s employment caused by the suspension process.

\textbf{b. The Dual Statutory Purpose of Ensuring Objectivity and Public Safety in Issuing Suspension.—}The Legislature implemented the point system in order to add objectivity to the suspension process,\textsuperscript{171} which was intended to protect public safety.\textsuperscript{172} The court’s decision in \textit{Toler} frustrated both of these policy goals.

The majority’s decision thwarted the Legislature’s attempt to add objectivity to the license suspension process through implementing the point system.\textsuperscript{173} By interpreting the clause “required to drive a motor vehicle in the course of his regular employment” to include driving that is incidental to employment, the court created a broad exception that swallows the rule by blurring the distinction between

\begin{itemize}
\item \textsuperscript{167} VA. \textsc{Code} \textsc{Ann.} § 46.2-506(B) (Michie 2002).
\item \textsuperscript{168} COLO. \textsc{Rev. \textsc{Stat.}} § 42-2-127(1)(a) (2002).
\item \textsuperscript{169} MD. \textsc{Code} \textsc{Ann.}, \textsc{Transp. II} § 16-405(b) (2002).
\item \textsuperscript{170} \textit{Toler}, 373 Md. at 228, 817 A.2d at 237-38.
\item \textsuperscript{171} Id. at 226, 817 A.2d at 236.
\item \textsuperscript{172} \textit{See} United States v. Woods, 450 F. Supp. 1335, 1346 (D. Md. 1978) (recognizing the revocation of a license under Maryland’s point system is intended to promote public safety).
\item \textsuperscript{173} \textit{See id.} ("The point system brought a measure of objectivity to the suspension and revocation regime, as it was based on convictions in court rather than subjective findings by the Commissioner that the licensee was unfit or unsafe . . . ").
\end{itemize}
all drivers and those who fall in the excepted class. The decision allows any licensee who must drive to work to fall within the exception, and at the very least, it gives these drivers a strong basis for challenging an application of the eight-point standard. The majority even recognized that under their broad interpretation salesmen and repairmen could all fall within the exception. The dissent added attorneys visiting clients, doctors seeing patients, and entertainers going to performances to this category of possibilities. The objective distinction has been blurred, and it is unclear what requirements a driver must meet to be deemed "required" to drive in the course of his employment. This uncertainty illustrates how the court has moved away from the legislative intent of objectivity underlying the enactment of the point system. The court's decision leaves a tough task for the MVA in deciding who falls within this exception and who does not. The court should have maintained the historic distinction between the two classes of drivers, but instead the majority blurred the distinction and added subjectivity back into the suspension process.

The majority's decision also frustrated the Legislature's efforts to protect the public's safety through license suspension polices. The courts in states that subject all drivers to the same minimum point levels have found that the single point requirements do not discriminate against "professional drivers." Moreover, the courts have recognized that the purpose of the statute is to ensure public safety, a

174. Toler, 373 Md. at 230-31, 817 A.2d at 239 (Raker, J., dissenting).
175. Id. at 231, 817 A.2d at 239.
176. Id. at 221, 817 A.2d at 233.
177. Id. at 231, 817 A.2d at 239 (Raker, J., dissenting).
178. The facts of Toler offer little guidance—Toler himself brought in two-thirds of his company's business by driving 100-200 miles a day in order to meet with customers and visit job sites. Id. at 218, 817 A.2d at 232. The holding of Toler leaves unanswered whether the distance driven or the "essentialness" of the driving is the important factor, or if they both must be present and a balancing standard should be used between the two. Also the number of miles necessary to constitute the requisite distance is unclear, as is the effect of a licensee's ability to take public transportation on the "essentialness" of their driving.
179. The court's decision leaves open the possibility that the section 16-405(b) exemption may apply to attorneys who drive to meet their clients, doctors who visit patients, or people who work construction.
180. Id. at 233, 817 A.2d at 240-41 (Raker, J., dissenting).
181. See supra note 172 and accompanying text (explaining that the purpose of the license suspension is to protect the public).
182. See, e.g., Glenn v. Comm'rs of D.C., 146 A.2d 575, 576-77 (D.C. 1958) (upholding the District of Columbia's point system against a discrimination challenge in finding that applying the same minimum point level to both "professional drivers" and "average drivers" is permissible).
goal best achieved by holding all drivers to the same standards.\(^{183}\) Although the Maryland Legislature found that the public could be protected by holding the small subclass of “professional drivers” to a lower standard,\(^{184}\) as this category is broadened, the statute becomes increasingly ineffective in protecting the public safety. Toler’s circumstances illustrate the negative effect on public safety created by the court’s holding. Even without falling in the excepted category of drivers, Toler had a restrictive license and was able to drive for purposes of work during the time of his license suspension, and he had his regular license reinstated while he continued to challenge the MVA ruling.\(^{185}\) By broadening the excepted class, the court decreased the point system’s incentive to drivers to refrain from breaking traffic laws, effectively allowing unsafe drivers to stay on the road.\(^{186}\) The court’s ruling will not deter Toler or another person in a similar situation from disobeying traffic regulations.\(^{187}\) None of the disciplinary actions the MVA took in the past deterred Toler, and now that his minimum point total is effectively doubled, it is likely that his violations will continue in the same pattern that has developed over the past nineteen years.\(^{188}\)

By mis-grouping section 16-405(b) with the other provisions that give the MVA flexibility in imposing suspensions that may adversely affect the employment of the licensee, the court granted more leeway to drivers who consistently break the law. Thus, the majority reduced the benefit of the suspension system to enhance public safety and made the implementation of the suspension provision under the point system more subjective.

\(^{183}\) See id. (reasoning that all drivers can be held to the same minimum point level when the purpose of the suspension system is to protect the public).

\(^{184}\) But see id. (reasoning that the legislature need not create two different standards to be fair to drivers who were on the road the most and had a greater chance of accumulating points).

\(^{185}\) Toler, 373 Md. at 219, 817 A.2d at 232. The only benefit Toler could obtain by the court finding that he fell within the excepted class of section 16-405(b) is a higher minimum point level for his next offenses. Id.

\(^{186}\) See Brief of Respondent at Apx. 10, Toler (No. 21). The MVA argued that broadening the section 16-405(b) exception would not be “consistent with the purpose of the statute, which is really to protect the public from someone who has really demonstrated through points or convictions, [or] tickets, that they are not a safe or competent driver.” Id.

\(^{187}\) See Glenn, 146 A.2d at 577 (noting that a strict point suspension system is intended “to correct the deplorable disregard that some drivers display toward traffic regulations”).

\(^{188}\) Toler, 373 Md. at 217-18, 817 A.2d at 231. The majority noted that Toler had a “long and continuous” involvement with the MVA. Id.; see also supra note 13 (discussing Toler’s driving record).
c. The Failure to Consider Statutory Purpose in the Application of Common Rules of Statutory Interpretation.—By strictly applying the general rule of statutory interpretation that two different words in one statute generally have two different meanings, the court failed to effectuate the statutory purpose underlying section 16-405(b), and it acted contrary to prior case law and legislative history that distinguished between two clear classes of drivers.\(^{189}\) In large part, the majority's holding rested on its interpretation of the common rule of statutory interpretation that two different words tend to imply different meanings.\(^{190}\) Thus, according to the majority, "professional driver" and "required to drive a motor vehicle in the course of his regular employment" could not have the same meaning.\(^{191}\)

The common rule states that two different terms generally have the same meaning, and it is derived from the more basic rule of statutory construction that a statute should be read so that no word or phrase is superfluous.\(^{192}\) Thus, a court should presume that a legislature intended for each word to have meaning.\(^{193}\) The historical context surrounding the suspension provisions illustrates that construing "required to drive a motor vehicle in the course of his regular employment" as synonymous with "professional driver" does not run afoul of the rule against superfluous terms.\(^{194}\) As the MVA argued, at the time the point system was first enacted in 1959, the provision could have only referred to "chauffeurs" because a driver with an operators' license was not permitted to receive payment for operating a motor vehicle.\(^{195}\) In 1970, when the Legislature made an exception to the minimum number of points required for a conference applicable only to "professional drivers," the meaning of section 16-405(b) did not automatically change.\(^{196}\) Rather, this provision reinforced the two distinct categories of drivers maintained by the Legislature since 1906.\(^{197}\)

The Legislature usually intends different words to have different meanings, but the wording of this rule and the terms "generally imply" and "usually" illustrate that there may be exceptions where differ-

\(^{189}\) See State v. Depew, 175 Md. 274, 275, 1 A.2d 626, 627 (1938) (holding that an employee whose driving was incidental to his employment was an operator and not a chauffeur and need not receive a chauffeur's license).

\(^{190}\) Toler, 373 Md. at 223-24, 817 A.2d at 235.

\(^{191}\) Id. at 228, 817 A.2d at 237-38.


\(^{193}\) Id.

\(^{194}\) Brief of Respondent at 9, Toler (No. 21).

\(^{195}\) Id. at 9-10.

\(^{196}\) 1970 Md. Laws 534.

