The Maryland Survey: 2003-2004

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Recent Decisions

THE COURT OF APPEALS OF MARYLAND

I. CIVIL PROCEDURE

A. Ignoring the American Rule: Interpretation of Statutory Fee-Shifting Gone Awry

In Pak v. Hoang, the Court of Appeals of Maryland considered whether a court could award a tenant postjudgment attorney’s fees for recovery efforts under the Maryland Security Deposit Act (MSDA), which includes reasonable attorney’s fees in its statutory remedy. The court held that the reasonable attorney’s fees provision of the MSDA included postjudgment attorney’s fees so that the remedy provided by the statute could not be circumvented. While the court appropriately provided recourse to the tenant, its statutory interpretation led to an overly broad “remedial statute” analysis that inappropriately extended application of the statute to include fees incurred in postjudgment recovery efforts. In its statutory interpretation, the court overlooked the importance of the American rule which would have led to a more appropriate narrow construction that would have precluded recovery under the MSDA. Reliance on the statute for recovery set a precedent with no clear limit to its applicabil-

2. Id. at 321, 835 A.2d at 1188. Recovery efforts include continued legal work designed to ensure collection of the judgment returned. See id. at 319, 835 A.2d at 1187.
4. Pak, 378 Md. at 320-21, 835 A.2d at 1188.
5. Id. at 335-36, 835 A.2d at 1196-97. The Court of Appeals reasoned that the remedy would otherwise be circumvented if such fees were not included because a landlord could appeal or fail to cooperate and overcome the tenant’s ability to pay for legal help in recovery of his or her judgment. Id.
6. See infra notes 160-174 and accompanying text (discussing the invalidity of the court’s application of remedial statute analysis to the MSDA).
7. The American rule represents the common-law rule followed by American courts, including those of Maryland, that requires each litigant to be responsible for their own attorney’s fees. See infra notes 78-84 and accompanying text (discussing the common law regarding attorney’s fees, often referred to by courts and the literature as the American rule).
8. See infra notes 175-214 and accompanying text (discussing the result of a correct statutory analysis of the MSDA).
Instead, recourse should have been provided to Mr. and Mrs. Pak through discovery sanctions under the Maryland Rules.\(^9\)

1. The Case.—

a. Prejudgment Proceedings.—In December 1999, Minh-Vu Hoang filed a complaint in the District Court of Maryland in Montgomery County seeking $25,000 in damages for a breach of lease against Ho and Lisa Pak.\(^11\) The Paks were tenants living in a townhouse owned by Hoang.\(^12\) The case was transferred to the Circuit Court for Montgomery County after the Paks requested a jury trial.\(^13\) After the transfer, the Paks filed counterclaims alleging that Hoang had breached the lease and had violated the MSDA by not returning the Paks' security deposit.\(^14\)

The Paks moved for summary judgment and in July of 2000, the circuit court granted the motion and dismissed with prejudice Hoang's claim that the Paks had broken their lease.\(^15\) On October 31, 2000, after a damages hearing, the circuit court entered judgment against Hoang on the Paks' counterclaims and awarded $7,378.91, which included attorney's fees incurred up until that point, to the Paks.\(^16\)

b. Postjudgment Proceedings.—To recover the judgment, the Paks filed postjudgment discovery motions to which Hoang made no initial response.\(^17\) The Paks then filed a Motion to Compel Answers to Interrogatories and Request for Production of Documents in Aid of Execution, which the circuit court granted on May 23, 2001.\(^18\) Hoang failed to respond to this order, and as a result, the Paks filed a Petition for Civil Contempt and for the Entry of Appropriate Relief two months later.\(^19\) After a hearing on September 20, 2001, the circuit court entered another order requiring Hoang to respond to both the

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9. See infra notes 215-221 and accompanying text (discussing the problems associated with the precedent established by allowing postjudgment fees to be recovered under the statute).
10. See infra notes 222-241 and accompanying text (discussing the application of the Maryland Rules regarding discovery sanctions to Pak).
11. 378 Md. at 318, 835 A.2d at 1186.
12. Id.
13. Id.
14. Id.
15. Id., 835 A.2d at 1186-87.
16. Id. at 318-19, 835 A.2d at 1187.
17. Id. at 319, 835 A.2d at 1187.
18. Id.
19. Id.
interrogatories and the request for documents. Hoang then failed to appear at an October 29, 2001, compliance review hearing. As a result, the circuit court issued a writ of body attachment for Hoang's arrest. Hoang was arrested and released on her own recognizance.

At the circuit court hearing on the Paks' Petition for Civil Contempt on December 6, 2001, the court found Hoang in civil contempt and sanctioned her with thirty days of incarceration subject to a purge provision. At the hearing, the circuit court gave Hoang one month to comply with the contempt order. The Paks also filed a Motion for Supplemental Award of Attorney's Fees from Hoang. The fees and expenses requested covered efforts to satisfy the original judgment and included fees incurred from January 22, 2001, until October 29, 2001, totaling $5,127.44. The Paks relied on the MSDA as the legal basis for their motion, but also argued that the court could award the fees pursuant to its contempt power. The compliance hearing was set for January 14, 2002, to determine if Hoang responded appropriately to the Paks' Motion to Compel Answers to Interrogatories and Request for Production of Documents in Aid of Execution.

At the end of the one month time period within which Hoang had to comply with the contempt order, Hoang delivered a check to the Paks' counsel for the total $7,378.91 originally ordered and all interest then due. Therefore, at the compliance hearing the only outstanding issue was the Paks' Motion for a Supplemental Award of Attorney's Fees. The circuit court denied the Paks' motion for such fees, reasoning, inter alia, that the MSDA did not allow the court to go back and award additional fees when the judgment creditor had difficulty collecting. The circuit court did find, however, that although Hoang had complied with the contempt order she did not do so by

20. Id.
21. Id.
22. Id.
23. Id.
24. Id. According to the purge provision, the incarceration sanction would be removed if Hoang complied with the circuit court's orders. Id.
26. Pak, 378 Md. at 319, 835 A.2d at 1187.
27. Pak, No. 38, slip op. at 2-3.
28. Id. at 3.
29. Pak, 378 Md. at 319, 835 A.2d at 1187.
30. Id.
31. Id. at 320, 835 A.2d at 1187.
32. Id. at 322, 835 A.2d at 1188.
the January 7 deadline.\textsuperscript{33} The circuit court, in announcing its decision, noted:

I think that [appellee's] conduct is reprehensible. I think that she really has done whatever she could to throw roadblocks in the way of the other side. I think that she has defied the orders of this court. She has done a lot of things that I take a very dim view of, and I think that she ought not get away with those things.

\ldots

So, as much as, in fairness, I would like to go ahead and impose a sanction for that contempt \ldots I don't think it would be enforceable.

\ldots I wish there were a greater sanction than that that could be imposed on her. I don't feel that I can.\textsuperscript{34}

The basis of the court's ruling on the motion was lack of power to award fees.\textsuperscript{35}

The Paks appealed the decision to the Court of Special Appeals, arguing for the award of postjudgment fees on several bases.\textsuperscript{36} However, the Court of Special Appeals held that such fees were not available to the Paks under the MSDA,\textsuperscript{37} the courts' contempt power,\textsuperscript{38} or the court's inherent power to impose sanctions for discovery violations.\textsuperscript{39} The Court of Appeals subsequently granted certiorari to decide whether the court had the power to award supplemental attorney's fees.\textsuperscript{40}

2. Legal Background.—A court's decision to grant postjudgment attorney's fees under a statutory reasonable attorney's fees clause implicates several areas of law. First, it requires the court to follow established statutory interpretation practice.\textsuperscript{41} Second, it involves an analysis of the Maryland courts' treatment of attorney's fees generally. In interpreting fee-statutes, Maryland has followed the American rule, which, while allowing for some exceptions, militates against such shift-
Third, should the statute offer little or no authority to grant postjudgment fees, it requires the exploration of other avenues for granting postjudgment attorney's fees, including the use and applicability of sanctions for discovery violations. In particular, sanctions for pretrial discovery violations can also be applied to postjudgment discovery.

a. Statutory Interpretation in Maryland.—Maryland courts follow the “cardinal rule” of statutory interpretation: statutes are interpreted to ascertain and give effect to the intention of the legislature. In interpreting statutes, the Court of Appeals first looks to the words of the statute, giving them their ordinary and natural meaning. In situations in which the ordinary and natural meaning of the statutory provision is unequivocal, courts need not engage in further statutory analysis because unambiguously-worded rules must be read without forcing hidden meanings designed to broaden the application of the statute.

Statutes, however, are not always unequivocal in their language—they can be ambiguous in several ways. In Giant Food, Inc. v. Department of Labor, Licensing & Regulation, the Court of Appeals of Maryland recognized that where a statute can be given more than one meaning, it is ambiguous. In Giant, the court was faced with determining the proper construction of a statute which contained two clauses—“stoppage of work” and “premises”—for which the parties offered differing definitions.

Previously, in Washington National Arena Ltd. Partnership v. Comptroller of the Treasury, the Court of Appeals had set forth another type of ambiguity, specifically concluding that where a statute omits an issue that is within its ambit and is relevant to its purpose, the statute is

42. See infra notes 78-103 and accompanying text.
43. See infra notes 104-133 and accompanying text.
45. Id. at 188-89, 738 A.2d at 860-61 (quoting Brodsky v. Brodsky, 319 Md. 92, 98, 570 A.2d 1235, 1237 (1990)).
46. Id. at 189, 738 A.2d at 861 (stating that when statutes “are clear and unambiguous, no construction or clarification is needed or permitted, it being the rule that a plainly worded statute must be construed without forced or subtle interpretations designed to extend or limit the scope of its operation”) (quoting Tucker v. Fireman’s Fund Ins. Co., 308 Md. 69, 73-75, 517 A.2d 730, 731-32 (1986)).
47. Id. (quoting Tucker, 308 Md. at 73-75, 517 A.2d at 731-32).
48. Id. at 187-88, 738 A.2d at 859-60 (analyzing section 8-1004 of the Labor and Employment Article).
ambiguous on that point. In Washington National Arena, the statute set forth a tax on gross receipts from admissions, but did not address allocation where a given fee included admissions and other services. The court found the statute to be ambiguous as to allocation because of the omission.

Where a statute is ambiguous, the Court of Appeals interprets the statute by considering the literal or usual meaning of the words, as well as their meaning and effect in light of the setting, objectives, and purpose of the enactment. In particular, in Washington National Arena, the court looked at the whole statute and noted that failure to prescribe allocation does not mean that the legislature intended to permit it. When faced with an ambiguous statute in Giant Food, the Court of Appeals stated that it may consider the results of applying one meaning over another and adopt the construction that avoids an unreasonable outcome.

In the court’s analysis of the ambiguous statute in Witte v. Azarian, it addressed one type of unreasonable outcome, stating that statutes in derogation of the common law are strictly construed so as not to make any change in the common law beyond what is expressly stated and necessary. There, the court based its finding on the fact that the statute at issue contradicted a long recognized common-law notion. Recognizing that most statutes change the common law, the court acknowledged that the principle of strict construction bends when there is a clear legislative intent to change the common law. The Witte court, however, did strictly construe the statute because it found that the legislative intent was not clear where there was no clear documentation or discussion of the provision by the legislature.

An examination of the Court of Appeals’s treatment of ambiguous statutory provisions pertaining to punishment is necessary to un-

50. Id. at 375, 519 A.2d at 1279.
51. Id.
52. Id.
53. Giant Food, 356 Md. at 189, 738 A.2d at 861.
54. 308 Md. at 375, 519 A.2d at 1279.
55. 356 Md. at 189, 738 A.2d at 861. Interpretation should avoid “an illogical or unreasonable result, or one which is inconsistent with common sense.” Id. (quoting Tucker v. Fireman’s Fund Ins. Co., 308 Md. 69, 73-75, 517 A.2d 730, 731-32 (1986)).
57. Id. at 533-34, 801 A.2d at 169-70.
58. Id. at 533, 801 A.2d at 169. The statute governed the qualification of an expert to a required certificate of merit in a malpractice claim and as a result restricted the pursuit of such common-law claims. Id.
59. Id.
60. See id. at 533-36, 801 A.2d at 169-71.
derstand the punitive attorney's fees provision of the MSDA. In analyzing ambiguous statutes that mete out punishments for violations, Maryland courts generally construe such statutory punishments in favor of the defendant. This general rule, termed the rule of lenity, has been followed by the Court of Appeals to require strict construction of punitive statutes to avoid punishment not contemplated by the legislature. The rule of lenity applies to statutory offenses.

The Supreme Court of the United States has allowed postjudgment attorney's fees in certain situations. In Pennsylvania v. Delaware Valley Citizens' Counsel for Clean Air, the Court held that attorney's fees could be awarded under the Clean Air Act (CAA) for legal work involving administrative proceedings crucial to the vindication of the Citizens' Counsel's rights under a consent decree because the efforts were ordinarily necessary to ensure compliance with the judgment. In that case, the Court based its holding on the common purpose of the CAA—to promote citizen enforcement of important federal policies. Specifically, the Court found that Congress enacted the CAA to encourage citizen enforcement of the standards and regulations established in the CAA. The Court further relied on its determination that the purpose behind the fee-shifting provision of the CAA was similar to that of the Civil Rights Act where Congress believed that many legitimate claims would not be redressed unless reasonable attorney's fees could be awarded for bringing these actions. The Court also relied on clearly stated legislative intent that the attorney's fees provide citizens broad opportunities to become involved in the effort to promote clean air. The fee award upheld by the Supreme Court was based on fees incurred in administrative proceedings designed to uphold a consent decree. According to the Court, the proceedings

61. See Gargliano v. State, 334 Md. 428, 437, 639 A.2d 675, 679 (1994) (finding that when there is doubt concerning a penalty, a milder one will be preferred over a harsher one). The court will not increase a penalty when such an interpretation can be based on no more than a guess as to legislative intent. Monoker v. State, 321 Md. 214, 222, 582 A.2d 525, 529 (1990).
62. Gargliano, 334 Md. at 437, 639 A.2d at 679.
63. Monoker, 321 Md. at 223, 582 A.2d at 529.
64. 478 U.S. 546 (1986).
65. Id. at 561 (stating that postjudgment attorney's fees were appropriate when "'useful and of a type ordinarily necessary' to secure the final result obtained from litigation") (quoting Webb v. Bd. of Educ., 471 U.S. 234, 243 (1985)).
66. Id. at 560.
67. Id.
68. Id.
69. Id.
70. Id. at 561.
were necessary to ensure continuing and ongoing compliance with the consent decree.\textsuperscript{71}

Other courts, including the United States Court of Appeals for the Eighth Circuit, have similarly allowed recovery of reasonable postjudgment attorney's fees in certain situations.\textsuperscript{72} For example, the Eighth Circuit awarded postjudgment attorney's fees in \textit{Jenkins v. Missouri}, where the court stated that providing attorney's fees was important to ensure enforcement of civil rights awards.\textsuperscript{73} Like \textit{Delaware Valley}, \textit{Jenkins} also dealt with attorney's fees incurred in ongoing monitoring of a court's decree and not the mere recovery of a judgment.\textsuperscript{74} The federal cases have involved situations where the government has widely stated the importance of private enforcement for the good of all and have largely been related to civil rights and other basic rights.\textsuperscript{75} In addition, the federal cases where the courts awarded postjudgment fees have generally involved ordinary and necessary ongoing monitoring of court orders.\textsuperscript{76}

\textbf{b. Maryland Courts Follow the American Rule with Respect to Fee-Shifting, While Allowing for Limited Exceptions.---}When faced with ambiguous statutes, Maryland courts have looked to the common law in an effort to discover legislative intent.\textsuperscript{77} In doing so, Maryland has followed the common-law rule against fee-shifting called the American rule, while allowing for statutory exceptions. The American rule influences statutory construction of fee-shifting by providing some indication of legislative intent, since statutes in derogation of the common law are often given limited construction in the absence of a clear indication that the legislature intended otherwise.

\textsuperscript{71} \textit{Id}.

\textsuperscript{72} \textit{See}, \textit{e.g.}, \textit{Jenkins v. Missouri}, 127 F.3d 709, 717 (8th Cir. 1997) (allowing for attorney's fees incurred in monitoring the defendant's compliance with court orders).

\textsuperscript{73} \textit{Id.} at 718.

\textsuperscript{74} \textit{Id}.

\textsuperscript{75} \textit{See}, \textit{e.g.}, \textit{Balark v. Curtin}, 655 F.2d 798, 803 (7th Cir. 1981) (emphasizing that "Congress has determined that attorneys' fees are necessary to fulfill the purposes of the civil rights laws by transferring the costs of litigation to those who infringe upon basic civil rights").

\textsuperscript{76} \textit{See}, \textit{e.g.}, \textit{Ass'n for Retarded Citizens of N.D. v. Schafer}, 83 F.3d 1008, 1010-11 (8th Cir. 1996) (stating that it is "generally accepted that prevailing plaintiffs are entitled to post-judgment fee awards for legal services necessary for reasonable monitoring of the decree").

\textsuperscript{77} \textit{See} \textit{Witte v. Azarian}, 369 Md. 518, 533, 801 A.2d 160, 169 (2002) (discussing the relationship between the common law and construction of ambiguous statutes and finding that the common law relevant to an ambiguous statute influences the finding of legislative intent).
The American rule, as applied in Maryland, makes litigants responsible for their own attorney’s fees. While Maryland courts have not always referred to it as the American rule, the Court of Appeals in Caffrey v. Department of Liquor Control noted that the American rule has been referred to in the court’s jurisprudence as far back as the beginning of the twentieth century. Specifically, the Caffrey court observed that the common-law principles underlying the American rule were recited in 1909 in McGaw v. Acker, Merrall & Condit Co., which discussed the principles based on a case from 1854. The Court of Appeals in Caffrey presumed that the legislature understood the generally accepted proposition that the courts rarely shift counsel fees when it passed a statute in 1941 that included a fee-shifting provision. The Caffrey court held that the legislature’s failure to include a provision in the statute at issue for the recovery of attorney’s fees indicated its intent not to allow the recovery.

The Court of Appeals has not strictly followed the American rule in all circumstances; instead, it has allowed for limited exceptions. When deciding whether the jury can consider attorney’s fees in calculating punitive damages in St. Luke Evangelical Lutheran Church, Inc. v. Smith, the Court of Appeals acknowledged the American rule and noted that it prevented the prevailing party from recovering attorney’s fees as an element of damages. Exceptions to the rule that attorney’s fees incurred by the prevailing litigant are not recoverable as compensatory damages against the losing party are quite rare. Yet the court in St. Luke allowed an exception, holding that reasonable attorney’s fees may be considered by the jury in cases in which punitive damages are appropriate. The St. Luke court also noted several

80. Id. at 294, 805 A.2d at 281.
82. 370 Md. at 293-94, 805 A.2d at 280-81 (citing Wallis v. Dilley, 7 Md. 237, 249 (1854)).
83. Id. The Caffrey court also noted that “nowhere in this country have statutorily-fixed attorney’s fees been revised to keep pace with the fall in the value of money. Such legislative reluctance to keep pace suggests that the principle of full compensation for litigation expenses never firmly took hold in this country.” Id. at 293, 805 A.2d at 280 (quoting St. Luke Evangelical Lutheran Church, Inc. v. Smith, 318 Md. 337, 344, 568 A.2d 35, 38 (1990)).
84. Id. at 295, 805 A.2d at 281. The American rule therefore restrained the court’s fee-shifting finding. Id.
85. 318 Md. at 344, 568 A.2d at 38.
87. 318 Md. at 339, 568 A.2d at 36.
other exceptions, stating that counsel fees may be awarded when: (1) parties to a contract include a fee-shifting provision; (2) there is statutory authority for imposing such fees; (3) the defendant’s wrongful conduct forces the plaintiff into litigation with another party; and (4) a plaintiff must defend against a malicious suit.88

The MSDA provides for the recovery of attorney’s fees and as a result is an exception to the American rule.89 The MSDA establishes the parameters under which landlords may require and hold security deposits from tenants.90 The MSDA specifically sets forth a tenant’s recourse when a landlord withholds the security deposit91 and further states, “[i]f the landlord, without a reasonable basis, fails to return any part of the security deposit . . . the tenant has an action of up to threefold of the withheld amount, plus reasonable attorney’s fees.”92 The statute does not make any reference to postjudgment fees.93

Furthermore, the punishment clause (threefold damages and reasonable attorney’s fees) is only triggered when the court decides that the landlord withheld the security deposit without a reasonable basis.94 The MSDA authorizes attorney’s fees in conjunction with a threefold damages award.95 The court has concluded that in Maryland, a statutory award of attorney’s fees serves as a legislative instrument for punishing wrongful conduct.96 Therefore, the punitive damages of the MSDA, including the recovery of attorney’s fees and threefold damages were designed to punish individuals for their violation of the statute.97

The court has, to some extent, interpreted legal-fee statutes with the underlying rationale that statutory fee-shifting is punitive. For example, the Court of Appeals in Rohrbaugh v. Estate of Stern concluded that the threefold damages clause of the MSDA is punitive in nature.98 In Rohrbaugh, the court held that the landlord unreasonably withheld a portion of the security deposit and that the threefold damages were

88. Id. at 345-46, 568 A.2d at 39.
89. See id. (noting that counsel fees may be awarded under an express statutory provision).
91. Id. § 8-203(e).
92. Id. § 8-203(e)(4).
93. Id.
95. Real Prop. § 8-203(c)(4).
97. See id. (stating that the attorney’s fees clause of the MSDA was a punishment).
98. 305 Md. at 449, 505 A.2d at 116.
intended to punish the egregiousness of the violation of the statute—that is, to punish the landlord's conduct in withholding the excessive amount of security deposit.  

The Court of Appeals of Maryland has not yet ruled on the idea of postjudgment attorney's fees under a statutory exception to the American rule. It has, however, in one case, alluded to the idea. In addressing the appropriateness of a jury determination of attorney's fees under a statute similar to the MSDA, the court in *Admiral Mortgage, Inc. v. Cooper* held that the remedial statute's reasonable attorney's fees should be determined by a judge, not a jury. It based its reasoning on the fact that judges would be better able to determine reasonable fees since such fees might continue to accrue if post-trial motions or appeals are filed. In noting that postjudgment fees are relevant to the determination of attorney's fees, the court implied that the initial grant of attorney's fees could take into account likely postjudgment efforts.

c. The Court of Appeals Has Used Sanctions to Award Attorney's Fees.—In addition to awards pursuant to specific statutory exceptions, attorney's fees may also be awarded for discovery violations. The Court of Appeals has employed sanctions under the discovery rules to punish wrongful or bad faith conduct. In particular, the sanctions allow for fee-shifting as a response to discovery violations. While sanctions are generally applied to pretrial discovery, the Maryland courts have applied the discovery rules in postjudgment situations as well.

Noncompliance with discovery orders are discovery violations addressed by Maryland Rule 2-433 and the available sanctions are set

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99. *Id.* at 451, 505 A.2d at 117.


101. *Admiral Mortgage, Inc.*, 357 Md. at 547, 745 A.2d at 1033.

102. *Id.* at 547-48, 745 A.2d at 1033.

103. *Id.*


105. See *infra* notes 113-124 and accompanying text (discussing the use of sanctions to punish discovery violations).


107. See *infra* notes 129-133 and accompanying text (discussing the situation in which discovery rules were applied in a postjudgment situation).
Rule 2-433 allows a circuit court to impose sanctions if it finds a failure to comply with an order compelling discovery. The possible sanctions for the failure to comply may include, but are not limited to, reasonable expenses, including attorney's fees. Moreover, the Court of Special Appeals has held that Maryland Rule 2-433 provides trial courts broad discretion to impose sanctions for discovery violations even in the absence of a specific rule describing the violation.

In addressing discovery violations, the Court of Appeals in *Lynch v. R.E. Tull & Sons, Inc.* determined that a trial court is not limited in its authority to impose sanctions to situations where it finds willful or contumacious behavior involving violations of Maryland discovery rules. Dismissal or entry of a default judgment may also be appropriate on other occasions. In *Lynch*, however, the Court of Appeals upheld a default judgment finding that a five-month delay in discovery responses was so flagrant that it was willful. The Maryland courts have dismissed cases for other similar discovery failures. For example, the Court of Special Appeals held in *Rubin v. Gray*, that failing to respond to interrogatories may warrant dismissal. In *Rubin*, the court found that the dilatory party ignored several attempts to obtain answers to propounded interrogatories and, furthermore, ignored prescribed dates for compliance.

The variety of circumstances in which courts may impose sanctions for discovery violations do not always require formal motions to

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109. *Id.* at 444, 746 A.2d at 973.
110. *Id.*
112. *Wilson*, 130 Md. App. at 444, 746 A.2d at 973. The *Wilson* court stated that:

Maryland case law teaches that merely because a specific discovery failure is not covered expressly by the sanctions rule, in and of itself, does not mean that the rule is inapplicable. When the conduct of a party or a deponent technically does not constitute a failure to abide by the rules of discovery, the court nevertheless may have rule-based sanctions authority, under Rule 2-433.

*Id.*
114. *Id.* at 261, 247 A.2d at 286-87.
115. *Id.*
116. *Id.* at 261-62, 247 A.2d at 287.
118. *Id.* at 401, 370 A.2d at 602 ("[A] failure to respond to interrogatories as a deliberate stall is a sufficiently flagrant abuse to justify dismissal.").
119. *Id.* at 400-01, 370 A.2d at 601-02.
be made under the rules. For example, the Court of Appeals, in Broadwater v. Arch, held that judges have the authority, under the discovery rules, to impose sanctions on their own motion without the request of a party to the suit. Specifically, the court held that when there is a problem with the response to interrogatories, a trial court may deal with the inadequacy by imposing sanctions sua sponte within the framework of the Maryland discovery rules. Furthermore, in Wilson v. N.B.S., Inc., the Court of Special Appeals noted that a court may have rule-based sanction authority under Rule 2-433 to sanction conduct that does not technically violate discovery rules.

The Maryland courts have frequently held that sanctions for non-compliance with discovery orders are at the discretion of the trial judge. However, in certain instances, a trial court’s failure to fashion at least some remedy to alleviate the resulting injury constitutes an abuse of discretion. In Bartholomee v. Casey, the Court of Special Appeals found an abuse of discretion where the court allowed the plaintiffs to present evidence that contradicted their responses to interrogatories. Specifically, the court held that a failure to supplement interrogatories substantially prejudiced the opponent’s defense and that the court should have fashioned a remedy.

In Maryland, discovery sanctions and rules created for prejudgment discovery apply to postjudgment discovery as well. The Court of Special Appeals in Melnick v. New Plan Realty Trust addressed this issue in a case involving postjudgment discovery proceedings designed to aid enforcement against a money judgment debtor. In Melnick, the court held that implicit in Maryland Rule 2-633, which governs postjudgment discovery in aid of enforcement, is the power and authority of the pretrial discovery procedures. The court reasoned that the policy considerations behind the discovery procedures are the same for prejudgment and postjudgment discovery and are thus

121. Id.
122. Id.
124. Id. at 444, 746 A.2d at 973.
125. See, e.g., Broadwater, 267 Md. at 336, 297 A.2d at 674 (stating that the trial court has discretion over sanctions for violations of the discovery rules).
127. Id. at 50, 651 A.2d at 915.
128. Id.
130. Id. at 436, 598 A.2d at 788.
131. See id. at 438, 598 A.2d at 789 (discussing the relationship between postjudgment discovery and the Title 2 prejudgment discovery rules and procedures).
necessary for both types of discovery.\textsuperscript{132} As a result, the finding in \textit{Melnick} allows the remedy for noncompliance with postjudgment discovery requests and orders to be addressed by the provisions of the discovery sanctions in the discovery rules, specifically Maryland Rule 2-433.\textsuperscript{133}

3. \textit{The Court's Reasoning}.—In \textit{Pak v. Hoang}, the Court of Appeals held that the circuit court has the power to award supplemental attorney's fees incurred in enforcing a judgment rendered under the MSDA and for appeals defending a judgment under the statute.\textsuperscript{134} Writing for the majority,\textsuperscript{135} Judge Cathell limited the basis for the court's analysis and finding to just one of the four questions presented by the Paks on appeal—whether the circuit court has the authority to award supplemental attorney’s fees pursuant to the MSDA in an effort to enforce a judgment entered pursuant to that Act.\textsuperscript{136} The court decided that it need not address the other questions presented for appellate review, including whether the circuit court could have awarded supplemental, postjudgment attorney’s fees under the Maryland Rules which govern discovery violations.\textsuperscript{137} Instead, the court found that the attorney's fees incurred when seeking to recover the judgment through filing postjudgment motions and appeals can be included in an expanded definition of the reasonable attorney's fees remedy of the MSDA.\textsuperscript{138}

In considering whether the MSDA gives courts the authority to award postjudgment attorney's fees, the Court of Appeals interpreted the MSDA and ultimately found that the MSDA is remedial in nature.\textsuperscript{139} The court then reasoned that the remedial nature of the MSDA requires liberal construction.\textsuperscript{140} That construction, in turn, allowed the Court of Appeals to conclude that the trial court had the authority under the MSDA to award postjudgment attorney's fees to

\begin{itemize}
\item \textsuperscript{132} \textit{Id.} ("The policy considerations for these discovery procedures have remained the same and are necessary during postjudgment as well as pre-trial proceedings.").
\item \textsuperscript{133} \textit{Id.} at 438, 598 A.2d at 788-89 (citing Price v. Orrison, 261 Md. 8, 9-10, 273 A.2d 183, 183 (1971)).
\item \textsuperscript{134} \textit{Pak}, 378 Md. at 321, 835 A.2d at 1188.
\item \textsuperscript{135} Judge Cathell was joined by Chief Judge Bell and Judges Eldridge, Wilner, Harrell, and Battaglia. \textit{Id.} at 317, 337, 835 A.2d at 1186, 1197.
\item \textsuperscript{136} \textit{Id.} at 321, 835 A.2d at 1188.
\item \textsuperscript{137} \textit{Id.} at 320, 835 A.2d at 1187. The other questions offered for review included whether the circuit court had the authority to award supplemental attorney's fees pursuant to a court's inherent powers or incident to its contempt powers. \textit{Id.} at 320, 835 A.2d at 1187-88.
\item \textsuperscript{138} \textit{Id.} at 321, 835 A.2d at 1188.
\item \textsuperscript{139} \textit{Id.} at 328, 835 A.2d at 1192.
\item \textsuperscript{140} \textit{Id.}
\end{itemize}
ensure the tenants’ rights regarding the return of their security deposit as described in the statute.  

The court first engaged in statutory interpretation to ultimately find that the MSDA was remedial in nature. Relying on the court’s definition of a remedial statute as one that, among other things, (a) provides a remedy or improves or facilitates remedies already existing, and (b) relates to practice, procedure, or remedies, the court reasoned that the MSDA provides a remedy to tenants who believe their landlord has failed to appropriately return their security deposit. The punitive damages remedy, clear procedure, and timeline set forth in the MSDA convinced the Pak court of the remedial nature of the statute, which favored the grant of postjudgment attorney’s fees.

Next, the court found that the liberal interpretation of remedial statutes provides courts with the authority to expansively interpret a statute to give effect to the remedial purpose, which in this case allowed the court to award postjudgment attorney’s fees. The Pak court relied on precedent to support its use of liberal construction of the MSDA in an effort to give effect to its remedial purpose. The court reasoned that prohibiting recovery of postjudgment attorney’s fees under the MSDA might preclude the tenant’s right to fully recover. The court also relied on an extrapolation of dicta from a prior case to support its argument that remedial statutes allowing for

141. Id. at 322, 835 A.2d at 1189.
142. Id. at 326-28, 835 A.2d at 1191-92.
143. Id. at 325-26, 835 A.2d at 1190.
144. Id. at 328, 336, 835 A.2d at 1192, 1197.
145. Id. at 327, 336, 835 A.2d at 1191-92, 1197. The Court of Appeals acknowledged that the punitive measure, capped at threefold the withheld amount of the security deposit, demonstrated the legislature’s concern for the tenant’s rights against landlords. Id. at 327-28, 835 A.2d at 1192. The court continued, and found that the legislature included the threefold damages clause in an effort to deal with the difficulties tenants have in seeking the return of their security deposit from difficult landlords. Id.
146. See id. at 328-29, 835 A.2d at 1192-93 (reasoning that liberal construction of the MSDA would allow the term “reasonable attorney’s fees” to include fees incurred postjudgment).
147. Id. at 326, 835 A.2d at 1191 (citing Caffrey v. Dep’t of Liquor Control, 370 Md. 272, 306, 805 A.2d 268, 288 (2002)). The court further supported its holding with its interpretation of federal fee-shifting cases and cases from other states. See generally id. at 331-36, 835 A.2d at 1194-96. The Pak court relied on several federal cases in which postjudgment attorney’s fees were granted. Id. at 331, 835 A.2d at 1194. The majority emphasized several cases where these fees were granted in response to efforts necessary for monitoring consent decrees. Id.
148. Id. at 329, 835 A.2d at 1192 (“An interpretation excluding postjudgment attorney’s fees from [the MSDA] during a tenant’s direct attempt to enforce collection of a judgment against such a landlord . . . might effectively defeat the tenant’s right to fully recover from the landlord.”).
recovery of attorney’s fees might also allow for recovery of fees incurred in postjudgment efforts.\textsuperscript{149}

In her dissent, Judge Raker argued that the MSDA does not provide the court with the authority to grant postjudgment attorney’s fees.\textsuperscript{150} She reasoned that Hoang’s highly objectionable conduct was not, by itself, a violation of the MSDA and that the Paks had already recovered the fees permissible under the MSDA.\textsuperscript{151} Judge Raker determined that this situation should be controlled by the general rule regarding attorney’s fees, which suggests that an award of attorney’s fees and other litigation expenses may not be granted by the court unless specific statutory provisions, or a contract between the parties, provide for them.\textsuperscript{152}

In addition, Judge Raker argued that the remedial nature of the statute did not require liberal construction, which would include recovery of attorney’s fees to enforce the judgment under the phrase “reasonable attorney’s fees.”\textsuperscript{153} She reasoned, without further explanation, that the majority’s finding significantly expands the definition of fee-shifting without sufficiently limiting its applicability.\textsuperscript{154}

4. Analysis.—In Pak v. Hoang, the Court of Appeals determined that the MSDA was remedial in nature and that such statutes are to be liberally construed.\textsuperscript{155} In applying a liberal construction, the court held that the clause in section 8-203(e)(4) of the MSDA allowing for the recovery of reasonable attorney’s fees includes supplemental, postjudgment, attorney’s fees.\textsuperscript{156} The court’s application of a liberal construction to the statute was inappropriate\textsuperscript{157} and has established a precedent whereby the threshold required for granting attorney’s fees is significantly lowered in contravention of the long-established common-law American rule that militates against fee-shifting. Proper stat-

\textsuperscript{149} See id. at 330, 835 A.2d at 1193 (finding that the court had earlier “recognized that remedial statutes providing for attorney’s fees might encompass post-judgment fees”) (referring to Admiral Mortgage, Inc. v. Cooper, 357 Md. 533, 745 A.2d 1026 (2000)). In its discussion, the court noted that the case was only somewhat similar and acknowledged that it was relying on dicta. Id.

\textsuperscript{150} See Pak, 378 Md. at 337, 835 A.2d at 1197 (Raker, J., dissenting) (stating that the respondent’s conduct in the recovery phase was not a violation of the MSDA).

\textsuperscript{151} Id. (Raker, J., dissenting). The dissent noted that the Paks had already recovered counsel fees under the Act and explicitly highlighted the absence of other provisions supporting the recovery of additional fees under the Act. Id. (Raker, J., dissenting).

\textsuperscript{152} Id. (Raker, J., dissenting).

\textsuperscript{153} Id. (Raker, J., dissenting).

\textsuperscript{154} Id. (Raker, J., dissenting).

\textsuperscript{155} Id. at 328, 835 A.2d at 1192.

\textsuperscript{156} Id. at 328-29, 835 A.2d at 1192.

\textsuperscript{157} Id. at 337, 835 A.2d at 1197 (Raker, J., dissenting).
utory construction, instead, suggests that the statute does not provide for recovery of fees incurred postjudgment.\textsuperscript{158} Furthermore, the court overlooked the application of discovery sanctions, which it could have used to achieve the same result—granting postjudgment attorney’s fees to the Paks—without ignoring the American rule.\textsuperscript{159}

\textit{a. The Pak Court Inadequately Supported Its Interpretation of the MSDA.—}In order to reach its holding, that the MSDA allows for postjudgment attorney’s fees, the court set aside commonly accepted rules of statutory construction. Furthermore, the court inadequately supported its holding with dicta from Maryland cases and distinguishable federal case law. The Pak court began its analysis by addressing statutory interpretation precedent in Maryland, but ultimately failed to conduct a proper analysis of legislative intent. The court replaced an ambiguous-statute analysis with a remedial-statute analysis, merely mentioning ambiguity when it noted that the MSDA was silent on postjudgment attorney’s fees, but going no further.\textsuperscript{160} The court thus restricted its analysis to an assumption that the legislature, once it intends a statute to be remedial, intends the broadest interpretation to effect that purpose.\textsuperscript{161} The court did not even cursorily address any countervailing evidence of legislative intent.\textsuperscript{162} Specifically, the court did not discuss the common law regarding fee-shifting in Maryland\textsuperscript{163} and it failed to address the absence of any postjudgment language in the statute or to properly assess that ambiguity.

In addition, the court failed to cite case law to support its finding that the MSDA, or any other Maryland statute, could provide for postjudgment attorney’s fees.\textsuperscript{164} The court admitted that the only Maryland case it cited, \textit{Admiral Mortgage, Inc.}, had a tenuous relationship to Pak.\textsuperscript{165} The court relied on dicta in \textit{Admiral Mortgage, Inc.} that

\begin{itemize}
\item \textsuperscript{158} See infra notes 175-214 and accompanying text (discussing the result of a proper interpretation of the MSDA).
\item \textsuperscript{159} See infra notes 222-241 and accompanying text (discussing the applicability of discovery violation sanctions).
\item \textsuperscript{160} Pak, 378 Md. at 324, 835 A.2d at 1190.
\item \textsuperscript{161} See id. at 336, 835 A.2d at 1197 (finding that, even though the MSDA is silent on postjudgment attorney’s fees, the remedial nature of the statute necessitates their availability).
\item \textsuperscript{162} See generally id. (omitting any discussion of other evidence of legislative intent exclusive of that which flows from a finding that the statute is remedial in nature).
\item \textsuperscript{163} See generally id. (omitting any general discussion of fee-shifting in Maryland or the adherence to the American rule).
\item \textsuperscript{164} See generally id. (citing just one Maryland case where postjudgment attorney’s fees were even mentioned).
\item \textsuperscript{165} See id. at 330, 835 A.2d at 1193 (qualifying the applicability of \textit{Admiral Mortgage, Inc. v. Cooper}, 357 Md. 533, 745 A.2d 1026 (2002) by stating that the case was “somewhat similar
merely suggested that attorney’s fees might continue to accrue after a verdict.\textsuperscript{166} From this dicta, however, the court implied that Maryland courts may allow postjudgment fees under a “reasonable attorney’s fees” statutory provision.\textsuperscript{167}

Moreover, the \textit{Pak} court mistakenly relied on the federal case law it cited in support of statutory postjudgment attorney’s fees in that the cases favoring such fees involved statutes where the legislative intent focused on the importance of easing citizen enforcement, which is linked to postjudgment efforts. The \textit{Pak} court correctly noted that the provision for attorney’s fees of the CAA discussed in \textit{Delaware Valley} is similar to that of the MSDA, in that it allows for the recovery of “reasonable attorney’s fees.”\textsuperscript{168} The \textit{Pak} court, however, failed to recognize that the Supreme Court granted such fees because it found that the clear intent of the statute was to encourage and facilitate private enforcement of the CAA.\textsuperscript{169} Furthermore, the \textit{Pak} court failed to recognize that \textit{Jenkins} allowed postjudgment fees because that case involved the protection of civil rights, a consideration not presented in \textit{Pak}.\textsuperscript{170} While the postjudgment attorney’s fees in \textit{Jenkins} were necessary to adequately enforce important civil rights,\textsuperscript{171} the \textit{Pak} court did not offer an explanation as to why the government’s interest in protecting tenant rights necessitated postjudgment attorney’s fees—in fact, it undercut such an argument by noting the effect of the threefold damages clause.\textsuperscript{172}

The \textit{Pak} court also failed to recognize that the federal cases were inapplicable to \textit{Pak} because those cases granted postjudgment fees when legal work for ongoing monitoring of compliance with the courts’ orders was necessary and ordinary.\textsuperscript{173} In the federal cases cited by \textit{Pak}, the postjudgment efforts taken in private enforcement of a judicial decree were determined to be ordinarily necessary to ensure

\footnotesize{\textsuperscript{166} Id. at 330-31, 835 A.2d at 1193-94.  
\textsuperscript{167} Id. at 331, 835 A.2d at 1194.  
\textsuperscript{168} See id. at 331-33, 835 A.2d at 1194-95; Pennsylvania v. Del. Valley Citizens’ Council for Clean Air, 478 U.S. 546, 560 (1986); 42 U.S.C. § 7604 (d) (2000). The act states: “The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.” § 7604(d).  
\textsuperscript{169} Compare Pak, 378 Md. at 331-33, 835 A.2d at 1194-95, with \textit{Del. Valley}, 478 U.S. at 560.  
\textsuperscript{170} Jenkins v. Missouri, 127 F.3d 709, 718 (8th Cir. 1997); see supra note 73 and accompanying text.  
\textsuperscript{171} Jenkins, 127 F.3d at 718; see supra notes 74-75 and accompanying text.  
\textsuperscript{172} See infra note 184 and accompanying text (discussing the fact that the threefold damages already serve to help adequately enforce the judgment).  
\textsuperscript{173} See, e.g., \textit{Del. Valley}, 478 U.S. at 561.
compliance with the CAA and the judicial consent decree. In contrast, the postjudgment efforts here cannot be considered to be ordinarily necessary to ensure the result obtained from litigation because Hoang's reprehensible behavior hindering recovery was far from ordinary. The Pak court should have found that the continued monitoring required in Pak is not ordinarily necessary; normally the judgment debtor in a simple security deposit recovery case has no complicated settlement or court order to follow which necessarily requires additional legal work.

b. Proper Statutory Analysis Suggests That the MSDA Should Not Have Been Used to Recover Postjudgment Attorney's Fees.—In interpreting the MSDA the Pak court ignored the traditional rule for statutory interpretation reiterated by the court in Giant Food, requiring that the court first look at the plain language of the MSDA, giving the words their natural and ordinary meaning. The Court of Appeals, in Pak, correctly recognized that the language of the MSDA subsection (e) (4) does not define "reasonable attorney's fees," and as a result does not explicitly mention postjudgment fees. The court, however, failed to properly assess the effect of the omission—that it allows for two possible interpretations of the statute; reasonable attorney's fees either (1) include postjudgment fees or (2) do not include postjudgment fees. The omission thus renders the statute ambiguous as two interpretations are plausible.

The Pak court should have acknowledged, as it did in Washington National Arena, that a failure to proscribe a possible interpretation of a statute does not mean that the legislature intended that interpretation. The Pak court ignored the fact that the omission of any reference to postjudgment fees in the MSDA merely represents a failure to proscribe such attorney's fees and did not recognize that the legislature did not necessarily intend to permit them.

Given the ambiguity, the court should have considered the meaning of the term "reasonable attorney's fees" in light of the objectives

174. Id.
176. Id. at 189, 738 A.2d at 861.
177. Pak, 378 Md. at 336, 835 A.2d at 1197.
178. See Washington Nat'l Arena Ltd. P'ship v. Comptroller of Treasury, 308 Md. 370, 375, 519 A.2d 1277, 1279 (1987) (deeming a statute that omits an issue that is within its ambit and is relevant to its purpose to be ambiguous).
179. See id.
180. See id.
and purposes of the statute.\textsuperscript{181} While the Pak court correctly ascertained the purpose of the MSDA, it erroneously held that postjudgment attorney’s fees were necessary to effectuate its goals. The judicial addition of recovery for postjudgment fees to the reasonable attorney’s fees clause was redundant given that postjudgment attorney’s fees can be achieved through other parts of the statute. The court noted that the legislature already implicitly included postjudgment attorney’s fees by including the threefold damages clause.\textsuperscript{182} The Pak court also recognized that the mere existence of a threefold damage clause demonstrates that the legislature acknowledged the difficulties tenants may have in getting landlords to return their security deposits.\textsuperscript{183} Furthermore, the court correctly stated that those difficulties include recovery, a difficulty the court acknowledged tenants consider when deciding whether to sue. The court improperly relied on each of these observations to support its remedial statute analysis when the observations more appropriately support the idea that the allowance for recovery of threefold damages already serves to counterbalance the difficulties in recovering security deposits without the need for supplemental, postjudgment attorney’s fees.\textsuperscript{184} Since the MSDA has already addressed the difficulty of recovery with the threefold damages, the judicial addition of the absent provision for postjudgment attorney’s fees was unnecessary and thus contrary to proper statutory interpretation as described in Giant Food, which cautioned against interpreting statutes in a manner that created unreasonable results.\textsuperscript{185} Given that the majority’s conclusion that the threefold damages clause eases the difficulty of recovery, it is superfluous to include postjudgment fees to achieve the same ends. The court should not have read an omission into the statute where the purpose of the omitted language was already addressed.\textsuperscript{186}

\textsuperscript{181} See Giant Food, Inc., 356 Md. at 189, 738 A.2d at 861 (solving an ambiguity by looking at the words of the statute in light of the objectives and purpose of the statute).

\textsuperscript{182} Pak, 378 Md. at 327, 835 A.2d at 1192.

\textsuperscript{183} Id. at 327-28, 835 A.2d at 1192.

\textsuperscript{184} See id. ("[T]he statute’s imposition of attorney’s fees recognizes the problem [tenants have in bringing suit] and addresses it by allowing for an additional remedy for tenants."). As such, the legislature has already explicitly worked to remedy the difficulty of recovery without explicitly providing for postjudgment attorney’s fees.

\textsuperscript{185} See Giant Food, 356 Md. at 189, 738 A.2d at 861 (finding that interpretation should avoid results that are inconsistent with common sense).

\textsuperscript{186} See id. (finding that interpretation of ambiguous terms should be conducted in light of the statute’s purpose). Where the purpose is satisfied without an expansive interpretation, such an interpretation is unnecessary and thus contrary to the rules of statutory interpretation.
The Pak court’s failure to recognize the importance of the noted ambiguity led the court to ignore prior case law that shed light on the MSDA’s objectives and purpose. The Pak court ignored the relevance of its finding in Rohrbaugh, which suggested that the award of postjudgment attorney’s fees should not be granted under the MSDA. In Rohrbaugh, the court observed that the wrongful conduct for which the MSDA provides the remedy of attorney’s fees is the withholding of the security deposit without a reasonable basis. Rohrbaugh suggests that including the fees incurred postjudgment would go beyond the legislative intent to punish that withholding. The Pak court failed to apply Rohrbaugh when it granted attorney’s fees that were incurred as a result of the separate and distinct act of neglecting to comply with the circuit court’s ruling and subsequent orders regarding its judgment. Therefore, the court should have concluded that the recovery of postjudgment attorney’s fees incurred in recovery efforts was beyond the legislative purpose of the MSDA.

Furthermore, the Pak court ignored the applicability of the principles underlying the rule of lenity regarding ambiguous punishments in its analysis of the MSDA’s “reasonable attorney’s fees” clause. Ordinarily, courts apply the rule of lenity to criminal law. However, the Pak court failed to recognize that its principles can also apply to civil punishment statutes. The rule of lenity in Maryland applies to ambiguous punitive measures, but the Pak court failed to recognize the connection between its finding in Rohrbaugh, that the threefold damages and attorney’s fees contained in the MSDA are punitive in nature, and its finding in the present case that the application of

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188. See Rohrbaugh v. Estate of Stern, 305 Md. 443, 505 A.2d 113 (1986) (stating that the damages of the MSDA were for the wrongful withholding of the security deposit).

189. Id.

190. Pak, No. 38, slip op. at 8 (stating that noncompliance with a postjudgment discovery order is a discovery violation, not a violation of the MSDA).

191. See Gargliano v. State, 334 Md. 428, 437, 639 A.2d 675, 679 (1994) (holding that the rule of lenity requires that ambiguous statutory punishments be construed in favor of the defendant).


194. Gargliano, 334 Md. at 437, 639 A.2d at 679.

the punitive "reasonable attorney's fees" clause in the MSDA is ambiguous.\textsuperscript{196}

The \textit{Pak} court should have followed the principles underlying the rule of lenity, which requires that an ambiguous statute be interpreted in favor of the defendant, and narrowly construed the "reasonable attorney's fees" clause.\textsuperscript{197} Specifically, such an analysis requires that a court not interpret a statute to increase the penalty that it places on an individual when there is some doubt as to the punishment imposed by a statute.\textsuperscript{198} The \textit{Pak} court should not have allowed for postjudgment fees because increasing the attorney's fees recoverable under the MSDA would increase the punishment beyond the threefold damages explicitly stated in the statute.\textsuperscript{199} While the court in \textit{Pak} noted that the damages section of the MSDA does not plainly include postjudgment attorney's fees,\textsuperscript{200} it ignored its holding in other cases that "the rule of lenity forbids the extension of punishment 'to cases not plainly within the language' of the statute."\textsuperscript{201} Application of the principles underlying the rule of lenity to \textit{Pak} would limit the award of attorney's fees to those that were incurred in the initial prosecution of the case.\textsuperscript{202}

Finally, in assessing the ordinary and natural meaning of the reasonable attorney's fees clause, the court ignored the influence of the common law on its statutory interpretation. The \textit{Pak} court ignored the common-law American rule which should have influenced its construction of the fee-shifting MSDA by providing an indication of legislative intent. Adherence to the American rule would have caused the \textit{Pak} court to narrowly interpret the fee-shifting because statutes in derogation of the common law are often given limited construction in the absence of a clear indication that the legislature intended otherwise.\textsuperscript{203}

\textsuperscript{196} See \textit{Pak}, 378 Md. at 324, 835 A.2d at 1190-91 (mentioning the possible ambiguous nature of the MSDA).

\textsuperscript{197} See \textit{Gargiulano}, 334 Md. at 437, 639 A.2d at 679 (finding that where there is doubt concerning a penalty, a milder one will be preferred over a harsher one).

\textsuperscript{198} \textit{Id}.

\textsuperscript{199} \textit{Id.} (finding that a court should not interpret a statute so as to increase the penalty it placed on an individual where the punishment is ambiguous).

\textsuperscript{200} \textit{Pak}, 378 Md. at 336, 835 A.2d at 1197.


\textsuperscript{202} See \textit{Rohrbaugh v. Estate of Stern}, 305 Md. 443, 451, 505 A.2d 113, 117 (1986) (finding that the punitive damages of the MSDA are based on the withholding of the security deposit).

\textsuperscript{203} The American rule refers to the common-law rule against fee shifting; see supra notes 78-103 and accompanying text (discussing the American rule and its exceptions).
The Pak court should have concluded that the legislature intended a limited construction of the term "reasonable attorney's fees" because the Maryland Court of Appeals has historically adhered to the American rule, limiting fee-shifting. An expansive definition of reasonable attorney's fees runs contrary to the court's reluctance to allow fee-shifting in general. Since the court, in Caffrey, assumed that the legislature understood the common-law American rule in 1941, the Pak court should have found that the same Maryland legislature, in passing the predecessor to the MSDA initially in 1957, was still aware of Maryland's adherence to the American rule and of the court's reluctance to award such fees. The court should have recognized the legislature's knowledge of the underlying common-law rule against fee-shifting and the legislature's decision to omit a provision in the MSDA explicitly stating that postjudgment attorney's fees be included in the term "reasonable attorney's fees." Based on these realizations the court should have found that the legislature did not intend to allow for the recovery of postjudgment fees under the MSDA.

The court should have found that the term "reasonable attorney's fees," while a statutory exception to the American rule, should be narrowly construed because the MSDA does not expressly allow the recovery of postjudgment attorney's fees. The Pak court should have acknowledged its finding in St. Luke, where the court recognized that an exception to the American rule is allowed where there is statutory authority for imposing fee-shifting. In so proceeding, the Pak court should have also noted that statutory exceptions to the American rule are quite rare and that such an exception is allowed only where a statute expressly allows the recovery of attorney's fees. The Pak court should have noted that there is statutory authority for fee-shift-

204. See Caffrey v. Dep't of Liquor Control, 370 Md. 272, 295, 805 A.2d 268, 281 (2002) (failing to include "reasonable attorney's fees" suggested that the legislature did not intend to allow them because allowing them ran contrary to the court's reluctance to award attorney's fees).


206. See Caffrey, 370 Md. at 294, 805 A.2d at 281 (discussing the legislature's awareness of the Maryland courts' adherence to the American rule in enacting an earlier statute).

207. See supra notes 78-84 and accompanying text.

208. See Pak, 378 Md. at 324, 835 A.2d at 1190-91.


ing in the MSDA and that it should be limited because the MSDA does not expressly allow for postjudgment attorney’s fees.\textsuperscript{212}

The court should have narrowly interpreted the MSDA because statutory fee-shifting, as an exception to the American rule, runs contrary to common law. The Pak court should have followed the precedent it set in Witte, in which it held that statutes which overlap with and contradict common law should be strictly construed.\textsuperscript{213} As such, the court should have construed the MSDA strictly to avoid changing the common-law American rule on attorney’s fees beyond what is expressly stated and supported by legislative intent.\textsuperscript{214} In conducting that strict construction, the court should not have presumed that the MSDA did not intend any change other than that which it clearly pronounced. Under the rationale in Witte, the legislative intent to change the common law requires clear documentation. In Pak, however, the legislature did not explicitly include postjudgment fees; therefore, the Pak court’s interpretation of “reasonable attorney’s fees” should have been limited to what was clearly announced, leaving fees incurred pursuant to efforts to recover the judgment unrecoverable under the statute.

c. By Allowing Postjudgment Attorney’s Fees Under the MSDA, the Court Set a Precedent with No Clear Limit to Its Applicability.—The Pak court’s extension of “reasonable attorney’s fees” under the MSDA to include those fees incurred postjudgment to aid recovery results in an unnecessary expansion of fee-shifting with no clear limit to its applicability.\textsuperscript{215} By improperly interpreting the statute, the court applied a liberal construction to the MSDA in order to bring postjudgment attorney’s fees within the ambit of its meaning and the authority it grants.\textsuperscript{216} In so doing, the court set a precedent whereby all statutory fee-shifting remedies can be used to obtain postjudgment attorney’s fees.\textsuperscript{217}

The holding of the Pak court is not tied to the factual underpinnings of the case—that Hoang defied court orders and undermined the initial judgment—but is instead tied to a liberal statutory interpre-

\textsuperscript{212} See Pak, 378 Md. at 324, 835 A.2d at 1190-91.

\textsuperscript{213} See Witte v. Azarian, 369 Md. 518, 533, 801 A.2d 160, 169 (2002) (finding that statutes in derogation of the common law are strictly construed so as not to make any change in the common law beyond what is expressly stated and necessary).

\textsuperscript{214} See id.

\textsuperscript{215} Pak, 378 Md. at 337, 835 A.2d at 1197 (Raker, J., dissenting).

\textsuperscript{216} See id. at 336, 835 A.2d at 1196.

\textsuperscript{217} See id. at 337, 835 A.2d at 1197 (Raker, J., dissenting).
tation of the term "reasonable attorney's fees." As a result, the court opened the door to the possibility of a postjudgment creditor obtaining attorney's fees from a postjudgment debtor who cooperates. Taken to the extreme, the court's holding would allow Pak to obtain punitive damages amounting to threefold the withheld amount, pre-judgment attorney's fees, and postjudgment attorney's fees for interrogatories designed to discover Hoang's ability to pay, even if Hoang complied with the court order. The court should have held that the threefold damages of the MSDA already address such ordinary postjudgment efforts because the legislature, by including the punitive measure, acknowledged that tenants have difficulty in recovering their security deposit. Since the threefold damages take into account some difficulty in suing and recovering, a court's decision not to provide postjudgment fees under the statute does not, as the majority suggests, make the MSDA meaningless. If that were the case, all judicial decisions which did not later allow for postjudgment fees would render the statutory remedy meaningless and such a conclusion strains reason.

d. The Court Ignored the Applicability of Discovery Sanctions as a Means to Allow for Recovery of Postjudgment Attorney's Fees.—The Pak court could have granted postjudgment fees under the Maryland discovery rules, but chose instead to ignore their applicability. The court should have applied discovery rule sanctions to avoid the problems inherent in expanding the definition of the statutory damages clause regarding reasonable attorney's fees.

While the Court of Appeals may not frequently impose sanctions for discovery violations and in fact may rely on the trial court's assessment, the Pak court ignored a record replete with evidence of the lower court's desire to punish Hoang and to use the Maryland Rules to allow for the recovery of postjudgment attorney's fees incurred dur-

218. See generally id. at 336, 835 A.2d at 1196-97 (basing its granting of postjudgment attorney's fees on its interpretation of the statute, not the defendant's behavior).
219. See id. (stating simply, and without providing any limitation, that reasonable attorney's fees under the MSDA may include postjudgment fees incurred so that the remedy is not rendered meaningless).
220. See id. at 327, 835 A.2d at 1192 (acknowledging that the threefold damages clause is designed to offset the difficulties ordinarily encountered by tenants seeking return of their security deposits).
221. See id. at 336, 835 A.2d at 1197.
222. Md. R. 2-433 (authorizing the imposition of sanctions based upon a failure to comply with an order compelling discovery).
223. See Pak, 378 Md. at 321, 835 A.2d at 1188.
224. See infra notes 236-241 and accompanying text.
ing efforts to recover the judgment. While trial courts have discretion in applying sanctions for discovery violations, the denial here came from a perceived lack of power to do so, not a decision within the court's discretion that discovery sanctions did not apply. The Pak court, however, correctly acknowledged that Hoang did not comply with the purge provision's requirements for production. As such, the Pak court was not constrained by the trial court's failure to impose sanctions. Moreover, the Pak court should have followed Broadwater, in which the court upheld sanctions, imposed sua sponte, for a delay in answering interrogatories.

The Pak court should have recognized that the Maryland Rules applied because Hoang's failure to comply was not a violation of the MSDA, but was instead a violation of the Maryland Rules governing discovery. While the MSDA punishes the retention of security deposits withheld without a reasonable basis, the problem in Pak was not that through the willful delay Hoang would effectively render the MSDA remedy meaningless (thus requiring a strengthening of the statute), but instead it was that through the willful delay Hoang would effectively render the court's decision meaningless (thus requiring a strengthening of the court's decision). As a result, the court should have instead found that Hoang's noncompliance with a postjudgment discovery order was a discovery violation.

Furthermore, the Pak court should have recognized that the Maryland Rules represent a viable exception to the American rule as attorney's fees may be awarded for discovery violations. While discovery rules ordinarily govern pretrial discovery, the court in Pak should have applied the reasoning of the Court of Special Appeals in Melnick, which determined that the circuit court may apply discovery

225. Pak, No. 38, slip op. at 6. The constrained circuit court stated: "[I]n fairness, I would like to go ahead and impose a sanction for that contempt . . . I don't think it would be enforceable . . . . I wish there were a greater sanction than that could be imposed on her. I don't feel that I can." Id. at 5.
226. Id. at 5.
227. Pak, 378 Md. at 319, 835 A.2d at 1187.
229. See Rohrbaugh v. Estate of Stern, 305 Md. 443, 505 A.2d 113 (1986) (stating that the damages of the MSDA were for the wrongful withholding of the security deposit).
230. See Pak, No. 38, slip op. at 8 (stating that "[n]oncompliance with a post-judgment discovery order is a discovery violation, not a violation of the Security Deposit Act").
231. See id.
sanctions under the authority granted by Maryland Rule 2-433 to postjudgment discovery violations.235

By applying discovery rule 2-433 to this situation, the court would have held that Hoang’s behavior was sufficiently willful to merit sanctions because Hoang’s failure to respond to Pak’s Motion to Compel Answers to Interrogatories and Request for Production of Documents in Aid of Execution is a violation of the rule.234 Furthermore, the court’s sanction for this failure, under the rule, could have included attorney’s fees.235

Moreover, even if the failure to respond was not mentioned specifically in a rule, application of the finding in Wilson suggests that the Pak court could still have granted sanctions including attorney’s fees.236 Based on Hoang’s dilatory behavior and the circuit court’s finding that Hoang willfully hindered recovery,237 the Court of Appeals should have followed the precedent it set in Lynch, in which a default judgment was upheld because the lower court found that the delay was willful and granted postjudgment attorney’s fees under the Maryland Rules as a sanction for discovery violations.238 In Pak, Hoang refused to answer interrogatories adequately for almost a year,239 far longer than the delay in Lynch240 and similar to the behavior in Rubin, both of which resulted in dismissals upheld on appeal.241 It is axiomatic that granting attorney’s fees is a less harsh sanction than dismissal or imposition of a default judgment. It would have been appropriate for the Pak court to impose a sanction under Maryland Rule 2-433 requiring Hoang to pay reasonable postjudgment attorney’s fees. This use of discovery sanctions would have avoided the expansion of fee-shifting associated with the Pak court’s interpretation of the MSDA.

236. See Wilson, 130 Md. App. at 444, 746 A.2d at 973; see also supra note 112 and accompanying text.
237. See supra note 34 and accompanying text.
239. Pak, 378 Md. at 319-22, 835 A.2d at 1187-88.
240. See supra note 116 and accompanying text (finding a five-month delay in completing discovery responses warranted a dismissal).
241. See supra notes 117-119 and accompanying text (discussing the defendant’s behavior in Rubin v. Gray, 35 Md. App. 399, 370 A.2d 600 (1977)).
5. Conclusion.—In Pak v. Hoang, the Court of Appeals held that the MSDA was remedial in nature and thus applied a liberal construction of the term “reasonable attorney’s fees” to hold that postjudgment attorney’s fees are included within its meaning. The court misapplied the rules of statutory interpretation and, in so doing, failed to narrowly interpret the statute because it ignored the relevance of its finding that the statute was ambiguous as to postjudgment fee-shifting. The court failed to recognize that while the common-law American rule allows for some exceptions, the exception in the case at bar, given the general reluctance to allow such fee-shifting, should not be broadly interpreted beyond what is clearly stated by the legislature. In finding that the statute was remedial, the court ignored the factual underpinnings of the case and set a precedent for the meaning of attorney’s fees that will allow all statutory fee-shifting clauses to include postjudgment fees regardless of the other party’s behavior. To avoid this outcome, the Court of Appeals should have clarified the authority of the circuit court by holding that the circuit court has the authority to apply sanctions based on discovery violations outlined in the Maryland Rules of Civil Procedure. Had it done so, the Court of Appeals could have not only punished Hoang’s reprehensible behavior, but also set a more appropriate limited standard for granting postjudgment attorney’s fees.

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242. Pak, 378 Md. at 336, 835 A.2d at 1197.
243. See supra notes 175-202 and accompanying text.
244. See supra notes 204-207 and accompanying text.
245. See supra notes 215-221 and accompanying text.
246. See supra notes 222-241 and accompanying text.
II. CONTRACTS

A. A Narrow Construction of the State's "Moral Obligation" at Contract

In Stern v. Board of Regents, the Court of Appeals of Maryland considered whether sovereign immunity barred an action against the Board of Regents of the University System of Maryland alleging that eleven State colleges and universities breached contracts with their students by increasing the price of tuition for the Spring 2003 semester after the semester had begun. The court held that the alleged contracts did not meet the requirements of section 12-201(a) of the State Government Article, which waives the State's sovereign immunity in actions arising from written contracts executed by duly authorized State officials. Narrowly construing section 12-201(a) to avoid diluting the doctrine of sovereign immunity, the court determined that the statute is unambiguously limited to written contracts signed by an authorized State official. Finding tuition bills and registration materials bearing university seals insufficient to satisfy this signature requirement, the court concluded that section 12-201(a) did not waive the State's immunity from the students' suit.

In concluding that section 12-201(a) is unambiguous, the court failed to recognize that the plain language of the statute yields at least two reasonable interpretations and thus satisfies the court's own definition of an ambiguous statute. Instead of holding that the text of section 12-201(a) unambiguously imposes a signature requirement that it does not explicitly articulate, the court should have examined other indicia of legislative intent. In declining to do so, the court ignored a body of compelling evidence that the legislature did not intend to limit the scope of section 12-201(a) to contracts signed by individual State officials. Finally, in a break with precedent, the court strictly construed section 12-201(a) wholly without reference to the statute's underlying purpose—to bind the state to its moral obligations at con-

2. Id. at 694, 846 A.2d at 998-99.
4. 380 Md. at 726, 846 A.2d at 1016.
5. Id. at 722, 846 A.2d at 1013-14.
6. Id. at 722-23, 846 A.2d at 1014.
7. See infra notes 183-215 and accompanying text.
8. See infra notes 216-244 and accompanying text.
9. See infra notes 216-245 and accompanying text.
10. See infra notes 250-262 and accompanying text.
tract—thus improperly elevating its own policy of disfavoring sovereign immunity waivers above the will of the legislature.11

1. The Case.—Based on its August 2001 budget, the Board of Regents (Board) of the University System of Maryland12 (USM) approved tuition rates for the 2002-2003 school year.13 During the Fall 2002 semester, the USM institutions distributed registration materials for the Spring 2003 semester with tuition pricing.14 Toward the end of the Fall 2002 semester, students who had followed the proper registration procedures received tuition bills for the Spring 2003 semester that reflected the prices advertised in the registration materials and listed due dates ranging from December 17, 2002, to January 31, 2003.15 A majority of students paid their bills in full before the due dates.16

When the state budget crisis began to escalate in the Fall of 2002, the presidents of the USM institutions and the Board met to discuss the possibility of budget cuts and various methods for absorbing them.17 In addition to a mid-year tuition increase, the Board discussed hiring freezes, staff furloughs, and the termination of certain operating expenses.18 On November 20, 2002, the Board learned that it would have to cut $30.4 million from its fiscal year 2003 budget, but decided not to raise tuition at that time.19 On December 23, 2002, after learning that an additional $36.6 million in budget cuts for fiscal year 2003 was probable, the Board called a special meeting to consider the possibility of a mid-year tuition increase for the Spring 2003 semester.20 The Board also prepared a letter to inform students that

11. See ch. 450, 1976 Md. Laws 1180, 1181 (preamble) (declaring that the State is morally obligated to fulfill its contractual obligations and that sovereign immunity is no longer appropriate in certain contract actions).
12. The Board of Regents sets forth the policies and regulations of the eleven institutions comprising the University System of Maryland, namely: University of Maryland, Baltimore; University of Maryland Baltimore County; University of Maryland, College Park; University of Maryland Eastern Shore; University of Maryland University College; Bowie State University; Coppin State College; Frostburg State University; Salisbury University; Towson University; and University of Baltimore. Md. Code Ann., Educ. §§ 12-101(b)(4), 12-102 (2004).
13. Stern, 380 Md. at 697-98, 846 A.2d at 999. The Board slightly increased these rates in May 2002 to reflect its actual budget allocation from the General Assembly. Id. at 698, 846 A.2d at 999.
14. Id. at 698, 846 A.2d at 1000.
15. Id.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 699, 846 A.2d at 1000.
an imminent tuition increase was possible.\textsuperscript{21} The letter was mailed to the USM institutions on January 8, 2003.\textsuperscript{22} Each institution sent the letter to its students promptly thereafter.\textsuperscript{23}

On January 17, 2003, Governor Ehrlich confirmed the additional $36.6 million in budget cuts.\textsuperscript{24} The Board met on January 23, 2003, and authorized the USM institutions to increase tuition for the Spring 2003 semester up to five percent,\textsuperscript{25} even though the semester had begun and tuition deadlines had passed.\textsuperscript{26} All but two institutions chose to increase tuition.\textsuperscript{27}

A group of students from the nine institutions that elected to raise tuition for the Spring 2003 semester filed suit in the Circuit Court for Baltimore City alleging breach of contract,\textsuperscript{28} equitable estoppel, and a violation of the Maryland Consumer Protection Act (CPA).\textsuperscript{29} The students also filed a motion for a temporary restraining order and a preliminary injunction to enjoin the imposition of the tuition increase.\textsuperscript{30} Shortly thereafter, the students moved to certify their suit as a class action.\textsuperscript{31}

The circuit court denied the students' motion for a preliminary injunction but promptly scheduled a hearing on the merits.\textsuperscript{32} After a hearing, the circuit court granted the Board's motion for summary judgment, holding that any contract between the students and their respective institutions would have to be an implied contract and that

\begin{itemize}
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Id.
  \item \textsuperscript{23} Id.
  \item \textsuperscript{24} Id.
  \item \textsuperscript{25} Id. at 699, 846 A.2d at 1001. The presidents of USM institutions are vested with the power to set tuition and fees subject to the authority of the Board. \textit{Md. Code Ann., Educ.} § 12-109(e)(7) (2004).
  \item \textsuperscript{26} Brief of Appellants at 9-10, Stern v. Board of Regents, 380 Md. 691, 846 A.2d 996 (2004) (No. 476).
  \item \textsuperscript{27} Stern, 380 Md. at 699 n.8, 846 A.2d at 1001 n.8. Coppin State College and the University of Maryland University College did not increase tuition. \textit{Id.}
  \item \textsuperscript{28} Id. at 694, 846 A.2d at 997-98. The students argued that their tuition bills established an express contract between the students and the University. Brief of Appellants at 14, 32, Stern (No. 476). The bills reflected the names of the parties to be bound by the contract (i.e., the student and the institution), the educational services to be provided, the price for the semester, the due date for payment, and the penalty for late payment. \textit{Id.}
  \item \textsuperscript{29} Stern, 380 Md. at 694, 846 A.2d at 997-98. The complaint named the Board of Regents, Chancellor William E. Kirwan, and David Ramsey, President of the University of Maryland, Baltimore as defendants. \textit{Id.}, 846 A.2d at 998.
  \item \textsuperscript{30} Id. at 694-95, 846 A.2d at 998.
  \item \textsuperscript{31} Id. at 695, 846 A.2d at 998.
  \item \textsuperscript{32} Id.
\end{itemize}
implied contracts are barred by sovereign immunity. The students then filed a notice of appeal to the Court of Special Appeals. The Court of Appeals, on its own initiative, granted a writ of certiorari to consider whether sovereign immunity bars a breach of contract claim against the Board for a mid-year tuition increase.

2. Legal Background.—The doctrine of sovereign immunity has operated as a bar to suits against the State of Maryland for well over a century. By the 1960s, however, the General Assembly took the position that the doctrine often unjustly barred valid claims, and in 1976 enacted a statute, now codified at section 12-201(a) of the State Government Article, waiving the State’s defense of sovereign immunity in certain contract actions. The Court of Appeals has long acknowledged the cardinal rule that statutes must be interpreted to effectuate the intent of the legislature. To this end the court must look first to the plain language of the statute, giving its words their ordinary and natural meaning, and look to other indicia of legislative intent only where the plain language is ambiguous. In addition, the court has at different times applied the canon that statutes in derogation of the

33. Id. The circuit court also ruled that the students’ equitable estoppel and CPA counts could not be asserted against a state agency. Id. The day after the circuit court granted the Board’s summary judgment motion, the students filed a motion to alter or amend, requesting a ruling on the merits of their motion for declaratory and injunctive relief. Brief of Appellants at 4 Stern (No. 476). After a hearing, the circuit court denied the students’ motion, concluding that although sovereign immunity did not bar the students’ claim for declaratory and injunctive relief and that a quasi-contract likely existed between the students and the University, the University’s breach was reasonable under the circumstances. Id. at 4-5; Stern, 380 Md. at 696, 846 A.2d at 998-99.

34. Stern, 380 Md. at 696, 846 A.2d at 999.


36. Stern, 380 Md. at 696-97, 846 A.2d at 999. The students did not raise the equitable estoppel or CPA issues on appeal. Id. The Board filed a cross-appeal challenging the circuit court's ruling that sovereign immunity did not bar the students’ claim for declaratory and injunctive relief. Id. at 697, 846 A.2d at 999.


38. See Md. H.J. Res. 49, 1968 Sess. (asserting that sovereign immunity often capriciously and unjustly bars recovery for valid claims).


common law must be directly construed, and the countervailing canon that remedial statutes are to be liberally construed. Where a statute is both remedial and in derogation of the common law, courts must exercise care not to construe the statute so narrowly as to perpetuate the injustice it was enacted to remedy. With respect to section 12-201(a) specifically, the court has upheld the view that as a statutory waiver of sovereign immunity, section 12-201(a) must be strictly construed to avoid diminishing the doctrine by judicial fiat and to comport with the principle that statutes in derogation of the common law must be strictly construed. The court has also held that the waiver created by section 12-201(a) is limited to contracts that State officials execute with "actual authority."

a. Maryland's Common-Law Doctrine of Sovereign Immunity.—The doctrine of sovereign immunity has been firmly established in Maryland since the late nineteenth century. Rooted in the English common-law principle that the king cannot be sued in his own courts without his consent, the doctrine prevented interference with governmental functions and the public treasury. Thus, the court has held that all State agencies and instrumentalities performing government functions are entitled to sovereign immunity from suit. It is

44. See infra note 113 and accompanying text.
45. See infra notes 110-118 and accompanying text.
46. See infra notes 121-127 and accompanying text.
48. See Alden v. Maine, 527 U.S. 706, 715 (1999) (noting the English common-law origins of sovereign immunity); Katz, 284 Md. at 507, 397 A.2d at 1030 (noting that the doctrine of sovereign immunity is rooted in the notion that "the king can do no wrong"); Godwin v. County Comm'nrs of St. Mary's County, 256 Md. 326, 330-34, 260 A.2d 295, 297-99 (1970) (tracing the doctrine from its origins in English common law to its adoption in Maryland).
49. See Alden, 527 U.S. at 715-16 (noting that sovereign immunity was a matter of profound interest for the early American states, who were deep in debt following the Revolution and fearful of suit); Md. State Highway Admin. v. Kim, 353 Md. 313, 333, 726 A.2d 238, 248 (1999) (noting that the doctrine of sovereign immunity operates to protect the State from interference with governmental functions and maintain its control over the state treasury) (citing Katz, 284 Md. at 507, 397 A.2d at 1030).
50. Katz, 284 Md. at 507, 397 A.2d at 1030; Godwin, 256 Md. at 334, 260 A.2d at 299. While entitled to immunity in tort, counties and municipalities have been regularly subject to suit in contract actions since 1862. Baltimore County v. RTKL Assoc., Inc., 380 Md. 670, 675, 846 A.2d 433, 436 (2004).
well established that Maryland’s public colleges and universities are State agencies for sovereign immunity purposes.\(^{51}\)

\(b\). Legislative History of Maryland’s Statutory Waiver of Sovereign Immunity in Contract Actions.—In 1976, the General Assembly enacted Maryland’s first statutory waiver of sovereign immunity.\(^{52}\) Now codified in sections 12-201 through 12-204 of the State Government Article, the Act announced the State’s consent to be sued in contract actions, subject to certain limitations.\(^{53}\) The statute was the culmination of a seven-year movement in the legislature to abrogate the doctrine of sovereign immunity.

By the late 1960s, sovereign immunity had become disfavored for unjustly allowing State and local governments to escape accountability for their actions.\(^{54}\) In 1974 and 1975, the legislature passed bills abrogating the State’s sovereign immunity in contract actions,\(^{55}\) but the Governor vetoed them because they did not address the issue of negligence claims masquerading as contract actions, neglected to preserve the defense of unauthorized contracts, and failed to adequately provide for funds to pay judgments.\(^{56}\) In 1976, the Governor’s Commission to Study Sovereign Immunity (hereinafter “Commission”), which

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\(^{51}\) See Md. Code Ann., Educ. § 12-102(a)(2), (4) (2004) (providing that the University is a State instrumentality which exercises an essential public function); Frankel v. Bd. of Regents of Univ. of Md. Sys., 361 Md. 298, 301, 761 A.2d 324, 325 (2000) (recognizing the University of Maryland as a unit of the State government for sovereign immunity purposes).


\(^{53}\) Id. The General Assembly has subsequently enacted additional statutes waiving sovereign immunity, most notably, the Maryland Tort Claims Act, which waives the defense of sovereign immunity in certain tort actions. Md. Code Ann., State Gov’t § 12-104 (2004). Other waivers include section 12-104 of the Education Article, which authorizes Maryland’s public universities to sue and be sued under certain circumstances, Md. Code Ann., Educ. § 12-104 (2004), and section 13-901 of the Tax General Article, which authorizes refund claims against the state by claimants who erroneously pay the state a fee or charge greater than is legally payable. Md. Code Ann., Tax-Gen. § 13-901 (2004).


\(^{55}\) Md. H.B. 5, 1974 Sess.; Md. H.B. 1672, 1975 Sess. Two bills waiving the State’s immunity had been introduced previously but failed to gain the approval of both houses. Md. S.B. 651, 1969 Sess. (proposing constitutional amendment waiving defense of sovereign immunity in any suit against State or local governmental unit except as provided by law); Md. H.B. 1119, 1973 Sess. (waiving sovereign immunity in any contract action).

the Governor organized a year earlier, released an interim report noting that in the forty-five states that had abrogated sovereign immunity in contract actions, the fiscal impact of doing so had been negligible. The Commission found that this minimal impact was due, in part, to the various statutory limitations these states placed on their waivers. Approximately three months after the Commission's interim report was issued, the Governor signed into law House Bill 885, which had been introduced by Commission member Delegate Joseph E. Owens. Citing in a preamble the legislature's belief that the State is under a "moral obligation" to fulfill its contractual duties, the new law enacted a conditional waiver of sovereign immunity in contract actions. The statute, codified at section 10A of Article 41, incorporated the following limitations, each of which had been highlighted in the Commission Report for successfully limiting the impact of abrogation in other states: (1) limiting liability to written contracts; (2) limiting liability to contracts executed by a state official acting within the scope of the official's authority; (3) preserving immunity from punitive damages; and (4) limiting liability to claims within one year from the later of the date on which the claim arose or the date on which the contract was completed. The law also required the Governor to allocate adequate funds in the state budget for the satisfaction of judgments. With the passage of House Bill 885, Maryland joined thirty-one other states that had abrogated sovereign immunity in contract actions as of 1976.

57. The Commission was initially appointed in 1968 but ceased activities due to an apparent lack of funding. RTKL Assoc., Inc., 380 Md. at 680, 846 A.2d at 439.
58. COMMISSION REPORT, supra note 56, at J-2.
59. Examples of these limitations included: limitations on time to assert claims, id. at 64-65, 72, 78-79, 88-91 (Alabama, Arizona, Arkansas, Illinois, Minnesota, Montana, Oregon, Pennsylvania, South Carolina, South Dakota); liability only on written contracts, id. at app. A-29 (New Mexico); no liability on implied contracts, id. at 78 (Kansas); liability only on claims arising from contracts made by agencies within the scope of their authority, id. at 88-90; app. A-29 (New Mexico, Oregon); no liability for exemplary or punitive damages, id. at 79, 88-90 (Montana, Oregon); no liability for interest on judgments, id. at 79 (Montana); no liability for attorneys fees, id. (Montana); requiring plaintiffs to exhaust their administrative remedies, id. at 79, 80-81 (Montana, Nevada); and appropriating funds to satisfy judgments, id. at app. A-27 (New Jersey).
63. Id. § 10A(A)-(C).
64. Id. § 10A(D).
65. According to the Governor's Commission, the following states had adopted statutes or constitutional provisions abrogating governmental contract immunity: Alaska, Arizona, California, Delaware, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mex-
The scope of the waiver came into question following the addition of Article 21 to the Maryland Code in 1980. The Act that created Article 21, titled "State Procurement of Supplies, Services, and Construction," transferred the statutory waiver of contract immunity codified at Article 41, section 10A of the Maryland Code to sections 7-101 through 7-104 of the new Article 21. While the language of the contract immunity statute remained largely unmodified, with the exception of some minor style changes and the re-designation of the statute's subsections, the "definitions" subtitle of the new article defined "contract" as "every agreement entered into by a State agency for the procurement of supplies, services, construction, or any other item . . . ."

Three years later, in *Q C Corp. v. Maryland Port Administration*, the Maryland Port Administration (MPA) invoked the defense of sovereign immunity in an action to enforce a lease, arguing that the re-codification of the contract immunity waiver at Article 21 effectively limited the waiver to actions arising from procurement contracts. Because leases are not procurement contracts, the MPA contended that the plaintiff's claim was barred by sovereign immunity. The Court of Special Appeals rejected the MPA's argument, noting that both the Governor's Commission and the General Assembly intended for Chapter 450 to establish a broad waiver of immunity. Because nothing in the legislative history of Article 21 suggested that the legislature intended to modify the waiver of contract immunity adopted in 1976, the court concluded that the General Assembly was unaware that transferring the statute might subject it to the narrow definition of "contract" that appeared in Article 21. In addition, the court noted that its holding was confirmed by House Bill 1684, which repealed the section of the code that purportedly limited the waiver to procurement contracts. The bill also restored sections 12-202

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67. Id.
70. 68 Md. App. at 184-85, 188, 510 A.2d at 1103, 1105.
71. *Id.* at 188, 510 A.2d at 1105.
72. *Id.* at 190, 510 A.2d at 1106.
73. *Id.* at 190-91, 510 A.2d at 1106.
through 12-204 of the same article to nearly the same form the contract immunity waiver embodied in 1976.\textsuperscript{75} The restored section 12-201(a), which has not changed since House Bill 1684 became effective in 1986, reads in relevant part as follows:

§ 12-201. Sovereign immunity defense barred.
(a) Except as otherwise expressly provided by a law of the State, the State, its officers, and its units may not raise the defense of sovereign immunity in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1 of its units while the official or employee was acting within the scope of the authority of the official or employee.\textsuperscript{76}

c. Statutory Interpretation.—The Court of Appeals has long upheld the cardinal rule that statutes must be interpreted to determine and effectuate the intent of the legislature.\textsuperscript{77} Because the statute itself is the best evidence of legislative intent,\textsuperscript{78} the first step in interpreting a statute is to examine the plain language of the statutory text, giving words their ordinary and natural meaning.\textsuperscript{79} In ascertaining a word's natural meaning, the court often consults a dictionary.\textsuperscript{80} Dictionary definitions, however, are not determinative and are used


\textsuperscript{76} See Md. Code Ann., State Gov't § 12-201(a) (2004). Section 12-201(b) reads in its entirety: "Exclusions.—In an action under this subtitle, the State and its officers and units shall have the immunity from liability described under § 5-522(d) of the Courts and Judicial Proceedings Article." That section provides that "in a contract action under Title 12, Subtitle 2 of the State Government Article, the State and its officers and units are not liable for punitive damages." Cts. & Jud. Proc. § 5-522 (2004). Sections 12-202 and 12-203 read as follows:

§ 12-202. Limitation on claims.
A claim under this subtitle is barred unless the claimant files suit within 1 year after the later of:
(1) the date on which the claim arose; or
(2) the completion of the contract that gives rise to the claim.

§ 12-203. Budget request to satisfy judgments.
To carry out this subtitle, the Governor shall include in the budget bill money that is adequate to satisfy a final judgment that, after the exhaustion of the rights of appeal, is rendered against the State or any of its officers or units.


\textsuperscript{78} In re Adoption/Guardianship No. CCJ14746, 360 Md. 634, 641, 759 A.2d 755, 759 (2000).

\textsuperscript{79} Holbrook, 364 Md. at 364, 772 A.2d at 1245-46.

\textsuperscript{80} See State Dep't of Assessments & Taxation v. Md.-Nat'l Capital Park & Planning Comm'n, 348 Md. 2, 14, 702 A.2d 690, 696 (1997) (noting that the court often consults dictionaries when interpreting the ordinary and natural meaning of statutory text).
merely as an aid in ascertaining the legislature's intent. All pertinent parts of the text are to be given meaning to the extent possible, and no part of the law is to be rendered surplusage or meaningless unless there is a clear indication to the contrary.

The Court of Appeals has often declined to find implied requirements in a statute that the legislature could have explicitly included had it intended to do so—a disposition consistent with the axiom that the court may not substitute its judgment for that of the legislature. In *Blind Industries and Services of Maryland v. Maryland Department of General Services*, for example, the court considered whether a statute requiring State entities to buy supplies and services that Blind Industries provided also required State entities to buy services Blind Industries did not ordinarily offer but had the ability to provide. In concluding that it did require such, the court noted that had the legislature intended such an interpretation, "it undoubtedly would have said so; the statute very easily could have included the phrase, 'or may in the future provide.'" In *In re Douglas P.*, the court similarly rejected the petitioner's argument that Maryland's child abuse statute is limited to adult offenders, reasoning that if the legislature intended to impose such a limitation, it would have done so explicitly, as it had in other statutes.

Where the plain language is ambiguous the court may then look beyond the language of the statute. The court has defined an am-

82. Chen v. State, 370 Md. 99, 106, 803 A.2d 518, 522 (2002). A clear illustration of the canon against surplusage is provided in *Hyle v. Motor Vehicle Administration*, 348 Md. 143, 702 A.2d 760 (1997). There, the court considered whether the absence of a "person" qualified to administer a breath test to a drunk driving suspect satisfied a statutory provision allowing a blood test to be administered in the absence of suitable breath test "equipment." *Id.* at 145, 702 A.2d 760-61. In overturning the administrative law judge's holding that the term "equipment," as used in the statute, included a "person" qualified to administer a breath test, the court noted that if "equipment" encompassed "person," there would have been no need for the statute to require elsewhere a report both identifying the "qualified person" who administered the test and stating whether the test was performed with approved "equipment." *Id.* at 150, 702 A.2d at 763. In other words, one of the two subsections would have been rendered surplusage. *Id.*
84. 371 Md. 221, 808 A.2d 782 (2002).
86. 371 Md. at 223, 808 A.2d at 783.
87. *Id.* at 235, 808 A.2d at 790.
89. *Id.* at 393 & n.3, 635 A.2d at 430 & n.3.
ambiguous statute as one that can be reasonably interpreted more than one way. In such cases, the court takes the second step of consulting other indicia of the statute's underlying legislative intent. Some commonly consulted sources of insight into legislative intent include the statute's legislative history, amendments made to the statute's predecessor bills as they passed through the legislature, changes to the statute after its initial enactment, the practical and legal implications of competing constructions, titles and preambles, and sources of information available to the legislature when drafting the statute, including commission reports.

The court has also looked to legislative purpose to aid in the interpretation of a statute once it is deemed ambiguous. In Derry v. State, however, the court looked to the legislative purpose of the statute at issue, even though it had declared the statute unambiguous. The plain language of a statute should not be read "in a vacuum," the court explained, but with reference to its underlying legislative purpose. Derry thus supports the alternative view that a court need not necessarily deem a statute ambiguous to draw properly from legislative purpose in interpreting a statute.

Where statutory language is deemed ambiguous, the manner in which the statute alters existing law may also guide the court's interpretation. For instance, the court has applied the canon that statutes in derogation of the common law are to be strictly construed. In Romm v. Flax, for example, the court invoked the canon in interpreting section 10-702 of the Real Property Article, which provided...