\(^{197}\) 1906 Md. Laws 449.
ent words have the same meanings.\textsuperscript{198} One reason for finding an exception is illustrated in cases following the corollary rule that the same words generally have the same meaning.\textsuperscript{199} On previous occasions, the court has refused to follow this rule in order to uphold the purpose of the statute.\textsuperscript{200} In \textit{Whack}, to fulfill the general purpose of the statute of imposing greater penalties on repeat offenders, the court interpreted "convicted" to include conviction pending appeal despite a different meaning of the word used earlier in the statute.\textsuperscript{201} Also, in \textit{Knowles}, to fulfill the purpose of the statute, the court construed the word "may" as "shall" or "must" in one part of a statute and then used "may" in its permissive sense in another part of the same section.\textsuperscript{202} Just as the court in \textit{Whack} and \textit{Knowles} departed from the general rule of statutory interpretation to effectuate the purpose of the statute, the court in \textit{Toler} should have weighed the dual purpose behind the suspension policies and the point system and recognized that the provisions were an exception to the general rule of different words requiring different meanings.\textsuperscript{203} Although the court has not explicitly held that in any case the different word-different meaning rule to have an exception, it is notable that in the one case where the Court of Appeals relied on the rule, it found that even though "give" and "sell" had different meanings, the overall purpose of the statute to prevent liquor procurement by minors was not inhibited by using both terms.\textsuperscript{204}

Thus, in \textit{Toler}, the court could have interpreted "required to drive" a motor vehicle in the course of his regular employment as synonymous with "professional driver" without violating the different word-different meaning rule, because of the leeway built into the gen-

\textsuperscript{198} See, e.g., Bryant v. Better Bus. Bureau of Greater Md., Inc., 923 F. Supp. 720, 736 (D. Md. 1996) (relying on the general rule that the use of different language creates the inference that Congress meant different things in finding "reasonable accommodation" and "undue hardship" have different meanings).


\textsuperscript{200} E.g., \textit{Whack}, 338 Md. at 674-75, 659 A.2d at 1351 (finding that the meaning of "conviction" may vary within a statute depending on the context of the specific provisions); \textit{Knowles}, 90 Md. at 654-55, 45 A. at 878 (construing "may" as "shall" in one part of a statute, and using it in its permissive sense in a latter part of the same section of the statute in order to effectuate the legislative intent behind the statute).

\textsuperscript{201} \textit{Whack}, 338 Md. at 675, 659 A.2d at 1351.

\textsuperscript{202} \textit{Knowles}, 90 Md. at 654-55, 45 A. at 878.

\textsuperscript{203} Cf. \textit{Whack}, 338 Md. at 675, 659 A.2d at 1351; \textit{Knowles}, 90 Md. at 654-55, 45 A. at 878.

\textsuperscript{204} Parkinson v. State, 14 Md. 184, 197-98 (1859).
eral rule. Instead the court based its decision on a strict interpretation of the different word-different meaning rule and failed to effectuate the legislative intent. The Legislature intended for the point based suspension system to ensure public safety and objectivity in the suspension process. Both of these purposes require that the exception apply to a distinct subgroup of individuals, and the majority's expansion of the class of exempted individuals undermines the goals of public safety and objectivity. Interpreting “required to drive a motor vehicle in the course of his regular employment” as synonymous with “professional driver” also would have been consistent with the court's prior case law that holds the meanings of terms subject to statutory purpose.

Instead of finding an exception to the different word-different meaning rule in *Toler*, the court acted contrary to its own prior case law that upheld the distinction between two classes of drivers. In broadening the class of people included in the exception of section 16-405(b), the court acted contrary to the historic interpretation of the statute by the MVA and the court itself. In *Depew*, the Court of Appeals rejected the idea of broadening the excepted licensees to include driving that was incidental to employment when it found that an auditor who had to drive to visit clients was not a “chauffeur.” In 1973, the Court of Appeals explicitly endorsed the view of the Court of Special Appeals that section 16-405(b) only applied to “professional drivers.” The ALJ and circuit court decisions in *Toler* both recognized that historically section 16-405(b) has been interpreted as applying only to “chauffeurs.” The ALJ in the MVA proceeding expressly

205. See, e.g., *Whack*, 338 Md. at 674-75, 659 A.2d at 1351 (illustrating an exception to the general rule that the same word will have the same meaning throughout a statute in order to fulfill the statutory purpose behind the act).


207. See supra notes 181-184 (discussing the legislative intent behind the point based license suspension system).

208. See supra notes 186-188 and accompanying text (discussing the inherent problems in achieving objectivity and public safety when the class of excepted individuals increases).

209. *Whack*, 338 Md. at 672, 659 A.2d at 1350; *Knowles*, 90 Md. at 654-55, 45 A. at 878.


211. *Curley*, 270 Md. at 257, 311 A.2d at 235.

212. 175 Md. at 277, 1 A.2d at 627.

213. *Curley*, 270 Md. at 257, 311 A.2d at 236 (accepting section 16-405(b) to impose suspension of an operator's license only after the holder is charged with 8 points and suspension of a chauffeur's license after the holder is charged with 15 points).

214. Record Extract at 29, *Toler* (No. 21); Brief of Respondent at Apx. 7, *Toler* (No. 21). Judge Jackson did not say that Toler was not a chauffeur but found that Toler's need to drive was only incidental to his employment and that he, therefore, did not qualify for the higher point minimum. *Id.* at Apx. 9.
stated that Toler did not fall within the exception because the exception had historically been interpreted to only apply to “professional drivers.”215 In the circuit court proceeding, Judge Jackson recognized that section 16-405(b) would apply only to those whose job actually “required” them to drive, and Toler did not qualify.216 The majority in Toler did not distinguish the court’s precedent that maintained two distinct classes of drivers from its current holding.217 In addition, the court did not offer any explanation as to why the court maintained this distinction in 1973 if the legislative history illustrated the broader meaning of “required to drive a motor vehicle in the course of his regular employment,” as the majority argues it does.218 Furthermore, not only did the majority in Toler fail to consider the statutory purpose when applying the general rules of statutory interpretation, but it also contradicted its past case law maintaining two distinct categories of drivers.219

d. A Possible Interpretation that Is Not Contrary to Common Sense.—The majority should have placed more emphasis on the general rule of statutory interpretation that “a statute is to be given a reasonable interpretation, not one that is illogical or incompatible with common sense.”220 A broad interpretation of section 16-405(b) runs contrary to common sense by allowing the exception to swallow the rule.221 Even if the court refused to accept that the Legislature did intend for “required to drive in the course of his regular employment” to be synonymous with “professional driver,” it could have analyzed “required” consistently with the purpose of the statute to uphold the rule of statutory interpretation that requires construction to render meanings that are not contrary to common sense.222

The Toler majority’s broad interpretation of section 16-405(b) gives the exception an expansive meaning that runs contrary to com-

215. Record Extract at 29, Toler (No. 21).
216. Brief of Respondent at Apx. 9, Toler (No. 21).
217. Toler, 373 Md. at 216-28, 817 A.2d at 230-38.
218. Id.
219. See Depew, 175 Md. at 275, 1 A.2d at 627 (rejecting the petitioner’s plea to broaden the excepted class to include driving that was incidental to employment).
221. The majority’s interpretation of section 16-405(b) allows the potential for a wide class of drivers to fall within the excepted class of licensees. Toler, 373 Md. at 230-31, 817 A.2d at 239 (Raker, J., dissenting). Thus, the exception will be applicable to many drivers and the possibility exists for more drivers to fall within the exception than outside of it. Id.
222. See id. (criticizing the majority for interpreting the statute contrary to common sense).
mon sense.\textsuperscript{223} Just as in \textit{Brantner}, where the court found unreasonable the definition of "public records" under the fraud statute\textsuperscript{224} as including \textit{all copies} generated by an official or agency in line with the duties of the official or agency so that the alteration of one of those copies would constitute fraud, an expansive exception to the point system is also unreasonable.\textsuperscript{225} As previously mentioned, the possibilities of who may fall within the exception are endless.\textsuperscript{226} As the circuit court and dissent both pointed out, Toler's job of doing home improvements did not "require" him to drive; Toler would be able to do the home improvements by having someone else drive him to the worksite.\textsuperscript{227} Based on this interpretation of "required," the court could have found that Toler did not fall within the exception. In so doing, the majority would have upheld the statute's dual purposes of public safety and objectivity.

Instead the majority adopted a broad interpretation of "required" and established a meaning of section 16-405(b) contrary to common sense.\textsuperscript{228} The majority of people with driver's licenses are "required" to drive to do their job as much as Toler was "required" to drive to do home improvements, whether they drive to an office building or to visit clients.\textsuperscript{229} With the possibility of most license holders in the state of Maryland falling within this exception, it is clear that the majority's interpretation of "required" is contrary to common sense.\textsuperscript{220} To apply an elevated point level to all those whose employment may be inconvenienced by a license suspension is illogical.\textsuperscript{231} It is unreasonable to

\begin{itemize}
  \item \textsuperscript{223} \textit{Id.}
  \item \textsuperscript{224} Md. Ann. Code art. 27, § 45 (1957) (prohibiting the willful and unauthorized alteration of a public document).
  \item \textsuperscript{225} State v. Brantner, 360 Md. 314, 323, 758 A.2d 84, 89 (2000) (accepting the argument that "an interpretation of the statute to mean that the mere alteration of a copy of a public record in the hands of a third party is actionable defies common sense") (footnote omitted).
  \item \textsuperscript{226} See supra note 179 and accompanying text (discussing the wide range of possible exceptions to section 16-405(b), including attorneys meeting clients and doctors visiting patients).
  \item \textsuperscript{227} Brief of Respondent at Apx. 9, \textit{Toler}, (No. 21); \textit{Toler}, 373 Md. at 231, 817 A.2d at 239 (Raker, J., dissenting) (noting that "Toler [did] not dispute that, via a hired chauffeur or the assistance of a friend, he could perform his job without driving").
  \item \textsuperscript{228} See Whiting-Turner Contracting Co. v. Fitzpatrick, 366 Md. 295, 302, 783 A.2d 667, 671 (2001) (stating that "a statute is to be given a reasonable interpretation, not one that is illogical or incompatible with common sense").
  \item \textsuperscript{229} \textit{Toler}, 373 Md. at 231, 817 A.2d at 239-240 (Raker, J., dissenting) (recognizing that a wide variety of people need to drive as a part of their employment). Judge Raker further noted that "[e]mployees' need to get to their place of employment will always be 'incident to their work.'" \textit{Id.} at 231 n.1, 817 A.2d at 239 n.1.
  \item \textsuperscript{230} \textit{Id.} at 230-31, 817 A.2d at 239.
  \item \textsuperscript{231} \textit{Id.}
\end{itemize}
presume that the Legislature intended to raise the minimum point level for such a broad class of people when it provided the MVA with the explicit authority to issue restricted licenses to alleviate any adverse employment effects.