92. Id. at 317, 799 A.2d at 1272 (noting that when a statute is capable of more than one meaning the court examines the circumstances surrounding its enactment).
93. Id.
99. E.g., Liverpool v. Baltimore Diamond Exch., 369 Md. 304, 318, 799 A.2d 1264, 1272 (2002) (noting that when a statute is capable of more than one meaning, the court interprets statutory language in light of legislative purpose).
100. 358 Md. 325, 748 A.2d 478 (2000).
101. Id. at 336-37, 748 A.2d at 483-85.
102. Id. at 336, 748 A.2d at 483-84.
103. This principle is rooted in Article 5 of the Maryland Declaration of Rights, under which Maryland citizens are guaranteed the common-law of England. Hardy v. State, 301 Md. 124, 131-32, 482 A.2d 474, 478 (1984).
that if a required disclosure statement was delivered more than three days after a vendor enters into a contract for the sale of property with the purchaser, the contract was void.\textsuperscript{105} The court first determined that the statute was ambiguous, noting that "void" could mean either "of no legal force" or "voidable."\textsuperscript{106} The court then looked to the legislative purpose and history of the statute, but found no evidence that the legislature intended "void" to be interpreted in the former sense.\textsuperscript{107} The court further noted that interpreting "void" to mean "of no legal force" ran counter to precedents in which the court rejected this reading where it would have impermissibly allowed one party to avoid contractual obligations by violating conditions precedent.\textsuperscript{108} Strictly construing the statute because it appeared to alter the common-law meaning of "void," the court held that because there was no evidence of legislative intent to the contrary, "void" must not be interpreted to mean "of no legal force."\textsuperscript{109}

Since most statutes alter the existing law, as the court noted in Harrison v. John F. Pilli & Sons, Inc.,\textsuperscript{110} the canon is typically reserved for statutes that threaten existing contract or property rights or that interfere with personal liberties.\textsuperscript{111} Moreover, while the statute at issue in Harrison, which required certain disclosures in connection with the sale of improved real property, altered the common law, it was also remedial.\textsuperscript{112} Noting the existence of the countervailing canon that remedial statutes must be liberally construed to "suppress the evil and advance the remedy,"\textsuperscript{113} the court rejected the lower appellate court's strict construction of the statute and held that the contracts at issue clearly fell within the scope of the statutory remedy.\textsuperscript{114} In Pak v. Hoang,\textsuperscript{115} the court similarly cautioned that courts should not mindlessly adhere to the canon of strict construction in a manner that perpetuates the very problem the legislature sought to remedy.\textsuperscript{116} Accordingly, upon determining that a statute giving tenants the right

\begin{itemize}
  \item \textsuperscript{105} Id. at 691-92, 668 A.2d at 1-2.
  \item \textsuperscript{106} Id. at 694, 668 A.2d 2-3.
  \item \textsuperscript{107} Id. at 695, 668 A.2d at 3.
  \item \textsuperscript{108} Id. at 696-97, 668 A.2d at 4.
  \item \textsuperscript{109} Id. at 698, 668 A.2d at 4-5.
  \item \textsuperscript{110} 321 Md. 336, 582 A.2d 1231 (1990).
  \item \textsuperscript{111} Id. at 341, 582 A.2d at 1233 (citing N. Singer, Sutherland on Statutory Construction, § 61.06 (4th ed. 1986 rev.)).
  \item \textsuperscript{112} Id. at 341, 582 A.2d at 1234.
  \item \textsuperscript{113} Id.
  \item \textsuperscript{114} Id. at 342, 582 A.2d at 1234.
  \item \textsuperscript{115} 378 Md. 315, 835 A.2d 1185 (2003).
  \item \textsuperscript{116} Id. at 326, 835 A.2d at 1191.
\end{itemize}
to sue landlords for the return of security deposits was remedial,\textsuperscript{117} the court asked whether, when liberally construed, the statute afforded the relief sought by the plaintiff; the court held in the affirmative.\textsuperscript{118}

d. Interpretation of Section 12-201(a).—To comport with the canon that statutes in derogation of the common law must be strictly construed, and the Court of Appeals's insistence that any diminution of sovereign immunity must come from the legislature and not the courts, the Court of Special Appeals held that section 12-201(a), which waives sovereign immunity in certain instances,\textsuperscript{119} must be narrowly construed.\textsuperscript{120} The Court of Appeals first interpreted section 12-201(a) in \textit{ARA Health Services, Inc. v. Department of Public Safety and Correctional Services}.\textsuperscript{121} There, the court considered whether the Court of Special Appeals properly held that the plaintiff's claim for reimbursement under a health services contract with the State failed to satisfy the requirements of section 12-201(a) and was therefore barred by sovereign immunity.\textsuperscript{122} In reaching its holding, the Court of Special Appeals emphasized that section 12-201(a) must be narrowly construed to comport with the Court of Appeals's insistence that any diminution of sovereign immunity must come from the legislature and not the courts, and the canon that statutes in derogation of the common law must be strictly construed.\textsuperscript{123}

On appeal, the Court of Appeals parsed section 12-201(a) into two elements limiting the application of the statute to actions where "(1) the contract upon which the claim is based was reduced to writing; and (2) the State employee or official acted within the scope of his or her authority in executing the contract."\textsuperscript{124} With respect to the second element, the court held that "scope of the authority" as used in 12-201(a) refers to actual authority, and that contracts entered into by State officials under apparent authority cannot be enforced against the State regardless of the reasonableness of the plaintiff's beliefs.\textsuperscript{125} Because the purported contractual modification upon which the

\begin{itemize}
  \item \textsuperscript{117} Id. at 324-28, 835 A.2d at 1190-92.
  \item \textsuperscript{118} Id. at 328-36, 835 A.2d at 1192-97.
  \item \textsuperscript{119} See supra note 76 and accompanying text.
  \item \textsuperscript{121} 344 Md. 85, 685 A.2d 435 (1996).
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Dep't of Pub. Safety & Corr. Servs., 107 Md. App. at 457, 668 A.2d at 966.
  \item \textsuperscript{125} ARA Health Servs., 344 Md. at 92, 685 A.2d at 438.
  \item \textsuperscript{126} Id. at 95, 685 A.2d at 440.
\end{itemize}
plaintiff relied exceeded the state entity's actual authority, the court affirmed, holding that sovereign immunity barred the plaintiff's claim.\textsuperscript{126} Thus, under \textit{ARA Health Services}, to satisfy section 12-201(a), plaintiffs must establish that the State official who executed the contract acted with \textit{actual} authority.\textsuperscript{127} 

The \textit{ARA Health Services} court did not resolve the question of what if any additional evidence was required to show that the contract was "written," and "executed" within the meaning of section 12-201(a). As a matter of Maryland common law, making a valid contract requires neither a writing nor the parties' signatures, unless the parties made them necessary at the time they expressed their assent as a precondition to that assent. In \textit{Porter v. General Boiler Casing Co.},\textsuperscript{128} the court cited these principles in rejecting the trial judge's conclusion that an employer was not a party to a collective bargaining agreement simply because there was no signature on its contract with the union.\textsuperscript{129} The court noted that the purpose of a signature is to demonstrate mutuality of assent, which can also be established by the conduct of the parties.\textsuperscript{130} Even when a signature is required by statute, as the court found in \textit{Drury v. Young},\textsuperscript{131} a printed name anywhere on a memorandum is sufficient if recognized by the named party as its own and printed with the party's authority.\textsuperscript{132}

3. \textit{The Court's Reasoning}.—In \textit{Stern v. Board of Regents}, the Court of Appeals affirmed the circuit court's decision holding that sovereign immunity barred the students' breach of contract claim against the University System of Maryland for raising the price of tuition for the Spring 2003 semester after the students had registered and paid their tuition bills in full.\textsuperscript{133} The court concluded that sovereign immunity was not waived under section 12-201(a)\textsuperscript{134} because the alleged contract had not been "executed" within the meaning of the statute.\textsuperscript{135} Construing section 12-201(a) narrowly to avoid diluting the doctrine

\textsuperscript{126} Id. at 96, 685 A.2d at 440.
\textsuperscript{127} Id.
\textsuperscript{128} 284 Md. 402, 396 A.2d 1090 (1979).
\textsuperscript{129} Id. at 410-11, 396 A.2d at 1095.
\textsuperscript{130} Id.
\textsuperscript{131} 58 Md. 546 (1882).
\textsuperscript{132} Id. at 554-55. The court held that an alleged contract for the sale of tomatoes contained all the elements of a complete bargain (i.e., the names of the parties, the quality and quantity of the goods to be sold, the contract price, the terms of the sale, and place of delivery) and therefore satisfied the statute of frauds. \textit{Id.}
\textsuperscript{133} \textit{Stern}, 380 Md. at 694, 726, 846 A.2d 996 at 997, 1016.
\textsuperscript{134} \textit{See supra} note 76 and accompanying text.
\textsuperscript{135} \textit{Stern}, 380 Md. at 719-23, 846 A.2d at 1012-14.
of sovereign immunity, the court interpreted the term "executed" to require the signature of a duly authorized State official. Without ruling on whether the contract at issue was "written" within the meaning of section 12-201(a), the court determined that even if it was, the contract did not satisfy section 12-201(a) because neither the letterhead nor the university seal on the tuition bills constituted a signature of a duly authorized State official. Thus, the court held that the waiver of sovereign immunity under section 12-201(a) did not apply because the contract at issue was not "executed" under the meaning of the statute.

Writing for the majority, Judge Cathell concluded that when read in a narrow light, section 12-201(a) is "clear and unambiguous." To support this conclusion, the court cited the definitions of the statutory terms "written contract" and "executed" in Black's Law Dictionary. The court first reviewed Black's definition of a written contract—"one whose terms have been reduced to writing"—and the commentary accompanying the definition, drawn from the Restatement (Second) of Contracts:

Written contracts are also commonly signed, but a written contract may consist of an exchange of correspondence, of a letter written by the promisee and assented to by the promisor without signature, or even of a memorandum or printed document not signed by either party. Statutes relating to written contracts are often expressly limited to contracts signed by one or both parties. Whether such a limitation is to be implied when not explicit depends on the purpose and context.

Based on this definition, the court found that because "written contract" defines a completed agreement, the legislature did not need to use the word "executed" in section 12-201(a) to convey the same meaning. Reasoning that that legislature must have used the term

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136. Id. at 720, 846 A.2d at 1012-13.
137. Id. at 723, 846 A.2d at 1014.
138. Id. at 721-23, 846 A.2d at 1013-14.
139. Id. at 723, 846 A.2d at 1014.
140. Judges Raker, Harrell, Battaglia, and Greene joined in the majority opinion.
141. Id. at 720, 846 A.2d at 1013.
142. Id. at 721-22, 846 A.2d at 1013 (quoting BLACK'S LAW DICTIONARY 327, 589 (7th ed. 1999)).
143. Id. at 721, 846 A.2d at 1013 (quoting BLACK'S LAW DICTIONARY, supra note 142, at 327).
144. Id. (quoting BLACK'S LAW DICTIONARY, supra note 142, at 327 (in turn quoting Restatement (Second) of Contracts § 95 cmt. c (1981))) (emphasis in Stern opinion).
145. Id.
146. Id.
"executed" to place a further limitation on the waiver of immunity in addition to those already imposed by the term "written contract," the court concluded that if the term "executed" did not mean "signed," it would have been surplusage. The court, therefore, concluded that the term "executed," in the context of the statute, meant "signed." 

To further support its interpretation of "executed," the court cited Black's definition of the term, "executed contract," and an excerpt of Black's definition of "executed." Black's defines "executed contract" as "[a] contract that has been fully performed by both parties," or "a signed contract." The portion of Black's definition of "executed" quoted by the court reads:

(Of a document) that has been signed . . . [T]he term 'executed' is a slippery word. Its use is to be avoided except when accompanied by explanation . . . . A contract is frequently said to be executed when the document has been signed, or has been signed, sealed, and delivered. Further, by executed contract is frequently meant one that has been fully performed by both parties.

Viewed in light of these definitions and the principle that statutory waivers of sovereign immunity are to be narrowly construed to preserve the State's control over government functions and public assets, the court concluded that section 12-201(a) applies only to written contracts signed by an authorized State official.

The court next addressed the students' claim that tuition bills bearing the university seal were sufficient to satisfy the signature requirement of section 12-201(a). In support of their argument, the students cited the court's holding in Drury that letterhead satisfied the signature requirement of the statute of frauds. The court rejected the students' argument, concluding that the statute of frauds is not applicable in the sovereign immunity context.

In addition to section 12-201(a), the court addressed four other theories under which the students claimed the Board's immunity had

147. Id.
148. Id. at 723, 846 A.2d at 1014.
149. Id. at 721-22, 846 A.2d at 1013.
150. Id. (quoting BLACK'S LAW DICTIONARY, supra note 142, at 321).
151. Id. at 721-22, 846 A.2d at 1013 (quoting BLACK'S LAW DICTIONARY, supra note 142, at 589).
152. Id. at 722, 846 A.2d at 1013-14.
153. Id. at 722-23, 846 A.2d at 1014.
154. Id.; Drury v. Young, 58 Md. 546 (1882).
155. Stern, 380 Md. at 722-23, 846 A.2d at 1014.
been waived. First, the court held that section 13-901(a) of the Tax General Article, which authorizes refund claims where the claimant has been charged more than is legally payable, was inapplicable because the issue sub judice was whether tuition increases were legal in the first place. Second, the court addressed the applicability of a cause of action in assumpsit available where a statutory policy authorizes a refund without specifying a remedy. The court held that the theory did not apply because no refund policy existed for mid-semester tuition increases. Third, the court held that the students could not maintain their action under the sue and be sued provision of section 12-104(b)(3) of the Education Article because they failed to show that the Board had funds to satisfy judgments or the authority to raise them. Finally, the court held that the students were entitled to no relief under the common-law rule that sovereign immunity is waived where the claimant seeks declaratory or injunctive relief from state action enforcing an unlawful statute or illegally applying a lawful statute. Because the students neither alleged that the Board acted pursuant to an unlawful statute, nor that the Board illegally applied a lawful statute, the court held that sovereign immunity barred their claims for declaratory and injunctive relief. Thus, the court rejected each of the five theories that the students raised in support of their assertion that sovereign immunity had been waived.

In dissent, Judge Wilner argued that section 12-201(a) precluded the University from asserting the defense of sovereign immunity. Judge Wilner concluded that the students satisfied section 12-201(a) because the alleged contract between the students and the University was both written and executed by a state official within the meaning of the statute. First, Judge Wilner determined that because a contract need not be proven by only one document, the writings between the

156. Id. at 705-18, 723-25, 846 A.2d at 1004-12, 1015-16. To this end the students relied principally on Frankel v. Board of Regents, in which the court discussed section 12-201(a) and each of the first three theories mentioned here as a possible basis for its holding that the plaintiff was entitled to a re-classification of his residency for tuition purposes. 361 Md. 298, 761 A.2d 324 (2000).
157. Stern, 380 Md. at 705-06, 846 A.2d at 1004.
158. Id. at 706-09, 846 A.2d at 1005-06.
159. Id.
160. Id. at 709-18, 846 A.2d at 1006-12.
161. Id. at 723-25, 846 A.2d at 1015-16.
162. Id. at 725, 846 A.2d at 1016.
163. Id. at 702-26, 846 A.2d at 1002-16.
164. Id. at 726, 846 A.2d at 1016 (Wilner, J., dissenting). Chief Judge Bell joined in dissent. Id. (Wilner, J., dissenting).
165. Id. at 727, 846 A.2d at 1017 (Wilner, J., dissenting).
students and the University—including course catalogs advertising tuition and fees, registration materials, and tuition bills—formed an enforceable agreement.\textsuperscript{166}

Second, Judge Wilner determined that section 12-201(a) did not impose a signature requirement because the plain language of the statute does not require the contract to be \textit{signed}, but merely \textit{executed} by an authorized State official.\textsuperscript{167} In support of this argument, he noted the Court of Appeals's holding in \textit{Porter v. General Boiler Casing Co.},\textsuperscript{168} that a signature is not necessary to form a contract, nor always necessary to establish that a contract has been executed.\textsuperscript{169}

Finally, Judge Wilner reasoned that the public policy interest against weakening the doctrine of sovereign immunity must be balanced against the legislature's purpose in enacting section 12-201(a)—to remedy the injustice of allowing the State to breach contracts.\textsuperscript{170} If shielded from liability for breaching its contract with paying students, the University could commit further breaches such as raising tuition for a given semester retroactively after its conclusion\textsuperscript{171} or shutting down schools mid-semester to absorb budget cuts without returning tuition payments.\textsuperscript{172} As such, Judge Wilner concluded that the court's interpretation of section 12-201(a) was out of balance with the purpose for which it was enacted.\textsuperscript{173}

\textit{4. Analysis.—} In \textit{Stern v. Board of Regents}, the Court of Appeals held that tuition contracts between the University System of Maryland and its students did not meet the requirements of section 12-201(a) of the State Government Article,\textsuperscript{174} which waives the defense of sovereign immunity in certain contract actions against the State.\textsuperscript{175} Narrowly interpreting the statute to avoid diluting the doctrine of sovereign immunity, the court concluded that the statutory text was unambiguous\textsuperscript{176} and that the students' contract was not "executed" within the meaning of the statute because it was not signed by an au-

\begin{thebibliography}{99}
\bibitem{166} Id. at 728-29, 846 A.2d at 1017-18 (Wilner, J., dissenting).
\bibitem{167} Id. at 730-31, 846 A.2d at 1019 (Wilner, J., dissenting).
\bibitem{168} 284 Md. 402, 396 A.2d 1090 (1979).
\bibitem{169} \textit{Stern}, 380 Md. at 731, 846 A.2d at 1019 (Wilner, J., dissenting).
\bibitem{170} Id. at 731, 846 A.2d at 1019.
\bibitem{171} Id. at 729, 846 A.2d at 1018.
\bibitem{172} Id. at 729 n.3, 846 A.2d at 1018 n.3.
\bibitem{173} Id. at 731, 846 A.2d at 1019.
\bibitem{174} \textsc{Md. Code Ann.}, \textsc{State Gov't} § 12-201(a) (2004); see supra note 76 and accompanying text.
\bibitem{175} \textit{Stern}, 380 Md. at 719-23, 846 A.2d at 1012-14.
\bibitem{176} Id. at 720, 846 A.2d at 1013.
\end{thebibliography}
In strictly interpreting the statute, the court improperly advanced its own policy of disfavoring sovereign immunity waivers while ignoring the statute's remedial purpose. The court's resultant conclusion that section 12-201(a) is unambiguous disregarded a compelling alternative interpretation of the statute and the legislature's decision not to explicitly articulate a signature requirement. The court should have acknowledged the ambiguity of the statute and examined other surrounding indicia of the legislature's intent. Had it done so, it would have found a body of evidence that suggested that limiting the scope of section 12-201(a) to signed contracts undermines the broad remedy the statute was enacted to implement.

a. The Court Should Have Acknowledged the Ambiguity of Section 12-201(a)'s Plain Language.—In concluding that section 12-201(a) is unambiguous, the Stern court failed to recognize at least two signs that the statute is ambiguous when read in light of its ordinary and natural meaning. First, the statute is subject to at least two reasonable interpretations, placing it squarely within the court's own definition of an ambiguous statute. Second, whereas other Maryland statutes explicitly articulate signature requirements, section 12-201(a) does not.

The same legal dictionary cited by the court in support of its interpretation reveals that section 12-201(a) is susceptible to at least two reasonable interpretations. While Black's Law Dictionary definitions cited in the opinion suggest that a contract may be executed with or without a signature, the court selectively quoted from only those defi-

177. Id. at 720-23, 846 A.2d at 1013-14.
178. See infra notes 246-262 and accompanying text.
179. See infra notes 188-208 and accompanying text.
180. See infra notes 209-215 and accompanying text.
181. See infra notes 216-245 and accompanying text.
182. See infra notes 216-245 and accompanying text.
185. See Liverpool v. Balt. Diamond Exch., 369 Md. 304, 318, 799 A.2d 1264, 1272 (2002) (stating that a statute is ambiguous if it is reasonably susceptible to more than one definition).
186. See infra notes 209-215 and accompanying text.
nitions supporting the former.\textsuperscript{188} For instance, the court quoted Black's first definition of "executed": "(Of a document) that has been signed,"\textsuperscript{189} yet omitted the second definition: "That has been done, given, or performed <executed consideration>".\textsuperscript{190} Thus, even if section 12-201(a) may be reasonably interpreted as applying to contracts that have been "signed" by a State official, the definition the court omitted suggests the equally reasonable interpretation that the statute applies to contracts "done, given, or performed" by a State official.\textsuperscript{191} Black's definition of "execute," also absent from the opinion, presents similar alternatives: "To make (a legal document) valid by signing; to bring (a legal document) into its final, legally enforceable form . . . ."\textsuperscript{192} Such definitions suggest that a signature is but one means of accomplishing the larger end of rendering a contract enforceable.\textsuperscript{193} The majority, however, failed to acknowledge that the mutuality of assent required to form a binding contract may be established by means other than a written signature, such as the conduct of the parties,\textsuperscript{194} thus ignoring at least one reasonable alternative interpretation of the statute.

\textsuperscript{188} See Stern, 380 Md. 721-22, 846 A.2d at 1013 (quoting excerpts from Black's Law Dictionary's definitions of "written contract," "executed contract," and "executed" (quoting Black's Law Dictionary, supra note 142, at 321, 327, 589)).

\textsuperscript{189} Id. at 721, 846 A.2d at 1013 (quoting Black's Law Dictionary, supra note 142, at 589).

\textsuperscript{190} Black's Law Dictionary, supra note 142, at 589. Black's further explains that "executed" is a "slippery word" whose "use is to be avoided except when accompanied by an explanation." Id. The court quoted this portion of the definition, yet made no attempt to reconcile this characterization of "executed" with its assertion that the term's meaning is unambiguous. See Stern, 380 Md. at 720, 846 A.2d at 1013.

\textsuperscript{191} Black's Law Dictionary, supra note 142, at 589.

\textsuperscript{192} Id. The court also quotes Black's definition of "executed contract": "[a] contract that has been fully performed by both parties . . . [a] signed contract." Stern, 380 Md. at 721, 846 A.2d at 1013 (quoting Black's Law Dictionary, supra note 142, at 321). Section 12-201(a), however, cannot be reasonably interpreted to incorporate this meaning. This term is the antonym of "executory contract," which Black's defines as "a contract that remains wholly unperformed or for which there remains something still to be done on both sides . . . ." Black's Law Dictionary, supra note 142, at 321. Because the universities had yet to enroll the students at the agreed upon price, their contract was executory. See Stern, 380 Md. at 728, 846 A.2d 1017 (Wilner, J., dissenting) (concluding that the students' contract was executory). Under a contract that is executed as opposed to executory, parties have fully performed their obligations, leaving few if any circumstances under which a cause of action for breach of contract could arise. Indeed, to interpret section 12-201(a) to waive the State's contract immunity only after there is no cause of action for breach of contract would be to render the statute a nullity.

\textsuperscript{193} See Black's Law Dictionary, supra note 142, at 589.

The court, however, argued that if "executed" did not mean "signed," it would have been surplusage, invoking the canon that statutes must be interpreted to avoid rendering any part of the statute surplusage. This argument rests on the flawed premise that the term "written contract," as used in section 12-201(a), means completed agreement. Based on this premise, the court reasoned that it would be redundant if "executed" also meant "completed," and therefore that "executed" must impose a further limitation. The only authority the court cites in support of the proposition that "written contract" means "completed agreement" is Black's Law Dictionary definition of "written contract"—one "whose terms have been reduced to writing." The court goes on to quote a portion of the Black's definition taken from the Restatement (Second) of Contracts: "written contracts are also commonly signed, but . . . may consist of . . . a letter written by the promisee and assented to by the promisor without a signature . . . or even of a . . . printed document not signed by either party." Even assuming that by "completed," which does not appear in the definition, the court meant "assented to," the court's argument that "written contract" means both "reduced to writing" and "assented to" ignores the equally compelling possibility that "written" simply means "reduced to writing," and that "executed" means "assented to."

195. Stern, 380 Md. at 721, 846 A.2d at 1013.
197. See Stern, 380 Md. at 721, 846 A.2d at 1013.
198. Id.
199. Id. (quoting BLACK'S LAW DICTIONARY, supra note 142, at 327).
200. Id. (quoting BLACK'S LAW DICTIONARY, supra note 142, at 327 (in turn quoting RESTATEMENT (SECOND) OF CONTRACTS § 95 cmt. c (1981))). It is noteworthy that Black's quotation of the Restatement commentary omits the Restatement commentary's citation to Chapter 5 of the Restatement, entitled "The Statute of Frauds." RESTATEMENT (SECOND) OF CONTRACTS § 95 cmt. c (1981). The students similarly invoked the statute of frauds in support of their argument that because printed letterhead had been held as a matter of equity to satisfy the statute of frauds' signature requirement, so too should the printed memoranda and tuition bills bearing the University seal satisfy any signature requirement imposed by section 12-201(a). Stern, 380 Md. at 722-23, 846 A.2d at 1014. The court rejected the argument, declaring the statute of frauds inapplicable in the context of sovereign immunity. Id. at 720, 846 A.2d at 1013. The court thus relied on the statute of frauds in one instance to support its assertion that "written contract" means "completed agreement," only to reject it three paragraphs later when invoked by the students. See id. at 721-23, 846 A.2d at 1013-14.
201. BLACK'S LAW DICTIONARY, supra note 142, at 327.
202. Id. at 589.
Even under the court's approach of substituting the term "signed" for the term "executed" in section 12-201(a), the statute is no less ambiguous. *Black's Law Dictionary* suggests two possible interpretations of the term "signed": one which narrowly limits the conception of a signature to "[a] person's name or mark written by that person . . .," and another which more broadly conceptualizes the term as including "[a]ny name, mark, or writing used with the intention of authenticating a document."203 While the court does not explicitly define what constitutes a signature within the meaning of section 12-201(a), in holding that letterhead, school stamps, and insignias cannot satisfy section 12-201(a), the court clearly rejected the broader conception of what constitutes a signature.204 Accordingly, under the narrow definition, an individual may not enforce written contracts against the State under section 12-201(a) unless a person duly authorized by the State to do so personally signed the contract.205 As *Black's Law Dictionary* suggests, the term "signature," like the term "executed," is subject to at least two reasonable interpretations—one broad and one narrow.206 Regardless of which word is used, section 12-201(a) appears susceptible to competing reasonable interpretations,207 and therefore meets the court's own definition of an ambiguous statute.208

Weighing further against the *Stern* court's conclusion that section 12-201(a) is unambiguously limited to signed contracts is the fact that the statute does not impose such a limitation explicitly.209 Whereas the court in *Blind Industries* and *In re Douglas P.* declined to read terms into the statutes at issue that the legislature could have explicitly included if it so desired,210 the *Stern* court read an implied signature requirement into section 12-201(a) that the statute could have explicitly articulated but did not.211 The *In re Douglas* court, for instance,
refused to read an implied limitation into the statute based on the fact that the legislature had explicitly adopted the same limitation in another instance.\textsuperscript{212} In contrast, the Stern court ignored the fact that another section of the State Government Article contains an explicit signature requirement,\textsuperscript{213} thus establishing that the legislature could have explicitly imposed a signature requirement under section 12-201(a) had it intended to do so. Finally, whereas the Blind Industries and In re Douglas courts consulted the legislative history of the statutes to determine whether the legislature intended to broaden or narrow the reach of the statute in a manner not explicitly stated,\textsuperscript{214} the Stern court reached the paradoxical conclusion that section 12-201(a) unambiguously imposes an implied signature requirement.\textsuperscript{215}

\textbf{b. Other Indicia of the Legislature's Intent Establish That the Court's Interpretation of Section 12-201(a) Fails to Effectuate the Statute's Broad Remedial Purpose.}—After reaching its strained conclusion that section 12-201(a) is unambiguous,\textsuperscript{216} the Stern court examined no indicia of legislative intent beyond the plain language of the statute.\textsuperscript{217} Among the many extrinsic aids courts use when interpreting ambiguous statutes,\textsuperscript{218} three available to the Stern court included the Commission Report;\textsuperscript{219} the pre- and postenactment legislative history of section 12-201(a)’s predecessor law;\textsuperscript{220} and the legal and practical ef-

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{212}] See In re Douglas P., 333 Md. at 393, 635 A.2d at 430 (noting that the legislature had explicitly confined section 3-831 of the Courts and Judicial Proceedings Article to adult offenders).
\item[\textsuperscript{213}] Md. Code Ann., State Gov’t § 19-108 (2004) (requiring certificates of acknowledgment to be executed by the signature of an officer). Prior to the enactment of section 12-201(a)’s predecessor law in 1976, what is now section 19-108 of the State Government Article was codified at article 18, section 8 of the Annotated Code of Maryland. As then codified, the statute provided that “[t]he certificate of the acknowledging officer shall be completed by his signature . . . .” Md. Ann. Code art. 18, § 8 (1973).
\item[\textsuperscript{214}] Blind Indus. & Servs. of Md., 371 Md. at 234-35, 808 A.2d at 789-90; In re Douglas P., 333 Md. at 393-94, 635 A.2d at 430.
\item[\textsuperscript{215}] See Stern, 380 Md. at 720-22, 846 A.2d at 1013-14 (holding that when read narrowly, pursuant to public policy against waivers of sovereign immunity, section 12-201(a) is unambiguous and that the term “executed” must mean “signed”).
\item[\textsuperscript{216}] Id. at 720, 846 A.2d at 1013.
\item[\textsuperscript{217}] See id. (noting the principle that the court will not look beyond the statute’s plain language unless the statute is ambiguous).
\item[\textsuperscript{218}] See supra text accompanying notes 93-98.
\item[\textsuperscript{220}] See supra notes 52-75 and accompanying text; Kaczarowski v. Mayor of Balt., 309 Md. 505, 515, 525 A.2d 628, 633 (1968) (noting that courts often consider amendments made to a statute as it passed through legislature and its relationship to past and future legislation).
\end{enumerate}
\end{footnotesize}
Each of these aids yields compelling evidence that the legislature did not intend to limit the waiver of section 12-201(a) to actions arising from signed contracts.

(1) The Commission Report.—The Commission Report establishes that the Governor’s Commission to Study Sovereign Immunity did not contemplate or recommend adding a signature requirement to the statute and presents empirical data that contradicts the court’s rationale for narrowly construing section 12-201(a). To determine how best to limit the fiscal impact of abrogation, the Commission documented what the forty-four states that had abrogated sovereign immunity in contract actions as of 1976 did to limit their respective waivers. The Commission Report does not mention any state that had limited abrogation to contract actions arising from signed contracts. Thus, the signature requirement read into section 12-201(a) by the Stern court is now the only limitation on the statute that was neither employed by another state at the time section 12-201(a)’s predecessor law was enacted, nor studied by the Commission.

The Commission Report also undercuts the court’s policy rationale for narrowly interpreting section 12-201(a), namely, to preserve the government’s control over the State treasury and prevent interference with government functions. All forty-four states that had abrogated sovereign immunity in contract actions as of 1876, none of which expressly limited abrogation to actions arising from signed contracts, reported that the effects of abrogation had been negligible. The Stern court’s assertion that a signature requirement is necessary to protect the State from the fiscal and administrative burden of defending contract claims, even though section 12-203 requires the Governor to allocate the necessary funds to pay such claims, therefore conflicts with the empirical data that shaped section 12-201(a).

221. See Balt. County v. RTKL Assoc. Inc., 380 Md. 670, 678, 846 A.2d at 433, 438 (2004) (noting that where the statute is ambiguous the court may look to legal and rational consequences of competing constructions).
222. COMMISSION REPORT, supra note 56; Stern, 380 Md. at 722, 846 A.2d at 1014.
223. See supra notes 58-59 (listing examples of limitations adopted in various states).
224. See COMMISSION REPORT, supra note 56, at 64-95 (surveying limitations imposed on other states’ contract immunity waivers as of 1976).
225. See id.
228. Md. Code Ann., State Gov’t § 12-203 (2004); see ch. 450, 1976 Md. Laws 1180, 1181 (preamble) (noting that the Governor’s Commission had thoroughly studied the implications of abrogating the State’s immunity from contract actions).
(2) Legislative History.—The pre- and postenactment legislative history of Chapter 450, section 12-201(a)'s predecessor law, counsels further against the Stern court's conclusion that the statute implicitly imposes a written signature requirement. Each element of section 12-201(a) was incorporated into the statute's predecessor bill to accomplish an objective that the earlier bills vetoed by the Governor did not. To preserve the State's immunity from negligence actions masquerading as contract actions (e.g., where a victim of an auto accident caused by ice alleges the state breached a contractual obligation to remove ice promptly from roadways), section 12-201(a) limits the waiver to actions arising from written contracts. To preserve the defense of unauthorized contracts, section 12-201(a) limits the waiver to actions arising from contracts executed on the State's behalf by an official acting within the scope of the official's authority. It is therefore unsurprising that when the court first had occasion to parse section 12-201(a) in ARA Health Services, Inc., it broke the single sentence containing both limitations into two elements, each connected to a specific objective of the statute, one satisfied by a writing, and the other by a State official's exercise of actual authority. By adding a personal signature requirement to section 12-201(a), the Stern court created a third element that is both redundant and unconnected with any of the statute's objectives. Indeed, because the writing at issue conceivably amounted to an express contract, and because the Board did not contend that the documents constituting the writing (i.e., catalogs and tuition bills) were not prepared with actual authority, the tuition contracts satisfied the two legislative objectives underlying section 12-201(a). The court's imposition of a signature requirement therefore was not only unnecessary to fulfill the objec-

229. COMMISSION REPORT, supra note 56, at B-22 to B-25; see also Balt. County v. RTKL Assoc., Inc., 380 Md. 670, 681-83, 846 A.2d 435, 439-40 (2004) (noting that limitations identified in the Commission Report were incorporated into House Bill 885 after the Governor expressed his desire to await the Commission's findings upon vetoing House Bill 1672).

230. § 12-201(a); COMMISSION REPORT, supra note 56, at B-23.

231. Id. Other sections of the current waiver statute exclude punitive damages, § 12-201(b); provide funds for the satisfaction of judgments, § 12-203; and impose a time limit on claims, § 12-202.


233. Stern, 380 Md. at 723, 846 A.2d at 1014.

234. See id. at 730, 846 A.2d at 1019-20 (Wilner, J., dissenting) (arguing that the students' contracts are express). But see id. at 722, 846 A.2d at 1014 (declining to decide whether the students' contracts were "written" within the meaning of section 12-201(a)).
tives of the statute’s limitations, but defeated both the students’ claim and the statute’s overarching remedial purpose.235

The postenactment legislative history of section 12-201(a)’s predecessor law further suggests that the legislature intended to establish a broader waiver of contract immunity than the court effectuated. In response to the 1980 law that appeared to limit section 12-201(a)’s predecessor law to procurement contracts236 the legislature quickly re-enacted the contract immunity waiver in a form all but identical to the original waiver enacted in 1976, making clear that attempts to narrow the scope of the waiver were disfavored.237 Yet in reading a signature requirement into section 12-201(a), the Stern court did precisely that. In Q C Corp., the court further held that the 1980 law was not intended to narrow the scope of the contract immunity waiver, noting that the Commission Report made clear the intent of the General Assembly in enacting the waiver was to establish a broad waiver of immunity.238 Yet the Stern court not only narrowly construed the statute,239 but did so wholly without reference to the statute’s remedial purpose.

(3) The Practical and Legal Effect of Competing Constructions.—Finally, the Stern court’s interpretation of section 12-201(a) ignores potentially unconscionable practical and legal consequences. As Judge Wilner noted in his dissent, the court’s interpretation may place severe and potentially unconscionable burdens on those to whom the legislature sought to provide a remedy unavailable at common law.240 He notes, for example, that the holding in Stern allows the Board to retroactively bill the students after the completion of a semester, or to shut down school as a cost-saving measure after students have paid tuition.241 On the other hand, an interpretation of section 12-201(a) that limits its waiver to written contracts rendered legally binding by an authorized state official, whether by signature, letterhead, or other evidence of assent poses no discernable threat to the State’s control over the public treasury or to the operation of government.242 While this interpretation may have placed a burden on

235. See id. at 731, 846 A.2d at 1019 (Wilner, J., dissenting) (noting that section 12-201(a) was passed to correct the injustice of allowing the State to breach solemn contracts).
236. 1980 Md. Laws 775.
238. Id. at 190, 510 A.2d at 1106.
240. Id. at 729-30 & n.3, 846 A.2d at 1018 & n.3 (Wilner, J., dissenting).
241. Id. (Wilner, J., dissenting).
242. See supra notes 226-228 and accompanying text.
the Board to meet its budget shortfall in the short term, such a predicament would not have been the result of the State's vulnerability to unpredictable contract actions, but of its failure to provide minimal notice of the tuition increase before accepting payment for the initial, agreed-upon price. As Judge Wilner noted, had the Board notified the students of the possibility of a tuition increase when it first considered the measure in November 2002, it would have avoided liability for breach of contract. Whereas the Board can avoid similar contract actions in the future by providing minimal notice of pending tuition hikes, Stern now subjects Maryland students to the prospect of unannounced and retroactive tuition hikes even after the university has accepted payment for the initially announced price as payment in full.

c. The Court's Narrow Construction of Section 12-201(a) Improperly Elevated Its Own Policy of Disfavoring Sovereign Immunity Waivers Above the Statute's Remedial Purpose.—The Stern court's decision to interpret section 12-201(a) in a narrow light without considering the statute's remedial purpose departs from court precedent in several respects. The court reasoned that as an unfavored legislative waiver of sovereign immunity, section 12-201(a) must be read in a narrow light to further the policy of preventing interference with the State's control over government functions and the public treasury. Yet in doing so without reference to the statute's remedial purpose, the court's approach ran afoul of its prior decisions strictly construing statutes in derogation of the common law; the countervailing canon that remedial statutes should be liberally construed; and recent decisions emphasizing that even unambiguous statutory language should not be read without reference to its underlying purpose.

First, the Stern court's application of a policy-driven strict construction at the plain language stage of the interpretation breaks with its prior applications of the canon that statutes in derogation of sovereign immunity should be strictly construed. Whereas in Romm the court invoked the canon only after finding the statute at issue am-

243. Stern, 380 Md. at 727 n.1, 846 A.2d at 1016 n.1 (Wilner, J., dissenting).
244. Id. (Wilner, J., dissenting).
245. See id. at 698, 846 A.2d at 1000 (noting that most students had received $0 account balances after paying the initial tuition price announced).
247. See infra notes 250-254 and accompanying text.
248. See infra notes 255-257 and accompanying text.
249. See infra notes 258-262 and accompanying text.
biguous and considering its legislative purpose and history,251 the Stern court strictly construed section 12-201(a) while asserting that the statute was unambiguous, and without consulting any surrounding indicia of legislative intent.252 Indeed, if a statute is unambiguous, a court should not have to resort to a canon of strict construction in order to effectuate its underlying legislative intent.253 The Stern court therefore applied the canon favoring strict construction of statutes that abrogate the common law in a manner that abandoned the caution with which the court applied the canon in prior decisions.

Second, in narrowly interpreting section 12-201(a),254 the Stern court failed to address the countervailing principle that remedial statutes are to be liberally construed to effectuate the remedy.255 Like the statutes at issue in Pak and Harrison, section 12-201(a) altered the common law, but did so to remedy an injustice.256 However, whereas the Pak and Harrison courts took pains not to so strictly construe those statutes as to undermine their respective remedial mandates, the Stern court avoided addressing the purpose of section 12-201(a) altogether.257 Avoiding inquiry into the purpose of section 12-201(a) in turn precluded any discussion of whether the statute is remedial, and if so, whether the remedy the legislature intended to create was available to the students. Even if strict rather than liberal construction was appropriate, the court should have, at a minimum, taken stock of sec-


252. See Stern, 380 Md. at 720-22, 846 A.2d at 1013-14 (declaring section 12-201(a) unambiguous and noting that court's interpretation was guided by policy disfavoring sovereign immunity waivers and dictionary definitions).

253. See Harrison v. John F. Pilli & Sons, Inc., 321 Md. 336, 342, 582 A.2d 1231, 1234 (1990) (holding that it is not necessary or preferable to invoke canons of strict or narrow construction where the statute is not ambiguous); N. Singer, SUTHERLAND ON STATUTORY CONSTRUCTION § 61.2 (6th ed. 2004) (noting that strict construction is applied most conclusively when it is corroborated by other tools of interpretation).


255. See Harrison, 321 Md. at 341-42, 582 A.2d at 1234 (recognizing the canon).

256. Id. at 341, 582 A.2d at 1234; Pak v. Hoang, 378 Md. 315, 324-28, 835 A.2d 1185, 1190-92 (2003); Stern, 380 Md. at 781, 846 A.2d at 1019 (Wilner, J., dissenting) (noting that the legislative history of section 12-201(a) makes clear it was intended to be remedial in nature).

257. See Stern, 380 Md. at 719-23, 846 A.2d at 1012-14 (interpreting statute based on policy-driven strict construction and dictionary definitions).
tion 12-201(a)’s remedial purpose to ensure that it was not defeated by an overly strict construction.

Finally, the court’s failure to inquire into section 12-201(a)’s underlying purpose cannot be justified on the basis that the court found the statute to be unambiguous. While the court typically looks to legislative purpose only after deeming a statute ambiguous,\(^\textit{258}\) in \textit{Derry}, the court resorted to the legislative purpose of the statute at issue even though it found the statute was not ambiguous.\(^\textit{259}\) In contrast to both of these approaches, the \textit{Stern} court avoided the purpose of section 12-201(a) altogether, seemingly in adherence to the principle that courts are to look beyond a statute’s plain language only where the statute is ambiguous.\(^\textit{260}\) True adherence to this principle, however, would have also precluded the court’s decision to look beyond the plain language of section 12-201(a) to the policy rationale of the doctrine it was designed to abrogate.\(^\textit{261}\) If the cardinal rule of statutory interpretation is to effectuate the intention of the legislature,\(^\textit{262}\) where a statute is designed to abrogate a court created doctrine, a proper interpretation of that statute should not give greater weight to the purpose of the court created doctrine than to the purpose of the statute itself.

5. \textit{Conclusion}.—In \textit{Stern}, the Court of Appeals held that the Board of Regents’ sovereign immunity was not waived under section 12-201(a) of the State Government Article in an action alleging that the Board’s approval of a mid-year tuition increase breached its member institutions’ contracts with their respective students.\(^\textit{263}\) After deeming section 12-201(a) unambiguous,\(^\textit{264}\) the court held that the statute implicitly limits its waiver to actions arising from written contracts bearing a duly authorized State official’s signature, and that tuition bills bearing university seals did not meet the statute’s signature requirement.\(^\textit{265}\) In so holding, the court improperly placed its policy

\(^{258}\) See, \textit{e.g.}, Comptroller of the Treasury v. Clyde’s of Chevy Chase, Inc., 377 Md. 471, 483, 833 A.2d 1014, 1021 (2003) (stating that it is appropriate to examine material that bears on the legislative purpose once the statute has been found ambiguous); \textit{Liverpool v. Balt. Diamond Exch.}, 369 Md. 304, 318, 799 A.2d 1246, 1272 (2002) (noting that when a statute is capable of more than one meaning, the court interprets statutory language in light of legislative purpose).


\(^{260}\) \textit{Stern}, 380 Md. at 720, 846 A.2d at 1013.

\(^{261}\) See \textit{id.} at 722, 846 A.2d at 1013-14 (noting that § 12-201(a) “must be viewed within the context of an unfavored limitation on a well-recognized and ancient doctrine with a strong public policy . . .”).


\(^{263}\) \textit{Stern}, 380 Md. at 719-23, 846 A.2d at 1012-14.

\(^{264}\) \textit{id.} at 720, 846 A.2d at 1013.

\(^{265}\) \textit{id.} at 722-23, 846 A.2d at 1014.
of disfavoring sovereign immunity waivers above the remedial purpose of the statute,\textsuperscript{266} ignored the ambiguity of the statute’s plain language,\textsuperscript{267} and failed to examine a body of extra-textual evidence weighing against its interpretation.\textsuperscript{268} As a result, the court reached a decision that allows the State to escape liability for even egregious breaches of contract clearly within section 12-201(a)’s intended scope.\textsuperscript{269} 

\textbf{Adam Connolly}
III. CRIMINAL LAW

A. A Missed Opportunity to Apply the Doctrine of Transferred Intent to Inchoate Crimes

In Harrison v. State, the Court of Appeals of Maryland examined whether the transferred intent doctrine should be applied to permit the charge of attempted second-degree murder for an unintended victim. The court held that transferred intent does not apply to inchoate offenses. In so doing, the court failed to recognize that its reasons for rejecting the application of transferred intent to inchoate crimes apply equally to the application of concurrent intent, which the court, nonetheless, found to be applicable to attempt offenses. Furthermore, the court’s decision in Harrison will allow chance to improperly alter criminal liability by treating two defendants differently whose conduct results in the same level of harm to their victims and who are equally culpable for their actions. The court should have applied transferred intent to inchoate offenses only where bystanders are injured, thus providing an appropriate standard to limit liability. By applying transferred intent to attempt crimes where a bystander suffers physical injury, the court would have better served public policy by punishing criminals with proportionate penalties and deterring dangerous violent conduct.

2. The transferred intent doctrine is “[t]he rule that if one person intends to harm a second person but instead unintentionally harms a third, the first person’s criminal or tortious intent toward the second applies to the third as well.” BLACK’S LAW DICTIONARY 1563 (8th ed. 2004).
3. Harrison II, 382 Md. at 480, 855 A.2d at 1221-22.
4. Id. An inchoate offense is a “step toward the commission of another crime.” BLACK’S LAW DICTIONARY, supra note 2, at 1108. Attempt, conspiracy, and solicitation are the three types of inchoate crimes. Id.
5. Concurrent intent is a theory of liability “when the nature and scope of [an] attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity.” Ford v. State, 330 Md. 682, 716, 625 A.2d 984, 1000 (1993).
6. See infra notes 150-161 and accompanying text (discussing the majority’s failure to recognize that its reasons for rejecting the application of transferred intent to inchoate offenses apply to concurrent intent as well).
7. See infra notes 162-176 and accompanying text (exploring the problematic consequences of the court’s willingness to allow chance to alter criminal liability).
8. See infra notes 177-180 and accompanying text (criticizing the court’s failure to discuss approaches to limit the scope of criminal liability when applying transferred intent to inchoate crimes).
9. See infra notes 181-206 and accompanying text (discussing the positive policy implications of adopting such an approach).
I. The Case.—On July 27, 2001, James Cook was standing on a sidewalk in Baltimore City talking with friends when he was struck in the neck with a bullet.\textsuperscript{10} Gerard Harrison and a man known as Twin Shitty\textsuperscript{11} fired shots at a man named Valentine.\textsuperscript{12} Harrison fired six shots from a .38 caliber handgun; all of the bullets missed Valentine and instead one of the bullets struck Cook.\textsuperscript{13} Cook was taken to Sinai Hospital where he underwent surgery and ultimately survived his injuries.\textsuperscript{14}

A witness to the incident was shown a photo array and identified Harrison as one of the shooters.\textsuperscript{15} In a statement to police on August 22, Harrison said that he and his cohort shot at Valentine because Valentine was selling drugs and he had previously told Valentine not to deal in the area.\textsuperscript{16}

Subsequently, Harrison was charged in a nine-count indictment in the Circuit Court for Baltimore City.\textsuperscript{17} On June 12, 2002, the circuit court convicted Harrison of attempted second-degree murder and unlawful use of a handgun in the commission of a crime.\textsuperscript{18} Harrison was sentenced to concurrent prison terms of twelve years for the former offense and five years for the latter.\textsuperscript{19}

On appeal to the Court of Special Appeals, Harrison claimed that the agreed statement of facts was not adequate to support his conviction for attempted murder because there was no evidence that he harbored the specific intent to kill Cook.\textsuperscript{20} The Court of Special Appeals held that the doctrine of transferred intent could not be used to support Harrison’s conviction because the Court of Appeals stated in Poe

\begin{enumerate}
\item Cook was standing on the fifteen hundred block of Clifton Avenue. \textit{Harrison II}, 382 Md. at 483, 855 A.2d at 1223-24.
\item "Twin Shitty" is the only name by which the second shooter is known. \textit{Harrison v. State}, 151 Md. App. 648, 652 n.2, 828 A.2d 249, 251 n.2 (2003) [hereinafter \textit{Harrison I}].
\item \textit{Harrison II}, 382 Md. at 483, 855 A.2d at 1224.
\item \textit{Id.} at 484-85, 855 A.2d at 1224. Harrison fired all of the bullets in his gun and Twin Shitty fired shots from the two guns that he carried; the two men then fled the scene. \textit{Id.} at 484, 855 A.2d at 1224.
\item \textit{Id.} at 484, 855 A.2d at 1224.
\item \textit{Id.} at 483, 855 A.2d at 1224.
\item \textit{Id.} at 484-85, 855 A.2d at 1224.
\item \textit{Id.} at 480-83, 855 A.2d at 1222-23. Harrison was charged with attempted first-degree murder; attempted second-degree murder; first-degree assault; second-degree assault; reckless endangerment; use of handgun in the commission of a felony or crime of violence; the wearing, carrying, and transportation of a handgun; possession of a regulated firearm after having been previously convicted of a misdemeanor carrying a penalty of more than two years imprisonment; and possession of a regulated firearm after having been previously convicted of a crime of violence. \textit{Id.}
\item \textit{Id.} at 483, 487, 855 A.2d at 1224.
\item \textit{Id.} at 485, 855 A.2d at 1224.
\end{enumerate}
v. State\(^2\) that the transferred intent doctrine cannot be used in cases where the unintended victim is not killed.\(^2\) However, the court found that there was sufficient evidence that Harrison and his fellow shooter created a "kill zone" around Valentine by firing a "hail of bullets."\(^2\) Consequently, the court affirmed Harrison's conviction because there was concurrent intent that satisfied the mens rea requirement for attempted second-degree murder.\(^2\)

Harrison then appealed to the Court of Appeals, which granted certiorari to determine whether transferred or concurrent intent could be applied in attempted murder cases.\(^2\)

2. Legal Background.—The Court of Appeals has considered the applicability of transferred intent to attempt crimes several times over the past sixteen years\(^2\) and its stance on the issue has shifted significantly over this time.\(^2\) Maryland recognizes the doctrine of transferred intent,\(^2\) which originates from English common law,\(^2\) and eventually expanded it to apply to inchoate crimes.\(^2\) However, shortly after the application of transferred intent to inchoate offenses, the Court of Appeals began to criticize the reasoning behind its own extension of the doctrine.\(^3\) The inconsistency in Maryland case law mirrors a division between other states concerning the application of

\(^{22}\) Harrison I, 151 Md. App. at 658, 828 A.2d at 254-55.
\(^{23}\) Id. at 661, 828 A.2d at 257.
\(^{24}\) Id.
\(^{25}\) Harrison II, 382 Md. at 486-87, 855 A.2d at 1225.
\(^{27}\) Compare Wilson, 313 Md. at 609, 546 A.2d at 1045 (holding that transferred intent applies to inchoate crimes), with Ford, 330 Md. at 709, 625 A.2d at 997 (stating that transferred intent is not applicable to attempt crimes).

\(^{28}\) Gladden v. State, 273 Md. 383, 405, 330 A.2d 176, 189 (1974) (finding that transferred intent is the law of Maryland). The court stated that the doctrine of transferred intent had "lost none of its patina by its application over the centuries down unto modern times; its viability is recognized by its current acceptance and application." Id. at 392, 330 A.2d at 181.

\(^{30}\) Wilson, 313 Md. at 609, 546 A.2d at 1045 (applying the doctrine of transferred intent to attempted murder by relying on the specific intent of a defendant as to his intended victim).

\(^{31}\) See Poe, 341 Md. at 529-30, 671 A.2d at 504 (stating that transferred intent only applies in cases where the unintended victim dies); Ford, 330 Md. at 709, 625 A.2d at 997 (stating, in dicta, that transferred intent does not apply to inchoate crimes even though the court recognized that its opinion conflicted with precedent).
transferred intent to inchoate offenses.\textsuperscript{32} States that have approved this application of transferred intent have relied largely on policy rationales of ensuring proportionate punishment for criminals and deterrence to support their decisions.\textsuperscript{33} Courts prohibiting the application of transferred intent to inchoate crimes, however, have argued primarily that it is an unnecessary extension of the doctrine.\textsuperscript{34}

Maryland courts that oppose the application of transferred intent to inchoate offenses have articulated an alternative to convict defendants charged with intent crimes against unintended victims.\textsuperscript{35} Instead of applying transferred intent, these courts have reasoned that concurrent intent is a better jurisprudential tool where an unintended victim is not fatally injured.\textsuperscript{36}

\textbf{a. Maryland Transferred Intent Case Law.}—The English common-law doctrine of transferred intent was incorporated into Maryland common law through the Declaration of Rights in 1776.\textsuperscript{37} In 1576, \textit{The Queen v. Saunders & Archer} was one of the first cases to outline the theory of transferred intent in its traditional form.\textsuperscript{38} Saunders tried to kill his wife by giving her a poisoned apple, but instead his wife gave the poisoned apple to their daughter who ate it and died.\textsuperscript{39} Saunders was convicted of murdering his daughter even though he did not intend to kill her.\textsuperscript{40}

\textsuperscript{32. See, e.g., State v. Hinton, 630 A.2d 593, 601 (Conn. 1993) (prohibiting the use of transferred intent to inchoate offenses); Blanche v. State, 690 N.E.2d 709, 712 (Ind. 1998) (holding that the transferred intent doctrine applies to attempted murder).}

\textsuperscript{33. See, e.g., State v. Fennell, 551 S.E.2d 512, 517 (S.C. 2000) (concluding that it was necessary to apply transferred intent to make sure defendants using deadly force are adequately punished).}

\textsuperscript{34. See, e.g., \textit{Hinton}, 630 A.2d at 601 (holding that transferred intent was not necessary to convict the defendant of attempted murder because a defendant can still be prosecuted for his intent and conduct towards the intended victim). One prominent jurist, Justice Stanley Mosk, advocated eliminating the use of transferred intent in all circumstances. \textit{People v. Scott}, 927 P.2d 288, 294 (Cal. 1996) (Mosk, J., concurring).}

\textsuperscript{35. See \textit{Ford}, 330 Md. at 716, 625 A.2d at 1000 (stating, in dicta, that concurrent intent could be used to justify a prior case erroneously applying transferred intent to attempted murder); \textit{Harvey v. State}, 111 Md. App. 401, 434-35, 681 A.2d 628, 645 (1996) (stating that there was sufficient evidence under the concurrent intent theory to uphold the defendant's conviction for assault with intent to murder).}

\textsuperscript{36. \textit{Ford}, 330 Md. at 716, 625 A.2d at 1000; \textit{Harvey}, 111 Md. App. at 434-35, 681 A.2d at 645.}

\textsuperscript{37. See \textit{Md. Const. Decl. of Rts.} art 5 ("That the Inhabitants of Maryland are entitled to the Common Law of England . . . as existed on the Fourth day of July, seventeen hundred and seventy-six.").}

\textsuperscript{38. 75 Eng. Rep. 706 (K.B. 1576).}

\textsuperscript{39. Id. at 707.}

\textsuperscript{40. Id.}
Despite the deep English common-law roots of transferred intent in Maryland, the Court of Appeals did not address the doctrine until 1974 in *Gladden v. State*.\(^{41}\) In *Gladden*, the defendant fired four or five shots at his intended victim, but he missed his target and instead one bullet went through the window of a nearby home, killing a twelve-year-old boy who was sitting in his living room.\(^{42}\) *Gladden* was convicted of first-degree murder of the boy.\(^{43}\) Addressing the transferred intent to kill, the court concluded that the death of Gladden's unintended victim produced the same societal harm as the death of an intended victim.\(^{44}\) Therefore, the court transferred the intent to kill from the intended victim to the twelve-year-old boy. The Court of Appeals acknowledged the "ancient vintage" of the transferred intent doctrine and affirmed its application in Maryland.\(^{45}\) The court upheld Gladden's murder conviction because the offense he completed against his unintended victim was the same as the crime he attempted to commit against his intended victim.\(^{46}\)

The Court of Special Appeals limited the doctrine of transferred intent by requiring injury to the unintended victim in *Harrod v. State*\(^{47}\) eleven years after the doctrine's initial application in *Gladden*.\(^{48}\) In *Harrod*, the court considered whether the transferred intent doctrine should be extended to cases where the unintended victim was not at all injured.\(^{49}\) The defendant in *Harrod* threw a hammer at his wife's male friend during a dispute.\(^{50}\) The hammer hit the wall above his baby's crib but the baby was not injured.\(^{51}\) *Harrod* was subsequently convicted of attempted battery-type assault against his son.\(^{52}\) However, the court overturned the defendant's conviction, holding that to transfer intent where the victim was not injured would lead to the absurd result of making the defendant criminally liable where there was no intent and that victim was not injured.\(^{53}\)

\(^{41}\) 273 Md. 383, 405, 330 A.2d 176, 189 (1974). Transferred intent was discussed in *Jones v. State*, but the court did not rule on its applicability. 188 Md. 263, 272-73, 52 A.2d 484, 489 (1947).

\(^{42}\) 273 Md. at 385, 330 A.2d at 177.

\(^{43}\) *Id.* at 386, 330 A.2d at 178.

\(^{44}\) *Id.* at 405, 330 A.2d at 188.

\(^{45}\) *Id.* at 392, 330 A.2d at 181.

\(^{46}\) *Id.* at 405, 330 A.2d at 188.


\(^{48}\) *Id.* at 137-38, 499 A.2d at 963-64.

\(^{49}\) *Id.* at 132, 499 A.2d at 961.

\(^{50}\) *Id.* at 131-32, 499 A.2d at 960-61.

\(^{51}\) *Id.* at 132, 499 A.2d at 961.

\(^{52}\) *Id.* at 130, 499 A.2d at 960.

\(^{53}\) *Id.* at 137-38, 499 A.2d at 963-64.
The court's most significant extension of the transferred intent doctrine occurred in 1988 in *State v. Wilson*.\(^5\) The Court of Appeals extended the doctrine of transferred intent to attempted first-degree murder of an unintended victim.\(^5\) Transferred intent was applied to convict Wilson of first-degree attempted murder of an unintended victim where he shot at and missed his intended victim, but instead hit and injured a bystander.\(^5\) The Court of Appeals interpreted *Gladden* to permit transferred intent in situations where the defendant's conduct affects or harms an unintended victim.\(^5\) The *Wilson* court, therefore, reasoned that intent does not have to be directed at an unintended victim to satisfy a specific intent mens rea element of an offense against that victim.\(^5\)

The Court of Appeals initiated a significant turn in its transferred intent doctrine jurisprudence with dicta in *Ford v. State* that questioned the validity of the *Wilson* precedent only five years after it was decided.\(^5\) In *Ford*, the defendant and three of his cohorts threw large rocks at vehicles driving on the Capital Beltway, injuring several passengers in the vehicles.\(^5\) The court upheld a conviction for assault with intent to disable both drivers and passengers, reasoning that the jury could have found that Ford had the requisite intent towards both drivers and passengers.\(^5\) The court went on to address, in dicta, the trial court's jury instruction that if it found Ford assaulted with intent to disable the drivers, the intent could be transferred to the passengers.\(^5\) The court indicated that a defendant's conviction for assault with intent to disable could not be based on transferred intent, because transferred intent was not applicable to crimes against unintended victims where the crime against the intended victim was completed.\(^5\) The Court of Appeals in *Ford* approved of the result in

\(^{54}\) 313 Md. 600, 546 A.2d 1041 (1988).
\(^{55}\) *Id.* at 609, 546 A.2d at 1045.
\(^{56}\) *Id.* at 601-02, 546 A.2d at 1042.
\(^{57}\) *Id.* at 604, 546 A.2d at 1043.
\(^{58}\) *Id.* at 605, 546 A.2d at 1043.
\(^{60}\) *Id.* at 689, 625 A.2d 987.
\(^{61}\) *Id.* at 708, 625 A.2d at 996. Ford was also convicted of the malicious destruction of property, and assault and battery. *Id.* at 698-99, 625 A.2d at 991-92.
\(^{62}\) *Id.* at 708-09, 625 A.2d at 996-97.
\(^{63}\) *Id.* at 709, 625 A.2d at 997.
\(^{64}\) *Id.* at 713, 625 A.2d at 999. The Court of Appeals acknowledged that this interpretation of the transferred intent doctrine was contrary to the court's holding in *Wilson* where the doctrine was applied to attempted murder. *Id.* The *Ford* court criticized *Wilson* for extending transferred intent beyond its traditional application. *Id.* at 715-16, 625 A.2d at 1000. The court noted that transferred intent was designed to combine a defendant's intent toward his intended victim with the harm inflicted on this unintended victim into
Wilson but reinterpreted its reasoning under the theory of concurrent intent.\textsuperscript{65} The court explained that concurrent intent differs from transferred intent in that the former is a legal fiction where the nature of a defendant's conduct is said to create a zone of danger such as to permit a finding of intent to injure a bystander whereas with the latter, the defendant's mens rea from an intended victim is simply imposed on conduct that harms a bystander without any further examination of the nature of the conduct.\textsuperscript{66}

Judge McAuliffe, in a concurring opinion in Ford, explained that the policy rationale favoring the application of transferred intent to inchoate offenses still supported the Wilson holding.\textsuperscript{67} He stated that there is a stronger deterrent effect in holding a defendant criminally liable for purposeful conduct that results in harm to unintended as well as intended victims.\textsuperscript{68}

In Poe v. State, the court ruled in accordance with the dictum in Ford when it applied transferred intent where the intended target was injured but not killed by the defendant and the unintended victim was killed.\textsuperscript{69} In Poe, the defendant and his wife were arguing. Mr. Poe retrieved a shotgun from his car and fired a slug at Ms. Poe.\textsuperscript{70} The shot went through Ms. Poe's arm and hit Kimberly Rice, a six-year-old girl, who was standing directly behind Ms. Poe.\textsuperscript{71} Rice died instantaneously from the wound to her head.\textsuperscript{72} Mr. Poe was convicted of first-

\textsuperscript{65} Id. at 712, 625 A.2d at 998. The court stated that transferred intent was not meant to create additional criminal liability but instead was intended to prevent defendants from escaping punishment where the mens rea and actus reus elements of an offense were present but could not be established for any one victim. Id. at 711, 625 A.2d at 998. Because there is already one completed crime against the intended victim of the same severity as one that could be charged with respect to the unintended victim, the court determined that transferred intent was not necessary to punish the defendant twice. Id. at 711-12, 625 A.2d at 998. Moreover, the court observed that attempted murder does not require a victim to be physically harmed and thus it would be impossible to create a logical approach to determine to whom the defendant's intent should be transferred. Id. at 715-16, 625 A.2d at 1000.

\textsuperscript{66} Id. at 715-16, 625 A.2d at 1000.

\textsuperscript{67} Id. at 725-26, 625 A.2d at 1005 (McAuliffe, J., concurring).

\textsuperscript{68} Id. (McAuliffe, J., concurring).

\textsuperscript{69} 341 Md. 523, 525, 671 A.2d 501, 502 (1996). The court reconciled its opinion in Poe with its previous dicta in Ford regarding the applicability of transferred intent by arguing that both decisions stood for the proposition that transferred intent could not be applied where the unintended victim did not die. Id. at 529-30, 671 A.2d at 504.

\textsuperscript{70} Id. at 526, 671 A.2d at 502.

\textsuperscript{71} Id.

\textsuperscript{72} Id.
degree murder of Rice and first-degree attempted murder of Ms. Poe. The court rejected the argument that the defendant could not be convicted of the first-degree murder of Rice because the crime of attempted murder had been completed against Ms. Poe. The court held that transferred intent was applicable where an unintended victim was killed because the doctrine was required to ensure that the defendant was properly punished.

In a concurring opinion in Poe, Judge Raker stated that Wilson and Ford should be interpreted as applying the doctrine of transferred intent only when an unintended victim is physically injured. She explained that both history and policy favor an extension of the doctrine to inchoate crimes where the unintended victim is harmed. Judge Raker noted that the policy behind transferred intent was to prevent offenders from avoiding criminal liability for their "bad aim" or misidentifying their victims. She then argued that the policy rationale supporting transferred intent in other situations also favored its application to cases where the unintended victim was injured but not killed. Moreover, Judge Raker reasoned that criminals may escape liability in "bad aim" or mistaken identity cases if transferred intent is not applicable to prove concurrent intent. Judge Raker noted that because separate intent would have to be established in such circumstances there may be situations where that additional evidence will be hard to prove.

The Court of Special Appeals in Harvey v. State followed the high court's dictum in Ford and Poe by holding that transferred intent did not apply to assault with intent to commit murder of an unintended victim. The defendant in Harvey fired nine shots at his intended

73. Id. at 527, 671 A.2d at 503.
74. Id. at 529-30, 671 A.2d at 504. The court held that intent is never "used up" such that the completion of one crime would prohibit transfer of intent to another crime. Id. at 528, 671 A.2d at 503.
75. Id. The court reasoned that Mr. Poe's offense was consistent with the policy rationale behind transferred intent that a defendant should not avoid conviction for a murder where all of the elements of a crime were committed, except that an unintended victim was killed instead of an intended victim. Id. at 530, 671 A.2d at 504.
76. Id. at 535, 671 A.2d at 507 (Raker, J., concurring).
77. Id. at 536, 671 A.2d at 507 (Raker, J., concurring). Historically, the common law in both England and the United States favored the application of transferred intent to bystanders who were injured. Id. (Raker, J., concurring).
78. Id. at 539, 671 A.2d at 509 (Raker, J., concurring).
79. Id. (Raker, J., concurring).
80. Id. at 539-40, 671 A.2d at 509 (Raker, J., concurring).
81. Id. (Raker, J., concurring).
victims and missed them all.\textsuperscript{83} An unintended target was hit in the leg by a stray bullet, but she survived her injuries.\textsuperscript{84} The court determined that the defendant’s criminal liability toward the unintended victim was not affected by what happened to the intended victims.\textsuperscript{85} The court concluded that transferred intent plays a necessary role in murder prosecutions because where an unintended victim is killed, there may not be another way to convict a defendant of that murder.\textsuperscript{86} However, the court determined that the same problems facing the State in obtaining convictions for murder are not present for obtaining convictions for unintended battery because the sentence for battery can be adjusted accordingly without resorting to the doctrine of transferred intent.\textsuperscript{87} Subsequently, the court found that applying transferred intent to inchoate offenses extended the doctrine beyond its needed scope.\textsuperscript{88}

\textit{b. Transferred Intent Case Law in Other Jurisdictions.—} The conflicting case law in Maryland is a microcosm of the split between jurisdictions throughout the United States on the applicability of transferred intent.\textsuperscript{89} Because the case law in Maryland and the rest of the country is sharply divided, it is instructive to examine how other jurisdictions have addressed the extension of transferred intent to inchoate offenses.\textsuperscript{90} The split between states regarding the applicability of transferred intent is largely over the policy implications of its extension.\textsuperscript{91} States favoring the application of transferred intent to inchoate offenses,

\begin{itemize}
\item \textit{Compare} Ochoa v. State, 981 P.2d 1201, 1204 (Nev. 1999) (applying transferred intent to inchoate offenses), \textit{with} State v. Brady, 745 So. 2d 954, 958 (Fla. 1999) (holding that transferred intent is not applicable to inchoate offenses).
\item \textit{See, e.g.,} State v. Hinton, 630 A.2d 593, 601 (Conn. 1993) (prohibiting the use of transferred intent to inchoate offenses); Blanche v. State, 690 N.E.2d 709, 712 (Ind. 1998) (holding that transferred intent applies to attempted murder).
\item \textit{Compare} State v. Gilman, 69 Me. 163, 171 (1879) (applying transferred intent to ensure defendants are punished for their conduct), \textit{and} Ochoa, 981 P.2d at 1204 (finding that both proportionate punishment and deterrence were served by application of transferred intent to inchoate offenses), \textit{and} State v. Worlock, 569 A.2d 1314, 1325 (N.J. 1990) (stating that the state’s policy of deterrence was better served by applying transferred intent), \textit{and} People v. Fernandez, 673 N.E.2d 910, 913 (N.Y. 1996) (finding that luck should not impact a defendant’s punishment if a different victim was injured or killed than was intended), \textit{and} State v. Fennell, 531 S.E.2d 512, 517 (S.C. 2000) (holding that transferred intent was necessary to ensure proportionate punishment), \textit{with} Ramsey v. State 56 P.3d 675, 681 (Alaska Ct. App. 2002) (holding that transferred intent was unnecessary to ensure
\end{itemize}
ate offenses have held that its extension was necessary to ensure propor
tionate punishment as well as to deter crime. In contrast, states that have opposed the use of transferred intent in attempt cases argue that its application would lead to disproportionate punishment and it is unnecessary to ensure culpability. The division between states that apply transferred intent to attempt crimes and those that do not is essentially over how far the policy rationale favoring transferred intent should be extended.

In State v. Gilman, the Supreme Judicial Court of Maine became one of the first courts in the United States to examine the applicability of transferred intent to inchoate crimes. The Gilman court based its extension of the transferred intent doctrine, in part, on a policy argument that its prohibition would make prosecutions for assault with intent to kill almost impossible. In State v. Gillette, a New Mexico court employed public safety arguments when it held that transferred intent was applicable to inchoate crimes because the defendant's actions endangered bystanders' lives and proved a willingness to kill. The court in Gillette extended the doctrine to the imposition of criminal liability even where there was no injury whatsoever to the unintended victims.

92. See, e.g., Gilman, 69 Me. at 171 (stating that transferred intent was necessary to ensure that the defendant was punished for his conduct); Ochoa, 981 P.2d at 1204 (stating that transferred intent ensures proportionate punishment and promotes deterrence when applied to inchoate offenses); Worlock, 569 A.2d at 1325 (holding that deterrence was better served by applying transferred intent to attempt crimes); Fennell, 531 S.E.2d at 517 (finding that transferred intent was needed to ensure proportionate punishment).

93. See Ramsey, 56 P.3d at 681 (holding that transferred intent was unnecessary to ensure liability and too expansive in its scope); Hinton, 630 A.2d at 601 (stating that the defendant can be punished for actions directed toward the intended victim and he therefore will be subject to criminal liability and transferred intent should not extend to increase that liability); Brady, 745 So. 2d at 958 (stating that transferred intent was unnecessary to establish criminal liability).

94. Compare Ochoa, 981 P.2d at 1205 (applying transferred intent to its fullest extent, including inchoate offenses), with Hinton, 630 A.2d at 601 (noting that transferred intent applies in cases where the unintended victim dies, but finding that it is unnecessary where a bystander is only nonfatally injured).

95. 69 Me. at 171.
96. Id.
98. Id. at 635-36.
99. Id. at 634-36. The defendant attempted to poison his intended victim by putting pentobarbital in a can of Dr. Pepper. Id. at 630. The unintended victims drank very small amounts from the can but were not injured. Id. at 630, 634.
The New Jersey Supreme Court in *State v. Worlock*\(^ {100} \) addressed additional policy rationales to support its use of transferred intent.\(^ {101} \) Relying on a state statute\(^ {102} \) permitting the use of transferred intent, the court found that transferred intent should apply where a defendant killed both his intended victim and also an unintended bystander.\(^ {103} \) After analyzing the legislative history of the statute, the court stated that transferred intent prohibited a defendant from escaping criminal liability because of bad aim and it deterred people from acting on impulses to injure others.\(^ {104} \) The court concluded that people would be deterred more forcefully by extending the doctrine of transferred intent to cases where both intended and unintended victims were killed.\(^ {105} \)

The Supreme Court of Nevada also addressed the justifications for applying transferred intent to inchoate offenses in *Ochoa v. State*.\(^ {106} \) The court concluded that, as a policy matter, transferred intent should apply to inchoate offenses where the intended victim is killed and the unintended victim is injured but not killed.\(^ {107} \) In *Ochoa*, the court determined that to prevent the defendant from escaping liability for his poor aim and to better deter similar conduct, the extension of transferred intent was the best public policy.\(^ {108} \) In addition to the above cases that articulate a rationale for the application of transferred intent to attempt crimes, several states have applied the doctrine without explanation.\(^ {109} \)

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\(^ {100} \) 569 A.2d 1314 (N.J. 1990).

\(^ {101} \) Id. at 1324.

\(^ {102} \) The statute provided: "A defendant shall not be relieved of responsibility for causing a result if the only difference between what actually occurred and what was designed, contemplated or risked is that a different person or property was injured or affected or that a less serious or less extensive injury or harm occurred." N.J. STAT. ANN. § 2C:2-3d (1990).

\(^ {103} \) *Worlock*, 569 A.2d at 1324.

\(^ {104} \) Id. at 1325.

\(^ {105} \) Id.

\(^ {106} \) 981 P.2d 1201, 1205 (Nev. 1999).

\(^ {107} \) Id. at 1204-05.

\(^ {108} \) Id. at 1204-05.

\(^ {109} \) See *State v. Rodriguez-Gonzales*, 790 P.2d 287, 288 (Ariz. Ct. App. 1990) (interpreting a state statute that codified the transferred intent doctrine and extended it to intentional criminal conduct that causes an unintentional result and applying transferred intent to attempted first-degree murder); *People v. Ephraim*, 753 N.E.2d 486, 497 (Ill. App. Ct. 2001) (applying transferred intent to attempted murder of an unintended victim who was injured but not killed); *Blanche v. State*, 690 N.E.2d 709, 712 (Ind. 1998) (holding that the transferred intent doctrine applies to attempted murder); *State v. Alford*, 151 N.W.2d 573, 575 (Iowa 1967) (affirming the defendant's conviction for assault with intent to commit murder where he shot at an intended victim and instead wounded an unintended victim); *State v. Thomas*, 53 So. 868, 869 (La. 1910) (affirming the defendant's conviction for in-
3. The Court's Reasoning.—In Harrison v. State, the Court of Appeals reversed the judgment of the Court of Special Appeals, finding that the application of the concurrent intent doctrine to support Harrison's conviction for attempted second-degree murder was in error because there was insufficient evidence to establish that the victim was in the “kill zone” created by Harrison's gunfire. In a 5-1 decision, Judge Battaglia, writing for the majority, held that transferred intent could not be used to establish the requisite mens rea element for attempted murder.

a. The Court's Analysis of Concurrent Intent.—The Court of Appeals evaluated the Court of Special Appeals' holding that the specific intent necessary to support a conviction for attempted second-degree murder was established through the doctrine of concurrent intent. The court went on to describe a concurrent intent analysis as an evaluation of the scope of the method used to perpetrate an offense and the degree to which those means increase the level of danger to bystanders. The court created a two-pronged approach to evaluating whether the application of concurrent intent is justified: “(1) whether a fact-finder could infer that the defendant intentionally escalated his mode of attack to such an extent that he or she created a ‘zone of harm,’ and (2) whether the facts establish that the actual victim resided in that zone when he or she was injured.”

The court then evaluated the facts of Harrison’s case against that standard for concurrent intent to determine if there was sufficient evidence to support his conviction. The court observed that other courts have found that a shooter created a zone of harm when firing several shots at an intended victim. Therefore, the court held that the six

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109. Harrison II, 382 Md. at 480, 486, 855 A.2d at 1222, 1225.
110. Id. at 487, 855 A.2d at 1225.
111. Id. at 491-98, 855 A.2d at 1228-32.
112. Id. at 491, 855 A.2d at 1228 (citing Ford v. State, 330 Md. 682, 717, 625 A.2d 984, 1001 (1993)).
shots Harrison fired at his intended victim created an inference that a kill zone was established around Valentine and that Harrison intended to kill anyone in that zone.\textsuperscript{117}

However, the court held that the State failed to prove the second prong of the concurrent intent standard.\textsuperscript{118} The court found that there was no evidence that Cook was within the kill zone when Harrison's bullet struck him.\textsuperscript{119} The court observed that although the statement of facts established where Cook generally was located when the stray bullet hit him, the State did not provide evidence of his relative position to Valentine or Harrison during the shooting.\textsuperscript{120} The court reasoned that a failure to provide evidence indicating the relative positions of Harrison, Valentine, and Cook prohibited a finding that Cook actually was in the zone of danger.\textsuperscript{121} Therefore, the court overturned Harrison's conviction for attempted second-degree murder because of the Court of Special Appeals' misapplication of the concurrent intent standard.\textsuperscript{122}

\textit{b. The Court's Analysis of Transferred Intent.}—The court rejected the State's argument that transferred intent applies to inchoate offenses and held that transferred intent cannot be used to establish the mens rea element of attempted second-degree murder.\textsuperscript{123} Judge Battaglia approvingly cited Ford, which criticized the court's opinion extending the doctrine of transferred intent to attempted murder in Wilson, a case almost factually identical to Harrison.\textsuperscript{124} The majority also noted that many other courts have similarly held that transferred intent is not applicable to inchoate offenses.\textsuperscript{125} The court stated that its holding did not present the pitfalls related to the creation of unlimited liability or disproportionate punishment that it found inherent in the use of transferred intent to support convictions for inchoate crimes.\textsuperscript{126}

The court noted that injury to a victim is not necessary for the State to secure a conviction for attempted murder against a defendant.\textsuperscript{127} Therefore, in order to limit the scope of a defendant's liabil-

\begin{footnotes}
\footnote{117. Id. at 496, 855 A.2d at 1231.}
\footnote{118. Id.}
\footnote{119. Id.}
\footnote{120. Id. at 497, 855 A.2d at 1231-32.}
\footnote{121. Id., 855 A.2d at 1292.}
\footnote{122. Id.}
\footnote{123. Id. at 508, 855 A.2d at 1238.}
\footnote{124. Id. at 507-08, 855 A.2d at 1237-38.}
\footnote{125. Id. at 506-07, 855 A.2d at 1237.}
\footnote{126. Id. at 507-08, 855 A.2d at 1237-38.}
\footnote{127. Id. at 507, 855 A.2d at 1238.}
\end{footnotes}
ity, the court held that transferred intent only applies to bystanders that are killed and not just injured.\textsuperscript{128}

The court stated that its most compelling reason for rejecting the application of transferred intent to inchoate offenses was that it was not necessary to create a whole crime by joining the intent directed towards one victim with the harm inflicted on another victim because proportionate punishment could be achieved without the extension of transferred intent.\textsuperscript{129} The court concluded that a defendant can be held criminally liable for the actual injuries sustained by an unintended victim without applying the doctrine of transferred intent.\textsuperscript{130} Furthermore, the court determined that the State was free to use the concurrent intent doctrine to satisfy mens rea requirements for specific intent offenses to pursue prosecution for injuries to unintended victims and therefore it was not necessary to extend the doctrine of transferred intent to cover inchoate offenses because a defendant could be punished appropriately without the use of transferred intent.\textsuperscript{131} The court also reasoned that in cases such as \textit{Harrison} there already was a completed crime committed against the intended target and additional charges such as criminal battery could be brought for harm caused to unintended victims in order to ensure that the defendant was adequately punished and transferred intent was thus not necessary.\textsuperscript{132}

In her dissenting opinion, Judge Raker argued that Harrison's conviction for attempted second-degree murder should be affirmed through the application of transferred intent.\textsuperscript{133} She argued that where a defendant evinces intent to kill there should be no distinction between the applicability of transferred intent to unintended victims that die and unintended victims that are harmed but not fatally injured.\textsuperscript{134} Judge Raker reasoned that because transferred intent should be applicable to inchoate offenses, Harrison should be held accountable for the attempted second-degree murder of Cook.\textsuperscript{135}

\textsuperscript{128} Id. at 506, 855 A.2d at 1237.
\textsuperscript{129} Id.
\textsuperscript{130} Id. at 508, 855 A.2d at 1238.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id. at 508-09, 855 A.2d at 1238-39 (Raker, J., dissenting).
\textsuperscript{134} Id. at 510, 855 A.2d at 1240 (Raker, J., dissenting). Judge Raker characterized the majority's limitation of the transferred intent doctrine to unintended victims that die as "artificial." Id. at 511, 855 A.2d at 1240 (Raker, J., dissenting).
\textsuperscript{135} Id. at 508-09, 855 A.2d at 1238-39 (Raker, J., dissenting).
Moreover, Judge Raker argued that Maryland should follow the many states that apply the transferred intent doctrine to inchoate crimes.\(^{136}\)

Judge Raker then refuted a criticism raised by the majority that applying the doctrine of transferred intent to inchoate offenses would create confusion as to when attempted murder should be charged because injury to the victim is not an element of the offense.\(^{137}\) The dissent explained that this problem could be resolved by permitting intent to be transferred only when the unintended victim is injured.\(^{138}\)

Judge Raker observed that because of the court's decision in Poe, the transferred intent doctrine applies when an unintended victim dies even when the defendant has committed a completed crime against the intended victim.\(^{139}\) The dissent thus criticized the court's argument that because Harrison already committed a completed crime against Valentine, his intended victim, that transferred intent could not be used to charge him with a crime against Cook, his unintended victim.\(^{140}\)

Judge Raker concluded that neither precedent nor public policy considerations favor prohibiting transferred intent from being applied to inchoate offenses,\(^{141}\) noting that both English and American courts have applied transferred intent to inchoate crimes.\(^{142}\) Judge Raker explained that the majority's limitation of the transferred intent doctrine will make it difficult to prosecute defendants charged with inchoate offenses against unintended victims.\(^{143}\) Although the majority contended that the doctrine of concurrent intent is sufficient to permit the State to hold defendants accountable for inchoate offenses, Judge Raker concluded that the requirement of additional evidence needed to establish concurrent intent will reward defendants that have bad aim with reduced sentences or acquittals.\(^{144}\)

4. Analysis.—In Harrison v. State, the court held that transferred intent was not applicable to inchoate offenses.\(^{145}\) The court failed to recognize that its primary rationales for prohibiting the use of transferred intent to inchoate offenses apply equally to excluding concur-

\(^{136}\) Id. at 510, 855 A.2d at 1239-40 (Raker, J., dissenting).
\(^{137}\) Id. at 510 n.2, 855 A.2d at 1240 n.2 (Raker, J., dissenting).
\(^{138}\) Id. (Raker, J., dissenting).
\(^{139}\) Id. at 511, 855 A.2d at 1240 (Raker, J., dissenting).
\(^{140}\) Id. at 511, 512 n.4, 855 A.2d at 1240, 1241 n.4 (Raker, J., dissenting).
\(^{141}\) Id. at 512 n.3, 855 A.2d at 1241 n.3 (Raker, J., dissenting) (citing Poe v. State, 341 Md. 523, 556, 671 A.2d 501, 507 (1996) (Raker, J., concurring)).
\(^{142}\) Id. (Raker, J., dissenting).
\(^{143}\) Id. at 518, 855 A.2d at 1244 (Raker, J., dissenting).
\(^{144}\) Id. (Raker, J., dissenting).
\(^{145}\) 382 Md. at 480, 855 A.2d at 1222.
rent intent, which the court nonetheless employs. Moreover, the court's decision will permit chance to inappropriately alter criminal liability. In arguing that no boundary can be established to limit liability for the application of transferred intent to inchoate offenses, the court failed to recognize that harm to the victim is a logical and appropriate limiting principle. Requiring that an unintended victim suffer physical injury before applying transferred intent to inchoate offenses provides a workable standard consistent with the court's usage of concurrent intent and ensures that violent conduct is deterred and defendants are punished appropriately.

a. The Rejection of Transferred Intent Where Concurrent Intent Is Applied Is Problematic Because the Rationales for Excluding Transferred Intent Apply Equally to Both Theories.—The Harrison court rejected the application of transferred intent to inchoate offenses, but accepted the application of concurrent intent to inchoate crimes even though the court's primary rationales for rejecting the former apply with equal force to prohibit the latter. The court's primary argument for rejecting transferred intent—that it was not necessary to join intent from an intended victim and harm from an unintended victim because Harrison could already be charged with attempted murder against his intended victim and other charges could be brought to ensure appropriate punishment for harm caused to his unintended victim—also applies to concurrent intent. The court failed to recognize that both doctrines are legal fictions that require imposition of a mens rea element toward an unintended victim where there was no intent to harm.

146. See infra notes 150-161 and accompanying text (discussing the majority's flawed reasoning in rejecting transferred intent but accepting the application of concurrent intent at the same time).

147. See infra notes 162-176 and accompanying text (criticizing the court for allowing defendants to be punished differently as a result of the improper application of chance in criminal law).

148. See infra notes 177-180 and accompanying text (arguing that the court erred in failing to consider injury to the victim as an appropriate limiting standard for controlling liability in the extension of transferred intent to inchoate offenses).

149. See infra notes 181-206 and accompanying text (exploring the positive policy benefits of extending the doctrine of transferred intent to inchoate offenses with physical harm to the victim as a liability cut-off).


151. Id. at 511, 855 A.2d at 1240 (Raker, J., dissenting).

152. See id. at 509, 855 A.2d at 1239 (Raker, J., dissenting) (calling concurrent intent a legal fiction); Poe v. State, 341 Md. 523, 529, 671 A.2d 501, 504 (1996) (stating that transferred intent is a legal fiction). A legal fiction is "[a]n assumption that something is true even though it may be untrue, made esp[ecially] in judicial reasoning to alter how a legal rule operates." Black's Law Dictionary, supra note 2, at 913. The majority glossed over
The court also failed to recognize that under both transferred and concurrent intent, a defendant that has no actual intent to injure a bystander is nonetheless implied to have such intent to injure the bystander as a consequence of his intent to harm his intended victim. Although the court correctly noted that under the doctrine of transferred intent a defendant's intent to injure a bystander is manufactured by the legal system to ensure that criminals do not go unpunished for their violent conduct, it nonetheless ignores the fact that under concurrent intent a defendant is said to create a zone of danger intended to harm bystanders even though no proof is required that the defendant actually intended to harm any bystander or even that the defendant was aware of the unintended victim's presence.

The court's second reason for rejecting transferred intent also applies to concurrent intent. The court reasoned that it was possible to bring additional charges for the harm caused to his unintended victim against Harrison to increase his punishment because this punishment could come close to the sentence permitted for attempted murder of the intended victim without using transferred intent. This reasoning also applies to concurrent intent, because there is not a difference in a prosecutor's discretion to charge defendants with additional crimes under either doctrine. If the court prohibited the use of concurrent intent for inchoate crimes, prosecutors could similarly bring multiple charges against a defendant in order to increase a defendant's potential sentence and make it closer to what the sentence could have been for attempted murder. The court, however, did not recognize that prosecutors would have the same discre-

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the fact that both transferred and concurrent intent are legal fictions by only distinguishing concurrent intent from depraved heart mens rea and not comparing it to transferred intent. Harrison II, 382 Md. at 492 n.14, 855 A.2d at 1229 n.14.

153. See Harrison II, 382 Md. at 500, 855 A.2d at 1233.

154. See id. at 495, 855 A.2d at 1230-31.

155. See MD. CODE ANN., CRIM. LAW § 1-201 (2001) (noting no difference in prosecutorial charging discretion when concurrent intent is applied as compared with transferred intent).

156. See id. at 508, 855 A.2d at 1238 (discussing part of a larger argument by the Court of Special Appeals in Harvey v. State, 111 Md. App. 401, 429-30, 681 A.2d 628, 642-43 (1996), that other charges could compensate for not applying transferred intent to inchoate offenses).

157. See MD. CODE ANN., CRIM. LAW § 1-201 (limiting “the punishment of a person who is convicted of an attempt to commit a crime [to] the maximum punishment for the crime attempted” and not placing any limitations on maximum punishment depending on whether transferred or concurrent intent was applied to establish the mens rea element of attempted murder).

158. See Harrison II, 382 Md. at 508, 855 A.2d at 1238 (noting that additional charges are available to increase a defendant's punishment in cases of injury to bystanders for inchoate offenses but failing to recognize that the same remedy is available for concurrent intent).
tion in charging defendants under both concurrent and transferred intent.\textsuperscript{159} Because both doctrines have the same limitations,\textsuperscript{160} to avoid inconsistency the court should have applied or rejected both transferred and concurrent intent to attempt offenses.\textsuperscript{161}

b. The Court's Decision Will Improperly Allow Chance to Alter Criminal Liability.—The rule in Harrison improperly allows chance to affect outcomes in criminal cases.\textsuperscript{162} Under Harrison, defendants in different cases whose conduct involves equivalent criminal liability factors of harm, culpability, and danger are subject to conviction for different crimes under the application of transferred intent based solely on the fact that one defendant hit his intended target, while the other had bad luck and hit an unintended victim.\textsuperscript{163} Instead, the court should have applied transferred intent so that if the conduct of defendants in different cases involves the same degree of harm, culpability, and danger, then the two defendants should be subject to the same charges.\textsuperscript{164} Chance should only be permitted to affect criminal liability when luck alters the harm resulting from a defendant's conduct and not where chance merely changes the person who is injured.\textsuperscript{165}

An example will illustrate how the Harrison decision lets chance play an impermissible role in determining liability. In a situation where an intended victim is wounded and a bystander is killed, just as the Court of Appeals in Poe permitted the use of transferred intent to convict the defendant of the first-degree murder of the bystander and

\begin{itemize}
\item[159.] See id.
\item[160.] Id. at 509, 855 A.2d at 1238-39 (Raker, J., dissenting).
\item[161.] Id. (Raker, J., dissenting).
\item[162.] See id. at 513, 855 A.2d at 1241 (Raker, J., dissenting) (criticizing the court's decision because it will allow a defendant with good luck who kills his intended victim to receive a lighter punishment than a defendant who kills a bystander).
\item[163.] See id. at 508, 855 A.2d at 1238 (applying transferred intent such that a defendant who kills an unintended victim and injures an intended target is subject to charges with more severe sentences than a defendant who kills his intended victim and only harms a bystander).
\item[164.] See Mitchell Keiter, With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law, 38 U.S.F. L. Rev. 261, 261, 263 (2004) (stating that the three factors that impact culpability operate on a sliding scale where more of one can compensate for less of another).
\item[165.] See People v. Fernandez, 673 N.E.2d 910, 913 (N.Y. 1996) (holding that chance should not alter criminal liability where luck only changed the victim and not the injury); see also Kimberly D. Kessler, The Role of Luck in the Criminal Law, 142 U. Pa. L. Rev. 2183, 2183-84 (1994) (discussing different possible outcomes when luck plays a role in criminal conduct and that concluding that under our current criminal justice system a defendant is punished less if she shoots at someone and misses because she is lucky than if she kills her target as intended).
\end{itemize}
the first-degree attempted murder of the intended victim, under Harrison, the court would reach the same result. However, assume the facts are similar to those of Ochoa and the intended victim is killed and a bystander is injured but not killed. Under the court's decision in Harrison, the defendant could be charged with first-degree murder of the intended victim, but he could not be charged with attempted murder of the bystander using transferred intent.

Society suffers an equivalent amount of harm in either the Poe or Ochoa scenario: one person is killed and a second person is injured. An equally culpable mental state also exists in both scenarios: there is intent to kill only one person. Moreover, the dangerousness of the defendant's conduct is the same in both Poe and Ochoa: their shots were aimed at one intended victim with one lone bystander in the direction of their shooting. Despite the same levels of harm, culpability, and danger that determine criminal liability in both Poe and Ochoa, the court's decision in Harrison permits prosecutors to charge Poe with one count of murder and one count of attempted murder but prosecutors could only charge Ochoa with one count of murder and one count of assault, or another similar lesser offense. Under the Harrison court's decision, a defendant with bad aim, such as Poe, who kills the "wrong" person (i.e., the unintended victim) will be convicted of more serious offenses than a defendant with better aim, such as Ochoa, who kills the "right" person (i.e., the intended victim). Because the criminal liability factors were held constant for Poe and Ochoa, the only difference between the two is that Ochoa killed the person whom he attempted to harm. As this comparison demonstrates, the court's decision in Harrison will inappropriately allow defendants whose conduct involves like levels of harm, culpability, and

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167. See Harrison II, 382 Md. at 506, 855 A.2d at 1237 (stating that transferred intent only applies in cases where the unintended victim is killed and not just wounded, in a manner consistent with the court's decision in Poe).
168. These facts are similar to those of Ochoa v. State, 981 P.2d 1201, 1202-04 (Nev. 1999), where the Nevada court found that the defendant could be charged with attempted murder against the bystander using transferred intent in contrast to the Court of Appeals's decision in Harrison. Id. at 1205.
169. Harrison II, 382 Md. at 506, 855 A.2d at 1237.
170. Poe, 341 Md. at 526, 671 A.2d at 502; Ochoa, 981 P.2d at 1202.
171. Poe, 341 Md. at 526, 671 A.2d at 502; Ochoa, 981 P.2d at 1202.
172. Poe, 341 Md. at 526, 671 A.2d at 502; Ochoa, 981 P.2d at 1202.
173. Harrison II, 382 Md. at 506, 508, 855 A.2d at 1237-38.
174. Id. at 508-10, 855 A.2d at 1238-39 (Raker, J., dissenting).
175. Compare Ochoa, 981 P.2d at 1202 (Ochoa killed his intended victim and only injured his unintended victim), with Poe, 341 Md. at 526, 671 A.2d at 502 (Poe killed an unintended bystander and only wounded his intended target).
danger to be subject to different charges based on bad aim or chance.\textsuperscript{176}

c. Application of Transferred Intent to Inchoate Offenses Where an Unintended Victim Is Injured Limits the Scope of Liability, Results in Judicial Consistency, and Advances Good Public Policy.—The Harrison court argued that transferred intent should not be used because there is no coherent way to apply the doctrine to inchoate offenses even though other states\textsuperscript{177} and Maryland case law\textsuperscript{178} both provide a logical approach to limit the scope of transferred intent. The court should have limited transferred intent to instances where physical injury to the unintended victim occurs.\textsuperscript{179} Instead, even though prior precedent in Maryland has adopted harm to the victim as a limiting principle for applying transferred intent, the court relied on flawed reasoning from the Court of Appeals in Ford that argued no reasonable standard could be implemented for limiting the scope of liability under transferred intent as applied to inchoate offenses.\textsuperscript{180}

Creating a clear limit on the application of transferred intent by requiring unintended victims to suffer injury eliminates concerns of unlimited liability, permits courts to apply transferred and concurrent intent consistently, ensures that defendants are punished appropriately, and acts to deter violent conduct.\textsuperscript{181} Past Maryland precedent favors applying transferred intent to satisfy the mens rea requirement

\textsuperscript{176} See People v. Fernandez, 673 N.E.2d 910, 913 (N.Y. 1996) (stating that punishment should be the same for a defendant regardless of whether he killed his intended victim or an unintended victim); Keiter, supra note 163, at 263 (arguing that culpability, danger, and harm can be used to determine culpability by putting each on a sliding scale where more of one can compensate for less of another and thus if all three elements are held constant criminal liability should be unchanged).