5. **Conclusion.**—In *Toler v. Motor Vehicle Administration*, the Court of Appeals held that section 16-405(b) of the Maryland Transportation Law Article, which allows drivers who are “required to drive a motor vehicle in the course of [their] regular employment” to accrue an elevated level of points before their license is suspended, applies to licensees whose driving is merely incidental to their employment.\(^\text{232}\) The court misinterpreted section 16-405(b) as a statute that gives the MVA discretion to consider any adverse affects license suspension may have on the individual’s employment.\(^\text{233}\) The majority’s broadening of the excepted class of drivers puts even more leeway in Maryland’s already lenient license suspension policies.\(^\text{234}\) By allowing a wider range of licensees to accumulate double the point totals applied to ordinary drivers before the MVA can consider license suspension, the decision reduces any enhancements the point system has on public safety and adds subjectivity back into the suspension process.\(^\text{235}\) The court failed to take into account the dual purposes of the statute of ensuring the objectivity of the suspension system and protecting public safety, by strictly applying the general rule of statutory construction that different words in the same statutes have different meanings and not properly recognizing this situation as an exception to the rule.\(^\text{236}\) The majority’s interpretation violates general notions of common sense and allows the exception to swallow the rule by broadening the statute to include a vast number of licensees who may drive incidentally to their employment and blurring the distinction between two cat-

\(^\text{232}\) *Id.* at 228, 817 A.2d at 238.

\(^\text{233}\) See *supra* notes 149-160 and accompanying text (arguing that section 16-405(b) does not give the MVA authority to consider the adverse effects a license suspension could have on a driver’s employment, while setting forth the provisions of the Motor Vehicle Code that do take potential hardships on a licensee’s employment into consideration).

\(^\text{234}\) See *supra* notes 62-70 and accompanying text (analyzing the suspension provisions of other states to illustrate the uniqueness of Maryland’s provisions).

\(^\text{235}\) See *supra* notes 171-188 and accompanying text (discussing the manner in which broadening the class of drivers subject to the elevated point level fails to uphold the dual statutory purposes of section 16-405(b)).

\(^\text{236}\) See *supra* notes 189-219 and accompanying text (criticizing the majority’s decision that the term “professional driver” used in section 16-404(a) prevented the language of section 16-405(b), “required to drive a motor vehicle in the course of his regular employment,” from having the same meaning as “professional driver”).
Categories of drivers—professional drivers and all other licensees—that the Legislature has maintained for the past ninety-seven years.\textsuperscript{237}

\textbf{Cortney L. Madea}

\textsuperscript{237} See \textit{supra} notes 220-231 (arguing that the court violated the general rule of statutory construction that statutes should be interpreted in line with common sense by finding allowing a broad class of drivers to accrue an elevated point level before invoking the license suspension system).
Recent Decision:

The United States Court of Appeals for the Fourth Circuit

I. CRIMINAL PROCEDURE

A. An Unnecessary Expansion of the Limited Collateral Order Doctrine

In United States v. Ferebe, the United States Court of Appeals for the Fourth Circuit considered whether an order denying a defendant's motion to strike a death notice as untimely filed was immediately appealable. The court also examined the standard used by lower courts to determine whether this notice was reasonably filed under the Death Notice statute. The court held that the district court's refusal to strike the notice constituted a collateral order and, as such, was immediately appealable. Furthermore, the court concluded the Death Notice statute requires district courts to evaluate whether notice of intention to seek the death penalty was reasonably filed by making an objective assessment as to the reasonableness of the timing before the actual trial begins. The Fourth Circuit's decision expanded the narrow body of criminal cases the Supreme Court has set aside as immediately appealable under the collateral order doctrine. In fact, at the time of the decision in Ferebe, the Supreme Court had allowed immediate appeal of an issue in only three circumstances.

1. 332 F.3d 722 (4th Cir. 2003).
2. Id. at 724.
3. Id. at 725. The “Death Notice statute,” 18 U.S.C. § 3593(a) (2000), states: If, in a case involving an offense [for which the defendant is death-eligible], the attorney for the government believes that the circumstances of the offense are such that a sentence of death is justified under this chapter, the attorney shall, a reasonable time before the trial or before acceptance by the court of a plea of guilty, sign and file with the court, and serve on the defendant, a notice.
4. Ferebe, 332 F.3d at 730. The court explained that the motion was collateral because an order denying a motion to strike a death notice under section 3593(a)'s timeliness provision is “conclusive, collateral to the merits, and if wrongly decided would irreparably deprive capital defendants of an important right.” Id.
5. Id. at 724.
6. The collateral order doctrine enables an issue to be immediately appealed rather than await a final decision in the criminal case if the issue is fully addressed in the lower court, is separate from the principal issue in the criminal trial, and if to await final decision of the criminal case would significantly undermine the rights of the accused. See, e.g., Abney v. United States, 431 U.S. 651, 659-60 (1977).
stances in a criminal case. Because the Supreme Court has applied the collateral order doctrine under so few circumstances, it would have been consistent with the Supreme Court's jurisprudence if the Fourth Circuit had not applied the collateral order doctrine in this case. The lower court's order refusing to strike the death notice could have awaited final judgment in the case without irreversible loss to the defendant, and thus the third prong of the collateral order doctrine was not satisfied. By instead allowing interlocutory appeal of the order, the court's decision permits capital defendants to interfere with pre-trial proceedings, while at the same time jeopardizing their constitutional right to a speedy trial and compromising the efficiency of the criminal justice system. The Ferebe court's decision, therefore, diminishes the strength and effectiveness of the legal system that the final judgment rule was designed to protect.

1. The Case.—On September 16, 1997, Donald Lee Ferebe was indicted on two counts of murder for the shooting deaths of Benjamin Harvey Page and Yolanda Evans. The prosecution sought the death penalty for both murder counts, and in May of 1998, the United States Attorney General authorized the death penalty for Ferebe, but only for the murder of Page. Ferebe was already serving a life sentence for a related murder conviction; therefore, the district court allowed Ferebe to postpone trial for the murders of Page and Evans until after he appealed the prior conviction. The Fourth Circuit affirmed the prior conviction in September of 1999, and in January of 2000, the Supreme Court denied certiorari. Five months later, the prosecution offered Ferebe concurrent life sentences if he pled guilty

7. See Stack v. Boyle, 342 U.S. 1, 6 (1951) (the denial of a motion to reduce bail constitutes a collateral order); Abney, 431 U.S. at 659 (a double jeopardy claim fits the collateral order exception); Helstoski v. Meanor, 442 U.S. 500, 591 (1979) (a claim that the Speech and Debate Clause has been violated is immediately appealable under the collateral order doctrine). Additionally, after Ferebe was decided, the Supreme Court utilized the collateral order doctrine in a fourth criminal case and held an order requiring a defendant to take medication involuntarily to stand trial was immediately appealable. Sell v. United States, 539 U.S. 166, 177 (2003).

8. See infra notes 181-196 and accompanying text (explaining that the use of the collateral order doctrine should be limited to rights that will be irretrievably lost if appeal must await final judgment).

9. See infra notes 197-210 and accompanying text (analyzing the effects that the interlocutory appeal has on the court system).

10. Id.

11. Ferebe, 332 F.3d at 724.

12. Id. at 741 (Niemeyer, J., dissenting).

13. Id. at 741-42.

14. Id. at 742.
to both new murder charges.\textsuperscript{15} Ferebe rejected the offer in October of 2000.\textsuperscript{16}

In December of 2000, the district court held a hearing and scheduled Ferebe's trial for September 10, 2001.\textsuperscript{17} On May 28, 2001, the prosecution asked the Attorney General to reconsider authorizing the death penalty for Ferebe's second murder charge.\textsuperscript{18} Before receiving a response from the Attorney General, however, Ferebe's attorney notified the prosecution that, as originally offered, Ferebe would plead guilty to both murders in exchange for concurrent life sentences.\textsuperscript{19} Consequently, in June of 2001, both parties signed a formal plea agreement to this effect.\textsuperscript{20} Because the Attorney General had to approve the agreement, both the parties and the court agreed to suspend trial preparations while awaiting the Attorney General's decision.\textsuperscript{21}

The Attorney General approved the death penalty for the second murder on July 6, 2001 but twenty days later informed the prosecution that the plea agreement was unacceptable.\textsuperscript{22} The parties and the court then met on July 31, 2001 to discuss the case.\textsuperscript{23} At this meeting, defense counsel announced that Ferebe still planned to plead guilty to the charges.\textsuperscript{24} Defense counsel explained that because the prosecution had not filed notice of an intent to seek the death penalty, the prosecution could not seek a sentence beyond life imprisonment.\textsuperscript{25} The government replied by filing a formal notice of its intent to seek the death penalty for both murder charges the next day.\textsuperscript{26} In response, Ferebe filed a motion with the district court to strike and bar the death notice, stating that the notice was untimely filed both because it was filed years after he was indicted and because it was filed just a short time before his trial was scheduled to commence.\textsuperscript{27}

\begin{itemize}
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Id. At this hearing the prosecution also withdrew its offer of concurrent life sentences in exchange for a guilty plea because Ferebe formally had rejected the offer. \textit{Id.}
\item \textsuperscript{18} \textit{Id.} at 725.
\item \textsuperscript{19} Id.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} \textit{Id.} at 726.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Id. The government was required to file notice of its intent to seek the death penalty under 18 U.S.C. § 3593(a) (2000). \textit{Id.} at 742.
\item \textsuperscript{27} Id.; see \textit{supra} note 3 (providing the text of the Death Notice statute and explaining that a death notice must be filed a "reasonable time" before trial).
\end{itemize}
The district court held a hearing on Ferebe's motion on September 7, 2001 and five days later issued an oral opinion denying the motion to strike the death penalty notice.\textsuperscript{28} The court found that Ferebe had actual, although not formal, notice of intent to seek the death penalty for the first murder count and that preparation for the second count was not substantially different than that for the first count.\textsuperscript{29} In analyzing whether the notice was reasonable, the court concluded that the statutory requirement that the prosecution serve the notice a "reasonable time before the trial" required considering any prejudice the defendant faced as a result of the timing of the notice.\textsuperscript{30} The court also postponed the trial date to a mutually agreeable date.\textsuperscript{31}