\textsuperscript{177} See State v. Martin, 119 S.W.2d 298, 302 (Mo. 1938) (limiting transferred intent to where an unintended victim is injured); Ochoa, 981 P.2d at 1205 (holding that transferred intent applies where an unintended victim is harmed).

\textsuperscript{178} See State v. Earp, 319 Md. 156, 163, 571 A.2d 1227, 1231 (1990) (holding that transferred intent could be applied to attempted murder where an unintended victim suffered injury); Harrod v. State, 65 Md. App. 128, 137, 499 A.2d 959, 963 (1985) (holding that transferred intent only applied in attempted battery-type assault cases where an unintended victim suffered injury).

\textsuperscript{179} See Poe, 341 Md. at 535, 671 A.2d at 507 (Raker, J., concurring) (stating that transferred intent should not apply to inchoate crimes where the unintended victim is not harmed).

\textsuperscript{180} Harrison II, 382 Md. at 507, 855 A.2d at 1238. The majority in Harrison relied on the arguments from Ford even though Judge Raker’s concurring opinion in Poe noted that transferred intent should only be applied where a victim is physically injured. Id.; Poe, 341 Md. at 535, 671 A.2d at 507 (Raker, J., concurring).

\textsuperscript{181} Harrison II, 382 Md. at 509, 510 n.2, 855 A.2d 1238-39, 1240 n.2 (Raker, J., dissenting); Poe, 341 Md. at 539, 671 A.2d at 509 (Raker, J., concurring).
for attempted murder, but the court in Harrison overruled its holding from Wilson that transferred intent was applicable to inchoate offenses. Wilson involved the exact same fact pattern at issue in Harrison where the defendant shot at his intended victim and missed and hit a bystander. The court departed from its holding in Wilson and abandoned the principle of stare decisis when there was not a clear error in judgment in Wilson. The court's decision in Harrison also departed from the spirit of its opinion in Gladden, in which Maryland first recognized the doctrine of transferred intent as a means of ensuring that violent conduct was appropriately punished even though a defendant's actions may have inflicted harm upon someone other than an intended victim. Although Harrison is consistent with dicta in Ford and Poe as well as the Court of Special Appeals' holding in Harvey in that each favored prohibiting the application of transferred intent to attempt crimes, in light of the Court of Appeals' decision in Wilson and its extension of transferred intent in Poe where a bystander was killed and given the willingness of the court to apply concurrent intent to attempt crimes, the most logically consistent approach would be to extend transferred intent to inchoate offenses. Because the Court of Appeals has been willing to expand the use of transferred intent to cases where an unintended victim is killed and in Harrison it has even stated that application of another legal fiction in concurrent intent is appropriate for attempt offenses, the court creates an arbitrary distinction when it refuses to apply transferred intent to inchoate crimes. The Harrison court should have followed the majority of other states that have extended the doc-

183. Harrison II, 382 Md. at 480, 855 A.2d at 1222.
184. Wilson, 313 Md. at 601-02, 546 A.2d at 1042.
185. See Gladden v. State, 273 Md. 383, 405, 330 A.2d 176, 188 (1974) (stating that the defendant could not escape criminal liability for his conduct because he had harmed someone other than his enemy). Instead, Harrison prohibits defendants in two separate cases whose conduct results in the same harm and who possess the same level of culpability from being charged with the same offenses. See infra notes 162-176 and accompanying text (discussing how the court's decision in Harrison permits chance to play an inappropriate role in establishing criminal liability).
189. See Poe, 341 Md. at 529-30, 671 A.2d at 504 (holding that the doctrine of transferred intent applied where the intended victim was injured by the same bullet that killed an unintended victim); Gladden, 273 Md. at 404-05, 330 A.2d at 188 (applying transferred intent where the intended victim was not injured but an unintended victim was killed).
190. Poe, 341 Md. at 529-30, 671 A.2d at 504.
191. See Harrison II, 382 Md. at 511, 855 A.2d at 1240 (Raker, J., dissenting).
trine of transferred intent to its fullest logical scope by applying the doctrine to inchoate offenses but limiting its application to injured bystanders.\textsuperscript{192} The Court of Appeals should also have paralleled the rationale of the jurisdictions extending transferred intent by basing its decision on the negative policy ramifications—lack of proportionate punishment and failure to deter—that rejecting the doctrine of transferred intent would cause.\textsuperscript{193}

The \textit{Harrison} court missed an opportunity to encourage proportionate charges by permitting transferred intent’s application to inchoate offenses.\textsuperscript{194} As far back as 1879 in \textit{Gilman}, courts in the United States have recognized that prosecutions for inchoate offenses against unintended victims are more burdensome if transferred intent cannot

\textsuperscript{192} LeEllen Coacher & Libby Gallo, \textit{Criminal Liability: Transferred and Concurrent Intent}, 44 A.F.L. Rev. 227, 232 (1998) (stating that the rejection of transferred intent to attempted murder is the stance in a minority of states); see State v. Rodriguez-Gonzales, 790 P.2d 287, 288 (Ariz. Ct. App. 1990) (holding that transferred intent was appropriately applied in an attempted first-degree murder conviction); People v. Ephraim, 753 N.E. 486, 497 (Ill. App. Ct. 2001) (holding transferred intent can be applied for attempted murder of an unintended victim); Blanche v. State, 690 N.E.2d 709, 712 (Ind. 1998) (holding transferred intent doctrine applies to attempted murder); State v. Alford, 151 N.W.2d 573, 575 (Iowa 1967) (affirming the defendant’s conviction for assault with intent to commit murder where he tried to shoot at an intended victim and wounded an unintended victim instead); State v. Thomas, 53 So. 868, 869-70 (La. 1910) (extending the doctrine of transferred intent to inchoate crimes and also discussing the English common-law history supporting the court’s holding); State v. Gilman, 69 Me. 163, 171 (1879) (concluding that public policy and the danger caused by defendants warranted the application of transferred intent to inchoate crimes); State v. Ford, 539 N.W.2d 214, 229 (Minn. 1995) (applying the doctrine of transferred intent to the attempted murder charge of a bystander where the defendant shot and killed a police officer); Ochoa v. State, 981 P.2d 1201, 1204 (Nev. 1999) (stating that transferred intent applies where “there is intent to commit a criminal act and the only difference between the actual result and the contemplated result is the nature of the personal or property injuries sustained”); State v. Andrews, 572 S.E.2d 798, 802 (N.C. Ct. App. 2002) (holding that transferred intent is applicable whenever an unintended victim is injured regardless of whether or not the intended victim was injured); Short v. State, 980 P.2d 1081, 1098 (Okla. Crim. App. 1999) (applying transferred intent where the defendant threw an explosive into an apartment and injured unintended victims). \textit{But see} Ramsey v. State, 56 P.3d 675, 681 (Alaska Ct. App. 2002) (holding that transferred intent was too expansive in scope when applied to inchoate crimes); State v. Hinton, 630 A.2d 593, 601 (Conn. 1993) (holding that transferred intent was not necessary to ensure proportionate punishment); State v. Brady, 745 So. 2d 954, 958 (Fla. 1999) (refusing to extend transferred intent to inchoate offenses).

\textsuperscript{193} \textit{Gilman}, 69 Me. at 171 (expressing concern that defendants would not be punished for inchoate offenses if transferred intent was not applied); Ochoa, 981 P.2d at 1204 (holding that transferred intent was needed to ensure proportionate punishment and maintain a deterrent effect to discourage criminal activity); State v. Worlock, 569 A.2d 1314, 1325 (N.J. 1990) (finding that there was a more powerful deterrent effect when transferred intent was applied to inchoate crimes); State v. Fennell, 531 S.E.2d 512, 517 (S.C. 2000) (holding that transferred intent was appropriate and necessary for punishing defendants who commit inchoate offenses).

\textsuperscript{194} Poe, 341 Md. at 599, 671 A.2d at 509 (Raker, J., concurring).
Prohibiting the use of transferred intent in attempt crimes means that separate evidence of intent will have to be given by the State and there may be circumstances where that additional proof will be difficult to establish. In concurrent intent cases, for example, the State may not be able to establish that a “kill zone” was created by a defendant’s actions where there were only one or two bullets fired, as opposed to the six by the defendant in Harrison. As discussed above, there is no logical difference between when a defendant shoots and injures an intended victim but also kills a bystander, as in Poe, and when a defendant kills an intended victim but a bystander is also wounded. The societal harm, culpability, and danger are equivalent in each case and thus prosecutors should be able to charge the defendants with the same offenses and not be unduly hindered in bringing those charges by the court’s rejection of transferred intent to inchoate offenses.

Although the doctrine of transferred intent would permit punishment for crimes not directly within the defendant’s actual intent, the dangerousness demonstrated by the specific intent to cause harm to someone and the actions taken in furtherance of that intent make punishment for crimes to both intended and unintended victims just and in the best interests of public policy as a deterrent. The dangerousness exhibited by defendants, such as Harrison, warrants the extension of criminal liability for unintended victims of shootings who are only injured. With proportionate punishment in mind, the court in Harrison should have held that the specific intent to cause harm to someone in conjunction with action taken in furtherance of that intent makes harm by bystanders a foreseeable and thus avoidable consequence and defendants should be punished for increased dangerousness just as they are when felony murder charges are brought even where no death was intended.

Similarly, it is a stronger deterrent to hold a defendant liable for the attempted murder of an unintended victim that is injured regard-

195. 69 Me. at 171.
196. Poe, 341 Md. at 539-40, 671 A.2d at 509 (Raker, J., concurring).
197. Id. (Raker, J., concurring).
198. Id. at 525-26, 671 A.2d at 502.
200. See Ochoa v. State, 981 P.2d 1201, 1205 (Nev. 1999) (concluding that transferred intent acts as a deterrent); State v. Worlock, 569 A.2d 1314, 1325 (N.J. 1990) (holding that transferred intent should be applied to deter criminals who intend to kill another).
202. See Worlock, 569 A.2d at 1325.
less of what happened to the intended victim.\textsuperscript{203} A defendant that uses deadly force must know that he will be punished to the fullest extent of the law for the harm caused by his conduct regardless of whether or not it is an intended or unintended victim that is injured.\textsuperscript{204} Through ensuring that a defendant will be punished to the fullest extent that the harm, culpability, and danger elements of liability warrant when an unintended victim is injured, it may be possible to deter or alter her conduct.\textsuperscript{205} Therefore, the court should have permitted the application of transferred intent to inchoate offenses where the unintended victim was injured but not killed.\textsuperscript{206}

5. Conclusion.—In Harrison v. State, the Court of Appeals reversed its holding in Wilson and ruled that transferred intent did not apply to inchoate offenses.\textsuperscript{207} The court’s opinion is misguided in its willingness to apply concurrent intent but reject transferred intent, because the arguments for rejecting transferred intent apply to concurrent intent with equal force.\textsuperscript{208} Moreover, prohibiting the application of transferred intent to inchoate offenses will allow chance to play an improper role in the criminal justice system.\textsuperscript{209} By arguing that no logical standard could be devised to limit the application of transferred intent to inchoate crimes the court failed to consider that injury to the unintended victim could serve as a reasonable point to cut off criminal liability.\textsuperscript{210} Instead of rejecting transferred intent, the court should have applied transferred intent to attempt crimes where bystanders suffer physical harm because it provides a workable stan-

\textsuperscript{203} Ford v. State, 330 Md. 682, 725, 625 A.2d 984, 1005 (1993) (McAuliffe, J., concurring); Ochoa, 981 P.2d at 1205.
\textsuperscript{204} State v. Fennell, 531 S.E.2d 512, 517 (S.C. 2000).
\textsuperscript{205} Ochoa, 981 P.2d at 1205.
\textsuperscript{206} Harrison II, 382 Md. at 510 n.2, 855 A.2d at 1240 n.2 (Raker, J., dissenting).
\textsuperscript{207} Id. at 508, 855 A.2d at 1238.
\textsuperscript{208} See supra notes 150-161 and accompanying text (discussing the majority’s failure to recognize that its arguments for rejecting the application of transferred intent to inchoate offenses apply with equal force to concurrent intent).
\textsuperscript{209} See supra notes 162-176 and accompanying text (arguing that transferred intent should be applied to inchoate offenses so that chance does not inappropriately allow defendants in bad aim cases to be punished less severely than other defendants whose conduct results in the same degree of harm).
\textsuperscript{210} See supra notes 177-180 and accompanying text (criticizing the court for failing to consider approaches to limit criminal liability when applying transferred intent to inchoate crimes that the Court of Appeals previously utilized).
standard and ensures that defendants are adequately punished and better deters criminal conduct.\footnote{See supra notes 181-206 and accompanying text (discussing how transferred intent serves to ensure proportionate punishment and deter violent conduct).}

TRAVIS E. ROBEY
IV. CRIMINAL PROCEDURE

A. A Missed Opportunity to Protect Incompetent Pro Se Criminal Defendants in Maryland

In Gregg v. State, the Court of Appeals of Maryland considered whether a trial court’s failure to conduct a sua sponte competency inquiry, based on a defendant’s bizarre behavior and mental health history, violated the defendant’s right to due process guaranteed by the Fourteenth Amendment. The court held that the trial court’s sua sponte duty, imposed by Criminal Procedure Article § 3-104(a) of the Maryland Code, to determine the defendant’s competency was not triggered by the defendant’s erratic behavior at trial absent a clear showing of mental health issues. In its holding, the court failed to consider all of the factors indicative of incompetence and narrowly defined the trial court’s sua sponte duty to investigate the competency of a defendant. The Gregg court failed to employ the approach adopted by the United States Supreme Court, which requires the trial court to consider several non-exclusive factors in determining whether a competency inquiry is warranted. The court should have

2. Consistent with the unusual nature of the crime for which Gregg stood trial, evidence was introduced by the police and his neighbors that demonstrated a pattern of erratic and strange behavior including, inter alia, appearing naked at the community beach with a bag over his head, crawling on his hands and knees through his home, and knocking children off their bicycles. Id. at 564, 833 A.2d at 1068 (Bell, C.J., dissenting). Further, Gregg’s behavior at the circuit court included several instances of irrational behavior. Id. at 559-63, 833 A.2d at 1066-68 (Bell, C.J., dissenting). During his two appearances at the circuit court, Gregg demonstrated difficulty understanding his right to representation by the public defender and a lack of knowledge concerning the outcome of his competency evaluation, displayed paranoia in stating that he believed his food at the detention center was drugged by the government, and engaged in an unusual colloquy with the judge concerning a “walking restriction” that prevented him from standing in court. Id. (Bell, C.J., dissenting).
3. Id. at 526, 833 A.2d at 1047-48; see U.S. CONST. amend. XIV, § 1 (requiring that states provide due process of law).
4. MD. CODE ANN., CRIM. PROC. § 3-104(a) (2001) (imposing a duty on trial court judges to make a competence determination if the defendant appears to be incompetent to stand trial).
5. Gregg, 377 Md. at 547, 833 A.2d at 1059. The court concluded that the record contained no basis for doubting the defendant’s competency and affirmed the conviction. Id.
6. See infra notes 176-196 and accompanying text (contrasting the Court of Appeals’s repeated professions to consider all of the relevant circumstances with its failure to consider factors other than the defendant’s behavior at trial).
7. See infra notes 197-210 and accompanying text (contrasting the Supreme Court’s use of the multi-factor approach with that taken by the Court of Appeals). The Supreme
included Gregg's request to proceed without counsel as a factor in determining when the duty to conduct a competency inquiry is triggered because the defendant no longer had an advocate to raise doubts concerning his competence. Failure of the Court of Appeals to adopt such a modified multi-factor approach leaves the constitutional rights of criminal defendants unprotected and makes the sua sponte trial court duty to determine competence entirely discretionary in the hands of Maryland trial court judges.

1. The Case.—On August 12, 2000, John Leon Gregg struck a ten-year-old girl with a bag as she passed him on her bicycle on a sidewalk in their neighborhood. The blow caused the girl to fall off her bicycle. Gregg was charged in the District Court for Anne Arundel County with second degree assault. The district court ordered Gregg to undergo a competency evaluation, which was conducted at Crownsville Hospital Center from September 14, 2001, to November 19, 2001. The written report prepared by the hospital staff and submitted to the district court concluded that Gregg had delusion disorder, persecutory type and schizoid, avoidant and dependent personality disorder. The hospital staff advised the court that Gregg was incompetent to stand trial because he could not understand the nature of the proceedings against him nor assist in his own defense.

Court has identified the defense counsel's doubts regarding competency, evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial as relevant factors in considering whether further inquiry into the defendant's competence to stand trial is warranted. Drope v. Missouri, 420 U.S. 162, 177 n.13, 180 (1975).

8. See infra notes 211-221 and accompanying text (arguing that the defendant's request to proceed without counsel should be included as a factor in determining whether a sua sponte competency inquiry is required). Application of this modified multi-factor approach would have resulted in a correct finding that the circumstances of Gregg's case triggered a sua sponte competence inquiry.

9. See infra notes 209-210 and accompanying text (discussing the consequences of the court's failure to define the sua sponte duty).


11. Gregg, 377 Md. at 518, 833 A.2d at 1042.

12. Id. Following Gregg's arrest, a district court commissioner set bail in the amount of $2,500, but Gregg declined bail review and was committed to the Anne Arundel County Detention Center. Gregg, No. 2415, slip op. at 2-3.

13. Gregg, 377 Md. at 518, 833 A.2d at 1042.

14. Id. The report included information concerning Gregg's bizarre behavior at the hospital including crawling on his knees, rapidly pacing the hallway, shaving his beard while kneeling on the floor, yelling and cursing, and being isolative. Id. at 559, 833 A.2d at 1066 (Bell, C.J., dissenting). Additionally, the report stated that Gregg's paranoia included a belief that the government harassed him, videotaped him, poisoned his food, and bugged his house. Id. (Bell, C.J., dissenting).

15. Id. at 518, 833 A.2d at 1042.
The district court held a competency hearing on November 19, 2001, where the judge questioned Gregg concerning the charges.\textsuperscript{16} Dr. Mohammed Ajanah, one of Gregg's evaluators at the Crownsville Hospital Center, testified and reiterated his professional belief that Gregg was not competent to stand trial.\textsuperscript{17} Dr. Ajanah explained that Gregg did not have a rational understanding of the charges against him because he believed them to be fabricated and a product of a conspiracy between the judicial system and his neighbors.\textsuperscript{18} To explain why Gregg appeared to, at times, understand the charges and the proceedings, Dr. Ajanah testified that competency is a "day-to-day issue."\textsuperscript{19} Dr. Ajanah also expressed fear that Gregg would be a danger to his neighborhood if he returned.\textsuperscript{20}

In spite of Dr. Ajanah's testimony, the district court judge determined that Gregg was competent to stand trial.\textsuperscript{21} Gregg requested a jury trial, and the case was transferred to the Circuit Court for Anne Arundel County.\textsuperscript{22} Neither the Crownsville Hospital competency report nor the transcript of the district court competency hearing were transferred with the case to the circuit court, and the circuit court did not hold a competency hearing of its own.\textsuperscript{23} The circuit court did hold a hearing on December 5, 2001, to consider Gregg's request to waive his right to counsel.\textsuperscript{24} Gregg explained to the court that he wished to waive his right to counsel because he preferred not to pay for an attorney and expressed a belief that he would be forced to pay

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\textsuperscript{16} Id. at 519, 833 A.2d at 1042.
\textsuperscript{17} Id. at 520, 833 A.2d at 1043.
\textsuperscript{18} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 521, 833 A.2d at 1043.
\textsuperscript{21} Id. at 522, 833 A.2d at 1044. The district court judge recognized that Gregg may have been suffering from mental illnesses that may have caused problems in the past and could result in future problems, but determined that Gregg was sufficiently competent to stand trial at that moment. Id.
\textsuperscript{22} Id. at 523, 833 A.2d at 1044-45. Courts and Judicial Proceedings § 4-302(e)(1) divests the district court's jurisdiction "if a defendant is entitled to and demands a jury trial at any time prior to trial in the District Court." Md. CODE ANN., CTS. & JUD. PROC. § 4-302(c)(1) (2002). Gregg was entitled to a jury trial because the maximum penalty for second degree assault exceeded ninety-days imprisonment. See Gregg, 377 Md. at 523, 833 A.2d at 1045.
\textsuperscript{23} Gregg, 377 Md. at 523, 833 A.2d at 1045. The CR-51 form, employed by the courts to order commitment to the Department of Health and Mental Hygiene for a competency evaluation, was the only document regarding the competency issue received by the circuit court. Id. at 522-23, 833 A.2d at 1044-45. Chief Judge Bell concluded from the record that the trial court did not read the report and did not discover the outcome of the evaluation from its cursory inquiry into the status of the Crownsville Hospital report. Id. at 564, 833 A.2d at 1069 (Bell, C.J., dissenting).
\textsuperscript{24} Id. at 523, 833 A.2d at 1045.
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for a public defender’s services.\textsuperscript{25} The court referred Gregg to the Public Defender’s Office again before setting the case for trial.\textsuperscript{26}

The December hearing covered several issues, but Gregg’s competence to stand trial was not addressed.\textsuperscript{27} When questioned as to whether he was under the influence of any alcohol, drugs, medications, or pills, Gregg responded that his food was drugged in jail.\textsuperscript{28} The judge failed to remark on the statement or question Gregg further on the issue after Gregg stated that the drugging would not affect his ability to understand his actions.\textsuperscript{29} The circuit court judge also questioned Gregg regarding his past hospitalizations at mental health facilities.\textsuperscript{30} The inquiry terminated with Gregg stating that he did not know the results of the competency report completed by his examiners at Crownsville.\textsuperscript{31} The circuit court judge proceeded through the hearing without asking any further questions concerning Gregg’s competency.\textsuperscript{32}

On the day of the trial, January 10, 2002, the circuit court accepted Gregg’s request to waive counsel as knowing and voluntary.\textsuperscript{33} Prior to the discussion concerning Gregg’s waiver of counsel, however, an exchange occurred between Gregg and the trial judge; Gregg, appearing somewhat confused, explained that he had a walking restriction.\textsuperscript{34} Gregg stated that he had been unaware that the trial would be held that day and that an orthopedic condition restricted his walking and standing.\textsuperscript{35} Despite repeated requests by the judge for Gregg to remain standing, he insisted on sitting and finally professed that he just did not want to stand.\textsuperscript{36} At the conclusion of the trial, the jury convicted Gregg of second degree assault and he was sentenced

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  \item \textsuperscript{25} \textit{Id.} Despite the circuit court judge’s efforts to explain the free nature of the services of the Public Defender’s Office, Gregg stated that he was not willing to accept the risk that he would be charged if he did not qualify for the services at no cost. \textit{Id.} Gregg expressed his belief that his case was straightforward and that he could handle it himself. \textit{Id.}
  \item \textsuperscript{26} \textit{Id.} During questioning concerning Gregg’s request for a jury trial, he expressed apprehension about the jury selection and stated that he would leave that to the prosecutor and the judge. \textit{Gregg}, No. 2413, slip op. at 7. The circuit court judge advised Gregg that an attorney could help him through the process and Gregg repeated that he preferred not to be assisted by counsel. \textit{Id.} at 7-8.
  \item \textsuperscript{27} \textit{Gregg}, No. 2413, slip op. at 3-6.
  \item \textsuperscript{28} \textit{Id.} at 5.
  \item \textsuperscript{29} \textit{Id.}
  \item \textsuperscript{30} \textit{Id.} at 5-6.
  \item \textsuperscript{31} \textit{Id.} at 6.
  \item \textsuperscript{32} \textit{Id.} at 6-8.
  \item \textsuperscript{33} \textit{Gregg}, 377 Md. at 523, 833 A.2d at 1045.
  \item \textsuperscript{34} \textit{Id.} at 561-63, 833 A.2d at 1067-68 (Bell, C.J., dissenting).
  \item \textsuperscript{35} \textit{Id.} at 563, 833 A.2d at 1068 (Bell, C.J., dissenting).
  \item \textsuperscript{36} \textit{Id.} (Bell, C.J., dissenting).
\end{itemize}
by the court to five years' imprisonment. All but six months of the sentence were suspended, and he received five years' probation.  

Gregg, represented on appeal by the State Public Defender's Office, argued that the circuit court erred in (1) failing to consider his competency to stand trial, (2) failing to consider his competency to waive counsel, and (3) failing to follow the requisite procedures of Maryland Rule 4-215 in accepting his waiver of counsel. The defense argued that the court should have investigated Gregg's competency to stand trial sua sponte based on his bizarre behavior at trial and history of mental illness, and further that the same behaviors should have triggered the court's sua sponte duty to ensure Gregg's competency to waive counsel. The Court of Special Appeals rejected the arguments and held that, despite his erratic and unexplained behavior, Gregg understood the proceedings against him, was capable of defending his rights throughout the trial, and waived his right to counsel knowingly and intelligently.

The Court of Appeals granted certiorari to decide whether the trial court had a sua sponte duty to inquire into Gregg's competency to stand trial and waive the right to counsel, and whether competency to stand trial conclusively determines competency to waive counsel.

2. Legal Background.—Maryland and federal law adhere to the common-law prohibition against allowing an incompetent defendant to stand trial. The United States Supreme Court has long held that the conviction of a legally incompetent defendant violates his right to

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37. Id. at 523, 833 A.2d at 1045.

38. Id. at 523-24, 833 A.2d at 1045. Gregg claimed that the advisements concerning the charges, the penalties, and the importance of assistance from counsel required by the rule were not given to him in full by the circuit court as required by the rule. Id. at 524-25, 833 A.2d at 1045-46. The Court of Special Appeals, rejecting Gregg's argument, found that he cumulatively received each of the required advisements from a circuit court judge, as required by the rule and prior interpretations of the rule. Id. at 526, 833 A.2d at 1046. Gregg raised additional issues on appeal, which were summarily rejected by the court, including (1) whether Gregg was given adequate notice under Maryland Rule 4-342(d) of the letters from his neighbors considered by the court during sentencing, (2) whether the trial judge abused his discretion in failing to investigate Gregg's claims of jury tampering or (3) his allegations that the state's witnesses were instructed to falsely testify, and (4) whether the trial court erred in permitting the state to violate Maryland Rule 4-236. Id. at 523 n.2, 833 A.2d at 1045 n.2.

39. Id. at 524, 833 A.2d at 1045.

40. Id. at 525, 833 A.2d at 1046.

41. Id. at 526, 833 A.2d at 1046-47. The Court of Appeals also considered whether the combined advisements given by two different circuit court judges, first, at the December 5, 2001 hearing concerning Gregg's request to waive counsel and, second, at the proceedings on the day of the trial, met the requirements of Rule 4-215. Id.

due process under the Fourteenth Amendment.\textsuperscript{43} The Supreme Court and the Maryland Court of Appeals apply the same competency standard, but take different approaches to determining when to apply the standard to ensure the competence of criminal defendants.\textsuperscript{44} In 1960, the Supreme Court established a two-prong test that defendants must meet to be deemed competent.\textsuperscript{45} The Maryland legislature has adopted this federal standard\textsuperscript{46} and allocated the duty to determine a defendant’s competence to stand trial to the trial courts.\textsuperscript{47} In considering the circumstances that indicate that a defendant may fail to meet the competency standard, thus triggering a sua sponte competency inquiry, the Supreme Court applies a multi-factor approach.\textsuperscript{48} However, Maryland courts have failed to adopt a uniform approach for trial courts to employ in determining when such a sua sponte duty is triggered. Despite this difference in approaches, the Supreme Court and the Maryland Court of Appeals have both adopted the same standard for determinations of competence to waive counsel as for competence to stand trial.\textsuperscript{49}

\textit{a. Competence to Stand Trial}—The Supreme Court has characterized competence to stand trial as the foundational right that enables the defendant to effectively exercise all other constitutional rights in a criminal trial.\textsuperscript{50} The Court has established a two-prong test to ensure the protection of this right and defendants’ right to due process.\textsuperscript{51} In Maryland, the legislature has adopted this standard\textsuperscript{52} and has codified the trial court’s duty to make sua sponte competency

\begin{itemize}
\item \textsuperscript{43} Pate v. Robinson, 383 U.S. 375, 378 (1966).
\item \textsuperscript{44} See infra notes 176-210 and accompanying text (describing the multi-factor approach employed by the Supreme Court and the failure of the Maryland Court of Appeals to adopt the same test).
\item \textsuperscript{45} Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam) (establishing the standard for competence to stand trial).
\item \textsuperscript{47} Id. § 3-104; Roberts v. State, 361 Md. 346, 363-66, 761 A.2d 885, 894-96 (2000).
\item \textsuperscript{48} Drope v. Missouri, 420 U.S. 162, 177 n.13, 180 (1975).
\item \textsuperscript{49} See Godinez v. Moran, 509 U.S. 389, 402 (1993) (holding that the standard for competence to waive the right to counsel is the same as that to stand trial); see also Thanos v. State, 332 Md. 511, 519-20, 632 A.2d 768, 772 (1993) [hereinafter Thanos II] (citing Godinez as support for the conclusion that the competence standards are the same).
\item \textsuperscript{50} Medina v. California, 505 U.S. 437, 457 (1992).
\item \textsuperscript{51} Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam). The Due Process Clause of the Fourteenth Amendment states, “nor shall any State deprive any person of life, liberty, or property, without the due process of law.” U.S. Const. amend. XIV, § 1.
inquiries in accordance with due process. Competency determinations of Maryland defendants must meet the due process requirements of the Fourteenth Amendment and Article 21 of the Maryland Declaration of Rights.

In 1960, the Supreme Court established the federal standard for competence to stand trial in *Dusky v. United States*. The two-prong test requires that the accused have the ability to understand communications with his lawyer and have a rational and factual understanding of the proceedings against him. In *Dusky*, the defendant pled not guilty to charges of kidnapping, and the district court, at the suggestion of the court-appointed defense counsel, ordered a psychiatric evaluation. Based on the findings of several psychiatric evaluations that the defendant was "oriented as to time, place, and person," but unable to assist counsel in his defense, the district court found the defendant competent to stand trial at a hearing on the issue. Rejecting Dusky's claim of insanity, the jury convicted him of kidnapping. On appeal, the United States Court of Appeals for the Eighth Circuit found that the trial court properly applied the "oriented in time, place, and person" competence standard and affirmed the conviction, but the Supreme Court disagreed and found that the district court judge incorrectly applied the standard that the defendant be oriented in time and place and have some recollection of events. Instead, the Court held that the defendant must have had the ability to understand communications with his lawyer and a rational and factual understanding of the proceedings against him. Under this standard, the Court found that the doubts and ambiguities surrounding the psychiatric testimony, as well as the difficulty in retrospectively de-

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53. Crim. Proc. § 3-104.
54. Md. Const. Decl. of Rts. art. XXI. The Maryland Declaration of Rights states "[t]hat in all criminal prosecutions, every man hath the right to be informed of the accusation against him; to have a copy of the Indictment, or charge, in due time (if required) to prepare for his defence; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not be found guilty." Id.
55. 362 U.S. at 402.
56. Id.
58. Id. at 387-90.
59. Id. at 386-87.
60. Id. at 401-02. The court reasoned that the determination of competence to stand trial was a question of fact for the trial court and therefore deferred to the judgment of the trial judge. Id. at 397.
61. Dusky, 362 U.S. at 402.
62. Id.
terminating the defendant's competency more than a year later, prevented an accurate determination of the defendant's competency to stand trial. The Court reversed and remanded the case to the district court for a determination of the defendant's competency to stand trial.

Federal district court judges employ the Dusky standard in determining whether defendants are competent to stand trial. Defendants have been found competent under the test despite a history of depression, possible mental health issues, learning impairments, and suicidal tendencies where the court determined that the defendant exhibited understanding of the proceedings through his behavior in court, the testimony of experts, or statements of defense counsel.

The Maryland legislature and courts have adopted the Dusky standard for determining competence to stand trial. The Maryland legislature codified the federal two-prong test in section 3-101 of the Criminal Procedure Article, which defines a defendant who is incompetent to stand trial as one who is not able "(1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." In 1977, the Court of Appeals, in Raithel v. State, interpreted this statute in considering whether the trial court improperly found the defendant, who was convicted by a jury of first degree murder, assault with intent to rape, and carrying a dangerous weapon openly, competent to stand trial. The defendant was charged with the murder of a female customer who suffered a fatal stab wound in the restaurant.
where the defendant worked as a busboy.\textsuperscript{71} The defendant confessed to the murder and claimed insanity at the time of the event, as well as incompetence to stand trial.\textsuperscript{72} The trial court conducted a competency hearing and heard the testimony of a psychiatrist, who recited the defendant’s extensive history of emotional illness and provided his opinion, based on four examinations of the defendant, that the defendant suffered from schizophrenia and was incompetent to stand trial.\textsuperscript{73} However, the trial judge struck the psychiatrist’s testimony after a determination that the doctor did not know the statutory standard for competence to stand trial.\textsuperscript{74} The trial judge then found the defendant competent to stand trial.\textsuperscript{75} Specifically, the judge found that the defendant was aware of the nature of the proceedings, but failed to make a determination as to the defendant’s ability to assist in his own defense.\textsuperscript{76}

The Court of Appeals held that the trial court erred in finding the defendant competent to stand trial, and reversed and remanded the case for a new trial.\textsuperscript{77} The court held that under the statutory standard for competence to stand trial\textsuperscript{78} the trial court must determine both that the defendant is able to understand the nature and object of the proceeding against him \textit{and} that he is able to assist in his defense.\textsuperscript{79} The court held that the trial court erred in failing to make a determination of the defendant’s ability to assist in his defense and in striking the psychiatrist’s testimony.\textsuperscript{80}

Since Raithel, Maryland courts have continued to apply the \textit{Dusky} standard to ensure the competence of criminal defendants. In 2000, the Court of Appeals in \textit{Ware v. State}\textsuperscript{81} reiterated that the standard must be met to prevent a mentally incompetent defendant from being subjected to trial in violation of his constitutional right not to be tried.

\begin{itemize}
  \item\textsuperscript{71} Id. at 293, 372 A.2d at 1070.
  \item\textsuperscript{72} Id.
  \item\textsuperscript{73} Id. at 293-94, 372 A.2d at 1071. The trial judge also recessed the hearing to enable the psychiatrist to conduct an additional examination of the defendant, and subsequently, the doctor reiterated his belief that the defendant was not competent to stand trial. \textit{Id.} at 294, 372 A.2d at 1071.
  \item\textsuperscript{74} Id. at 296, 372 A.2d at 1072.
  \item\textsuperscript{75} Id.
  \item\textsuperscript{76} Id.
  \item\textsuperscript{77} Id. at 304, 372 A.2d at 1076.
  \item\textsuperscript{78} The court stated that the statutory test for competence, formerly found in Article 59, section 23, closely tracks the federal test established in \textit{Dusky} and codified at 18 U.S.C. § 4244. \textit{Id.} at 298, 372 A.2d at 1073. The Maryland test has since been recodified at Md. CODE ANN., CRIM. PROC. § 3-101(f)(1)-(2) (2001).
  \item\textsuperscript{79} \textit{Raithel}, 280 Md. at 300, 372 A.2d at 1074.
  \item\textsuperscript{80} Id. at 300, 303, 372 A.2d at 1074, 1076.
  \item\textsuperscript{81} 360 Md. 650, 759 A.2d 764 (2000).
\end{itemize}
while incompetent. In Ware, the defendant was convicted by a jury of two counts of first degree murder and related handgun violations in the deaths of his former girlfriend and her friend. The defendant then elected to be sentenced by the jury despite his counsel’s strong recommendation for a court sentencing and his previous agreement with that course of action. Ware was sentenced to death. On appeal, the Court of Appeals found that there was no evidence in the record that Ware did not meet the Dusky standard for competence and his decision to proceed with jury sentencing was insufficient to trigger the trial court’s sua sponte duty to make a competency inquiry.

b. Multi-Factor Approach to Determining Need for Inquiry into Defendant’s Competence.—The United States Supreme Court has adopted a multi-factor approach in considering the facts that would trigger a trial court judge’s sua sponte duty to inquire into a defendant’s competency. The Maryland legislature has codified the duty of the state trial courts to determine a defendant’s competency to stand trial. The Maryland Court of Appeals has considered the issue of when such a duty is triggered but, unlike the Supreme Court, has not adopted a uniform approach to determining the circumstances under which a sua sponte inquiry is required.

In 1966, the Supreme Court held in Pate v. Robinson that a trial court’s failure to investigate a defendant’s competency to stand trial violated his Fourteenth Amendment right to due process. Charged with the murder of his common law wife, Robinson was defended by court-appointed counsel who raised the issue of incompetence to stand trial, in addition to a defense of insanity at the time of the shooting. The Court held that the defendant’s history of mental illness

82. Id. at 702, 759 A.2d 791.
83. Id. at 660-61, 759 A.2d at 769.
84. Id. at 696, 759 A.2d at 788.
85. Id. at 660, 759 A.2d at 769.
86. Id. at 705-06, 759 A.2d at 793.
89. See infra notes 176-196 and accompanying text (examining the approach taken by the Maryland Court of Appeals).
90. 383 U.S. at 385.
91. Id. at 376.
and erratic and violent behavior represented sufficient evidence to require an inquiry into Robinson's competency.\textsuperscript{92}

Nine years later, in \textit{Drope v. Missouri},\textsuperscript{93} the Court reiterated the significance of its decision in \textit{Pate} and found that doubt expressed by the defense counsel regarding competency, evidence of irrational behavior or an unusual demeanor at trial, and any past medical evaluation determining competence to stand trial are all relevant factors in determining whether a competence inquiry is triggered; in some instances, one of these factors alone could constitute sufficient doubt to require an inquiry.\textsuperscript{94} Under this multi-factor approach, the Court held that the irrational behavior of Drope, charged with forcible rape of his wife, including an attempted suicide during the trial, warranted a sua sponte inquiry by the trial court into his competency despite evidence of his seemingly competent demeanor at trial.\textsuperscript{95} The Court further cautioned that trial courts bear the duty of looking for changes in circumstances throughout the trial that could render the defendant incompetent to stand trial.\textsuperscript{96}

The Maryland legislature has similarly placed the duty of making the determination of competency on the trial courts.\textsuperscript{97} Section 3-104 of the Criminal Procedure Article requires that "[i]f, before or during a trial, the defendant in a criminal case appears to the court to be incompetent to stand trial or the defendant alleges incompetence to stand trial, the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial."\textsuperscript{98} The Court of Appeals summarized the trial court's duty to conduct a competence inquiry as triggered upon either allegations by the accused or the defense counsel of incompetence or upon the trial court's sua sponte decision that the accused appears incompetent to stand trial.\textsuperscript{99}

\begin{itemize}
\item \textsuperscript{92} \textit{Id.} at 385-86. The Court found that, under Illinois law, the trial judge's duty to conduct an inquiry was triggered where the evidence raised doubt about the defendant's competence to stand trial. \textit{Id.} at 385.
\item \textsuperscript{93} 420 U.S. 162 (1975).
\item \textsuperscript{94} \textit{Id.} at 177 n.13, 180.
\item \textsuperscript{95} \textit{Id.} at 164, 178-80. The Court reasoned, as in \textit{Pate}, that a trial court should not ignore evidence of a history of significant irrational behavior solely due to a defendant's rational demeanor at trial. \textit{Id.} at 179.
\item \textsuperscript{96} \textit{Id.} at 181. The Court stated that even if the defendant is competent at the beginning of his trial, a trial court must always be attuned to changes that would render the accused incompetent to stand trial. \textit{Id.}
\item \textsuperscript{97} MD. CODE ANN., CRIM. PROC. § 3-104(a) (2001).
\item \textsuperscript{98} \textit{Id.}
\item \textsuperscript{99} Thanos v. State, 330 Md. 77, 85, 622 A.2d 727, 730 (1993) [hereinafter \textit{Thanos I}]. The Court of Appeals has also recognized that the issue of the defendant's competence can be introduced and considered at any time before or during trial. Roberts v. State, 361 Md. 346, 364, 761 A.2d 885, 895 (2000).
\end{itemize}
The Court of Appeals has consistently recognized that the trial court bears a duty to determine sua sponte competency to stand trial in some situations, even where the issue was not raised by the defense.\textsuperscript{100}

In \textit{Thanos v. State}, the Court of Appeals considered whether the trial court had erred in failing to inquire sua sponte into the defendant's competence to stand trial in a first degree murder case.\textsuperscript{101} The defendant had confessed to the murder and led police to the body of the victim, who had picked up the defendant hitchhiking in a rural area.\textsuperscript{102} Although neither the defendant nor his counsel argued that he was incompetent during the trial, he offered witnesses at the sentencing proceedings to testify concerning his extensive mental health history.\textsuperscript{103} The defendant was convicted and sentenced to the death penalty.\textsuperscript{104} On appeal, the defendant argued that the trial court's sua sponte duty to consider the defendant's competence to stand trial was raised by his history of mental illness and a series of unusual and unexplained behaviors at trial and sentencing.\textsuperscript{105}

The Court of Appeals held that the trial court's sua sponte duty to conduct a competency inquiry was not triggered where the defendant initially opposed the State's request for a competency evaluation and made lucid and articulate statements throughout the trial, despite some peculiar remarks.\textsuperscript{106} The court found that the duty of the trial judge to investigate the defendant's competency was not triggered because the record indicated that the defendant met the \textit{Dusky} test for competence to stand trial.\textsuperscript{107} While the court stated that the decision was made after considering all of the circumstances,\textsuperscript{108} its reasoning focused exclusively on Thanos's demeanor at trial and sentencing and emphasized the fact that neither he nor his counsel raised the issue of competence prior to appeal.\textsuperscript{109}

\textsuperscript{100} See \textit{Thanos I}, 330 Md. at 85, 622 A.2d at 730; \textit{Roberts}, 361 Md. at 364, 761 A.2d at 895.

\textsuperscript{101} \textit{Thanos I}, 330 Md. at 84, 622 A.2d at 730.

\textsuperscript{102} Id. at 81, 622 A.2d at 729.

\textsuperscript{103} Id. at 82, 622 A.2d at 729.

\textsuperscript{104} Id. at 82-83, 622 A.2d at 729.

\textsuperscript{105} Id. at 85, 622 A.2d at 730-31. Thanos argued that his history of mental illness and his behavior at trial, including his request to absent himself from court and subsequent decision to attend the proceedings, his whimsical decisions to waive his right to a jury trial and sentencing, and his strange remarks to the judge, which included a comment concerning his age in dog years and a question as to whether his death sentence would be carried out by "roo-roo," were sufficient to trigger an inquiry into his competence by the trial court. Id.

\textsuperscript{106} Id. at 86-87, 622 A.2d at 731.

\textsuperscript{107} Id. at 87, 622 A.2d at 731.

\textsuperscript{108} Id. at 86, 622 A.2d at 731.

\textsuperscript{109} Id. at 86-87, 622 A.2d at 731.
In Ware v. State, the Court of Appeals reaffirmed Thanos I, holding that a sua sponte competency evaluation was not triggered where the defendant appeared competent during the trial. The court found that Ware, convicted of two counts of murder and two counts of use of a handgun in the commission of a felony, appeared to have a reasonable degree of rational or factual understanding of the proceedings throughout the trial. The court affirmed the conviction and held that Ware's decision to proceed with jury sentencing against his counsel's advice was insufficient without other indications of mental illness to trigger the trial court's sua sponte duty to inquire into his competency.

c. Competence to Waive the Right to Counsel.—The Sixth Amendment grants an accused the right to be assisted by counsel, as well as the right to proceed without counsel if he so chooses. The Supreme Court has held that the same competence standard applies to competence to waive the right to counsel as to stand trial. While the Court has allowed states the option of applying a higher standard for assessing competency than that required by the federal Due Process Clause, the Maryland Court of Appeals has adopted the federal standard.

In 1974, the Supreme Court, in Faretta v. California, established the constitutional right of defendants to proceed without counsel where they voluntarily and intelligently decide to do so. The Faretta trial court had made a preliminary ruling to allow the defendant to represent himself against charges of grand theft after determining that the defendant had previously represented himself in a criminal prosecution, had completed high school, and preferred not to be app-
pointed a public defender because he believed that the office would not spend adequate time on his case. However, after observing the defendant’s demeanor and hearing the defendant’s responses to inquiries into his legal knowledge at a sua sponte hearing on the defendant’s competence to waive counsel, the trial court determined that the defendant was not competent to waive counsel, reversed its preliminary ruling, and appointed a public defender. As a result of the competency hearing, the trial court held that the defendant had no constitutional right to proceed pro se.