Ferebe filed an interlocutory appeal of the district court's order denying his motion to strike the death penalty notice as untimely.\textsuperscript{32} On appeal, the United States Court of Appeals for the Fourth Circuit considered whether a district court's order denying a motion to strike a death notice for being untimely filed fell under the collateral order doctrine and therefore was immediately appealable.\textsuperscript{33}

\textbf{2. Legal Background.}—Although the United States Constitution does not provide an explicit right to an appeal in either criminal or civil cases, it does grant Congress the power to create statutes regulating judicial appeals.\textsuperscript{34} Under this authority, Congress enacted the Judiciary Act of 1789 to enable parties to appeal final judgments entered in United States district courts.\textsuperscript{35} It was not until 1949 that the Supreme Court first interpreted this statutory rule that all appeals await final judgment to encompass an exception, the collateral order doctrine,\textsuperscript{36} which the Court later held could enable certain orders in a

\textsuperscript{28} Ferebe, 332 F.3d at 726.
\textsuperscript{29} Id. at 743 (Niemeyer, J., dissenting).
\textsuperscript{30} Id.
\textsuperscript{31} Id.
\textsuperscript{32} Id. at 744.
\textsuperscript{33} Id. at 726.
\textsuperscript{34} Article III, section 2 of the United States Constitution states in relevant part: "the [S]upreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations, as the Congress shall make." U.S. CONST. art. III, § 2.
\textsuperscript{35} 1 Stat. 73. The current statute, 28 U.S.C. § 1291 (2000), was derived from this initial act and states "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (2000).
\textsuperscript{36} Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (holding that because an order requiring a district court to follow state law was final in the lower court and separate from the actual case, it could be immediately appealed without awaiting final judgment).
criminal case to be immediately appealed.\textsuperscript{37} The Court articulated that to meet this collateral order exception in a criminal case, the order must satisfy three requirements in the lower court: (1) conclusively resolve the disputed question, (2) involve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment.\textsuperscript{38} To determine whether an order was immediately appealable under the collateral order doctrine, the Court began to consider whether the contested claim contained an inherent right not to be subjected to a jury trial and consequently required intermediary appeal to preserve the defendant's right not to endure trial.\textsuperscript{39} The Court has been particularly reluctant to apply the collateral order doctrine in the criminal arena, using the doctrine only three times by 2003 to allow intermediate appeal for an interlocutory order within a criminal case.\textsuperscript{40} Following the Supreme Court's example, the United States Court of Appeals for the Fourth Circuit has applied the collateral order doctrine reticently to issues that it deems satisfy the three-prong test of the doctrine.\textsuperscript{41}

\textbf{a. The Supreme Court Articulates a Limited Exception to the Rule that Appeals Must Await Final Judgment.}—The Supreme Court has continuously adhered to the congressionally mandated requirement that only final decisions and decrees of federal district courts can be appealed to higher courts,\textsuperscript{42} particularly for criminal cases.\textsuperscript{43} In \textit{Cobbleidick v. United States},\textsuperscript{44} the Court explained that judicial review historically has been limited to final judgments of the lower courts except when this limitation would "practically defeat the right to any review at all."\textsuperscript{45} The \textit{Cobbleidick} Court considered whether an order denying a motion to repeal a subpoena requiring a witness to come before a grand jury was a final decision and could therefore be inme-

\begin{itemize}
\item \textsuperscript{37} Stack v. Boyle, 342 U.S. 1, 8 (1951).
\item \textsuperscript{38} Abney v. United States, 431 U.S. 651, 659-60 (1977).
\item \textsuperscript{39} See id. (holding that a double jeopardy claim protects against the trial itself and thus could be immediately appealed).
\item \textsuperscript{40} See supra note 7 and accompanying text (outlining the cases in which the Supreme Court had applied the collateral order doctrine to permit immediate appeal of interlocutory orders).
\item \textsuperscript{41} See infra notes 115-128 (giving examples of Fourth Circuit decisions involving the collateral order doctrine).
\item \textsuperscript{42} For a criminal case, this statutory rule limits appellate review to cases where the defendant has been convicted and sentenced for the crime committed. Flanagan v. United States, 465 U.S. 259, 263 (1984) (citing Berman v. United States, 302 U.S. 211, 212 (1937)).
\item \textsuperscript{43} See supra note 7 and accompanying text (listing the select instances in which the Supreme Court has allowed an appeal before final judgment in criminal cases).
\item \textsuperscript{44} 309 U.S. 325 (1940).
\item \textsuperscript{45} Id. at 324-25.
\end{itemize}
The Court held that the order must await final judgment and explained that neither a party nor a witness to the cause of action could immediately appeal an issue that arose during litigation to stall the proceedings before the final decision. The Court explained that for policy reasons, finality of review, particularly in the criminal arena, is essential for the success of the legal system. Therefore, the Court concluded that appeal of issues in most criminal cases should await a final judgment in the cause of action.

The Supreme Court first articulated an exception to the rule that all appeals must await final judgment in *Cohen v. Beneficial Industrial Loan Corp.* In *Cohen,* the Court considered whether an order requiring a district court to abide by New Jersey law was immediately appealable. The Court held that the order was final within the district court and was separate from the actual cause of action; therefore, it could not be included in one final appeal. Consequently, the order created a narrow exception to the general rule that appeals must await final judgment. The Court explained that the purpose of statutorily limiting appeals to final decisions was to forbid appeal on incomplete, intermediary issues as separate components rather than combining all issues into one final review. The Court reasoned the order requiring the district court to follow state law was immediately appealable because it completely disposed of a right that was separate from the stockholder’s derivative action and did not need to be deliberated as a substantive part of the case. In *Cohen,* the Supreme Court first established the collateral order doctrine, a narrow exception to the congressional statute which mandates appeals await final judgment.

Although *Cohen* established a limited exception to the final judgment rule for a civil case, it was not until *Stack v. Boyle* that the Su-

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46. Id. at 324.
47. Id. at 326.
48. Id. at 325-26.
49. Id. at 324-25.
50. 337 U.S. 541, 545-46 (1949).
51. Id. at 543. New Jersey law required an unsuccessful plaintiff who had a small interest in an action, such as a shareholder, to be held liable for all litigation expenses and to provide security for these expenses prior to prosecution of their action. Id. at 544-45.
52. Id. at 546.
53. Id.
54. Id.
55. Id. at 546-47. The Court further noted that not every order dealing with security would be subject to immediate appeal, but because this interlocutory appeal had nothing to do with the main cause of action, it was subject to an exception to the final judgment mandate. Id. at 547.
56. Id. at 546.
57. 342 U.S. 1 (1951).
The Supreme Court first used the collateral order doctrine in a criminal case to hold that an order denying a motion to reduce bail is also immediately appealable. In *Stack*, the defendant's bail was set at a much higher amount than that set for similar offenses without substantive evidence as to why the amount was so high. The Court found the district court's denial of the motion to reduce bail to be a final decision and thus immediately appealable under *Cohen*.* The Court reasoned that "there is no discretion to refuse to reduce excessive bail." In holding the order immediately appealable as a final decision, the Court expanded use of the collateral order doctrine exception from civil to criminal cases. This decision paved the way for future interlocutory orders to be immediately appealed before final judgment in the actual criminal trial.

Because the Supreme Court did not specifically address whether all pre-indictment motions were immediately appealable following *Stack*, a split developed in the circuits as to whether these motions automatically fell under the collateral order doctrine. The Court addressed this split over ten years after *Stack* and held that all pre-indictment motions are not immediately appealable in *DiBella v. United States*. The defense in *DiBella* argued that the collateral order doctrine applied to a pre-trial order to suppress evidence obtained through an unreasonable search and seizure in a criminal case. The Court noted that the existence of a pre-indictment motion alone is insufficient to automatically create an intermediate appeal. Specifically, the Court reasoned that suppression motions such as the order to suppress evidence are not separate from the cause of action because they will affect the proceedings and results of the actual trial. The motion was not an independent issue and therefore allowing in-

58. *Id.* at 6.
59. *Id.* at 3. The government explained that bail was set higher than that for offenses with similar penalties because these particular defendants were considered part of a conspiracy and were therefore more likely to leave the jurisdiction upon receiving bail. *Id.* at 5-6.
60. *Id.* at 6.
61. *Id.*
62. *Id.*
64. 369 U.S. 121, 131-33 (1962).
65. *Id.* at 121-22.
66. *Id.* at 131.
67. *Id.* at 127.
The intermediate appeal would cause "serious disruption to the conduct of a criminal trial." The Court emphasized that these orders are simply part of the process leading to the criminal trial. This holding cemented the Court's position that the existence of a pre-indictment motion alone does not provide an automatic intermediate appeal, thereby further constricting the Court's application of the collateral order doctrine.

b. The Supreme Court Outlines the Required Elements of the Collateral Order Doctrine.—Once the Supreme Court established that the collateral order doctrine could apply to criminal cases but did not automatically apply to pre-indictment motions, the Court needed to articulate a workable standard for orders to satisfy the collateral order doctrine. The Supreme Court defined the three prongs necessary to fulfill the collateral order doctrine in *Abney v. United States.* The issue in *Abney* was whether an order denying a motion to dismiss on the ground that the charges violated the Double Jeopardy Clause was immediately appealable. The Court outlined three prongs that an order must meet to satisfy the collateral order doctrine. An order must (1) conclusively resolve the disputed question, (2) involve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from final judgment. The Court found the first prong was satisfied because there were no further steps to take in the district court to avoid the trial the defendant claimed would violate his protection against double jeopardy; therefore, the denial of the order was the district court's final dismissal of the claim. The order fulfilled the second prong because the defendant's claim that he should not be subjected to trial had nothing to do with his culpability in the conspiracy charges he faced. The accused did not challenge the merits of the case or any of the evidence against him, as was the case in *DiBella.* Finally, the Court held