After granting certiorari, the Court held that the trial judge’s decision violated the defendant’s Sixth Amendment right to proceed pro se and instructed that an accused must only make an intelligent and knowing waiver of counsel. While the trial judge had found the defendant lacking in sufficient legal knowledge to represent himself adequately, the Court held that a defendant competently choosing self-representation is not required to have the skills and experience acquired by a lawyer.

In an effort to resolve a circuit split and to further clarify the federal standard for competency to waive the right to counsel, the Supreme Court held, in *Godinez v. Moran*, that the standard for competence to waive counsel was not higher than the standard for competence to stand trial. In *Godinez*, the Court held that the *Dusky* standard applied to the defendant’s competence to waive counsel, as well as his competence to stand trial. Godinez, charged with three counts of first degree murder, confessed to the crimes after attempting suicide. The defendant pled not guilty, and at the court’s order, two psychiatrists examined the defendant and both concluded that he was competent to stand trial. Thereafter, at the defendant’s second appearance at the trial court, he expressed his desire to discharge his counsel and change his pleas to guilty. Based on the findings of the psychiatric evaluations, the trial court determined that

120. *Id.* at 807-08.
121. *Id.* at 808-10.
122. *Id.*
123. *Id.* at 835-36.
124. *Id.*
126. *Id.* at 398.
127. *Id.* at 391. The defendant shot himself in the abdomen and attempted to slit his wrists after the murder of his ex-wife. *Id.* He then confessed to all three murders to police from his hospital bed. *Id.*
128. *Id.*
129. *Id.* at 392. The defendant professed a desire to stop the presentation of mitigating evidence at his sentencing. *Id.*
the defendant met the *Dusky* standard for competence to stand trial.\textsuperscript{130} The trial court accepted the defendant's waiver of counsel as given knowingly and intelligently, accepted his guilty pleas, and subsequently sentenced him to death for each of the murders.\textsuperscript{131}

The Supreme Court held that the Due Process Clause requires the same standard for competence to stand trial and for competence to waive counsel.\textsuperscript{132} The Court noted that the proper competency inquiry is whether the defendant is competent to make the decision, not whether he is able to represent himself.\textsuperscript{133} However, the Court acknowledged that more is needed to allow a defendant to waive his right to counsel than simply a finding that he is competent.\textsuperscript{134} In addition to meeting the requirements of the *Dusky* test, to find a proper waiver of counsel, the court must verify that the decision to waive the right to counsel was made knowingly and voluntarily.\textsuperscript{135}

In Maryland, a defendant's waiver of counsel must be made pursuant to Rule 4-215, which requires the trial court to follow specific procedures to advise the defendant of his right to counsel.\textsuperscript{136} In 1993, the Maryland Court of Appeals considered the standard for competence to waive the right to counsel in light of *Godinez*.\textsuperscript{137} In *Thanos I* and *Thanos II*, the Court of Appeals upheld first degree murder convictions and death sentences in two separate cases against Thanos.\textsuperscript{138} In the latter proceeding, the court considered Thanos's competence

\textsuperscript{130} *Id.* at 392.
\textsuperscript{131} *Id.* at 392-93.
\textsuperscript{132} *Id.* at 402. The Court reasoned that the decision to waive counsel is a choice of self-representation, which is no more complicated than other decisions the defendant must make over the course of the trial. *Id.* at 398-400.
\textsuperscript{133} *Id.*
\textsuperscript{134} *Id.* at 400.
\textsuperscript{135} *Id.*
\textsuperscript{136} Md. R. 4-215. At the defendant's first appearance in court without counsel, Maryland Rule 4-215(a) requires the trial judge to (1) ensure that the defendant received a copy of the charging document with notice concerning the right to counsel, (2) inform the defendant of the right to counsel and the importance of such assistance, (3) advise the defendant of the nature of the charges and possible penalties, (4) determine, based on an examination of the defendant, that the waiver of counsel was done knowingly and voluntarily where the defendant indicates such a desire to waive counsel, and (5) advise the defendant that the court could proceed to trial with the defendant unrepresented by counsel if the defendant so appears on the date of the trial. *Id.*
\textsuperscript{138} One conviction resulted from the murder of one teenager in St. Mary's County, who picked Thanos up when he was hitchhiking in the area. *Thanos I*, 330 Md. 77, 622 A.2d 727 (1993); see supra notes 101-109 and accompanying text (discussing the trial court's sua sponte duty to inquire into Thanos's competence to stand trial). The other conviction resulted from the murder of two teenagers committed in Garrett County. *Thanos II*, 332 Md. 511, 632 A.2d 768 (1993).
to waive counsel in relation to his murder conviction in Garrett County. In Thanos II, the defendant elected not to file a petition for certiorari with the United States Supreme Court or pursue other postconviction remedies and expressed his desire to terminate the public defender's representation of him while his appeal was pending before the Court of Appeals. Subsequent to the Court of Appeals' decision affirming his conviction for the Garrett County murders, the State filed a Motion for Hearing and Determination Regarding Waiver of Further Review Proceedings, and the court refused to rule on the validity of Thanos's waiver of postconviction remedies before a competency determination was made. The trial court ordered a competency evaluation and found the defendant competent to discharge his counsel and waive his right to post conviction review at the hearing. The Office of the Public Defender then appealed the competency finding on behalf of the defendant.

The Court of Appeals held that the same standard should be applied to determine the defendant's competence to waive the right to counsel as is used to determine competence to stand trial. Mirroring the reasoning of the Godinez Court, the Court of Appeals first found that the record supported the trial court's determination that the defendant was competent to waive counsel. The court further found that the decision to allow the defendant to discharge his counsel was proper because the defendant had done so knowingly, voluntarily, and intelligently.

3. The Court's Reasoning.—In Gregg v. State, the Court of Appeals rejected the defendant's contentions that the trial court failed to observe its sua sponte duty to inquire into Gregg's competency to stand trial and that a further inquiry was necessary to determine his competency to waive the right to counsel. Writing for the majority, Judge

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139. 332 Md. at 518-19, 632 A.2d at 771.
140. Id. at 515-16, 632 A.2d at 770.
141. Id. at 516-17, 632 A.2d at 770.
142. Id. at 517, 632 A.2d at 770-71. The hearing judge also presided at the defendant's trial in Garrett County. Id. The court received testimony from a psychiatrist and a forensic psychologist, who disagreed on the defendant's competence. Id.
143. Id. at 518, 632 A.2d at 771.
144. Id. at 519-20, 632 A.2d at 772.
145. Id.
146. Id. at 520, 632 A.2d at 772.
147. Gregg, 377 Md. at 547-49, 833 A.2d at 1059-60. The court also rejected Gregg's argument that the advisements provided to him piecemeal did not meet the requirements of Rule 4-215, concluding that the trial court properly advised Gregg concerning his right to counsel. Id. at 554, 833 A.2d at 1063.
Harrell held that nothing in the record justified the activation of the trial court's sua sponte duty to order a competency evaluation.\textsuperscript{148} The majority further determined, in following the Supreme Court's established standard for assessing competency to waive the Sixth Amendment right to counsel, that no further scrutiny of his competency was necessary prior to acceptance of his waiver of counsel.\textsuperscript{149} Therefore, the Court of Appeals found that Gregg competently and effectively waived his right to counsel and affirmed his conviction.\textsuperscript{150}

The majority rejected Gregg's argument that the trial court failed to recognize its sua sponte duty to conduct an inquiry into his competency to stand trial based on his mental health history, the results of the competency evaluation conducted as a result of the district court order, his erratic behavior at the trial court, and his decision to proceed pro se.\textsuperscript{151} The majority acknowledged that section 3-104 of the Criminal Procedure Article of the Maryland Code places a burden on the trial court to determine the defendant's competency to stand trial\textsuperscript{152} and further recognized that the district court proceedings, including the competency determination, were not binding on the trial court and that the proceedings began anew without any determination of Gregg's competency.\textsuperscript{153} Accordingly, the majority determined that the circuit court made no ruling on the issue of competence, as it was not presented to the court by either of the parties, and that the facts referenced by Gregg were insufficient to trigger the trial court's sua sponte duty to make an inquiry.\textsuperscript{154} The majority concluded that there was no basis for the trial court judge to question Gregg's ability to understand the object and nature of the proceedings or to assist in

\textsuperscript{148} Id. at 547, 833 A.2d at 1059. Judges Harrell, Raker, Wilner, Cathell, and Battaglia formed the majority, while Chief Judge Bell wrote a dissenting opinion joined by Judge Eldridge. \textit{Id.} at 516, 833 A.2d at 1041.

\textsuperscript{149} Id. at 547-49, 833 A.2d at 1059-60.

\textsuperscript{150} Id. at 554, 833 A.2d at 1063.

\textsuperscript{151} Id. at 547, 833 A.2d at 1059.

\textsuperscript{152} Id. at 542-43, 833 A.2d at 1056. Section 3-104(a) provides that "[i]f, before or during a trial, the defendant in a criminal case appears to the court to be incompetent to stand trial ... the court shall determine, on evidence presented on the record, whether the defendant is incompetent to stand trial." \textit{Md. Code Ann., Crim. Proc.} § 3-104(a) (2001).

\textsuperscript{153} Gregg, 377 Md. at 542-43, 833 A.2d at 1056. The majority stated that the issue of the defendant's competency to stand trial must be raised anew in the circuit court proceedings either by motion of the defendant or defense counsel or by the defendant's conduct if sufficient to trigger a sua sponte inquiry. \textit{Id.} at 545, 833 A.2d at 1058.

\textsuperscript{154} Id. at 543, 833 A.2d at 1056-57. The court characterized Gregg's behavior at trial as no more than stubborn and argumentative and found that there was no evidence in the circuit court record of a history of mental illness, noting that the brief mention of the Crownsville competency report constituted the only reference to Gregg's mental health. \textit{Id.} at 546-47, 833 A.2d at 1059.
or mount his own defense. The court therefore upheld the trial court's failure to investigate Gregg's competency.

The majority also rejected Gregg's contention that a heightened standard for competence should be applied in the determination to accept a defendant's waiver of the right to counsel. While Gregg advocated the use of a standard that would evaluate the defendant's mental capability and ability to defend himself, the court determined that Maryland law required only that the waiver of counsel be made knowingly and voluntarily. The majority recognized that the Maryland test tracks the federal standard for competency to waive counsel, which excludes a consideration of the defendant's knowledge of the law or ability to defend himself effectively. The majority further acknowledged that the Supreme Court has left the door open for states to employ a higher standard than that required by the Sixth Amendment, but declined to do so under the circumstances of Gregg's case. The majority concluded that Gregg's waiver of counsel met the legal requirements of a knowing and voluntary decision and that the trial court had no duty to make an additional inquiry into his competency to waive counsel.

In his dissent, Chief Judge Bell, joined by Judge Eldridge, disagreed with what he viewed as the majority's misapplication of the law. While not objecting to the majority's statement of the law as placing a duty on the trial court to notice indications that the defendant may not be competent to stand trial and make a subsequent com-

155. Id. at 547, 833 A.2d at 1059. Section 3-101(f) defines "incompetent to stand trial" as "not able (1) to understand the nature or object of the proceeding; or (2) to assist in one's defense." CRIM. PROC. § 3-101(f); see also Ware v. State, 360 Md. 650, 705-06, 759 A.2d 764, 793 (2000) (determining whether defendant lacked sufficient ability to communicate with his attorneys with a reasonable degree of rational and factual understanding of the proceedings).
156. Gregg, 377 Md. at 547, 833 A.2d at 1059.
157. Id. at 549, 833 A.2d at 1060.
158. Id. at 547, 833 A.2d at 1059.
159. Id. at 548, 833 A.2d at 1059-60.
160. Id. at 549, 833 A.2d at 1060.
161. Id. at 547, 833 A.2d at 1059. The court also rejected Gregg's argument that the failure of the circuit court to provide him with all of the required advisements denied him his right to be properly advised of his right to counsel. Id. at 549, 833 A.2d at 1060. The court reasoned that compliance with Rule 4-215 requires the defendant to receive each of the enumerated advisements from a circuit court judge. Id. at 554, 833 A.2d at 1063; see Md. R. 4-215. Accordingly, the court found the requirements met because the circuit court provided Gregg with all of the required advisements that were applicable. Gregg, 377 Md. at 554, 833 A.2d at 1063.
162. See Gregg, 377 Md. at 556-57, 833 A.2d at 1064 (Bell, C.J., dissenting) (disagreeing with the majority's application of the facts in determining whether the trial court's sua sponte duty to make a competence inquiry was triggered).
petency determination, the Chief Judge argued that the record in this case triggered that duty to make an inquiry into Gregg's competency prior to proceeding with the trial.\textsuperscript{163} The dissent asserted that sufficient basis existed in the record to create doubt as to Gregg's competency to stand trial.\textsuperscript{164}

Chief Judge Bell argued that several factors must be considered in determining whether further inquiry into a defendant's competency is required by the trial court.\textsuperscript{165} These factors include doubts concerning competency expressed by the defense counsel, evidence of irrational behavior, the defendant's demeanor at trial, and any past medical evaluation used to evaluate competence to stand trial.\textsuperscript{166} The dissent further argued that, while all of the factors are relevant in raising the trial court's sua sponte duty to inquire into competency, one of the factors alone can be sufficient to trigger the duty.\textsuperscript{167} The Chief Judge concluded that Gregg's history of mental illness, the absence of the district court competency hearing transcript, the strange dialogue with the trial court concerning his inability to stand, Gregg's statement concerning the drugged food provided to him in jail, Gregg's apparent misunderstanding of the role and cost of the public defender, and Gregg's desire to proceed pro se\textsuperscript{168} warranted an inquiry by the trial court into Gregg's competency to stand trial.\textsuperscript{169} In determining that a number of factors present in \textit{Gregg} triggered the trial court's sua sponte duty to determine Gregg's competence to stand trial, the dissent stated that trial courts may not ignore common sense or the totality of the circumstances.\textsuperscript{170}

4. \textit{Analysis.}—In \textit{Gregg v. State}, the Court of Appeals held that a criminal defendant's right to due process was not violated by a trial court's failure to conduct a sua sponte competence inquiry when the defendant's demeanor in court indicated that he met the legal competency standard to stand trial.\textsuperscript{171} In so concluding, the court nar-

\textsuperscript{163} Id. (Bell, C.J., dissenting).
\textsuperscript{164} Id. (Bell, C.J., dissenting).
\textsuperscript{165} Id. at 557, 833 A.2d at 1065 (Bell, C.J., dissenting).
\textsuperscript{166} Id. (Bell, C.J., dissenting); see \textit{Drope v. Missouri}, 420 U.S. 162, 177 n.13, 180 (1975) (considering the above factors in determining whether further inquiry into the defendant's competency was justified).
\textsuperscript{167} \textit{Gregg}, 377 Md. at 557, 833 A.2d at 1065 (Bell, C.J., dissenting).
\textsuperscript{168} Id. at 566 n.5, 833 A.2d 1070 n.5 (Bell, C.J., dissenting). Chief Judge Bell identified the refusal of representation as one factor that the trial court should consider in determining the defendant's competence to stand trial. \textit{Id.} (Bell, C.J., dissenting).
\textsuperscript{169} Id. at 566, 833 A.2d at 1069-70 (Bell, C.J., dissenting).
\textsuperscript{170} Id. (Bell, C.J., dissenting).
\textsuperscript{171} Id. at 547, 833 A.2d at 1059.
rowly defined the trial court’s sua sponte duty by focusing on only one factor indicative of incompetence, and it missed an opportunity to clarify the obligation of Maryland trial courts to investigate the competence of criminal defendants. The court failed to consider all of the factors indicative of incompetence to stand trial and mistakenly concluded that a sua sponte competency inquiry was not required, in turn upholding Gregg’s conviction. The Gregg court should have employed the multi-factor approach adopted by the Supreme Court, which provides several non-exclusive factors for the trial court to consider in determining whether a competency inquiry is warranted. Further, the court should have included the defendant’s request not to be represented by counsel as a factor in the determination.

a. The Court Narrowly Defined the Trial Court’s Sua Sponte Duty.—In Gregg, the Court of Appeals considered only the defendant’s behavior at trial in holding that the trial court’s sua sponte duty to investigate Gregg’s competency was not triggered because it found nothing in the record indicating that he failed to meet the Dusky standard for competence to stand trial. In so doing, the Gregg court followed the general trend of the Court of Appeals by professing to require the trial courts to consider all of the circumstances that could indicate incompetence to stand trial in determining whether a competency inquiry is warranted, while narrowly focusing its decision on the criminal defendant’s behavior at trial. The Court of Appeals continues to acknowledge the trial courts’ duty to raise the issue of

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172. See infra notes 176-196 and accompanying text (describing the court’s repeated failure to consider all factors indicative of incompetence despite professions to do so).
173. See Gregg, 377 Md. at 566, 833 A.2d at 1070 (Bell, C.J., dissenting) (arguing that trial courts may not rely on only one factor indicative of competence to the exclusion of others).
174. See Drope v. Missouri, 420 U.S. 162, 177 n.13, 180 (1975) (considering multiple factors in determining the need for a competency inquiry); infra notes 197-210 and accompanying text (examining the Supreme Court’s use of the multi-factor approach in contrast to the undefined approach taken by the Maryland courts).
175. Gregg, 377 Md. at 566 n.5, 833 A.2d at 1070 n.5 (Bell, C.J., dissenting); see infra notes 211-221 and accompanying text (discussing the need to include consideration of the defendant’s request to proceed without counsel as a factor in determining whether the trial court’s sua sponte duty to make a competence inquiry is triggered).
177. See, e.g., Thanos I, 330 Md. 77, 86-87, 622 A.2d 727, 731 (1993) (emphasizing the consideration of all circumstances in concluding that the court did not have an obligation to order a competency hearing, while basing the determination almost exclusively on his behavior at trial).
178. See infra notes 182-186 and accompanying text (describing the failure of the Court of Appeals in prior Maryland cases to consider all of the circumstances indicative of incompetence).
competence when triggered; however, it has once again failed to give the duty any substantive meaning.\footnote{179} In \textit{Gregg}, the court's failure to consider all of the indices of incompetence led to the finding that the trial court's sua sponte duty to make a competence inquiry was not triggered.\footnote{180}

In \textit{Gregg}, the Court of Appeals professed consideration of all of the circumstances indicative of incompetence in determining whether the trial court's sua sponte duty to make a competence inquiry was required, while actually failing to implement that approach.\footnote{181} In so doing, the court followed the approach taken in previous decisions, including \textit{Thanos I}, where the court found that the sua sponte duty to make a competence determination was not triggered after considering only that the defendant initially opposed the State's request to establish competency and that the issue of competence to stand trial was never raised by the defense counsel.\footnote{182} Similar to \textit{Thanos I}, the court in \textit{Gregg} professed to take all relevant factors into account, yet failed to give weight to the defendant's very unusual behavior at trial and sentencing, as well as his history of mental illness.\footnote{183}

The approach taken in \textit{Gregg} is also similar to that taken in \textit{Ware}, where the Court of Appeals failed to weigh all factors indicative of incompetence in considering whether the defendant's sudden decision to proceed with jury sentencing triggered the court's sua sponte duty to make a competency inquiry.\footnote{184} Following a jury conviction of two counts of murder, Ware elected to be sentenced by the jury despite his counsel's strong recommendation for a court sentencing and his previous expressions of agreement to do so.\footnote{185} The Court of Appeals found that Ware's decision to proceed with jury sentencing was insufficient to trigger the trial court's sua sponte duty to make a competency inquiry, but failed to consider the change in circumstances in

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\item \footnote{179}{See \textit{Gregg}, 377 Md. at 539, 833 A.2d at 1054 (stating that the circumstances that warrant a sua sponte competency inquiry by the court remain unclear).}
\item \footnote{180}{\textit{Id.} at 556-57, 833 A.2d at 1064-65 (Bell, C.J., dissenting).}
\item \footnote{181}{\textit{See id.} at 539-47, 833 A.2d at 1054-59 (discussing the court's prior considerations of the circumstances that would trigger the trial court's sua sponte duty to make a competence inquiry and determining that the duty was not triggered by the circumstances in \textit{Gregg}).}
\item \footnote{182}{\textit{Thanos I}, 330 Md. at 86-87, 622 A.2d at 731.}
\item \footnote{183}{\textit{Id.} In \textit{Gregg}, the court found, after considering the whole record, that there was not an adequate basis for a sua sponte competency evaluation. \textit{Gregg}, 377 Md. at 547, 833 A.2d at 1059.}
\item \footnote{184}{\textit{Ware v. State}, 360 Md. 650, 704-06, 759 A.2d 764, 792-93 (2000).}
\item \footnote{185}{\textit{Id.} at 696, 759 A.2d at 788.}
\end{itemize}
}
connection with the other factors that could have indicated that Ware was not competent or had become incompetent to stand trial.\(^{186}\)

In *Gregg*, the court again failed to consider the totality of the circumstances in finding that there was no basis in the record to trigger the trial court's sua sponte duty to determine Gregg's competence to stand trial.\(^{187}\) While the *Gregg* court properly articulated the *Dusky* standard for competence to stand trial, it failed to give sufficient weight to the factors indicating that Gregg may have failed to meet that standard.\(^{188}\) The court properly recognized that *Dusky* requires that to stand trial, the accused must have the ability to understand communications with his lawyer and have a rational and factual understanding of the proceedings against him. The *Gregg* court found that there was no indication in the record that Gregg failed to meet the *Dusky* standard for competence to stand trial\(^{189}\) and reasoned that the record indicated that Gregg had the ability to consult with his attorneys with a rational and factual understanding of the proceedings because his participation at trial was coherent.\(^{190}\)

Although the court professed to consider all of the factors indicative of incompetence to stand trial, it based its determination that the trial court's sua sponte duty to make an inquiry was not triggered solely on Gregg's behavior at trial.\(^{191}\) The majority found no evidence on the record of a history of mental illness despite Gregg's statement that a competency evaluation had been conducted by the district court.\(^{192}\) The majority found the missing evaluation indicative of an absence of a history of mental illness and relied solely on what it char-

\(^{186}\) *Id.* at 705-06, 759 A.2d at 793.

\(^{187}\) 377 Md. at 566, 833 A.2d at 1070 (Bell, C.J., dissenting).

\(^{188}\) *Id.* at 555-57, 833 A.2d at 1064-65 (Bell, C.J., dissenting). The Supreme Court established the *Dusky* standard in 1960 to be employed by courts in making competency determinations in order to protect the due process rights of criminal defendants. *Dusky* v. United States, 362 U.S. 402 (1960); see also *Raithel* v. State, 280 Md. 291, 298, 372 A.2d 1069, 1073 (1977). In 1977, in *Raithel*, the Court of Appeals required Maryland courts to employ the *Dusky* standard in determining competence. *Raithel*, 280 Md. at 300, 372 A.2d at 1074. The Maryland legislature adopted the *Dusky* standard and codified the trial court's duty to make sua sponte competency inquiries where the judge has reason to doubt that the defendant meets the *Dusky* standard. Md. Code Ann., Crim. Proc. §§ 3-101(f), 3-104(a) (2001).

\(^{189}\) *Gregg*, 377 Md. at 546, 833 A.2d at 1058.

\(^{190}\) *Id.* (citing Ware, 360 Md. at 706, 759 A.2d at 793).

\(^{191}\) *Id.*

\(^{192}\) *Id.* at 546, 833 A.2d at 1059. The court stated that it found only a single reference to Gregg's history of mental illness in the circuit court record and that Gregg's sixty-six-day stay at the Hospital Center for a competency evaluation and ten-day evaluation at the Anne Arundel Hospital was not substantial enough to compel the court to inquire into his competency. *Id.*
characterized as Gregg’s “appropriate” responses to the judge’s questions to find that the trial court judge’s sua sponte duty to make an inquiry was not triggered.\textsuperscript{193} Missing from the majority’s reasoning were the strange nature of the offense that consisted of pushing a child off of her bicycle, the results of the competency evaluation conducted by order of the district court, Gregg’s statements concerning his belief that the judicial system and his neighborhood were involved in a conspiracy against him, his remark regarding the “drugging” of his food in jail, his unexplained walking and standing impairment, and his apparent misunderstanding of the role of the public defender.\textsuperscript{194} The court should also have considered the fact that Gregg was proceeding pro se and had no advocate to raise issues such as incompetence.\textsuperscript{195} Had the court correctly considered all of the circumstances and indices of mental incompetence, as it professed, it would have found the trial court’s sua sponte duty to make a competence inquiry triggered.\textsuperscript{196}

\textit{b. Maryland Trial Courts Should Be Held to the Multi-Factor Approach.}—Although it professed to consider all of the circumstances indicative of incompetence, the \textit{Gregg} court failed to employ the multi-factor approach adopted by the Supreme Court to determine when a trial court’s sua sponte duty to make a competency inquiry is triggered and thus failed to hold Maryland trial courts to a uniform standard.\textsuperscript{197} The Court of Appeals acknowledged in \textit{Gregg} that the question of whether the evidence at trial raises suspicion about the defendant’s competence is often difficult,\textsuperscript{198} but nonetheless failed to employ the multi-factor approach established in \textit{Drope} to better determine whether the court had a sua sponte duty to make a competence in-

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  \item \textsuperscript{193} \textit{Id.} at 545-47, 833 A.2d at 1058-59. The court found no evidence in the record of a history of incompetency and characterized Gregg’s behavior as “stubborn and argumentative at most.” \textit{Id.}
  \item \textsuperscript{194} \textit{Id.} at 557-66, 833 A.2d at 1064-69 (Bell, C.J., dissenting). Chief Judge Bell declared that a court should consider the totality of the circumstances in determining whether the court’s duty is triggered, rather than base the decision on only a portion of the facts. \textit{Id.} at 565, 833 A.2d at 1069 (Bell, C.J., dissenting).
  \item \textsuperscript{195} \textit{Id.} at 565-66, 833 A.2d at 1069-70 (Bell, C.J., dissenting).
  \item \textsuperscript{196} \textit{Id.} (Bell, C.J., dissenting).
  \item \textsuperscript{197} \textit{See infra} notes 208-210 and accompanying text (discussing the failure of the \textit{Gregg} court to employ the multi-factor approach and the likely consequences for criminal defendants).
  \item \textsuperscript{198} \textit{Gregg}, 377 Md. at 545, 833 A.2d at 1058 (citing \textit{Drope} v. Missouri, 420 U.S. 162, 180 (1975)).
\end{itemize}
The multi-factor approach adopted in *Drope* includes consideration of the defendant's behavior prior to and during trial and opinions regarding the defendant's competence to stand trial.\(^{199}\)

The *Gregg* court missed an opportunity to determine the circumstances that would demand a competency inquiry and define the instances in which the sua sponte duty to conduct such an inquiry is triggered. The *Gregg* court should have followed the Supreme Court's multi-factor approach for determining whether a competency inquiry is required.\(^{200}\) Although the Supreme Court has not identified a specific quantum of evidence that would trigger the trial court's sua sponte duty, the multi-factor approach includes consideration by the trial judge of (1) doubts expressed by counsel as to the defendant's incompetence; (2) evidence of a defendant's irrational behavior; (3) his demeanor at trial; and (4) any prior medical opinion on competence to stand trial in determining the need for a competence inquiry.\(^{202}\) While any one of the factors alone could lead to a conclusion that a competence inquiry is warranted,\(^{203}\) the court may not solely act as the *Gregg* court did and rely on one factor and exclude other factors from consideration to conclude that a competence inquiry is not triggered.\(^{204}\) The *Gregg* court failed to employ the multi-factor approach by considering only Gregg's demeanor at trial to the exclusion of other factors, such as his court-ordered competency evaluation and history of mental illness.\(^{205}\)

The *Gregg* court's decision is not consistent with Supreme Court precedent, which has found the trial court's sua sponte duty to make an inquiry triggered after consideration of the identified factors. In *Pate*, the Court found that despite the defendant's seemingly rational demeanor at trial, a competence inquiry was required based on his history of irrational and violent behavior and treatment for mental illness.\(^{206}\) Subsequently, in *Drope*, the Court again found the trial court's duty to investigate the defendant's competence to stand trial

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199. See *supra* notes 187-196 and accompanying text (discussing the *Gregg* court's implicit acknowledgment of the multi-factor approach by claiming to consider the totality of the circumstances and failure to do so).


201. See *id.* (identifying the factors to consider in determining whether a competency inquiry is necessary); but see *supra* notes 176-196 and accompanying text (discussing the failure of the Court of Appeals to consider all of the factors indicative of incompetence).

202. *Drope*, 420 U.S. at 177 n.13, 180. However, the Court cautioned that there are no definite signs that automatically warrant the need for further inquiry. *Id.*

203. *Id.* at 180.

204. *Gregg*, 377 Md. at 566, 833 A.2d at 1070 (Bell, C.J., dissenting).

205. *Id.* at 565-66, 833 A.2d at 1069-70 (Bell, C.J., dissenting).

triggered where the defendant appeared competent at trial, but had a history of irrational behavior including a suicide attempt.\footnote{\textit{Drope}, 420 U.S. at 180-81.}

In \textit{Gregg}, the Court of Appeals should have employed the multi-factor approach used by the Supreme Court to clarify the trial court's duty to conduct an inquiry into Maryland criminal defendants' competence to stand trial. The totality of the circumstances required the trial court sua sponte to conduct an inquiry into all factors influencing Gregg's competence to stand trial.\footnote{\textit{Gregg}, 377 Md. at 565-66, 833 A.2d at 1069 (Bell, C.J., dissenting).} In determining that a competency inquiry is not warranted, the trial judge should at least consider those factors identified by the Supreme Court. The failure of the Court of Appeals to hold Maryland trial courts to the multi-factor approach results in a failure to conduct competence inquiries where they are warranted and increases the risk that incompetent defendants will be forced to stand trial. Adoption and implementation of the multi-factor approach would safeguard the constitutional due process rights of Maryland's criminal defendants.\footnote{The conviction of a legally incompetent defendant while he is legally incompetent violates his right to due process. \textit{Pate}, 383 U.S. at 378.}

The \textit{Gregg} court's failure to clarify the trial court's duty to raise the issue of competency to stand trial inefficiently protects the due process rights of criminal defendants suffering from mental illness in Maryland and leaves the frontier of competency open to complete discretion by the trial court judges. The consequences of complete discretion will include unpredictable and inconsistent results for defendants, trial judges, and the state court system. By providing no guidance to the trial judges in permitting them to determine haphazardly when a competence inquiry is warranted, the Court of Appeals has essentially made the sua sponte trial court duty, dictated by the state legislature, discretionary at the hands of individual trial judges. As long as the duty remains undefined and unenforced by the Court of Appeals, the rights of many mentally ill criminal defendants in Maryland remain unprotected despite the legislature's attempt to institute a safeguard.\footnote{\textit{MD. Code Ann., Crim. Proc.} § 3-104(a) (2001).}

c. Waiver of Counsel Should Be Considered as a Factor in the Multi-Factor Approach.—The \textit{Gregg} court should have considered the request by Gregg to proceed pro se as a factor in the multi-factor approach to determine whether the trial court's sua sponte duty to conduct a competence inquiry was triggered. The court followed
precedent in applying the *Dusky* standard to competence to stand trial as well as competence to waive the right to counsel.\(^{211}\) However, while the *Gregg* court properly refused to adopt a standard for determining competence to waive counsel that was higher than the standard for determining competence to stand trial, the court should have considered the request by Gregg to proceed pro se as a factor in the multi-factor approach used to determine whether a sua sponte competence inquiry was required.

The *Gregg* court followed federal and state precedent by ensuring that Gregg’s waiver of counsel was made intelligently and knowingly by applying the *Dusky* standard to determine competence to waive representation. In *Faretta*, the Court found that a criminal defendant need not have the skill and experience to represent himself effectively, but must only make an intelligent and knowing decision to waive counsel.\(^{212}\) In *Thanos II*, the Court of Appeals adhered to the standard established by the Supreme Court in *Godinez*, requiring the trial court to apply the *Dusky* standard in determinations of competence to waive counsel.\(^{213}\) Thus, the *Gregg* court followed established precedent in determining competence to waive representation, but failed to consider Gregg’s request to waive counsel in light of the other circumstances indicating incompetence to stand trial.

The *Gregg* court should have considered the request by Gregg to proceed pro se as a component of the multi-factor approach due to the absence of a defense counsel to recognize and raise the issue of competence on Gregg’s behalf.\(^{214}\) The multi-factor approach established by the Supreme Court to determine the need for a competence evaluation includes a consideration of doubts expressed by counsel as to the defendant’s competence.\(^{215}\) The Court of Appeals previously considered this factor in *Thanos I*, where it emphasized the failure of the defense counsel to raise the issue of incompetence as a primary reason for its determination that the trial court’s sua sponte duty to

\(\text{211. Godinez v. Moran, 509 U.S. 389, 398 (1993); Thanos II, 332 Md. 511, 519-20, 632 A.2d 768, 772 (1993). In addition to ensuring that the *Dusky* standard is satisfied, the trial court must verify that the decision to waive the right to counsel was made knowingly and voluntarily. *Faretta* v. California, 422 U.S. 806, 835 (1975).}

\(\text{212. *Faretta*, 422 U.S. at 835-36.}

\(\text{213. *Thanos II*, 332 Md. at 519-20, 632 A.2d at 772; *Godinez*, 509 U.S. at 398.}

\(\text{214. See *Gregg*, 377 Md. at 566 n.5, 833 A.2d at 1070 n.5 (Bell, C.J., dissenting) (stating that the defendant’s refusal of representation should be considered as one factor indicative of incompetence).}

\(\text{215. See *Drope v. Missouri*, 420 U.S. 162, 177 n.13 (1975) (finding a defense counsel’s doubts as to the competence of the defendant not determinative, but deserving of significant consideration).}
investigate Thanos's competence was not required. However, where the defendant appears for trial without counsel and requests a waiver of the right to representation, as in Gregg, the defendant is denied the opportunity for counsel to raise the issue of competence, as no doubts could be expressed by an absent defense counsel. Rather than eliminate consideration of doubts expressed by counsel as to the defendant’s competence as a factor in determining the need for a competency evaluation for defendants proceeding pro se, the trial court should replace this factor with consideration of the request to waive counsel. Gregg’s inability to understand the role and cost of the public defender and his decision to proceed without counsel should have been weighed with the other factors indicative of incompetence.

Gregg’s request to proceed pro se represented a change in circumstances that should have been weighed with the other factors indicative of incompetence in determining whether the trial court’s sua sponte duty to make a competence inquiry was required. In making such a determination, the Gregg court could have relied on section 3-104 of the Criminal Procedure Article, which requires the trial court to reconsider competency to stand trial, even after an initial competency determination was made, as circumstances change. The Gregg court failed to recognize that, where the circumstances up to the point of request by the defendant to waive his right to counsel have not indicated a need for an inquiry into his competence, such a request could represent a changed circumstance. A sua sponte obligation of the trial court would then be triggered to reevaluate the defendant’s ability to meet the Dusky standard to stand trial because the defendant no longer has an advocate to alert the court concerning competency issues or to protect the defendant’s rights. The multifactor approach requires a weighing of the identified factors, and the Gregg court should have recognized that a request by Gregg to proceed pro se, weighed with the other factors, created doubts as to


217. See Gregg, 377 Md. at 566, 833 A.2d at 1069-70 (Bell, C.J., dissenting) (arguing that Gregg’s request to proceed pro se, in combination with other factors, triggered the trial court’s duty to make a competence inquiry).

218. Id.

219. Md. Code Ann., Crim. Proc. § 3-104(c) (2001). The Supreme Court has held that the issue of competence to stand trial can become evident at any point in the trial by a change in circumstances, Drope, 420 U.S. at 181, and the Court of Appeals has acknowledged that the duty of the trial court to raise the issue is extended throughout the trial. Roberts v. State, 361 Md. 346, 364, 761 A.2d 885, 895 (2000).
Gregg’s competency. Because no competence evaluation or hearing had been conducted at the circuit court, the Gregg court should have considered Gregg’s request to waive counsel, along with his bizarre behavior at pretrial proceedings and history of mental illness, in determining whether the sua sponte duty to inquire into Gregg’s competence to stand trial was triggered.

5. Conclusion.—The Court of Appeals failed to weigh all of the factors in Gregg that would cumulatively trigger the trial court’s sua sponte duty to make a competence inquiry and instead placed emphasis on Gregg’s demeanor at trial. In holding that a criminal defendant’s right to due process was not violated by a trial court’s failure to make a competence inquiry, the court missed an opportunity to clarify the sua sponte duty of the trial court to order a competence inquiry where circumstances indicate that the defendant may not meet the Dusky standard for competence to stand trial. The court should have employed the multi-factor approach, to determine when a competence inquiry is warranted, established by the Supreme Court to protect Maryland’s incompetent criminal defendants from violations of their right to due process. The court should also have weighed the defendant’s request to proceed without counsel as a factor with the other circumstances indicating that Gregg failed to meet the Dusky standard for competence to stand trial because he lacked an advocate to raise the issue on his behalf.

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220. See Gregg, 377 Md. at 566, 833 A.2d at 1069-70 (Bell, C.J., dissenting) (including Gregg’s decision to proceed without counsel as a factor leading to the determination that a sua sponte competence inquiry was required).
221. Id. (Bell, C.J., dissenting).
222. Gregg, 577 Md. at 547, 833 A.2d at 1059.
223. See supra notes 176-196 and accompanying text (discussing the Court of Appeals’s repeated failure to consider all of the indices of incompetence in determining whether the sua sponte duty was triggered).
224. See supra notes 197-210 and accompanying text (contrasting the federal approach and that taken by the Gregg court).
225. See supra notes 211-221 and accompanying text (arguing for the substitution of the request to proceed pro se in place of the consideration of defense counsel’s doubts regarding competency in the multi-factor approach).
B. Failed Analysis and Policy Reasoning Undercut Maryland Citizens' Rights to Privacy and Security in Their Homes

In *Brown v. State*, the Court of Appeals of Maryland examined a practice whereby police, acting without probable cause or reasonable articulable suspicion, used deception to induce a person to open the door of his motel room, and then once the door was open, identified themselves as police officers and asked for permission to enter the room and conduct a search. Specifically, the court considered whether the initial use of a subterfuge to prompt the opening of the door eroded the subsequent consent to enter and search, thereby violating the Fourth Amendment’s protection against unreasonable searches. The court held that the method employed by the police did not erode the consent to enter or search because the deception only induced the opening of the door. The court reasoned that once the door was opened, the consent to enter was voluntary because the occupant of the motel room knew that he was allowing police into his room when he agreed to their entry.

In reaching this decision, the court failed to analyze a majority of factors that undermined the voluntary quality of the search, and thus did not meaningfully apply the prescribed “totality of the circumstances” test to determine whether the consent to enter and search was truly voluntary. Further, the court undermined honest citizens’ rights to privacy and security in their homes.

2. Reasonable articulable suspicion requires that the police have rational inferences based on specific, objective, and articulable facts which reasonably warrant the intrusion into the home. E.g., Terry v. Ohio, 392 U.S. 1, 21 (1968); Stokes v. State, 362 Md. 407, 415-16, 765 A.2d 612, 616-17 (2001). Reasonable articulable suspicion is a less demanding standard than probable cause and significantly less demanding than the standard of preponderance of the evidence. E.g., Illinois v. Wardlow, 528 U.S. 119, 123 (2000); Stokes, 362 Md. at 415-16, 765 A.2d at 616-17.
3. 378 Md. 359, 835 A.2d at 1210.
4. Id. at 360, 835 A.2d at 1211.
5. Id. at 365, 835 A.2d at 1213.
6. Id.
7. The totality of the circumstances test, prescribed by the Supreme Court in *Schneckloth v. Bustamonte*, see infra note 64, directs the court to carefully scrutinize all of the surrounding circumstances of a search in order to determine whether the search was conducted pursuant to voluntary consent. 412 U.S. 218, 226-27 (1973).
8. See infra notes 201-223 and accompanying text (explaining that, although the *Brown* court claimed to apply the test, it did so superficially and did not consider all of the evidence). In determining that the consent to search was voluntary, the court most notably failed to consider the police officers' lack of justification for initially approaching the suspect's motel room, and the police officers' use of deception and its effect on the suspect. Infra notes 210-225 and accompanying text.
rights to privacy and security in their homes by failing to align itself with the majority of state courts that have limited the use of deception to situations where there is a reasonable basis for believing that criminal activity is taking place in the home. By allowing the police to use deception in the absence of reasonable articulable suspicion of wrongdoing, the court has left citizens vulnerable to arbitrary and selective invasions of their privacy and has infringed upon their Fourth Amendment rights.

1. The Case.—On the morning of January 31, 2001, Maryland State Trooper George Wooden, working with a Drug Enforcement Administration interdiction group, received an anonymous tip about possible drug activity in Room 109 at the Super Eight Motel in Aberdeen, Maryland. In response to the anonymous tip, Wooden and two other officers went to the motel at 10:00 A.M. that morning and knocked on the door to Room 109. Roger Brown, one of two occupants of the room, asked who was knocking. Wooden, dressed in plain clothes, responded that he was maintenance and asked that he be allowed in the room to check the thermostat.

Brown consequently opened the door in his boxer shorts, at which point Wooden smelled the odor of burnt marijuana coming from the room. Wooden then flashed his police badge, identified himself as a police officer, and asked if he could enter the room to talk with Brown. Brown said yes, and stepped away from the door to allow Wooden and one other officer to enter; the third officer re-

9. See infra notes 234-243 and accompanying text.
10. See infra notes 244-262 and accompanying text.
11. Brown, 378 Md. at 359, 835 A.2d at 1210. The facts of the case recited in this section are as testified to at a hearing on defendant's motion to suppress evidence found in the motel room. Id. at 360, 835 A.2d at 1210.
12. Id. at 359, 835 A.2d at 1210. The tip did not rise to the level of reasonable articulable suspicion because it was uncorroborated and anonymous, and the officers had no prior history as to the credibility of the information. Joint Record Extract at 18-19, Brown v. State, 378 Md. 355, 835 A.2d 1208 (2003) (No. 140).
14. Id.
16. Brown, 378 Md. at 359, 835 A.2d at 1210.
mained outside. Brown then proceeded to lie down on one of the beds in the room.

Upon Wooden’s entry into the room, the smell of marijuana became more potent, and he observed a burnt marijuana cigarette sitting in an ashtray on the night table between the two beds. Brown grabbed the cigarette and placed it entirely in his mouth. Wooden told Brown he had already observed the cigarette, and Brown thus took the cigarette out of his mouth and returned it to the ashtray.

After confirming that Brown had rented the room, Wooden asked for permission to search the room, and Brown consented. Wooden found a scale with white powder on it underneath a shirt on the floor, cocaine in one of the dresser drawers, and $926 in cash in the night table drawer. Wooden consequently placed Brown and the other occupant of the room under arrest.

Brown was tried in the Circuit Court for Harford County. In September 2001, there was a hearing on defendant’s motion to suppress the evidence found in the motel room. The defense argued that the evidence found in the search was tainted because the police used subterfuge to trick Brown into opening his motel room door, thereby eroding the consensual search. The trial court rejected the defense’s argument. Noting that it found Officer Wooden’s testimony to be more credible than that of Brown, the court determined that there was express consent to enter and search. Therefore, the court denied the motion to suppress.

17. Id. Although Brown acknowledged that Wooden identified himself as a police officer before asking to enter the room, he stated that he thought he had to comply with the officers’ request, and thus backed away from the door to avoid a confrontation. Id. at 360, 835 A.2d at 1210.