68. *Id.* at 129.
69. *Id.* at 131.
70. *Id.*
72. *Id.* at 653.
73. *Id.* at 659.
74. *Id.* at 659-60.
75. *Id.* at 659.
76. *Id.* at 660.
77. *Id.* In *DiBella v. United States,* the defense sought to suppress evidence obtained through an allegedly unlawful search and seizure. 369 U.S. 121, 122 (1962). The Court held the second prong of the collateral order doctrine was not satisfied because the claim would affect the evidence presented as well as the conduct of the trial itself. *Id.* at 127.
that the order met the final prong; the defendant's right would be
"significantly undermined" if the appeal had to await final judgment
because the defendant would be forced to endure a trial he claimed
he had a right to avoid.\textsuperscript{78} The Court based this holding on the fact
that it previously had construed the Double Jeopardy Clause as pro-
tecting against both being convicted and being tried twice for the
same crime.\textsuperscript{79} A double jeopardy claim is therefore a narrow excep-
tion to the rule that all appeals must await final judgment because it
satisfies all three required prongs of the collateral order doctrine.\textsuperscript{80}

After the Supreme Court established three specific elements re-
quired to satisfy the collateral order doctrine, the Court began rigidly
applying these three prongs to orders within criminal cases to deter-
mine whether the orders could be immediately appealed. For exam-
ple, in \textit{United States v. MacDonald},\textsuperscript{81} the Supreme Court refused to
extend the collateral order doctrine further into the criminal arena
for an order denying a defendant's motion to dismiss an indictment
based on the denial of the right to a speedy trial under the Sixth
Amendment to the United States Constitution.\textsuperscript{82} The Court reasoned
that the order was not immediately appealable by applying the three
prongs of the collateral order doctrine explicitly set forth in \textit{Abney}.\textsuperscript{83}
The Court explained that the defendant had not fulfilled the first
prong because the issue of whether his right to a speedy trial was vi-
olated was not fully disposed of until after an evaluation of the particu-
lar facts of the case, which, the Court reasoned, usually can be done
only upon completion of the trial.\textsuperscript{84} The Court further reasoned that
the defendant did not satisfy the second prong because in most situa-
tions the actual case is intertwined with how the passage of time has
affected the defendant's ability to assert his innocence; therefore, a
speedy trial claim is not adequately independent of the issues at
trial.\textsuperscript{85} Finally, the Court held that the defendant did not meet the

\textsuperscript{78} \textit{Abney}, 431 U.S. at 660.
\textsuperscript{79} \textit{Id.} at 660-61.
\textsuperscript{80} \textit{Id.} at 659.
\textsuperscript{81} 435 U.S. 850 (1978).
\textsuperscript{82} \textit{Id.} The Sixth Amendment to the United States Constitution states, in relevant part,
that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and pub-
lic trial, by an impartial jury of the State and district wherein the crime shall have been
committed." U.S. Const. amend. VI. This clause is commonly referred to as the Speedy
Trial Clause.
\textsuperscript{83} \textit{MacDonald}, 435 U.S. at 861.
\textsuperscript{84} \textit{Id.} at 859.
\textsuperscript{85} \textit{Id.} at 859-60. The Court distinguished double jeopardy claims from speedy trial
cases on this ground. \textit{Id.} The Court reasoned that while a double jeopardy claim is sepa-
rate from the trial itself, a speedy trial claim intertwines the prejudice the defendant may
third prong because the Speedy Trial Clause, unlike the Double Jeopardy Clause, does not provide a right not to be tried. Therefore, the Court concluded that no fundamental right would be lost if the claim were not upheld prior to trial. The Court concluded that such claims are not immediately appealable because a speedy trial claim does not satisfy any of the three prongs outlined in Abney.

Despite strict adherence to the three prongs of the collateral order doctrine, the Supreme Court is willing to expand the doctrine further in the criminal context when the order fits the required prongs. Helstoski v. Meano concerned a former congressman's argument that a grand jury analysis of his legislative acts violated the Speech and Debate Clause. In holding that the claim constituted a collateral order, the Court compared the Speech and Debate Clause to the Double Jeopardy Clause when considering the three prongs of the collateral order doctrine. The Court reasoned that the claim met the first prong because, like a double jeopardy claim, once the speech and debate claim is denied there are no additional steps the lower court can take to prevent the trial itself. The order satisfied the second prong because, although the defendant did challenge the evidence to be presented at trial, this dispute would end if the indictment were overruled. Lastly, central to the argument that the claim fulfilled the third prong was the Court's previous determination that the Speech and Debate Clause protected congressional members

suffer with the events that transpire at the actual trial. Id. at 859. In addition, the Court reasoned that a double jeopardy claim does not question the defendant's guilt or innocence, but a speedy trial claim usually posits that the amount of time that has passed from arrest to trial adversely affected the defendant's ability to prove his innocence. Id. Therefore, the speedy trial claim is tied to the defendant's culpability. Id.

86. Id. at 861.
87. Id. at 860-61. The Double Jeopardy Clause, on the other hand, protects an individual not only from being convicted twice for the same crime but also from being tried twice for the same crime; therefore, to disallow immediate appeal and await final judgment would eliminate this inherent right of the clause itself. Id. at 861-62.
88. Id. at 861.
89. 442 U.S. 500 (1979).
90. Id. at 504-05. These acts included allegations that the defendant, at the time he was a member of Congress, solicited and accepted bribes from aliens in exchange for introducing private bills into the House of Representatives that would allow the aliens to remain in the United States. Id. at 502. The Speech and Debate Clause provides, in relevant part, that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other Place." U.S. Const. art. I, § 6.
91. Helstoski, 442 U.S. at 506-07.
92. Id. The Court specifically stated that "[o]nce a motion to dismiss is denied, there is nothing the [congressman] can do under that Clause in the trial court to prevent the trial." Id. at 507.
93. Id.
from the trial itself, not just from the results of the trial.\(^{94}\) Therefore, the Court reasoned that review of a claim involving the Speech and Debate Clause must occur before trial to protect this constitutional right to avoid trial.\(^{95}\) The Court found that the order was collateral because it met all three prongs and involved the right not to be subjected to trial.\(^{96}\)

Five years later in *Flanagan v. United States*,\(^{97}\) the Supreme Court held that the pretrial disqualification of defense counsel in a criminal case was not a collateral order because it did not meet any of the prongs of the collateral order doctrine and, more specifically, it did not inherently contain a right not to be tried.\(^{98}\) In *Flanagan*, one firm originally represented four defendants in a criminal case.\(^{99}\) Subsequently, three defendants decided to try their cases separate from the fourth defendant.\(^{100}\) The district court disqualified the firm from representing any of the defendants on the theory that it had received confidential information from all of them.\(^{101}\) The Court emphasized the importance to both the defendant and society of shortening the time between arrest and sentencing in criminal cases, a right encompassed in the Sixth Amendment guarantee to a speedy trial.\(^{102}\) Examining the elements of the collateral order doctrine, the Court explained that the right not to have counsel disqualified, unlike an order denying bail reduction, would not be lost if the defendants were convicted.\(^{103}\) Next, the Court noted that the defendants' right to counsel of their choice fits into the category of rights of all criminal defendants, that is, "merely a right not to be convicted in certain circumstances."\(^{104}\) Unlike the Speech and Debate Clause or the Double

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94. *Id.* at 508 (citing Dombrowski v. Eastland, 387 U.S. 82, 85 (1967)).
95. *Id.*
96. *Id.*
98. *Id.* at 269.
99. *Id.* at 261.
100. *Id.* The defendants felt the government's evidence against defendant Flanagan was much more substantial than that against them and it would therefore affect their chances of acquittal if all the cases were tried together. *Id.*
101. *Id.* at 262; see also *Fed. R. Crim. P.* 44(c) (stating that when two or more defendants have been charged for the same crime and have the same counsel, the court should intervene to protect each defendant's right to counsel unless there is obviously no conflict of interest).
102. *Flanagan*, 465 U.S. at 264. The Court explained that "[a]s the Sixth Amendment[,] . . . indicates, the accused may have a strong interest in speedy resolution of the charges against him. In addition, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." *Id.* (citing Barker v. Wingo, 407 U.S. 514, 519 (1972) (internal quotation marks omitted)).
103. *Id.* at 266.
104. *Id.* at 267.
Jeopardy Clause,\textsuperscript{105} the right not to have counsel disqualified "is in no danger of becoming moot upon conviction and sentence."\textsuperscript{106} Therefore, the Court held that the right did not fall under the collateral order doctrine because it would not be lost if appeal awaited final judgment.\textsuperscript{107}

Similarly, in \textit{Digital Equipment Corp. v. Desktop Direct, Inc.},\textsuperscript{108} the Supreme Court found a district court order dismissing a settlement agreement was not immediately appealable because the right could be sufficiently corrected upon appeal from a final judgment in the case.\textsuperscript{109} The Court explained that even if a settlement agreement protected a right not to stand trial, this fact alone was insufficient to allow the order to fall under the collateral order doctrine.\textsuperscript{110} The Court noted that it consistently had emphasized the collateral order doctrine as a narrow exception to the general rule that appeals await final judgment and had explained in numerous instances congressional dislike for partial litigation.\textsuperscript{111} The defendant's rights could be reviewed effectively after final judgment of the action in a way that the right not to endure a second trial for the same crime could not be.\textsuperscript{112} Consequently, the case did not satisfy this third prong of the collateral order doctrine because the defendant would not lose its rights under the settlement agreement if forced to await final judgment to appeal the agreement's dismissal.\textsuperscript{113}

c. The Fourth Circuit Follows the Supreme Court's Jurisprudence for Intermediary Appeals.—Following the guidance of the Supreme Court, the United States Court of Appeals for the Fourth Circuit also has applied the collateral order doctrine when the issue satisfies the three prongs outlined in \textit{Abney}. For example, in \textit{United States v. Smith},\textsuperscript{114} the court found a district court's order denying a defendant's motion to dismiss an indictment due to the prosecution's deci-

\footnotesize{105. See \textit{supra} notes 78-79 and 94-95 and accompanying text (explaining that both the Double Jeopardy Clause and Speech and Debate Clause encompass a right not to be tried, and therefore meet the third prong of the collateral order doctrine).
106. \textit{Flanagan}, 465 U.S. at 266.
107. \textit{Id.} at 266-67.
109. \textit{Id.} at 869. The Court considered only the third prong of the collateral order doctrine because the establishment of the first two prongs was not contested and failure of the third prong was alone sufficient to deny appeal. \textit{Id.} at 868-69.
110. \textit{Id.} at 871.
111. \textit{Id.} at 867-68.
112. \textit{Id.} at 881.
113. \textit{Id.}
114. 851 F.2d 706 (4th Cir. 1988).}
sion to try him as an adult rather than as a juvenile to be immediately appealable.115 The court explained that the order met the first prong of the collateral order doctrine because the district court had conclusively determined that the defendant would be tried as an adult at the trial level.116 The court then explained that a defendant's juvenile status is detached from his guilt or innocence of the crimes of which he is accused, thus satisfying the second prong of the collateral order doctrine.117 The court reasoned that the claim fulfilled the third prong because, although a juvenile still could contest being tried as an adult after the trial, many of the rights he would have had as a juvenile, such as the right to have court records sealed, would be effectively lost.118 The court likened the protection of juveniles to the protection against double jeopardy, where the Supreme Court previously had applied the collateral order doctrine.119 Therefore, the court stated that the order denying dismissal due to the defendant's juvenile status fit the collateral order doctrine and was immediately appealable.120

Although the Fourth Circuit has used the collateral order doctrine in select situations, the court has generally followed the Supreme Court's jurisprudence and maintained that the doctrine is a narrow exception that should be applied only in limited circumstances.121 United States v. Blackwell122 exemplified this reticence when the Fourth Circuit considered whether an order transferring venue to a North Carolina district court could be appealed immediately.123 The defendants argued that a Kentucky district court did not have the authority to transfer their case back to North Carolina.124 The court

115. Id. at 708.
116. Id.
117. Id.
118. Id. The court explained that in a juvenile proceeding, the defendant's court records are sealed and there are limitations to the inquiries that can be made into these records. Id. In addition, the defendant does not have to be photographed and no information about the defendant, such as his name or picture, can be released. Id. If the defendant were to be tried as an adult and then appeal, these rights would be lost. Id.
119. Id.
120. Id.
121. See, e.g., United States v. Lawrence, 201 F.3d 536, 537-38 (4th Cir. 2000) (explaining that the sentence is the final judgment in a criminal case and therefore an appeal can only occur after sentencing); United States v. Buchanan, 946 F.2d 325, 326 (4th Cir. 1991) (stating that "[i]n criminal cases, a final judgment is not deemed to have occurred until after conviction and imposition of sentence"); United States v. Blackwell, 900 F.2d 742, 747 (4th Cir. 1990) (noting that the collateral order doctrine should be applied with the "utmost strictness in criminal cases").
122. 900 F.2d 742 (4th Cir. 1990).
123. Id.
124. Id. at 746.
explained that there was some basis to believe the first two prongs of the collateral order doctrine were satisfied because the district court had entered its final decision to the defendants' argument of an improper transfer and the issue was clearly separate from the defendants' culpability.\textsuperscript{125} The court reasoned that the claim of an improper venue transfer did not fulfill the third prong because if the defendants were convicted, they could appeal and argue that the district court did not have proper venue from the beginning.\textsuperscript{126} Because the trial would not violate the defendants' rights, appealing the order through the usual appellate manner was the appropriate form of relief.\textsuperscript{127} Following the Supreme Court's example, the Fourth Circuit held the collateral order doctrine did not apply because the right would not be lost upon final judgment.\textsuperscript{128}

3. The Court's Reasoning.—In United States v. Ferebe, the United States Court of Appeals for the Fourth Circuit held that a district court's denial of a motion to strike a notice of intention to seek the death penalty because it was untimely filed was immediately appealable under the collateral order doctrine.\textsuperscript{129} In this 2-1 decision, Judge Luttig, writing for the majority,\textsuperscript{130} explained that death notices satisfy the three prongs that the Supreme Court outlined for an order to qualify for interlocutory appeal: (1) it must fully dispose of the disputed issue, (2) it must settle an issue completely separate from the cause of action, and (3) it must involve an important right that would be lost irreparably if not reviewed until final judgment.\textsuperscript{131} The court further held that the timeliness of the filing of notice under the Death Notice statute should be evaluated under a pre-trial inquiry into the “objective reasonableness” of the timing of the filing.\textsuperscript{132} The court explained that the statute should not be examined under a post-trial inquiry looking at the prejudice the defendant suffered at trial because the statute was meant to be “prophylactic” rather than remedial.\textsuperscript{133}

\textsuperscript{125} Id. at 747.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Ferebe, 332 F.3d at 726.
\textsuperscript{130} Id. Judge Michael joined in the opinion. Id. at 723.
\textsuperscript{131} See id. at 726 (citing Abney v. United States, 431 U.S. 651, 658 (1977)).
\textsuperscript{132} Id. at 724.
\textsuperscript{133} Id. at 727. As the court further explained, looking at the prejudice the defendant suffered under a post-trial inquiry would transform the statute into a remedial one designed to remedy the actual prejudice the specific defendant endured. Id. Because the
The court noted that the first prong of the collateral order doctrine mandates that the lower court completely dispose of the issue. The court explained that this element was satisfied because the district court had denied the motion to strike the death notice and had scheduled a trial. The court reasoned that because the statute is meant to be "prophylactic," the accused has a right to reasonable notice of the prosecution's intent to seek the death penalty as well as a right to avoid suffering through a capital trial without proper notice. Because the district court already had denied the motion and set a trial, the court reasoned that the only alternative—besides interlocutory review—would be to force the defendant to endure a trial for his life without this statutorily required notice. Therefore, the court explained that there were no further steps to take in the district court to avoid the trial.

The court noted that the second prong of the collateral order doctrine requires the disputed order to be completely separate from the prosecution's case. As the court explained, the second prong was satisfied because whether Ferebe had received reasonable notice was not connected to his criminal culpability for the murders. The court reiterated the importance of determining timeliness under the pre-trial objective standard to ensure that the issue does not become intertwined with the cause of action. The court explained that if the statute were incorrectly interpreted to protect the right to notice but not the right not to stand trial, then the second prong would not be satisfied because the effect of the timing of the notice on the defendant's culpability could only be evaluated after the trial; therefore, the collateral order doctrine would be inapplicable.

Finally, the court found that the timeliness of a death notice satisfied the final prong of the collateral order doctrine because the right probably would be irretrievably lost if it was not immediately reviewed. Because the statute guarantees the right not to stand trial without reasonable notice, the court noted that this right would van-

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134. Id. at 727.
135. Id.
136. Id. at 727-28.
137. Id. at 728.
138. Id.
139. Id. at 726 (citing Abney v. United States, 431 U.S. 651, 658 (1977)).
140. Id.
141. Id.
142. Id.
143. Id. at 729.
The court's analysis again turned on the fundamental rights that the Death Notice statute provides. If the statute only provided the right not to be convicted and sentenced without sufficient preparation, the court reasoned, then the mere fact that the defendant will have to stand trial without adequate notice does not automatically eliminate the right. Because the court found the statute to contain the right not to stand trial, however, it concluded that the right would be lost irretrievably if the defendant was tried without adequate notice.

Having held the order reviewable under the collateral order doctrine, the court next interpreted the statute to require a pretrial inquiry into the objective reasonableness of the time of the filing of the death notice to ensure that the accused is not tried for capital punishment without first receiving adequate notice. The court reasoned that the defendant's rights are denied when a capital case moves to trial without the accused receiving adequate notice of the prosecutor's intent to seek the death penalty, regardless of whether the defendant was actually prejudiced by the timing of the notice. The court rejected the idea that the right to a timely death notice is comparable to the speedy trial right. Keeping in mind that the Supreme Court had previously determined an alleged violation of the speedy trial right is subject to the post-trial prejudice analysis rather than the pretrial inquiry, the court explained that the speedy trial right protects the defendant as well as society. In contrast, the court observed that the Death Notice statute protects only the defendant. The court further noted that violation of the speedy trial right may be advantageous to the defendant, in that the delay in trial caused by the

144. Id. The court explained that "[t]he focus in this third prong is not on whether a court can later adjudicate the claim asserted . . . [r]ather, the focus is on whether the assurances underlying the asserted right will be reneged upon if review is delayed until after trial." Id.
145. Id.
146. Id. at 729-30.
147. Id. at 730.
148. Id. The court noted that both the district court and the dissent failed to consider this aspect of the statute. Id. at 731. Both interpreted the statute as instead requiring a post-trial, harmless error inquiry, which the majority felt did not fully protect the rights guaranteed in the statute because such an inquiry only assessed injury based on actual prejudice to the defendant after the completion of the trial. Id. at 730-31.
149. Id. at 732.
150. Id. at 734.
151. Id. (citing Barker v. Wingo, 407 U.S. 514, 521 (1972), which held that the speedy trial right should be assessed by examining prejudice to the defendant as one factor).
152. Id.
violation may cause witnesses to become unavailable or forgetful,\textsuperscript{153} while a violation of the Death Notice statute never benefits the accused.\textsuperscript{154} Finally, the court reasoned that the speedy trial right is vague because it is difficult to determine what length of time constitutes too long\textsuperscript{155} whereas the Death Notice statute lacks this ambiguity.\textsuperscript{156} In the absence of the defining characteristics of a speedy trial right that the Supreme Court relied on in \textit{Barker v. Wingo}\textsuperscript{157} the Fourth Circuit dismissed application of the post-trial prejudice standard for the Death Notice statute.\textsuperscript{158}