18. Id. at 359, 835 A.2d at 1210. The other occupant of the room was in the second bed. Id.

19. Id.

20. Id.

21. Id.

22. Id. at 359-60, 835 A.2d at 1210.

23. Id.

24. Id. Wooden testified that no force or coercion was used during the incident, and that Brown was cooperative. Id.

25. Id. at 357, 835 A.2d at 1208.

26. Id. at 360, 835 A.2d at 1210.

27. Joint Record Extract at 61, Brown (No. 140).


29. Id.

30. Id. In reaching its decision, the trial court distinguished the present case from Perkins v. State, 83 Md. App. 341, 341-50, 574 A.2d 356, 356-60 (1990). The court reasoned that while the police in Perkins used subterfuge to actually gain entry into the defendant’s home, thereby eradicating consent, the police in the present case used subterfuge solely to
Brown was subsequently tried and convicted of possession with intent to distribute cocaine.31 He was sentenced to prison for ten years, with all but five years suspended.32 Brown filed an appeal to the Court of Special Appeals but, prior to argument, the Court of Appeals granted certiorari to decide whether the use of deception to trick Brown into opening his door had an erosive effect on the voluntariness of Brown's consent to enter and search.33

2. Legal Background.—The Fourth Amendment protects the privacy of peoples' homes and generally requires that police officers have probable cause and obtain search warrants before entering private residences.34 This command yields, however, when searches are conducted pursuant to valid consent.35 When individuals voluntarily consent to a search of their home, police may enter and search the home without having probable cause or obtaining a warrant.36 Voluntary consent must be freely and voluntarily given, and it must be free from express or implied duress or coercion.37 When police employ deception to gain entry into a home, the voluntariness of the consent to enter and search is called into question, and the totality of the circumstances must be carefully examined to determine whether the consent was coerced or freely given.38

a. Fourth Amendment Protections.—The Fourth Amendment to the Constitution, made applicable to the States through the Fourteenth Amendment,39 states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation,
and particularly describing the place to be searched, and the persons or things to be seized.\textsuperscript{40}

The Fourth Amendment protects people from unreasonable governmental intrusions into areas in which they have a legitimate expectation of privacy.\textsuperscript{41} Central to the protections afforded by the Fourth Amendment is the protection of the sanctity of the home, where people have the greatest right to privacy.\textsuperscript{42} Under the Fourth Amendment, a hotel or motel room is afforded the same protection as an individual's home for the period of its use and occupancy.\textsuperscript{43}

The privacy of an individual's home is protected by the warrant requirement of the Fourth Amendment.\textsuperscript{44} The warrant requirement provides the foremost protection against unnecessary or arbitrary physical intrusions into the home by police officers seeking to arrest a suspect or search a home.\textsuperscript{45} Accordingly, because the warrant is so vital in protecting the privacy of the home, warrantless searches and seizures of a home are per se unreasonable, with only a few specific exceptions.\textsuperscript{46} In order to counter the presumption of unreasonableness that accompanies a warrantless search, the state bears the burden of proving the existence of an exception to the warrant requirement.\textsuperscript{47} Consent is one such exception.\textsuperscript{48}

\textbf{b. The Consent Exception.}—A search that is conducted pursuant to a valid consent is excepted from the probable cause and warrant requirements.\textsuperscript{49} The philosophy underlying this exception is that there is nothing unfair, unreasonable, or constitutionally suspect about conducting a search when an individual has freely consented to that search.\textsuperscript{50} Moreover, the community has an interest in promoting consensual searches because evidence found in such a search may allow for the speedy and efficient prosecution of the crime, and may consequently decrease the chance that an innocent person will be

\textsuperscript{40} U.S. CONST. amend. IV.
\textsuperscript{45} Id.
\textsuperscript{46} Katz v. United States, 389 U.S. 347, 357 (1967); see also Doering v. State, 313 Md. 384, 997, 545 A.2d 1281, 1287-88 (1988) (stating that because individuals have such a substantial privacy interest in their homes, there are few exceptions to the warrant requirement).
\textsuperscript{47} Jeffers, 342 U.S. at 51.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 243.
wrongly charged with the crime.\textsuperscript{51} Thus, it is well settled that a warrantless search of a home conducted with the consent of the occupant is constitutionally permissible under the Fourth Amendment.\textsuperscript{52}

The parameters of a valid consent, however, are not well-established and continue to evolve. In \textit{Bumper v. North Carolina}, the Supreme Court articulated the meaning of a valid consent, and held that consent must be freely and voluntarily given in order for the state to rely on consent as the justification for a search.\textsuperscript{53} In \textit{Bumper}, law enforcement officials told a woman that they had a search warrant to search her house, but then later relied solely on her consent to justify the search.\textsuperscript{54} The Court determined that the search was unlawful; the woman's consent was not freely and voluntarily given because it was given in submission to the officers' representation that they had a search warrant.\textsuperscript{55} The Court held that mere acquiescence to an assertion of lawful authority does not qualify as a valid consent.\textsuperscript{56} Thus, the main issue involving an alleged consent to search is often whether the consent was given voluntarily or whether the consent was coerced or given in obedience to an improper claim of authority.\textsuperscript{57}

c. \textit{Voluntary Consent}.—The principal case addressing the issue of voluntary consent is the 1973 case \textit{Schneckloth v. Bustamonte}.\textsuperscript{58} In \textit{Schneckloth}, a police officer stopped a car with a headlight and license plate light burned out and asked one of the occupants if he could search the car.\textsuperscript{59} The occupant of the car consented, and then proceeded to open the trunk and glove compartment for the officers.\textsuperscript{60} On these facts, the Court was presented with the question of whether knowledge of a right to refuse consent is a necessary prerequisite to making a voluntary consent.\textsuperscript{61}

In determining the meaning of voluntary consent, the Court recognized that it had to balance two opposing concerns: (1) the need

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 222.
\textsuperscript{53} 391 U.S. 543, 548 (1968).
\textsuperscript{54} Id. at 547-48.
\textsuperscript{55} Id. at 548-49.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 548-50.
\textsuperscript{58} 412 U.S. 218 (1973).
\textsuperscript{59} Id. at 220.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 232-33.
for effective law enforcement\(^6^2\) and (2) the requirement that a consent be made free from express or implied coercion.\(^6^3\) To address both of these concerns effectively, the Court reasoned that voluntariness is a fact-specific inquiry to be determined by analyzing the totality of the circumstances.\(^6^4\) The Court also held that while the subject's knowledge of a right to refuse a search is one factor to be taken into account, it is not determinative of whether the consent is voluntary.\(^6^5\) However, the Court warned that when the subject of a search has not been informed of his rights, the Court must thoroughly scrutinize the circumstances of the search to ensure that the consent was truly voluntary.\(^6^6\)

Several Maryland cases also address the issue of voluntary consent. In determining whether a consent is voluntary, Maryland courts have applied the *Schneckloth* totality of the circumstances analysis and have considered a variety of different factors.\(^6^7\) They have considered the number of officers present, the age and intelligence of the consenting party, the experience that the consenting party has had with the law, the behavior of the officers, and the duration, location and time of the encounter.\(^6^8\) Maryland courts have also looked at whether the police used force or threats to coerce the consent, whether the consent was given in submission to a claim of legal authority, or whether the police used implicitly coercive threats to gain consent.\(^6^9\)

In *State v. Wilson*,\(^7^0\) for example, the Court of Appeals held that a suspect's consent was involuntary because the consent was obtained by
coercion.\textsuperscript{71} Three police officers arrived at the suspect's home and were invited inside by the suspect's housemate.\textsuperscript{72} One of the officers advised the suspect of his \textit{Miranda} rights and then explained that they observed and verified stolen property in his home the night before.\textsuperscript{73} At the officers' request, the suspect then surrendered the stolen property.\textsuperscript{74}

In deciding that the consent was involuntary, the court followed the \textit{Schneckloth} rule and looked at the totality of the circumstances.\textsuperscript{75} The court found the following factors particularly relevant to its determination that the consent was obtained by coercion: (1) three officers arrived at the suspect's home;\textsuperscript{76} (2) the suspect's housemate had already acquiesced to the officer's request to search, leaving the suspect with no other option but to consent to the search as well;\textsuperscript{77} (3) the officers read the suspect his Miranda rights but conspicuously failed to inform the suspect of his right not to consent to the search, thereby communicating to the suspect that he had no right to refuse the search;\textsuperscript{78} (4) the officers explained their presence by referring to the search conducted the night before—the court reasoned that this reasonably communicated to the suspect that the police were still acting under the authority granted by the search warrant used the night before, and that he therefore had no right to resist the search;\textsuperscript{79} (5) the suspect's consent was likely influenced by his belief that his involvement in the crime was already determined because the police had seen the stolen goods in his house the night before;\textsuperscript{80} and (6) the officers' request that the suspect surrender the property, coupled with the presence of three officers, could be construed as a demand rather than a request.\textsuperscript{81} The totality of these factors led the court to hold that the suspect's consent was given involuntarily.\textsuperscript{82}

\begin{thebibliography}{9}
\bibitem{71} Id. at 202, 367 A.2d at 1231.
\bibitem{72} Id., 367 A.2d at 1231-32.
\bibitem{73} Id. at 193, 367 A.2d at 1226.
\bibitem{74} Id.
\bibitem{75} Id. at 201, 367 A.2d at 1231.
\bibitem{76} Id. at 202, 367 A.2d at 1231.
\bibitem{77} Id., 367 A.2d at 1231-32.
\bibitem{78} Id., 367 A.2d at 1232.
\bibitem{79} Id. at 203, 367 A.2d at 1232.
\bibitem{80} Id. at 204, 367 A.2d at 1233. The court warned that subtle police conduct must be considered and noted that a consent to search can be unjustly influenced when a suspect believes he has already admitted involvement in the crime that is the focus of the search. \textit{Id.}
\bibitem{81} Id. at 203, 367 A.2d at 1232.
\bibitem{82} Id. at 202, 367 A.2d at 1231.
\end{thebibliography}
The Court of Appeals added to the concept of voluntary consent in *Doering v. State*.* The court held that a suspect's consent to a search of the bus he was living in was voluntary even when the police displayed weapons because the police made no threats and did not claim to have authority to search the bus.* Most importantly, however, the court found that the consent was voluntary because the consent was volunteered by the suspect.* The court reasoned that when the idea for the search originates with the suspect, it is difficult to view the consent as acquiescence to the commanding presence of police.*

In *Gamble v. State*, the Court of Appeals of Maryland again addressed the issue of voluntary consent, but declined an opportunity to adopt a rule that consent given to a superior in a military or law enforcement situation is always deemed involuntary. Specifically, the court held that a police officer's consent to his sergeant's request to search his car trunk was voluntary, and was not in obedience to a command.* Despite the fact that the request to search was made by the officer's superior, the court held that the consent was voluntary because: (1) the suspect had four years of police experience and clearly was more aware than most civilians of his Fourth Amendment rights; (2) the suspect admitted to cooperating with the request that he open his trunk; and (3) the superior officer did not use threats, force, or an express command to open the trunk, or insistence on an actual or supposed legal right to enter the trunk. Further, the court noted that the incident involved no trickery. Thus, after examining the totality of these circumstances, the court held that the consent was voluntary.

Lastly, in 2001, the Court of Appeals had occasion to decide a case of first impression involving the issue of voluntary consent in *Scott v. State*. The court examined a police investigatory technique called "knock and talk," and held that a person's knowledge of his right to refuse a search or limit the scope of the search is just one factor to

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83. 313 Md. 384, 545 A.2d 1281 (1988).
84. *Id.* at 402, 545 A.2d at 1290.
85. *Id.* The police did not request permission to enter the bus; rather, when the police asked if there was anyone on the bus, the suspect stated "go check for yourselves." *Id.* at 401, 545 A.2d at 1289.
86. *Id.* at 402, 545 A.2d at 1290.
87. 318 Md. 120, 567 A.2d 95 (1989).
88. *Id.* at 128, 567 A.2d at 99.
89. *Id.* at 128-29, 567 A.2d at 100.
90. *Id.*
91. *Id.* at 127, 567 A.2d at 99.
92. *Id.* at 129, 567 A.2d at 100.
take into consideration when determining whether a consent is voluntary. The knock and talk technique involves officers who, without probable cause or reasonable articulable suspicion, randomly knock on motel room doors in hopes that the occupants will allow the police to enter and consent to a search. The police identify themselves as police officers, request entry in order to talk about illegal activity in the area, and then once inside the room, request permission to search.

In Scott, four officers approached a random motel room at 11:30 p.m., knocked on the door, and identified themselves as police officers prior to the opening of the door. Once the occupant of the room opened the door, the officers explained the many drug problems afflicting the area and asked if they could enter the room to talk with the occupants. The occupants agreed, and once in the room, the officers requested permission to search the room. The occupants consented to the search, and the officers subsequently found cocaine and drug paraphernalia. Following the Schneckloth precedent that rejected litmus tests of voluntariness, the Scott court rejected the argument that a search is per se involuntary unless the subject of the search is advised that he has the right to refuse or limit the scope of the search. Instead, the court followed the totality of the circumstances analysis. The court found the following factors persuasive in determining that the consent was voluntary: (1) the encounter with the police took only two to three minutes; (2) Scott had previously been convicted of a drug offense and thus had experience with the law; (3) Scott's own testimony admitted an awareness of his right to refuse the officers entry; (4) Scott exposed the officers to a marijuana cigar immediately upon entry; and (5) the police did not use force or threats. Thus, the court declared that the consent to search pursuant to the knock and talk technique was voluntary.

d. Deception and Its Effect on Voluntariness.—In certain situations, most notably when police lack probable cause or reasonable ar-
articulable suspicion to search a home, the use of deception by police officers to gain entry into the home may erode the voluntariness of consent. However, when there exists reasonable articulable suspicion that the occupants of a home are engaged in crime, and the officers are subsequently invited into the home to engage in an illegal activity, most often the purchase of drugs, the use of deception by the police is constitutionally permitted.

(1) Supreme Court and Maryland Cases Addressing the Effect of Deception on Voluntary Consent.—The only Supreme Court case that directly considers the effect of deception on the voluntariness of a consent to search is the 1966 case Lewis v. United States. In Lewis, the Supreme Court held that the Fourth Amendment was not violated when an undercover agent obtained an invitation to the suspect’s home, successfully purchased illegal drugs from the suspect, and consequently had the drugs admitted as evidence at the suspect’s criminal trial. In support of its decision, the Court noted that the misrepresentation of officers as purchasers of drugs is a practical necessity in effectively combating narcotics traffic because, unlike with other crimes, there are rarely complaining witnesses to report the offense. More specifically, however, the Court stated that a ruse entry was permissible because the defendant converted his home into a commercial center and invited outsiders into his home to engage in illegal transactions. The Court reasoned that a government agent, just like any private person, may accept an invitation to do business and may enter the home precisely for the purposes considered by the occupant. Thus, in holding that the use of deception was constitutionally permissible, the Court found it persuasive that the suspect

105. See, e.g., State v. Ahart, 324 N.W.2d 317, 319 (Iowa 1982) (holding that police officers may not use deception to enter homes in the absence of at least reasonable articulable suspicion because doing so would be patently unreasonable and would violate the Fourth Amendment).


107. Id.; see also Sorrels v. United States, 287 U.S. 435, 441-42 (1932) (discussing the defense of entrapment and observing that artifice is an important part of law enforcement because it can be used to expose those engaged in criminal activity).

108. Lewis, 385 U.S. at 206-07.

109. Id. at 210-11 n.6.

110. Id. at 211.

111. Id. The Court cautioned, however, that an invitation into the home does not authorize the officer to engage in a general search for illicit materials. Id.; see also Gouled v. United States, 255 U.S. 298 (1921) (holding that the Fourth Amendment was violated when an informant obtained entry to a suspect’s home by falsely stating that he was paying a social visit, but then acted outside of the scope of a social visit when, in the suspect’s absence, he secretly rummaged through the office and took private papers).
willingly waived his right to privacy in his home by inviting unlawful traffic into his home.\textsuperscript{112}

In \textit{Killie v. State},\textsuperscript{113} the Court of Special Appeals of Maryland followed \textit{Lewis} and held that the Fourth Amendment was not violated when an undercover police agent socially befriended the suspect at a bar, obtained an invitation to the suspect's home where a group of people smoked marijuana, and then placed the suspect under arrest and seized the drugs.\textsuperscript{114} In holding that the deception used by the police to gain entry into the suspect’s home did not violate the Fourth Amendment, the court stated that the Fourth Amendment does not protect the rights of people who unwisely issue invitations into their home.\textsuperscript{115} Rather, the Fourth Amendment protects people from unwanted and arbitrary invasions of the home executed without the consent of the victim.\textsuperscript{116} Thus, because the suspect in this case issued the undercover officer an invitation to enter his home and the officer entered the suspect's home for the precise reason contemplated by the suspect, the court determined that the officer's use of deception did not violate the Fourth Amendment.\textsuperscript{117}

Another Maryland case that addresses the use of deception is \textit{Perkins v. State}.\textsuperscript{118} Perkins addressed the use of deception to gain entry into a motel room and the effects that the deception has on the voluntariness of the consent.\textsuperscript{119} In \textit{Perkins}, two police officers received information from a motel desk clerk that the occupant of one of the rooms was wanted in a criminal matter.\textsuperscript{120} After running a background check on the occupant and finding that there were no outstanding warrants on the occupant, the officers nonetheless obtained a pass key to the room from the desk clerk and approached the motel room.\textsuperscript{121} The officers knocked on the door, and when the occupant asked who was there, the police identified themselves and com-

\begin{itemize}
\item \textsuperscript{112} \textit{See} \textit{Lewis}, 385 U.S. at 213 (Brennan, J., concurring) (stating that the suspect waived his right to privacy in his home when he opened his doors to business and invited people in to trade with him).
\item \textsuperscript{113} 14 Md. App. 465, 287 A.2d 310 (1972).
\item \textsuperscript{114} \textit{Id.} at 467-68, 472-73, 287 A.2d 310, 313-15.
\item \textsuperscript{115} \textit{Id.}, 287 A.2d at 314.
\item \textsuperscript{116} \textit{Id.}
\item \textsuperscript{117} \textit{Id.}, 287 A.2d at 315.
\item \textsuperscript{118} 83 Md. App. 341, 574 A.2d 356 (1990).
\item \textsuperscript{119} \textit{Id.} at 349-50, 574 A.2d at 360-61.
\item \textsuperscript{120} \textit{Id.} at 343, 347, 574 A.2d at 357-59.
\item \textsuperscript{121} \textit{Id.} at 347-48, 574 A.2d at 359. Based on these facts, the court emphasized that the officers' justification for approaching the room in the first place was questionable. \textit{Id.} at 347, 574 A.2d at 359. The court also stated its misgivings as to the reason why the officers obtained the pass key if they actually intended to honor the occupant's right to refuse the officers' entry. \textit{Id.} at 348, 574 A.2d at 359.
\end{itemize}
manded that the occupant open the door.\textsuperscript{122} Upon entering the room, the police misrepresented that they were there to investigate a noise complaint.\textsuperscript{123}

The court held that the entry into the room was not consensual on the basis of three primary factors: (1) the fact that the officers obtained the pass key to the room;\textsuperscript{124} (2) the contradiction in the police officer's testimony and the police report in reference to whether he asked for consent to enter the room;\textsuperscript{125} and (3) the deception involving the false noise complaint that was used to induce consent to enter.\textsuperscript{126} The court emphasized its disdain for the use of deception, stating that the affirmative misstatement used to obtain entry called into question the voluntariness of the consent.\textsuperscript{127}

In concluding that the deception eroded the voluntary quality of consent, the court found case law on the comparable subject of warrantless doorway arrests to be instructive.\textsuperscript{128} The court cited case law holding that consensual entries for the purpose of doorway arrests exist where no deception is used to induce the opening of the door, and where the defendant is aware of who is asking for admission into the home.\textsuperscript{129} Based on these holdings, the court concluded that the use of deception to obtain the opening of the door diminishes the voluntary quality of that opening.\textsuperscript{130} The court then extended this analysis, and argued that the use of deception to obtain entry into a residence following the opening of a door also erodes the voluntary quality of that entry.\textsuperscript{131} Thus, the court in \textit{Perkins} concluded that the occupant's consent to entry was coerced rather than voluntary, and that the evidence found incident to the entry and search was consequently inadmissible.\textsuperscript{132}

\textsuperscript{122} \textit{Id.} at 348, 574 A.2d at 359-60.
\textsuperscript{123} \textit{Id.} at 349, 574 A.2d at 360. Although one of the officers testified that he requested consent to enter to investigate the noise complaint, his police report stated that he simply walked in and told the occupants he was there to investigate a noise complaint. \textit{Id.} The appellant testified that the officer entered uninvited. \textit{Id.}
\textsuperscript{124} \textit{Id.} at 347-48, 574 A.2d at 359.
\textsuperscript{125} \textit{Id.} at 349, 574 A.2d at 360.
\textsuperscript{126} \textit{Id.} at 349-51, 574 A.2d at 360-61.
\textsuperscript{127} \textit{Id.} at 349-50, 574 A.2d at 360-61.
\textsuperscript{128} \textit{Id.}, 574 A.2d at 360. Specifically, the court looked to \textit{Smith v. State}, 72 Md. App. 450, 466-67, 531 A.2d 302, 310-11 (1987), which surveyed case law on warrantless doorway arrests and found that even those jurisdictions which allow warrantless doorway arrests at the threshold of the home require that the opening of the door be consensual. \textit{Perkins}, 83 Md. App. at 349-50, 574 A.2d at 360.
\textsuperscript{129} \textit{Perkins}, 83 Md. App. at 350, 574 A.2d at 360.
\textsuperscript{130} \textit{Id.}
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} \textit{Id.} at 350-52, 574 A.2d at 361-62.
(2) Deception Allowed when Reasonable Articulable Suspicion of Wrongdoing Exists.—In addition to the few Maryland cases that discuss the effect of deception on the voluntariness of consent, there is a significant amount of case law from other jurisdictions that sheds light on the issue. Many jurisdictions allow officers to use deception to gain entry into a home when there is reasonable articulable suspicion that criminal activity is taking place in the home.\textsuperscript{133} However, when no such reasonable suspicion exists, courts have been stricter in allowing deception, and many courts have held that the use of deception in such cases is unconstitutional.\textsuperscript{134}

When police officers have reasonable suspicion that criminal activity is taking place in the home, the use of deception to gain entry into the home has often been held to be constitutional. For example, in United States v. Raines, the United States Court of Appeals for the Eighth Circuit held that it was permissible under the Fourth Amendment for an officer to gain entry into a suspect's home by misrepresenting that he wanted to talk about the arrest of a mutual friend because the police, after speaking with someone who identified the suspect as his source for heroin, had reasonable articulable suspicion that the suspect was dealing heroin.\textsuperscript{135}

In United States v. Wright,\textsuperscript{136} the Eighth Circuit further upheld the use of deception to conduct a plain view search because it was conducted pursuant to reasonable suspicion.\textsuperscript{137} In Wright, undercover officers pretending to have car trouble knocked on the suspect's door asking to borrow a flashlight and tools to fix their car.\textsuperscript{138} From the doorway of the house, the officers observed a white powdery substance

\textsuperscript{133}. See, e.g., United States v. Raines, 536 F.2d 796 (8th Cir. 1976) (holding that it was permissible for an officer, who had a reasonable articulable basis for believing that the suspect was involved in criminal activity, to gain entry into the suspect's home by misrepresenting that he wanted to talk about the arrest of a mutual friend).

\textsuperscript{134}. See, e.g., State v. Ahart, 324 N.W.2d 317 (Iowa 1982) (holding that ruse entries that are not justified by at least a reasonable suspicion are unconstitutional).

\textsuperscript{135}. See also State v. Poland, 645 P.2d 784, 792-93 (Ariz. 1982) (holding it permissible under the Fourth Amendment for an officer with reasonable articulable suspicion to pose as a potential buyer of a home to gain entry into the home, and then to use plain view observations of contraband to obtain a warrant to search the home); Commonwealth v. Morrison, 418 A.2d 1378, 1378-79, 1382 (Pa. Super. Ct. 1980) (holding that a police officer who misrepresented his identity as one interested in converting his barn into a photography studio in order to induce the suspect to show the officer the interior of his converted barn, which contained large quantities of marijuana, was constitutionally permissible because the officer had reasonable suspicion that the suspect was storing drugs in his barn).

\textsuperscript{136}. 641 F.2d 602 (8th Cir. 1981).

\textsuperscript{137}. Id. at 603-05.

\textsuperscript{138}. Id. at 603.
and drug paraphernalia in plain view on a desk. The officers used their observations of the white powdery substance to obtain a search warrant for the home. The court concluded that the officers did not see anything more than a member of the general public would have observed upon the opening of the door. The court therefore reasoned that the plain view search was constitutional under the Fourth Amendment because the suspect's reasonable expectation of privacy was not offended and the use of deception was based on a reasonable suspicion of criminal activity.

Additionally, in United States v. Garcia, the United States Court of Appeals for the Ninth Circuit held that it was constitutionally permissible for officers to pretend that they were interested in renting a home in the neighborhood in order to induce the suspect to open his door. Because the Ninth Circuit had previously held in United States v. Bosse that a federal agent cannot obtain entry by misrepresenting the scope or purpose of a search, the Garcia court upheld the use of deception by drawing a distinction between the opening of a door and entry into a home. The court reasoned that because the officers identified themselves as police after the door was opened and before the request to enter and search, the initial use of the ruse did not erode the suspect's consequent consent to search because the ruse had ended by the time the suspect gave consent. Thus, courts have validated the use of deception to gain entry into homes when there is reasonable articulable suspicion that the occupants of the home are engaged in criminal activity.

(3) Use of Deception Unconstitutional Without Reasonable Articulable Suspicion of Wrongdoing.—When there is no reasonable articul-

139. Id.
140. Id.
141. Id. at 604; see also Katz v. United States, 389 U.S. 347, 351 (1967) (holding that the Fourth Amendment does not protect what a person knowingly exposes to the public).
142. Wright, 641 F.2d at 604-05.
143. 997 F.2d 1273 (9th Cir. 1993).
144. Id. at 1280.
145. 898 F.2d 113 (9th Cir. 1990).
146. Id. at 115. In Bosse, a federal agent posed as a license inspector in order to gather evidence to support a search warrant. Id. at 114. The court held that the use of deception violated the Fourth Amendment because the suspect did not know a federal officer was searching his house. Id. at 115.
147. See Garcia, 997 F.2d at 1282 (noting that whereas in Bosse a federal agent used deception to enter and search a house, the officers in the Garcia case used deception only to induce the opening of the door, and then identified themselves as officers before requesting entry).
148. Id.
able suspicion that occupants of a home are engaged in criminal activity, many courts do not allow deception to be used as a tool to induce individuals to open up their homes to government agents. For instance, in *State v. Ahart*, the Supreme Court of Iowa held that ruse entries are invalid unless there is, at a minimum, a reasonable suspicion that criminal activity is occurring inside the home.\(^{149}\) Recognizing that protection against arbitrary and unreasonable intrusions is at the core of the Fourth Amendment, the court declared that ruse entries that are not justified by at least a reasonable suspicion are unconstitutional.\(^ {150}\) The court emphasized that a search conducted pursuant to a consent obtained by deception is unwarranted and patently unreasonable, unless there is a justifiable reason for the deception.\(^ {151}\)

Similarly, the Supreme Court of New York County in *People v. Ramirez*\(^ {152}\) held that without an articulable reason to invade an individual's privacy, the police cannot use deception to trick an individual into opening his door.\(^ {153}\) Specifically, the court held that police officers, acting without reasonable suspicion, unlawfully used subterfuge when they misrepresented themselves in order to induce the occupants of the motel room to open the door.\(^ {154}\) The court reasoned that the police must have a predicate before they can use deception to intrude upon a person's privacy.\(^ {155}\) The court further stated that because the officers unlawfully used deception to trick the occupants into opening the door, the plain view doctrine was inapplicable, and thus any evidence observed upon the opening of the door was suppressed.\(^ {156}\) The *Ramirez* court found that the suspect's reasonable ex-

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149. 324 N.W.2d 317, 319 (Iowa 1982). The *Ahart* court stated that before the police can rely on consent to conduct a warrantless entry and search of a home, there must be a show of cause or an articulable reason for targeting and searching the particular home. *Id.*; see also United States v. Montoya, 760 F. Supp. 37, 39 (E.D.N.Y. 1991) (stating that there is no justification for a ruse entry when officers do not have reasonable suspicion that the occupants are engaged in crime); State v. Johnson, 856 P.2d 134, 140 (Kan. 1993) (holding that officers must have reasonable suspicion of criminal activity in order to execute a valid ruse entry).

150. *Ahart*, 324 N.W.2d at 319.

151. *Id.*


153. *Id.* at 716 (emphasis added).

154. *Id.*

155. *Id.* n.3. The court noted that to hold otherwise would eviscerate the Fourth Amendment because it would allow police to randomly knock on anyone's door, use trickery to have the occupants open the door, and use the plain view doctrine to look inside to see anything that was not in their direct line of sight. *Id.*

156. *Id.* at 716. The plain view doctrine gives officers the authority to make warrantless seizures of weapons and contraband in plain view in nonpublic places when the police have lawful access to the place from which the item can be plainly viewed. *Arizona v.*
pectation of privacy in his motel room, as protected by the Fourth Amendment, was violated as soon as the suspect was tricked into opening his door.\footnote{\textsuperscript{157}}

In \textit{United States v. Maldonado Garcia},\footnote{\textsuperscript{158}} the United States District Court for the District of Puerto Rico also required reasonable suspicion of criminal activity occurring in the home as a prerequisite for using deception or ruse to gain access to private premises.\footnote{\textsuperscript{159}} The police in \textit{Maldonado Garcia}, who used deception to enter a home in order to search for stolen mail, acted solely on an anonymous tip and thus did not have the necessary reasonable suspicion to lawfully use deception to further the search.\footnote{\textsuperscript{160}} The court reasoned that in order to use a ruse, the police must have more than mere conjecture that illegal activity is taking place in the residence.\footnote{\textsuperscript{161}} As the court noted, "[t]o hold otherwise would be to give police a blanket license to enter homes randomly in the hope of uncovering incriminating evidence and information."\footnote{\textsuperscript{162}} Not all jurisdictions, however, have accepted this position.\footnote{\textsuperscript{163}}

3. \textit{The Court's Reasoning.}—In \textit{Brown v. State}, the Court of Appeals considered whether police officers’ use of deception to induce a suspect to open the door to his motel room eroded the voluntary quality of the suspect’s subsequent consent to enter and search the room.\footnote{\textsuperscript{164}} The court affirmed the judgment of the trial court, and held that the deception did not erode the voluntariness of the consent.\footnote{\textsuperscript{165}} Writing for the majority, Judge Wilner began by noting the similarities between the present case and \textit{Scott}, a case decided by the Court of Appeals of Maryland thirteen months prior to the \textit{Brown} decision.\footnote{\textsuperscript{166}}

\begin{itemize}
\item Hicks, 480 U.S. 321, 325-26 (1987). The \textit{Ramirez} court reasoned that because the officers improperly used deception to gain entry into the motel room in the absence of reasonable suspicion, the officers were not lawfully in a position to make observations of the inside of the motel room. \textit{Ramirez}, 747 N.Y.S.2d at 716. The plain view doctrine was thus inapplicable. \textit{Id.}
\item \textsuperscript{157} \textit{Ramirez}, 747 N.Y.S.2d at 716.
\item \textsuperscript{158} 655 F. Supp. 1363 (D.P.R. 1987).
\item \textsuperscript{159} \textit{Id.} at 1367.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.}
\item \textsuperscript{162} \textit{Id.}
\item \textsuperscript{163} At least two jurisdictions have rejected this position. \textit{See People v. Catania}, 398 N.W.2d 343, 352 (Mich. 1986) (refusing to limit use of deception to cases where reasonable suspicion exists); \textit{State v. Hastings}, 830 P.2d 658, 660-61 (Wash. 1992) (rejecting the artificial limitation on use of deception).
\item \textsuperscript{164} 378 Md. at 360, 835 A.2d at 1210-11.
\item \textsuperscript{165} \textit{Id.} at 365, 835 A.2d at 1213.
\item \textsuperscript{166} \textit{Id.} at 357, 835 A.2d at 1209. Judge Wilner was joined by Judges Cathell, Harrell, and Battaglia. \textit{Id.} at 355-57, 835 A.2d at 1208. Judge Raker concurred. \textit{Id.} at 365, 835 A.2d
\end{itemize}
Accordingly, the court reaffirmed the three holdings made in Scott: (1) a nighttime "knock and talk" is constitutionally permissible and does not constitute a seizure under the Fourth Amendment; (2) the correct test for determining the validity and voluntariness of a consent to search or enter is the totality of the circumstances test enunciated by the Supreme Court in Schneckloth; and (3) upon examination of the totality of the circumstances, the consent given pursuant to the knock and talk technique was voluntary.

Next, recognizing that the appellant relied heavily on Perkins in arguing that the use of deception eroded the voluntariness of the consent to enter and search, the Brown court agreed with the Perkins court that the voluntary quality of a consent may be eroded when the police, lacking any lawful reason to enter a residence, obtain consent to enter through the use of deception. The court was careful, however, to clarify that the use of deception in such circumstances does not make the consent per se involuntary. Rather, the court emphasized that the use of deception is just one factor, "albeit an important one," to be examined under the totality of the circumstances test laid out in Schneckloth.

Next, the court discussed Supreme Court cases that upheld the use of deception as a valid police investigatory tool to demonstrate that the use of deception and ruses to gain access into peoples' homes are not new and alarming techniques, but are rather a standard and long-recognized police practice. The court also observed that most federal and state courts that have addressed this issue have admitted

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at 1213. The court noted that there were only two factors that distinguished the present case from Scott, 366 Md. 121, 782 A.2d 862 (2001) discussed supra notes 93-104 and accompanying text. The first distinction was that the search occurred at 11:37 p.m. in Scott, and at 10:00 a.m. in the present case. Brown, 378 Md. at 357, 359, 835 A.2d at 1209-10. Second, whereas the police in Scott did not use deception in their encounter with the occupants of the motel room, the police in Brown used deception to induce the occupants of the motel room to open the door. Id. at 360, 835 A.2d at 1210-11.

168. Brown, 378 Md. at 357-58, 835 A.2d at 1209.
169. Id. at 362, 835 A.2d at 1211.
170. Id. In Perkins, the Court of Special Appeals considered three factors which together weakened the validity of the consent: (1) the officer's attainment of a pass key to the motel room prior to knocking on the motel door; (2) the fact that the testimony of the officer stating that he requested permission to enter the room conflicted with his police report of the incident; and (3) the use of deception to gain entry into the room. Id. at 361-62, 835 A.2d at 1211.
171. Id.
evidence seen in plain view or found pursuant to a valid search after officers gained entry into homes by deception or ruse.\textsuperscript{173}

The court then considered state court decisions limiting the use of deception or ruse to situations where there is, at the very least, reasonable articulable suspicion that the occupants of the home are engaged in criminal activity.\textsuperscript{174} Ultimately, the court rejected putting such an artificial limit on the use of deception because it conflicts with the holding of \textit{Schneckloth}, which instructs courts to determine the voluntariness of consent to enter or search by examining the totality of the circumstances.\textsuperscript{175}

Next, the court reaffirmed its agreement with the Court of Special Appeals’ observation in \textit{Perkins} that when deception is used to trick individuals to consent to an officer’s entry into an area in which the person has a legitimate expectation of privacy, the voluntariness and validity of that consent is vitiated.\textsuperscript{176} However, the court then noted that the present case is distinguishable from \textit{Perkins}, and thus does not fall into the category of cases in which deception destroys the voluntariness of consent.\textsuperscript{177}

The court reasoned that the critical distinction between the present case and \textit{Perkins} is that in \textit{Brown}, the deception induced the appellant solely to open his door;\textsuperscript{178} it did not induce him to consent to the officer’s request to enter or search.\textsuperscript{179} Thus, the court reasoned that while in \textit{Perkins} the police entered the motel room under the ruse that they were there to investigate a noise violation, the police in \textit{Brown} did not enter the motel room under any such ruse.\textsuperscript{180} Brown knew that Officer Wooden and his colleague were police officers before he consented to their entry and the subsequent search of the motel room.\textsuperscript{181} Accordingly, the court held that the previous deception used to trick appellant into opening the door did not erode his subsequent consent to enter or consent to search.\textsuperscript{182}

\textsuperscript{173} \textit{Brown}, 378 Md. at 363, 835 A.2d at 1212.
\textsuperscript{174} \textit{Id.} at 364, 835 A.2d at 1213.
\textsuperscript{175} \textit{Id.} The court noted the observations of the Washington Supreme Court that restrictions on the use of deception are “an unnecessary limitation on undercover police investigations” and serve “no valid purpose.” \textit{Id.} at 364-65, 835 A.2d at 1213 (quoting State \textit{v. Hastings}, 830 P.2d 658, 660 (Wash. 1992)).
\textsuperscript{176} \textit{Id.} at 365, 835 A.2d at 1213. The court again emphasized that although deception does not necessarily eradicate the consent, it does indeed erode the consent. \textit{Id.}
\textsuperscript{177} \textit{Id.}
\textsuperscript{178} \textit{Id.}
\textsuperscript{179} \textit{Id.}
\textsuperscript{180} \textit{Id.}
\textsuperscript{181} \textit{Id.}
\textsuperscript{182} \textit{Id.}
In her concurrence, Judge Raker stated her continuing disagreement with the court’s decision in Scott, which upheld the knock and talk technique, and noted that if it were not for the principle of stare decisis, she would dissent in the present case and urge the court to overrule Scott. However, because Scott is the controlling law in Maryland, she concurred in the judgment of the court.

In his dissent, Chief Judge Bell disagreed with the majority’s holding because it expands the already questionable policy of knock and talk and gives police officers too much discretion in using deception to invade the privacy of peoples’ homes. Chief Judge Bell distinguished the present case from Scott by pointing out that there was no deception involved in the knock and talk technique in Scott. Specifically, Chief Judge Bell stated that there is a critical difference between knowing from the beginning of an encounter that the police are involved, and thus knowingly choosing to open the door to the police, and finding out that the police are involved halfway through the encounter after already having opened the door to maintenance.

Chief Judge Bell also noted that the majority opinion erroneously dismissed the warning of the Perkins court that the use of deception erodes the voluntary quality of consent. He observed that the majority dismissed this warning by unrealistically splitting a single event—an unwarranted entry obtained by deception—into two separate events consisting of the opening of the door and the entry into the motel room. Moreover, Chief Judge Bell stated that a search is a functional process, and as such the deceptive act is inseparable from the remainder of the event, and thus erodes the voluntary quality of the consent to enter and search.

Chief Judge Bell further observed that the bewilderment and shock that necessarily result from the realization that one has been tricked diminishes the voluntary quality of the consent. Additionally, he noted that the appellant’s realization in Brown that the police

185. Id. at 366, 835 A.2d at 1214 (Bell, C.J., dissenting). Chief Judge Bell was joined in his dissent by Judge Eldridge. Id. at 378, 835 A.2d at 1221 (Bell, C.J., dissenting).
186. Id. at 367, 835 A.2d at 1214 (Bell, C.J., dissenting).
187. Id. at 367-68, 835 A.2d at 1214-15 (Bell, C.J., dissenting).
188. Id. at 370, 835 A.2d at 1216 (Bell, C.J., dissenting).
189. Id. (Bell, C.J., dissenting).
190. Id. at 371, 835 A.2d at 1217 (Bell, C.J., dissenting).
191. Id. (Bell, C.J., dissenting).
had smelled marijuana upon the opening of the door also tainted the voluntariness of the subsequent consent to enter. Thus, Chief Judge Bell concluded that when the use of deception is viewed as part of the totality of the circumstances in the Brown case, the voluntariness of the consent is undermined.

Lastly, Chief Judge Bell discussed his agreement with those courts in other jurisdictions that have held that the use of deception is valid only when there is reasonable articulable suspicion of criminal activity taking place in the home. He observed that allowing police officers to use deception to invade the privacy of peoples' homes when they have no probable cause or reasonable articulable suspicion to do so constitutes bad public policy. He argued that the majority's holding sanctions violations of Fourth Amendment protections of the home, and enables the police to subject the citizens of Maryland to discriminatory, vague, and disproportionate police action. Thus, Chief Judge Bell concluded that when the police use deception to induce a person to open his door when no probable cause or reasonable articulable suspicion exists, the quality of that person's consent should be viewed as diminished.

4. Analysis.—In Brown v. State, the Court of Appeals held that the police, in the absence of reasonable articulable suspicion or probable cause, lawfully used deception to trick appellant into opening his motel room door, whereafter they successfully requested permission to enter and search the motel room. In so deciding, the court failed to properly apply the prescribed totality of the circumstances test to determine whether appellant's consent to the police officers' entry and search of his motel room was voluntary, thus improperly upholding the police practice of using deception to induce entry into peoples' homes. Further, by failing to align itself with the majority of state courts that have limited the use of deception to those situations where a reasonable basis exists for believing that illegal activity is taking place in the home, the court sanctioned arbitrary invasions into

192. Id. at 371-72, 835 A.2d at 1217 (Bell, C.J., dissenting).
193. Id. at 372, 835 A.2d at 1217 (Bell, C.J., dissenting).
194. Id. at 375-78, 835 A.2d at 1219-21 (Bell, C.J., dissenting).
195. Id. at 377-78, 835 A.2d at 1221 (Bell, C.J., dissenting).
196. Id. at 377, 835 A.2d at 1221 (Bell, C.J., dissenting).
197. Id. at 378, 835 A.2d at 1221 (Bell, C.J., dissenting).
198. Id. at 365, 835 A.2d at 1213.
199. See infra notes 201-233 and accompanying text.
the homes of honest citizens, thereby weakening the protections of the Fourth Amendment.\textsuperscript{200}

\textit{a. The Court’s Failure to Meaningfully Apply the Totality of the Circumstances Test Weakens Fourth Amendment Protections.---}The Brown court failed to follow the Supreme Court’s instruction in Schneckloth that requires courts to carefully examine all of the circumstances surrounding a consent in order to determine whether the consent is voluntary.\textsuperscript{201} Although the majority claimed it was following the totality of the circumstances test, it did not meaningfully apply the test.\textsuperscript{202} The Brown court neglected to make a fact-specific determination of voluntariness, and instead attempted to determine voluntariness by a cursory review of only a few select factors.\textsuperscript{203} In fact, the majority limited its discussion in Brown mainly to the issue of whether deception eroded the quality of consent and did not look critically at any of the other factors affecting the voluntariness of appellant’s consent.\textsuperscript{204} Had the majority carefully scrutinized all the surrounding circumstances in Brown, it likely would have concluded that the consent to enter and the consent to search were involuntary.\textsuperscript{205}

In failing to meaningfully apply the totality of the circumstances test, the \textit{Brown} court first ignored the fact that Brown did not know that he had a right to refuse the search.\textsuperscript{206} Although the Supreme Court in \textit{Schneckloth} held that the subject’s knowledge of a right to refuse is just one factor in assessing the voluntariness of the consent, the Supreme Court nonetheless acknowledged that it was an impor-

\begin{itemize}
\item \textsuperscript{200} See infra notes 234-262 and accompanying text.
\item \textsuperscript{201} Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).
\item \textsuperscript{202} See \textit{Brown}, 378 Md. at 371, 835 A.2d at 1217 (Bell, C.J., dissenting) (noting that the court did not actually apply the totality of the circumstances test, despite its claim to the contrary).
\item \textsuperscript{203} See \textit{Schneckloth}, 412 U.S. 226.
\item \textsuperscript{204} See \textit{Brown}, 378 Md. at 370-71, 835 A.2d at 1216-17 (Bell, C.J., dissenting) (stating that the court’s analysis of the totality of the circumstances was limited to the simple assertion that the deception employed by the police induced nothing more than the opening of the door). Although the court mentioned the strong similarities between the present case and \textit{Scott}, in which a motel occupant’s consent to a police officer’s entry was determined to be voluntary, the \textit{Brown} court did not engage in any significant discussion of voluntary consent in the present case. \textit{Id.} at 357-59, 835 A.2d at 1208-10.
\item \textsuperscript{205} See \textit{id.} at 370-72, 835 A.2d at 1216-17 (Bell, C.J., dissenting) (stating that an analysis of the totality of the circumstances, including the use of police deception, indicates that the consent was involuntary).
\item \textsuperscript{206} \textit{Id.} at 360, 835 A.2d at 1210. The officers did not inform Brown of his right to refuse the search, and Brown testified at the suppression hearing that he believed he had no right to prevent the officers from entering. \textit{Id.} Brown had previously been convicted of a drug offense, however, and his prior experience with the law is a factor that supports a finding that Brown may have had knowledge of his right to refuse the search.
\end{itemize}
tant factor to be considered.\textsuperscript{207} The \textit{Brown} court ignored the \textit{Schneckloth} Court's warning that when subjects have not been informed of their rights, the voluntariness of their consent must be carefully scrutinized to ensure that the consent was voluntarily given.\textsuperscript{208} The court failed to address the fact that the officers did not inform Brown of his right to refuse the search, and ignored its own recognition in \textit{Wilson} that the conspicuous absence of any reference to the defendant's right not to consent to the search is a factor that negatively impacts the voluntariness of the defendant's consent.\textsuperscript{209}

The second factor that the \textit{Brown} court failed to consider as part of the totality of the circumstances test is the police officers' lack of justification for initially approaching the motel room.\textsuperscript{210} The \textit{Brown} court ignored \textit{Perkins}, in which the court noted that the police officers' strained justification for approaching the motel room was one factor that contributed to the court's conclusion that the consent was involuntary.\textsuperscript{211} In \textit{Brown}, the police based their action on an anonymous and uncorroborated tip, and thus similarly lacked a credible justification for approaching the motel room.\textsuperscript{212} The lack of reasonable articulable suspicion as the basis for the search in \textit{Brown} is an additional factor that the court should have addressed and that negatively impacts the assessment of whether the consent was voluntary.

The third factor that the \textit{Brown} court failed to properly address, and which has significant bearing on the voluntariness of the consent to search, was the deception that was used to induce Brown to open his motel room door.\textsuperscript{213} Even accepting the court's decision sub judice to allow the use of deception in cases where no reasonable suspicion exists, deception remains a factor that erodes the voluntary quality of an encounter with the police, and thus should be examined as part of the totality of the circumstances test. The \textit{Brown} court ig-

\textsuperscript{207} \textit{Schneckloth}, 412 U.S. at 248-49.
\textsuperscript{208} \textit{Id.} at 248.
\textsuperscript{211} \textit{Id.} at 347, 574 A.2d at 359. The court in \textit{Perkins} emphasized its apprehension over the fact that the officers approached the motel room even after learning that there were no outstanding warrants for the occupant of the room. \textit{Id.}
\textsuperscript{212} See \textit{Brown}, 378 Md. at 367-68, 835 A.2d at 1214-15 (Bell, C.J., dissenting).
\textsuperscript{213} \textit{Perkins}, 83 Md. App. at 348-50, 574 A.2d at 359-61 (examining the deception used by the police as a significant factor leading to the determination that the suspect's consent was involuntary); \textit{see also} State v. Johnson, 856 P.2d 134, 140 (Kan. 1993) (stating that deception is one factor that should be examined as part of the totality of the circumstances).
nored precedent in failing to meaningfully examine the deceptive misrepresentation of the officers as part of the totality of the circumstances analysis.\textsuperscript{214} Although courts have sanctioned the use of deception in certain circumstances, the \textit{Perkins} court stated its general disdain for the use of deception, and the Court of Appeals in \textit{Gamble} noted the absence of trickery as a factor in favor of a voluntary consent.\textsuperscript{215} Further, the Supreme Court in \textit{Lewis} warned that there are forms of deception that violate the Fourth Amendment.\textsuperscript{216} The \textit{Brown} court ignored these warnings in failing to properly analyze the officers' use of deception as part of the totality of the circumstances test.