Instead, the court reasoned that the right to receive a death notice within a reasonable time was comparable to the right not to be placed in double jeopardy.\textsuperscript{159} The court explained that both a death notice and a double jeopardy claim encompass a right not to be tried.\textsuperscript{160} Additionally, the court noted that charging instruments, such as indictments and death notices, protect the fairness of criminal proceedings, provide notice to the accused before trial, and invalidate the trial if there is a violation of these rights.\textsuperscript{161} Based on these similarities, the court reasoned that because the Supreme Court never had utilized the prejudice standard for double jeopardy claims, the standard should not apply to death notice claims.\textsuperscript{162}

Finally, the court outlined factors a court must consider to determine whether there is reasonable time remaining after a death notice is filed but before trial commences: “1) the nature of the charges presented in the indictment; 2) the nature of the aggravating factors provided in the Death Notice; 3) the period of time remaining before trial, measured at the instant the Death Notice was filed . . . ; and . . . 4) the status of discovery in the proceedings.”\textsuperscript{163} The court emphasized that this list was not exclusive, and that other factors may be relevant depending on the circumstances.\textsuperscript{164}

In his dissent, Judge Niemeyer argued that the court should dismiss the appeal as interlocutory because the trial court could only ac-

\begin{itemize}
\item \textsuperscript{153} \textit{Id.} at 734-35 (citing \textit{Barker}, 407 U.S. at 521).
\item \textsuperscript{154} \textit{Id.}
\item \textsuperscript{155} \textit{Id.} (citing \textit{Barker}, 407 U.S. at 521).
\item \textsuperscript{156} \textit{Id.}
\item \textsuperscript{157} \textit{Id.} In \textit{Barker}, the Supreme Court noted that these three characteristics made the speedy trial right different from other constitutional rights. 407 U.S. at 519.
\item \textsuperscript{158} \textit{Ferobo}, 332 F.3d at 735.
\item \textsuperscript{159} \textit{Id.} at 736.
\item \textsuperscript{160} \textit{Id.} at 735.
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.} at 736.
\item \textsuperscript{163} \textit{Id.} at 737 (citing \textit{Barker}, 407 U.S. at 530).
\item \textsuperscript{164} \textit{Id.}
\end{itemize}
accurately determine the reasonableness of the notice after the actual trial occurred. Judge Niemeyer noted that the collateral order doctrine previously has been applied only in three criminal instances, and the Supreme Court has emphasized that it is a limited exception because of congressional dislike for “piecemeal litigation.” Judge Niemeyer explained that the Death Notice statute merely provides defendants with a guarantee that they will have adequate time to prepare between the issuance of the notice and the trial, but does not give the accused a right not to stand trial for a capital offense without reasonable notice. He compared the death penalty notice to the speedy trial right in that both rely on prejudice to determine the effect that the delay ultimately had on the quality of the defendant’s defense.

Judge Niemeyer next analyzed the Death Notice statute in light of the three prongs of the collateral order doctrine. He reasoned the district court’s ruling did not constitute a final ruling but was “merely speculative” because the defendant could renew the motion to strike the intention to seek the death penalty in the district court during or after trial. He also determined that the timeliness of the notice was not sufficiently separate from the merits of the case because the court could only determine whether the defendant received notice a reasonable time before trial by considering how their preparation for trial was affected, which depended upon the evidence and complexity of the case. Finally, because the timeliness objection is still reviewable after the trial is completed, Judge Niemeyer concluded that the right to receive notice of the prosecutor’s intent to seek the death penalty is not a right that would be lost if the defendant had to await final judgment. Judge Niemeyer, therefore, concluded the Fourth Circuit did not have jurisdiction to hear the defendant’s appeal until after trial and a final judgment was issued because the order did not satisfy the three prongs of the collateral order doctrine.

4. Analysis.—In United States v. Ferebe, the United States Court of Appeals for the Fourth Circuit held that an order denying a motion to

165. Id. at 740-41 (Niemeyer, J., dissenting).
166. Id. at 745; see supra note 7 and accompanying text (listing three instances at the time of the decision where the Supreme Court had allowed use of the collateral order doctrine for a criminal case).
167. Ferebe, 332 F.3d at 746-47.
168. Id. at 749.
169. Id. at 750.
170. Id. at 751.
171. Id. at 751-52.
172. Id. at 752.
173. Id. at 753.
strike a death notice as untimely filed was immediately appealable under the collateral order doctrine.\(^\text{174}\) The court reasoned that the Death Notice statute provides a defendant the right not to stand trial for his life without first receiving reasonable notice of the government's intent to seek the death penalty.\(^\text{175}\) In so holding, the court added this class of appeals into the small category set forth by the Supreme Court under the collateral order doctrine.\(^\text{176}\) Because the Supreme Court continuously has stressed that the collateral order doctrine is the exception and should apply only in limited situations,\(^\text{177}\) it would have been more consistent with the Supreme Court's reasoning for the Fourth Circuit to restrain from applying the doctrine so liberally. The \textit{Ferebe} order was an issue that could await final judgment without irreversible loss and thus did not satisfy the third prong of the collateral order doctrine test, which requires the issue to be irreparably lost if the defendant is forced to await a final decision.\(^\text{178}\) Instead, by permitting intermediate appeal, the court's decision allows capital defendants to interfere with pre-trial proceedings while simultaneously jeopardizing their constitutional right to a speedy trial, as well as compromising the general efficiency and cost of maintaining the criminal justice system.\(^\text{179}\) Consequently, the \textit{Ferebe} court's unnecessary use of the collateral order doctrine diminishes the strength and effectiveness of the legal system that the final decision rule is meant to protect.\(^\text{180}\)

\textbf{a. Appealing the Order to Strike the Death Notice Should Have Awaited Final Judgment.—}

\textbf{(1) Ferebe Disregards the Supreme Court's Reasoning in Digital.—}Although the \textit{Ferebe} court correctly applied the test set forth in \textit{Abney}\(^\text{181}\) to find that orders concerning the Death Notice statute are final decisions in the lower court separate from the defendant's culpa-

\begin{itemize}
\item \textit{Id.} at 726.
\item \textit{Id.} at 727-28.
\item \textit{See supra} note 7 and accompanying text (explaining the collateral order doctrine and that the Supreme Court has used it in only four instances for a criminal case).
\item \textit{See, e.g.,} Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867-68 (1994) (noting the Court has continuously explained the congressional dislike for piecemeal litigation and that consequently the collateral order doctrine should be applied sparingly).
\item \textit{See infra} notes 181-196 and accompanying text (explaining that use of the collateral order doctrine should be limited to rights which will be irreparably lost if appeal must await final judgment).
\item \textit{See infra} notes 197-210 and accompanying text (analyzing the effects that intermediate appeal has on the legal system).
\item \textit{Id.}
\item \textit{See supra} note 6 (discussing the three prongs of the collateral order doctrine).
\end{itemize}
bility and thus meet the first two prongs of the collateral order doctrine, the court incorrectly applied the third prong to hold that the decision would be irretrievably lost if review were to await a final decision in the case.\textsuperscript{182} An order denying a motion to strike the death notice as untimely filed fully disposes of the issue in the lower court and thus satisfies the first prong because the lower court has conclusively determined that notice was adequately given before trial and nothing further can be done in the lower court until the trial occurs.\textsuperscript{183} The Death Notice statute also meets the second prong of the collateral order doctrine because it is an entirely separate issue from the cause of action; the timeliness of the death notice had no relation to Ferebe’s culpability in the murders.\textsuperscript{184} The Death Notice statute, however, does not satisfy the third prong of the collateral order doctrine because the right will not be lost forever upon final decision of the issue. Because the order does not fulfill all three required prongs of the doctrine, it cannot be immediately appealed and therefore should await final judgment.\textsuperscript{185} Consequently, the Fourth Circuit should not have found the issue satisfied the collateral order doctrine.

The Fourth Circuit incorrectly reasoned that the Death Notice statute protects against a right to stand trial, a right that would be lost irretrievably if the appeal were to await a final decision. In Digital Equipment Corp. v. Desktop Direct, Inc., the Supreme Court explained that every pretrial right could be considered a right not to stand trial, and consequently the argument that a defendant has a right to avoid trial should be regarded with skepticism and does not render an order immediately appealable.\textsuperscript{186} The Court noted that without an “explicit

\textsuperscript{182} See Ferebe, 332 F.3d at 752 (Neimeyer, J., dissenting) (arguing that an “untimely death penalty notice remains effectively reviewable upon final judgment”).

\textsuperscript{183} See Abney v. United States, 431 U.S. 651, 658 (1977) (interpreting this requirement to mean that there were no additional steps available in the district court after the defendant’s double jeopardy claim was denied without holding trial and thereby violating the defendant’s Fifth Amendment claim); see also supra notes 134-138 and accompanying text (illustrating the Ferebe court holding that the Death Notice statute adequately met the first prong because nothing further could be done in the lower court).

\textsuperscript{184} See Abney, 431 U.S. at 659 (explaining that a double jeopardy claim is collateral from the defendant’s guilt or innocence of the accused crime and therefore satisfies the second prong of the collateral order doctrine); see also supra notes 139-142 and accompanying text (explaining the Ferebe court holding that the order fulfilled the second prong of the collateral order doctrine).

\textsuperscript{185} See supra text accompanying note 38 (explaining that an order must meet all three prongs of the collateral order doctrine to be considered “collateral”).

\textsuperscript{186} 511 U.S. 863, 873 (1994). The Court went on to explain that because so many rights could encompass a right to avoid trial, allowing immediate appeal merely because there may exist a right not to be tried would grant the appellant a wide spectrum to force his opponent to be burdened with cost and delay each and every time this right may exist. Id.
statutory or constitutional guarantee that trial will not occur," there is no right to an intermediate appeal.187 Although allowing use of the collateral order doctrine in Abney, the Court explained that the Double Jeopardy Clause protects an individual from being "twice put in jeopardy" for the same crime, which continuously has been interpreted to encompass the longstanding premise that an individual has a right to avoid criminal trial and punishment twice for the same crime.188 Because the Death Notice statute does not explicitly state nor is it an established principle that the statute protects a right to avoid trial, the right can be fully vindicated upon final judgment of the criminal trial itself.189 By reading the statute as encompassing a right not to be tried in addition to a right to reasonable notice, the Ferebe court unduly expanded the statute to fit the third prong of the collateral order doctrine and to avoid the final judgment rule.190 Because any pretrial order can be read as a right not to be tried, the holding in Ferebe has set the stage for future courts to read that any order will be lost irretrievably if it cannot be immediately appealed.

(2) The Effect of the Order on a Defendant Does Not Automatically Establish Irrevocable Loss.—Because the collateral order doctrine should be applied sparingly,191 the unavoidable effects that a trial can have on any criminal defendant are insufficient to satisfy the third prong of the doctrine and normally will not create a right that will be lost irretrievably if review must await final judgment.192 Although lack of reasonable notice of intention to seek the death penalty will affect the criminal defendant in some way, it is indistinguishable from the numerous "pretrial judicial decisions that affect the rights of criminal

187. Id. at 874 (quoting Midland Asphalt Corp. v. United States, 489 U.S. 794, 801 (1989)).
188. Abney, 431 U.S. at 660-61.
189. See, e.g., United States v. MacDonald, 435 U.S. 850, 860-61 (1978) (explaining that because the Speedy Trial Clause never has been interpreted to protect against a right to be tried, it does not constitute an important right that would be lost if review awaited final judgment); Flanagan v. United States, 465 U.S. 259, 267 (1984) (expanding this view and holding that review must await final judgment even if the wait may violate a defendant's constitutional right, as exemplified by the denial of an interlocutory appeal for an order disqualifying defense counsel, which may affect "the asserted right to counsel of one's choice").
190. Ferebe, 332 F.3d at 729.
191. See supra note 7 and accompanying text (illustrating a preference for the final judgment rule by showing the Supreme Court's reluctance to use the collateral order doctrine generally in criminal proceedings).
192. See, e.g., Flanagan, 465 U.S. at 266 (holding that an order denying objection to counsel's disqualification would not become moot upon completion of trial and consequently could wait until the final decision in the trial, and that even if the defendant's rights were affected by the order, they still must await final judgment).
defendants yet must await completion of trial court proceedings for review."

An accused, even if ultimately found innocent, must in most criminal cases suffer through the difficult experience of a trial as part of the American criminal justice system. In Blackwell, the Fourth Circuit explained that even upon conviction most defendants still can vindicate their rights by appealing and arguing that the pretrial order was improper; if they are successful, the conviction will be overturned. Although Ferebe may be forced to endure a capital trial without reasonable notice, unquestionably a difficult experience for any individual, he retains the right to appeal the district court's denial of the order to suppress the death notice upon completion of trial. Therefore, the right would not have been irreparably lost if Ferebe was forced to await final judgment to appeal it.

b. The Court's Misapplication of the Collateral Order Doctrine Disrupts the Efficiency of the Legal System.—

(1) Expanded Use of the Collateral Order Doctrine Allows Defendants to Inappropriately Interfere with Criminal Proceedings.—By holding that an order denying a motion to strike a death notice can be immediately appealed under the collateral order doctrine, the court in Ferebe misapplied the narrow exception to the rule that all appeals await final judgment. In Abney, the Court explained that the long-standing preference for finality before appeal in criminal cases was established to promote an efficient legal system. Because defendants can use intermediate appeals to interfere with the proceedings, the efficiency of the system is put in jeopardy by unnecessary expansions of the collateral order doctrine as the courts move toward extinguishing the final judgment rule. There always will be a substantial amount of time between the accused's arrest and the prosecutor's decision to seek the death penalty; accordingly, any accused could attack the reasonableness of the notice and, if his motion is denied, immedi-
ately appeal the denial under the collateral order doctrine. The Fourth Circuit's holding in *Ferebe* thus gives the defendant a measure of unintended control over the proceeding.

In *Cobbledick*, the Supreme Court explained that allowing intermedial appeal also can lead to harassment by the defendant and disruption of the case's momentum. Disallowing frequent intermediate appeals, on the other hand, helps maintain respect for trial courts and their judges' decisions, which yields a more efficient legal system overall. Indeed, the *Cobbledick* Court explained that the purpose of the final judgment rule is to promote a "healthy legal system." The delays caused by intermediary appeals further test the health of the criminal justice system because they create an overall more costly and unhealthy legal system.

(2) Expanding the Collateral Order Doctrine also Compromises the Speedy Trial Right.—Just as defendants could use the *Ferebe* court's holding to slow the criminal justice system, prosecutors also can use the same holding to infringe upon the defendant's constitutional

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200. See, e.g., United States v. MacDonald, 435 U.S. 850, 862-63 (denying pretrial appeal for a speedy trial claim and noting that one argument for the denial was that any defendant could make the motion and, if not granted, seek intermediate appeal).

201. *Ferebe*, 332 F.3d at 729-30. Under the majority's opinion, the defendant can immediately appeal any denial of the reasonableness of intention to seek the death penalty and thereby affect the proceedings by delaying the actual criminal trial. *Id.*

202. *Cobbledick*, 309 U.S. 325-26; see also Flanagan v. United States, 465 U.S. 259, 264 (1984) (indicating that by limiting appeal to final judgments, parties have less opportunity to "clog the courts" and burden the opposing side with numerous cases within a single dispute); *DiBella*, 369 U.S. at 129 (arguing that allowing intermediate appeal, on the other hand, can lead to harassment because the delay may jeopardize the availability of evidence or witnesses at the criminal trial).

203. *Flanagan*, 465 U.S. at 263-64. The Court explained that because trial judges must make numerous pre-judgment decisions throughout the litigation process, limiting interference by the higher courts maintains deference and respect for these decisions. *Id.* at 264.

204. 309 U.S. at 326. As the Court explained, the congressional statute mandating that appeals await final judgment was enacted in a quest to promulgate the most effective legal system possible. *Id.* at 325-26; see also Michael D. Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207, 213-17 (1984) (analyzing the numerous ways the final decision requirement promotes judicial efficiency).

205. *Cobbledick*, 309 U.S. at 326 (explaining that the congressional rule that appeals await final judgment was created to promote efficiency throughout the criminal justice system); see also Pamela Johns, Comment, *Interlocutory Appeals in Criminal Trials: Appellate Review of Vindictive Prosecution*, 51 U. CIN. L. REV. 375 (1982) (continuously noting that the final judgment rule is designed to promote the administration of justice).
right to a speedy trial. By allowing intermediate appeal, the speedy trial right is unavoidably slowed as the defendant must submit to pre-trial appeals before the merits of the case are reached. In DiBella, the Supreme Court echoed this sentiment by noting that the "delays and disruptions" that arise in conjunction with intermediate appeal affect the Sixth Amendment right to a speedy trial as well as the efficiency of criminal law in general. The public also maintains an interest in a speedy trial guarantee because a delay may affect the strength of the prosecution's case, increase society's cost in keeping defendants in pretrial detention, and allow defendants a longer period to commit additional crimes while on bail. The Fourth Circuit's expansion of the collateral order doctrine eventually could render the speedy trial guarantee virtually obsolete because all pretrial orders could be immediately appealed, each one delaying the trial date. The court's decision hindered the legal system by improperly retracting the constitutional right to a speedy trial.

5. Conclusion.—In United States v. Ferebe, the Fourth Circuit held that an order denying a motion to strike a death notice as untimely filed was immediately appealable under the collateral order doctrine. The decision extended the application of the collateral order doctrine to the denial of an order that could have awaited appeal upon final judgment. The Ferebe court's decision overlooked the Supreme Court's directive in Digital that the collateral order doctrine, a limited exception to the accepted rule that appeals must await final decisions, should be applied sparingly. The court's decision discourages the efficiency and health of the legal system in that it allows defendants to inappropriately interfere with the operation of the criminal justice system as well as compromises their right to a speedy trial.

206. See U.S. CONST. amend. VI (stating that "[i]n 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").
207. DiBella, 369 U.S. at 126.
208. United States v. MacDonald, 435 U.S. 850, 862 (1978). The Court explained that, although the defendant may be willing to accept any delays and waive their speedy trial right, the delay also may affect these important societal interests. Id.
209. Id.
210. See supra note 206 (noting that the Speedy Trial Clause guarantees the right to a speedy trial in a criminal prosecution).
211. Ferebe, 332 F.3d at 726.
212. Id. at 722.
and efficient trial.\textsuperscript{214} Therefore, it would have been consistent with established precedent for the Fourth Circuit to refrain from expanding the collateral order doctrine and allow the appellate process to operate as established by Congress, upon final judgment in the cause of action.\textsuperscript{215}

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\textsuperscript{214} See \textit{supra} notes 202-213 and accompanying text (explaining policy reasons for limiting appeal to final judgment). These policy reasons include preventing the defendant from disrupting the case and adding costs to the legal system, maintaining respect for lower courts and their decisions, and upholding both the defendants and the societal interest in a speedy trial. \textit{Id.}

\textsuperscript{215} 28 U.S.C. § 1291 (2000) (stating that the appeal process should stem from final decisions in the lower courts.