The \textit{Brown} court failed to consider that as a result of the subterfuge, appellant was unaware that the persons knocking on his door were police officers, and that consequently appellant did not consciously choose to relinquish some of his privacy to the officers when he opened his door.\textsuperscript{217} The court also failed to consider that as a result of the subterfuge, the appellant, who was awakened by the officers' knock and consequently answered the door in his boxer shorts, had significantly little time and physical space to decide whether he wanted to allow the police to enter.\textsuperscript{218} The court ignored these important factors and failed to consider them as part of the totality of the circumstances test.\textsuperscript{219} Rather, the court simply made the blanket statement that the deception that was used to induce the opening of the door did not have a negative effect on the quality of the consent to enter or the consent to search.\textsuperscript{220} This determination was made in a

\begin{footnotesize}
\textsuperscript{214} See \textit{Brown}, 378 Md. at 371-72, 855 A.2d at 1217 (Bell, C.J., dissenting) (stating that the court failed to consider the negative effect of the police officer's subterfuge on the appellant's consent to enter).

\textsuperscript{215} \textit{Perkins}, 83 Md. App. at 350, 574 A.2d at 361; see \textit{Gamble} v. State, 318 Md. 120, 127, 567 A.2d 95, 99 (1989) (noting, as part of the discussion on voluntary consent, that the incident did not involve trickery).

\textsuperscript{216} \textit{Lewis} v. United States, 385 U.S. 206, 210 (1966). The Court in \textit{Lewis} noted that the law should attempt to distinguish between permissible and impermissible deceits. \textit{Id}. n.6.

\textsuperscript{217} Brief for Appellant at 9, \textit{Brown} (No. 0683).

\textsuperscript{218} \textit{Id}. at 9-10. The court failed to recognize that the situation in \textit{Brown}, where deception was used, is critically different from the knock and talk situation in \textit{Scott}, where the occupants of the motel room had both time and space (behind their closed door) to consider whether they wanted to part with some of their privacy and open their door to police officers. \textit{Id}.

\textsuperscript{219} See \textit{Brown}, 378 Md. at 371-72, 855 A.2d at 1217 (Bell, C.J., dissenting) (stating that the court failed to consider the negative effect of the police officer's subterfuge on the appellant's consent to enter).

\textsuperscript{220} See \textit{id}. at 370-71, 855 A.2d at 1217 (Bell, C.J., dissenting) (noting that rather than fully examining the use of police deception, the court simply concluded, without explanation, that the deception induced nothing more than the opening of the door and therefore did not erode the consent to enter and search).
\end{footnotesize}
vacuum, and was not part of a meaningful analysis of the totality of the circumstances.\textsuperscript{221}

An additional circumstance that the \textit{Brown} court neglected to consider is the psychological impact that the use of deception has on the person who has been tricked.\textsuperscript{222} The \textit{Brown} court failed to adhere to \textit{Schneckloth} by ignoring the confusion and surprise that accompany the realization that one has been tricked by the police as factors that taint and undermine the voluntariness of the subsequent consent.\textsuperscript{223} The confusion and surprise that accompany the realization that one has been duped by the police are heightened when the police officers have no probable cause or even reasonable suspicion to approach the particular residence in the first place.\textsuperscript{224} A person who has no reason to suspect an encounter with the police, and who suddenly finds himself looking into the faces of police officers after having been duped by those same officers, will undoubtedly presume that the police are entitled to be present at his home, and will more likely acquiesce to the officers' requests to search.\textsuperscript{225} The voluntariness of consent is certainly eroded by such circumstances. The psychological impact that the use of deception had on the appellant was therefore a factor that the \textit{Brown} court should have assessed in the totality of the circumstances analysis.

The next factor that the \textit{Brown} court failed to address as part of its totality of the circumstances test is that a defendant's consent to a search is likely eroded when the defendant believes he already disclosed his involvement in the crime.\textsuperscript{226} Thus, in determining whether

\textsuperscript{221} See \textit{id}.

\textsuperscript{222} See \textit{Schneckloth v. Bustamonte}, 412 U.S. 218, 226 (1973). The Supreme Court in \textit{Schneckloth} established that the voluntariness standard that is used to determine consent in police confessions under the Due Process Clause is similar to the standard used to determine voluntary consent in search and seizure cases. \textit{id.} at 223-29. Thus, as is done in the context of police confessions, the Court noted that a factor to be considered in determining whether a consent is voluntary is the psychological impact on the accused of the police action. \textit{id.}

\textsuperscript{223} \textit{Brown}, 378 Md. at 371, 833 A.2d at 1217 (Bell, C.J., dissenting); \textit{see also Scott v. State}, 366 Md. 121, 155, 782 A.2d 862, 882 (2001) (Raker, J., dissenting) (citing \textit{Washington v. Ferrier}, 960 P.2d 927, 933 (1998)) (stating that in the less invasive knock and talk context, subjects of the knock and talk technique would be too shocked by the circumstances to make a reasoned decision about whether or not to consent).

\textsuperscript{224} \textit{Brown}, 378 Md. at 371, 833 A.2d at 1217 (Bell, C.J., dissenting).

\textsuperscript{225} \textit{See Bumper v. South Carolina}, 391 U.S. 543, 550 (1968) (stating that when people believe the police have a valid reason for being at their home, their consents to police entry are not given voluntarily, but are rather made in acquiescence to a claim of lawful authority).

\textsuperscript{226} \textit{State v. Wilson}, 279 Md. 189, 204, 367 A.2d 1223, 1233 (1977). In \textit{Wilson}, the court stated that the voluntary nature of the suspect's consent was eroded by his belief that his involvement in the crime was already determined. \textit{See also State v. Ramirez}, 747 N.Y.S.2d
Brown's consent was voluntary, the court should have considered that when Brown consented to the officers' entry into his motel room, he was likely aware that the officers had already smelled the potent odor of burnt marijuana upon the initial opening of his motel room door.\(^{227}\) This fact should have weighed against voluntary consent because Brown likely felt as if his guilt was already established, and therefore more likely acquiesced, rather than consented, to the officers' consequent entry and search.\(^{228}\)

Additionally, the *Brown* court ignored the coercive environment created by the presence of three officers who flashed their badges at Brown's motel room door.\(^{229}\) In so doing, the court failed to follow its own reasoning set forth in *Wilson*, where the court noted that the presence of three officers at a search is a factor that can illustrate that the defendant's consent was obtained by coercion.\(^{230}\)

And lastly, the final factor ignored by the *Brown* court in its failed totality of the circumstances analysis is the timing of the search.\(^{231}\) When the officers knocked on Brown's door at 10:00 A.M., claiming to be maintenance, Brown was asleep and in his boxer shorts.\(^{232}\) The trial judge in *Brown*, likely aware of the appellant's privacy interests, stated his concern with the awakening of the defendant under these circumstances.\(^{233}\) Nonetheless, the *Brown* court ignored the timing of the search, determining the voluntariness of consent. While these fac-

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711, 717 (N.Y. Sup. Ct. 2002) (holding that the voluntariness of the defendants' consent was eroded because the defendants knew that the police had already seen some of the drugs in open view when they gave their consent to search, and it would have been pointless to deny the police actual entry when they already had entry in fact).

227. See *Brown*, 378 Md. at 371, 835 A.2d at 1217 (Bell, C.J., dissenting) (stating that it is unlikely that a person who knew the police were at the door would open the door despite the obvious smell of marijuana). In reference to Brown's consent to the officers' search of his motel room, the court also should have considered that Brown testified that he felt apprehended after the officers entered the room because he knew that one officer had seen the burnt marijuana cigarette in the ashtray. *Id.* at 360, 835 A.2d at 1210.

228. See *id.* at 371, 835 A.2d at 1217 (Bell, C.J., dissenting) (noting that a person who exposes the police to the smell of burning marijuana after being tricked into opening his door is undoubtedly confused and rattled, and that this erodes the voluntariness of his consent).

229. See *Scott*, 366 Md. at 142, 782 A.2d at 875 (noting that courts have considered the number of officers present at a search as a factor to be examined as part of the totality of the circumstances analysis).

230. See *Wilson*, 279 Md. at 202, 367 A.2d at 1231. But see *Scott*, 366 Md. at 143, 782 A.2d at 875 (failing to examine the presence of three or four officers in plain clothes as a factor weighing against a voluntary consent).

231. *Scott*, 366 Md. at 142, 782 A.2d at 875 (noting that courts have considered the time of a search as a factor to be examined as part of the totality of the circumstances analysis).


233. *Id.*
tors would have provided further support for the court’s conclusion, the court’s failure to analyze them is further evidence of the court’s failure to meaningfully apply the totality of the circumstances test.

b. The Brown Court Missed an Opportunity to Make Good Public Policy and Limit Police Use of Deception to Gain Entry into Private Residences to Only Those Situations Where There Is a Reasonable Articulable Suspicion That Criminal Activity Is Taking Place in the Home.—In Brown, the court condoned the use of police deception in the absence of reasonable articulable suspicion of wrongdoing, thereby leaving the citizens of Maryland vulnerable to arbitrary and unreasonable intrusions on their privacy. The court in Brown thus failed to take advantage of the opportunity to limit the use of police deception as an investigatory technique to only those situations where there is a reasonable and justifiable basis for suspecting wrongdoing. Instead, the court adopted a policy that grants the police discretion to use deception to invade the privacy of honest citizens’ homes without the justification of a warrant, probable cause, or even reasonable articulable suspicion, thereby violating citizens’ Fourth Amendment rights.

In deciding not to limit the use of deception to those situations in which there is reasonable articulable suspicion of wrongdoing, the Brown court argued that putting such a generic limitation on the use of deception is inconsistent with the instruction in Schneckloth that voluntariness be determined by analyzing the totality of the circumstances. The court thus determined that the best approach is not to place predetermined limitations on deception, but to analyze the use of deception as part of the totality of the circumstances of each particular situation where deception is involved. The court’s reasoning is consistent with the stance taken by the Supreme Court of Michigan and the Supreme Court of Washington, which have both found that a predicate requirement of reasonable articulable suspicion for ruse entries is an unnecessary limitation on police investigations, and serves no legitimate purpose.

235. Id. at 366, 835 A.2d at 1214 (Bell, C.J., dissenting).
236. Id. at 375-78, 835 A.2d at 1219, 1221 (Bell, C.J., dissenting).
237. Id. at 366, 835 A.2d at 1214 (Bell, C.J., dissenting).
239. Id.
However, the Brown decision is inconsistent with the majority of state courts that have ruled on the issue and have held that ruse entries must be justified by at least reasonable articulable suspicion.\textsuperscript{241} These courts have recognized that deception used in the absence of reasonable articulable suspicion violates the Fourth Amendment and notions of fundamental fairness because it is an arbitrary intrusion on the privacy of peoples' homes.\textsuperscript{242} While deception may be fairly used when the officer is invited into the home by the suspect to engage in an illegal activity, or when there is reasonable suspicion that criminal activity is taking place in the home, deception is not fairly used when there is no reasonable basis to suspect wrongdoing.\textsuperscript{243} Thus, the Brown court, in failing to limit the use of police deception to instances in which the police have reasonable articulable suspicion of wrongdoing, failed to align itself with the majority of state courts that have recognized that such a decision constitutes bad public policy.

By failing to limit the use of police deception to those situations where there is at least reasonable articulable suspicion of wrongdoing, the Brown court also enabled violations of the Fourth Amendment and left the citizens of Maryland vulnerable to arbitrary and unreasonable intrusions into their privacy.\textsuperscript{244} Every aspect of Fourth Amendment law requires that there is a justifiable predicate before the police may invade a person's home.\textsuperscript{245} A rule that allows police to invade private residences without first having a reasonable and articulable basis for doing so therefore violates the Fourth Amendment.\textsuperscript{246} Thus, by stating that it was strictly adhering to Schneckloth's totality of the circumstances test while recognizing that it may not be good public policy,\textsuperscript{247} the Brown court lost sight of its greater responsibility to uphold and accommodate the constitutional command of the Fourth Amendment. The Brown court ignored the danger that increased expansions

\textsuperscript{241} See supra notes 149-163 and accompanying text (noting that the police must have a reasonable and justifiable suspicion of illegal activity before they can use deception to intrude upon a person's privacy).

\textsuperscript{242} See, e.g., State v. Ahart, 324 N.W.2d 317, 319 (Iowa 1982), discussed supra notes 149-151 and accompanying text.

\textsuperscript{243} Ahart, 324 N.W.2d at 319.

\textsuperscript{244} See id. (holding that ruse entries that are not justified by at least reasonable suspicion are unconstitutional because they violate the core of the Fourth Amendment, which protects against arbitrary and unreasonable intrusions).

\textsuperscript{245} People v. Ramirez, 747 N.Y.S.2d 711, 715 (N.Y. Sup. Ct. 2002).

\textsuperscript{246} Id.

\textsuperscript{247} See Brown, 378 Md. at 364, 835 A.2d at 1213 (2003) (stating that putting an artificial limitation on the use of deception "may or may not be good public policy").
and deviations from accepted legal procedures can ultimately result in unconstitutional practices.\textsuperscript{248}

Undoubtedly, the use of police deception has significant investigative benefits.\textsuperscript{249} Certain types of covert criminals may not be convicted without the use of deception, and the War on Drugs may not be waged as effectively.\textsuperscript{250} However, considerable losses accompany these same gains.\textsuperscript{251} Judge Spaeth of the Superior Court of Pennsylvania stated in 1980:

> The law of search and seizure is not concerned with protecting the criminal's right of privacy but the honest citizen's right. If we are to be able to enjoy liberty and pursue happiness, we must know what part of our world is real and what part is illusion—that our home is our castle, and not a broadcasting center for hidden police transmission devices; that a repairman is a repairman, a business associate a business associate, and not a police agent. Permit the police to make our world an illusion, and no one, neither criminal nor honest citizen, will be free.\textsuperscript{252}

Thus, when defining the limits of police deception, the question is always whether the losses are worth the gains. When the police have probable cause or at least reasonable articulable suspicion to suspect wrongdoing in the home, the gains of using deception are often worth the losses because the deception aids in the legitimate detection of covert criminal activity.\textsuperscript{253}

However, the \textit{Brown} court's decision to not limit deception to instances where the police have reasonable articulable suspicion produces considerable losses that outweigh any gains because honest citizens' rights to privacy are violated. The \textit{Brown} decision allows police officers to randomly approach a home, without any reasonable articulable suspicion for doing so, and use deception to induce the

\textsuperscript{248} See \textit{Boyd v. United States}, 116 U.S. 616, 635 (1886) (warning that unconstitutional practices often begin with slight deviations from procedure).


\textsuperscript{250} \textit{Id.}

\textsuperscript{251} \textit{Id.}

\textsuperscript{252} \textit{Id.}

\textsuperscript{253} See \textit{Brown}, 378 Md. at 372-73, 835 A.2d at 1217-18 (Bell, C.J., dissenting) (stating that the use of police deception may be appropriate when there is probable cause or reasonable articulable suspicion because it furthers the goal of detecting criminal activity); \textit{see also} \textit{State v. Ahart}, 324 N.W.2d 317, 319 (Iowa 1982) (stating that the use of deception is legitimate to secure entry to execute a valid search or arrest warrant, to engage in an illegal transaction, or to investigate the premises of a home where there is a reasonable suspicion that criminal activity is afoot).
occupants to open their door, thereby gaining a view of the room and infringing on the privacy of the occupant.\textsuperscript{254} A search occurs whenever something becomes visible to police officers in plain view.\textsuperscript{255} Thus, a search does occur when officers use a subterfuge to trick individuals into opening the doors of their homes, thereby gaining a view of the rooms that they did not previously have. This search occurs before the police even ask the occupants for permission to enter their residence. In such circumstances, the opening of the door and the search are co-extensive.\textsuperscript{256} The \textit{Brown} decision therefore leaves honest citizens vulnerable to searches of their homes when the police have no reasonable articulable suspicion to be there, and the citizens have not consented to the search. This is clearly inconsistent with the protections of the Fourth Amendment, which demand that the police have a reasonable, articulable basis for invading a person's privacy.

The \textit{Brown} decision is further alarming because it provides officers with unchecked opportunities to randomly invade homes, gain probable cause, and use the plain view doctrine to seize illegal contraband by inducing the opening of a door through deception.\textsuperscript{257} Once the door is opened, if there is illegal contraband in plain view, or if officers smell marijuana in the home, the officers have probable cause.\textsuperscript{258} They can then obtain a search warrant and return to the home, or they can use the plain view doctrine to seize any contraband in plain view.\textsuperscript{259} Thus, armed with the sanctioned use of deception and the plain view doctrine, officers are given an alarming amount of power and discretion that will likely lead to discriminatory, vague, and disproportional use.\textsuperscript{260} The \textit{Brown} decision undercuts Maryland citi-

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\textsuperscript{254} See People v. Ramirez, 747 N.Y.S.2d 711, 716 (N.Y. Sup. Ct. 2002) (noting that the police, after tricking motel occupants into opening their door, attempted to use the plain view doctrine to make observations of the room).


\textsuperscript{256} See id. at 215, 754 A.2d at 1088 (noting that the officers' entry into the home and their search were co-extensive because the officers saw the contraband in plain view immediately upon entering the apartment).

\textsuperscript{257} The plain view doctrine gives officers the authority to make warrantless seizures of weapons and contraband in plain view in nonpublic places when the police have lawful access to the place from which the item can be plainly viewed. \textit{Hicks}, 480 U.S. at 325-26. \textit{But see Ramirez, 747 N.Y.S.2d 711, 716 (2002)} (holding that the plain view doctrine, which requires that the police lawfully be in a position to make their observation, is inapplicable because the police did not have reasonable articulable suspicion of wrongdoing and thus unlawfully tricked the defendants into opening their door).


\textsuperscript{259} \textit{Hicks}, 480 U.S. at 326.

\textsuperscript{260} \textit{Brown}, 378 Md. at 366, 835 A.2d at 1214 (Bell, C.J., dissenting).
zens' expectations of privacy and leaves them susceptible to arbitrary intrusions of their homes.

In broadening the policy of knock and talk and sanctioning the use of deception in situations where no reasonable suspicion exists, the Brown court went one step too far and endorsed an unconstitutional practice that allows police officers to arbitrarily and unreasonably invade the privacy of peoples' homes. Rather than affirmatively halting the gradual deterioration of Maryland citizens' Fourth Amendment rights, which began with the sanctioning of the knock and talk technique in Scott, the Brown court chose to contribute to that deterioration.

5. Conclusion.—In Brown v. State, the Court of Appeals limited Maryland citizens' Fourth Amendment rights by holding that the police can use deception to induce people to open their doors and ultimately gain entry into their homes in the absence of reasonable articulable suspicion that the occupants of the home are engaged in illegal activity. In making this decision, the court failed to examine the circumstances surrounding the deception and the consent to enter and search. The court therefore did not meaningfully apply the prescribed totality of the circumstances test to determine whether the use of deception in such situations erodes the voluntary quality of the consent to enter and consent to search. Had the court properly applied the test and engaged in a thorough, fact-specific analysis, the court would have determined that the totality of the circumstances in the case combined to erode the voluntary nature of the appellant's consent. Further, in sanctioning the use of deception in situations where there is no reasonable basis to suspect that individuals are involved in wrongdoing, the court missed an opportunity to join a majority of state courts that have limited the use of such deception to comport with the demands of the Fourth Amendment. Consequently, the Brown court's decision to allow police to use deception in
the absence of reasonable articulable suspicion of wrongdoing compromises the protections of the Fourth Amendment, and leaves the citizens of Maryland vulnerable to arbitrary, selective, and unconstitutional invasions of the privacy of their homes.\textsuperscript{266}

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\textsuperscript{266} Brown, 378 Md. at 366, 835 A.2d at 1214 (Bell, C.J., dissenting); see supra notes 244-262 and accompanying text.
V. LABOR AND EMPLOYMENT LAW

A. Weakening Trade Secret Protection and Encouraging Commercial Immorality by Rejecting the Doctrine of Inevitable Disclosure

In Lejeune v. Coin Acceptors, Inc., the Court of Appeals of Maryland considered for the first time whether Maryland should recognize the doctrine of inevitable disclosure. Specifically, the court examined whether under the Maryland Uniform Trade Secrets Act (MUTSA), a plaintiff could use the doctrine of inevitable disclosure to enjoin a former employee from working for a competitor where the employee would inevitably disclose the trade secrets of his former employer while working for the new employer. The Court of Appeals vacated a preliminary injunction enjoining William LeJeune from working for Mars Electronics, Inc. (Mars), holding that the theory of inevitable disclosure cannot serve as the basis for an injunction under MUTSA because the doctrine violates Maryland’s public policy favoring employee mobility.

The court based its conclusion that inevitable disclosure restricts employee mobility in part on the determination that the doctrine allows courts to infer the inevitable disclosure of trade secrets from only an individual’s exposure to a trade secret. The court misconstrued the doctrine of inevitable disclosure set forth in PepsiCo, Inc. v. Redmond, the seminal case on inevitable disclosure, which established that the doctrine should only be applied to employees who show more than simple knowledge of a former employer’s trade secret. The court found that the inevitable disclosure doctrine offends Maryland’s

2. Id. at 320, 849 A.2d at 470. Under the doctrine of inevitable disclosure, a plaintiff may prove a claim of trade secret misappropriation by showing that a defendant employee’s new employment will inevitably lead him to use his former employer’s trade secrets. Id. at 319, 849 A.2d at 470.
4. LeJeune, 381 Md. at 293, 849 A.2d at 454.
5. Id. at 322, 849 A.2d at 471.
6. Id.
7. 54 F.3d 1262, 1269 (7th Cir. 1995) (recognizing that under the Illinois Uniform Trade Secrets Act, a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant’s new employment will inevitably lead him to rely on the plaintiff’s trade secrets); see infra notes 184-196 and accompanying text.
8. See PepsiCo, 54 F.3d at 1271 (concluding that an injunction is proper when there is a demonstrated inevitability that a former employee will rely on a former employer’s trade secrets and the employee’s bad faith behavior makes it unlikely that the employee will refrain from disclosing trade secrets in the employee’s new job).

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policy favoring employee mobility. Moreover, the court’s rejection of inevitable disclosure has set a dangerous precedent where employees who are not bound by noncompetition agreements may dishonestly and in bad faith use their knowledge of a former employer’s confidential trade secrets to further their own economic interests. Accordingly, the court should have adopted the doctrine of inevitable disclosure, and upheld the injunction prohibiting Lejeune from working for Mars.

1. The Case.—In 1993, William Lejeune began working for Coin Acceptors, Inc. (Coinco), a Missouri corporation engaged in the business of designing, manufacturing, and servicing coin acceptors, coin changers, bill validators, and other coin operated machines. Lejeune initially worked with Coinco as a Sales and Field Service Representative selling currency equipment and servicing machines. In 1997, Lejeune received a promotion to Baltimore Branch Manager; he thus assumed responsibility for supervising sales and field service throughout Maryland, Delaware, Virginia, and West Virginia. Following a restructuring of its operations in 2002, Coinco changed Lejeune’s job title to Area Account Manager; his new job duties consisted strictly of supervising vending sales in the expanded region.

Throughout his employment at Coinco, Lejeune worked primarily in sales and developed an extensive knowledge of Coinco’s products through his service and sales experience. Additionally, during his employment with Coinco, Lejeune was given access to Coinco’s pricing strategies, marketing plans, business initiatives, selling strategies, and product specifications.

9. See infra notes 197-224 and accompanying text.
10. See infra notes 225-236 and accompanying text.
11. Lejeune, 381 Md. at 293-94, 849 A.2d at 454-55. Coinco’s business was divided into three segments: (1) Vending, which includes beverage and snack food companies such as Coke and Pepsi; (2) Amusement, which includes video game manufacturers and distributors; and (3) Specialty Markets, which includes self-checkout services and transportation service providers. Id. at 294, 849 A.2d at 454-55.
12. Id. at 294, 849 A.2d at 455. Lejeune’s job duties also involved leading seminars on the maintenance and repair of Coinco machines. Id.
13. Id.
14. Id. Aside from a brief project in Specialty Markets, Lejeune spent the majority of his time on the Vending market. Id. at 294-95, 849 A.2d at 455.
15. Id. at 295, 849 A.2d at 455. While employed at Coinco, Lejeune never participated in research and development or manufacturing. Id.
16. Id. Lejeune never received complete access to information regarding Coinco’s contracts with customers. Id. To maintain the confidentiality of company information, Coinco restricted access to company documents on a need-to-know basis, and guarded its computer mainframe system with a password. Id. at 297, 849 A.2d at 457. In addition, Coinco negotiates nondisclosure agreements with its customers regarding pricing informa-
In May and June of 2003, LeJeune contemplated new employment opportunities and had several interviews with Mars, Coinco’s primary competitor in the currency acceptor industry. During LeJeune’s two interviews with Mars, he described his work experience at Coinco, and informed his interviewer about several of Coinco’s new products and strategic concerns.

On July 7, 2003, LeJeune signed a job-offer letter with Mars, and accepted a position as an Amusement Original Equipment Manager (OEM). As an Amusement OEM, LeJeune would primarily sell Mars’s products to the amusement industry, but would also have contact with full line distributors in the vending market. On July 14, 2003, LeJeune met with his superior at Coinco, William Morgan, and informed him that he had accepted a position at Mars. During their conversation, LeJeune told Morgan that based on his experience at Coinco, he would be in a “unique” position at Mars.

At the time, Morgan believed that LeJeune’s statement alluded to the future use and disclosure of Coinco’s confidential information; however, LeJeune later claimed that his statement referred to how his vending experience at Coinco would be unique in an amusement position at Mars. Following his meeting with Morgan, LeJeune returned his company laptop and a box of company documents to Coinco.

However, after LeJeune returned his company computer, Coinco determined that he transferred files from his Coinco laptop to a CD on three separate occasions after he had accepted employment at Mars. The transferred files included Coinco’s budgeting software, manufacturing costs, and profit margins. After copying information from his Coinco laptop to a CD, LeJeune made a second copy of the CD. LeJeune also kept hard copies of Coinco’s price and cost information, designates company pricing and strategy documents as confidential, and specifically states in the Coinco Employee Handbook that all business methods are proprietary and that employees should protect company information as confidential. 

17. Id. at 295, 849 A.2d at 455.
18. Id., 849 A.2d at 455-56.
19. Id., 849 A.2d at 456.
20. Id. at 295-96, 849 A.2d at 456.
21. Id. at 296, 849 A.2d at 456.
22. Id.
23. Id.
24. Id.
25. Id.
26. Id.
27. Id. LeJeune claimed that he copied the company files because he did not know how to transfer individual files to a CD, and therefore to copy the personal files he kept on his company laptop, he copied the entire “My Documents” folder instead of his individual personal files. Id. at 296-97, 849 A.2d at 456. However, an expert in computer forensics
After learning that LeJeune allegedly possessed its trade secrets, Coinco filed for injunctive and other relief and moved for a Temporary Restraining Order against LeJeune in the Circuit Court for Anne Arundel County. Specifically, Coinco sought injunctive relief under Section 11-1202(a) of MUTSA claiming that LeJeune had misappropriated Coinco’s trade secrets. The circuit court granted the Temporary Restraining Order, which prohibited LeJeune from working for Mars in the Vending, Amusement, and/or the Specialty Markets Industries pending the outcome of Coinco’s Motion for a Preliminary Injunction.

Following a hearing, the trial judge concluded that Coinco would likely succeed on the merits of its case against LeJeune. The court also found that it would be impossible for LeJeune to work in his new position at Mars without utilizing or considering the confidential information he misappropriated while working for Coinco. Additionally, the trial judge concluded that Coinco would suffer a significant loss of market share and irreparable harm if the injunction were denied, and that the issuance of a preliminary injunction against LeJeune would not harm the public interest.

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28. Id., 849 A.2d at 456-57.
29. Id. at 298, 849 A.2d at 457.
30. Id. Section 11-1202(a) of MUTSA provides that “actual or threatened misappropriation may be enjoined.” Md. Code Ann., Com. Law II § 11-1202(a) (2000).
31. Lejeune, 381 Md. at 298, 849 A.2d at 457.
32. Id. Particularly, the trial judge noted that Coinco would likely succeed at trial in establishing that LeJeune maintained possession of Coinco’s technical information and overall strategy which would qualify as trade secrets under MUTSA. Id. Furthermore, the trial judge concluded that for the purpose of Coinco’s Motion for a Preliminary Injunction, Coinco had presented sufficient evidence that LeJeune misappropriated Coinco’s trade secrets by downloading confidential company documents from his company laptop. Id.
33. Id. at 298-99, 849 A.2d at 457.
34. Id. at 299, 849 A.2d at 457-58. Specifically, the trial judge observed that Mars could use Coinco’s trade secrets to push Coinco out of its market, and that monetary damages could not fairly compensate Coinco for the irreparable injuries it would suffer. Id., 849 A.2d at 458.
35. Id.
LeJeune appealed to the Court of Special Appeals, and the Court of Appeals then acted on its own initiative and issued a writ of certiorari. The Court of Appeals granted certiorari to consider whether under MUTSA, LeJeune misappropriated Coinco’s trade secrets, and if so whether he should be prohibited from working in the Vending, Amusement, and Specialty Markets at Mars because he would inevitably disclose Coinco’s trade secrets.

2. Legal Background.—Maryland courts have not accepted or rejected the doctrine of inevitable disclosure under MUTSA. However, courts outside of Maryland have applied the doctrine of inevitable disclosure to allow an employer to enjoin a former employee from working for a competing company, in some cases without regard to the absence of a confidentiality or noncompete agreement. The doctrine of inevitable disclosure is typically applied when a court finds that it is inevitable that a former employee will use or disclose his former employer’s trade secrets while working for a competitor employer. The landmark case supporting the adoption of the inevitable disclosure doctrine is PepsiCo, Inc. v. Redmond, in which the United States Court of Appeals for the Seventh Circuit upheld an injunction against a former PepsiCo employee finding that the departed employee would inevitably disclose PepsiCo’s trade secrets while working for PepsiCo’s competitor, Quaker. In decisions following PepsiCo, courts have relied upon and further developed the factors used in PepsiCo to analyze whether, based on the inevitable disclosure doctrine, an injunction is warranted. In deciding whether to reject or accept the doctrine of inevitable disclosure, courts balance the competing social interests of employee mobility

36. Id.
37. LeJeune v. Coin Acceptors, 379 Md. 224, 841 A.2d 339 (2004); see also Md. R. 8-301(a)(3) (2004) (allowing the Court of Appeals to take a case from the Court of Special Appeals by issuing a writ of certiorari on its own initiative).
38. LeJeune, 381 Md. at 299-300, 849 A.2d at 458.
39. See, e.g., Padco Advisors, Inc. v. Omdahl, 179 F. Supp. 2d 600, 611 (D. Md. 2002) (stating that Maryland state courts have not adopted the doctrine of inevitable disclosure under MUTSA).
41. PepsiCo, 54 F.3d at 1269.
42. Id. at 1271-72.
43. See infra notes 120-132 and accompanying text.
and the employer's legally recognized countervailing interests in trade secret protection and commercial morality. At the present time, the doctrine of inevitable disclosure is accepted or viewed favorably by courts in eighteen states and three states reject the doctrine; the remaining states lack adequate case law on the doctrine.

a. The Competing Social Policies of Employee Mobility, Trade Secret Protection, and Commercial Morality in Maryland.—While the doctrine of inevitable disclosure is a new issue for Maryland courts, Maryland courts have addressed cases in which an employer sought to enjoin a former employee with access to the employer's trade secrets from working for a competitor. In attempting to balance the right of an employee to enter into competition with a former employer, and the countervailing right of an employer to restrict a former employee's competitive behavior after employment, Maryland courts balance the social interest of employee mobility with the conflicting social policies of commercial morality and trade secret protection.

Maryland common law and statutes are concerned with enforcing high standards of commercial morality and fairness in the marketplace. To encourage innovation and technological development in the corporate business structure, the employer-employee relationship necessitates that the employer entrust its employees with confidential information and place a substantial amount of trust in high-level employees. As a result, however, there exists the possibility that an employee could abuse his employer's confidence for personal economic benefit. Accordingly, the law's concern for the integrity of the employment relationship has led Maryland courts to establish a general principle that an employee must be loyal to his or her employer.

For example, in Maryland Credit Finance Corp. v. Hagerty, the Court of

44. *PepsiCo*, 54 F.3d at 1268.
45. See infra notes 118-119 and 133-137 and accompanying text (discussing individual states' acceptance and rejection of the doctrine).
46. See *Md. Metals, Inc. v. Metzner*, 282 Md. 31, 37-41, 382 A.2d 564, 567-70 (1978) (finding that the freedom of an employee to compete with a former employer is tempered by a duty not to misuse a former employer's trade secrets, improperly use confidential information, solicit customers prior to the end of employment, or massively entice fellow employees).
48. *Metzner*, 282 Md. at 37, 382 A.2d at 568.
49. *Id.*
50. *Id.* at 37-38, 382 A.2d at 568; see also *C-E-I-R, Inc. v. Computer Dynamics Corp.*, 229 Md. 357, 366, 183 A.2d 374, 379 (1962) (finding that the employment relationship is one of confidence and trust and places a duty upon the employee to use his best efforts on his employer's behalf); *Md. Credit Fin. Corp. v. Hagerty*, 216 Md. 83, 90, 139 A.2d 230, 233
Appeals denied a former employee his right to a year-end bonus he otherwise would have received because the employee breached his fiduciary duty to his employer by violating business ethics and becoming a profit-sharing partner in, and accepting loans from, third-party businesses whose finances the employee was responsible for monitoring.\footnote{1. 216 Md. at 91-92, 139 A.2d at 234.}

Additionally, Maryland courts have recognized that a direct extension of the principle of employee loyalty is that a high-level employee is prohibited from competing with his employer during his employment, even in the absence of an express noncompetition agreement.\footnote{2. Ritterpusch v. Lithographic Plate Servs., Inc., 208 Md. 592, 602-04, 119 A.2d 392, 397-98 (1956).} On the other hand, the social policy favoring free competition and employee mobility has prompted Maryland’s judicial recognition of an employee’s right to make preparations to compete against a former employer without violating the employee’s duty of loyalty to his employer.\footnote{3. Id. at 602, 119 A.2d at 397.} For example, in \textit{Ritterpusch v. Lithographic Plate Service, Inc.}, the Court of Appeals concluded that an employee can prepare to compete against his or her employer by purchasing a business, but an employee’s implied duty of good faith forbids him from directly competing against his or her employer or soliciting the employer’s customers until the agency relationship has officially terminated.\footnote{4. Id. at 605-06, 119 A.2d at 398.} Accordingly, the \textit{Ritterpusch} court upheld an injunction preventing an employee of a printing company from starting a competing business because during the course of his employment, he had solicited his employer’s customers in preparation to start the business.\footnote{5. 229 Md. 357, 363-66, 183 A.2d 374, 377-79 (1962).}

In \textit{C-E-I-R, Inc. v. Computer Dynamics Corp.}, the Court of Appeals issued an injunction against a former employee of a data processing business who secretly accepted an offer to work for a competing company based on his knowledge of his former employer’s trade secret information and then inappropriately solicited his former employer’s employees.\footnote{6. Id. at 369, 183 A.2d at 381.} In its decision, the \textit{C-E-I-R} court held that a breach of fiduciary duty owed by an employee to his employer will entitle the employer to an injunction against the employee’s wrongful actions.\footnote{7. Id. at 369, 183 A.2d at 381.}

(1958) (holding that an agent’s fundamental duties are loyalty to the interests of his employer and the need to avoid any conflicts between his interests and that of his employer).

51. 216 Md. at 91-92, 139 A.2d at 234.


53. Id. at 602, 119 A.2d at 397.

54. Id.

55. Id. at 605-06, 119 A.2d at 398.


57. Id. at 369, 183 A.2d at 381.
Following \textit{C-E-I-R}, in \textit{Space Aero Products Co. v. Darling},\textsuperscript{58} the Court of Appeals upheld an injunction against four former employees of a business that manufactured oxygen breathing hoses who left to form a competing business using their former employer's secret production methods.\textsuperscript{59} Specifically, the \textit{Space Aero Products} court held that an injunction is a proper remedy to protect an employer's trade secret interest against its inappropriate use in breach of an employee's fiduciary duty.\textsuperscript{60}

Employing similar considerations in \textit{Maryland Metals v. Metzner}, where Metzner, a high-level employee of Maryland Metals, ended his employment to establish a competing business, the Court of Appeals declined to enjoin Metzner from establishing a competing business because Metzner acted in good faith towards his former employer.\textsuperscript{61} However, the \textit{Metzner} court noted that fairness and commercial morality dictate that an employee may not abuse the confidence of an employer to obtain an unfair economic advantage as a competitor.\textsuperscript{62} Moreover, the court recognized that the employee's right to make arrangements to compete is not absolute.\textsuperscript{63} The court observed that an employee's privilege to prepare to compete with a former employer has never been applied to excuse an employee who has committed a fraudulent or wrongful act in the course of preparing for future employment from his fiduciary duty of loyalty.\textsuperscript{64}

Specifically, the \textit{Metzner} court, citing \textit{Space Aero Products} and \textit{C-E-I-R}, noted that Maryland courts have traditionally held that the misappropriation of trade secrets\textsuperscript{65} and the improper use of confidential information\textsuperscript{66} can defeat an employee's right to prepare to compete against a former employer.\textsuperscript{67} Ultimately, the court concluded that the determination of whether an employee breached his fiduciary duty to

\textsuperscript{58} 238 Md. 93, 208 A.2d 74 (1965).
\textsuperscript{59} Id. at 101-03, 125, 208 A.2d at 77-78, 91.
\textsuperscript{60} Id. at 123, 208 A.2d at 89.
\textsuperscript{61} 282 Md. 31, 48, 382 A.2d 564, 573-74 (1978).
\textsuperscript{62} Id. at 37, 382 A.2d at 568.
\textsuperscript{63} Id. at 40, 382 A.2d at 569.
\textsuperscript{64} Id.
\textsuperscript{65} Id. (citing \textit{Space Aero Prods. Co., Inc. v. R.E. Darling Co., Inc.}, 238 Md. 93, 117, 208 A.2d 74, 86 (1965) (holding that an injunction is a proper equitable remedy to protect the proprietor of a trade secret against the wrongful use of that secret in breach of an employee's fiduciary duty)).
\textsuperscript{66} Id. (citing \textit{C-E-I-R, Inc. v. Computer Dynamics Corp.}, 229 Md. 357, 368-69, 183 A.2d 374, 380-81 (1962) (holding that an injunction is a proper equitable remedy to prevent employees from competing against their former employer by improperly using confidential information of the employer in breach of their fiduciary duty)).
\textsuperscript{67} Id.
his employer depends on the facts of each individual case.68 Looking at the facts before it, the court found that the employees who left Maryland Metals to form a competing venture did not violate their duty to Maryland Metals because they acted in good faith, did not inappropriately solicit Maryland Metals' customers, did not misappropriate trade secrets, and only used their general knowledge as opposed to specific confidential information to compete against their former employer.69

Accordingly, while the Metzner court recognized the right of an employee to compete against a former employer using his general experience, knowledge, skill, and memory,70 it also held that the right to compete is tempered by the equally strong principle that an employee may not use specialized, unique or confidential information to compete against a former employer.71

Maryland courts, adhering to the principles of Metzner, have held that even in the absence of an express contract, an employee is under a duty not to disclose his former employer's trade secrets.72 For instance, in Tabs Association v. Brohawn, the Court of Special Appeals affirmed an injunction against two former employees of a mail sorting business from competing against the business using their employer's confidential business model because the court concluded that the employees had violated their fiduciary duty by improperly using the employer's trade secrets.73 As such, in the Metzner line of cases, the Court of Appeals firmly established the precedent that an injunction is appropriate to prevent a former employee from using or disclosing trade secrets and confidential information, in breach of an implied fiduciary duty, to compete against his former employer.74

The aforementioned cases were decided by Maryland courts prior to Maryland's adoption of the Uniform Trade Secrets Act, codified as MUTSA, on July 1, 1989.75 The basic purpose of the Uniform Trade Secrets Act was to codify and standardize the common law of trade

68. Id. at 41, 382 A.2d at 570.
69. Id. at 45-48, 382 A.2d at 572-74.
70. Id. at 46, 382 A.2d at 573.
71. Id.
73. 59 Md. App. 330, 343, 475 A.2d 1203, 1210 (1984). The Court of Special Appeals also noted that one of the former employees was in violation of a specific trade secret agreement. Id.
74. See Metzner, 282 Md. at 38-41, 382 A.2d at 568-70.
secrets among the states.\textsuperscript{76} Similar to Maryland's common-law approach to trade secret protection, under MUTSA an injunction is an appropriate remedy to prevent the actual or threatened disclosure of a trade secret.\textsuperscript{77} Additionally, the relevant principles established by the Metzner line of cases are applicable to cases decided under MUTSA because MUTSA expanded upon the common-law protection afforded trade secrets, and did nothing to alter the fiduciary duties that Maryland courts have long recognized an employee owes to an employer with regards to protecting the confidentiality of trade secret information.

\textit{b. The History of the Doctrine of Inevitable Disclosure.}—Courts have used the doctrine of inevitable disclosure when a traditional trade secrets case cannot be brought because trade secrets have not yet been disclosed, nor has disclosure been threatened, but rather it is alleged that in the future the employee will inevitably use or disclose the trade secrets of his former employer while working for a competitor.\textsuperscript{78} Traditionally, the doctrine is applied to situations where an employee has not signed a noncompetition agreement with his former employer and where the employee has not actually disclosed or threatened to disclose the trade secrets of his former employer to his new employer.\textsuperscript{79} In applying the doctrine, a court restrains an employee from working for a competitor as if the employee had actually signed a noncompetition agreement with the employer.\textsuperscript{80} Consequently, the doctrine of inevitable disclosure acts as a judicially created covenant not to compete.\textsuperscript{81}

The doctrine of inevitable disclosure originates from three factually similar cases decided in the mid-1960s in which a competitor em-

\textsuperscript{77} \textit{Md. Code Ann., Com. Law II} § 11-1202.
\textsuperscript{78} \textit{See}, \textit{e.g.}, PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995) (granting an injunction against an employee after finding that the employee would inevitably disclose his former employer's trade secrets while working at a competing company, and that the disclosure of those trade secrets would cause the former employer irreparable harm).
\textsuperscript{79} The inevitable disclosure doctrine is not typically applied in cases where an employee signed a noncompetition agreement because the issue could be tried as a breach of contract case. Likewise, if there were a threatened disclosure or actual disclosure of trade secrets, the case could be tried under the Uniform Trade Secrets Act, as the act allows an injunction for the actual or threatened disclosure of trade secrets. \textit{Md. Code Ann., Com. Law II} § 11-1202.
\textsuperscript{80} \textit{See} Emery Indus., Inc. v. Cottier, 202 U.S.P.Q. (BNA) 829, 836 (S.D. Ohio 1978) (concluding that an injunction preventing a former employee from assuming new employment has the same effect as a noncompetition agreement).
\textsuperscript{81} \textit{Id.}
ployer hired away one of the industry leader’s top scientists or executives who had access to trade secrets that could help the competitor compete in the market. In *B.F. Goodrich Co. v. Wohlgemuth*, employer B.F. Goodrich was a pioneer and market leader in the development and production of high altitude, full-pressure space suit technology. Employee Donald Wohlgemuth worked for B.F. Goodrich as an engineer designing and developing space suit technology and gained access to many of B.F. Goodrich’s trade secrets, including detailed knowledge of the production and design process of B.F. Goodrich’s space suits. After working for B.F. Goodrich for eight years, Wohlgemuth accepted employment with International Latex Corporation, one of B.F. Goodrich’s competitors in the space suit market. Prior to leaving B.F. Goodrich, Wohlgemuth stated to his coworkers that “[o]nce he was a member of the Latex Team, he would expect to use all of the knowledge that he had to their benefit.”

In response to Wohlgemuth’s comments, B.F. Goodrich sought to enjoin Wohlgemuth from working for International Latex in the space suit industry, even though he had not signed a noncompetition agreement. The Court of Appeals of Ohio granted the injunction preventing Wohlgemuth from working for International Latex because the circumstances surrounding his departure from B.F. Goodrich and the comments he made to coworkers established a substantial threat of trade secret disclosure, and B.F. Goodrich would sustain immediate and irreparable damage to its space suit business if the injunction were denied. While the *B.F. Goodrich* court did not explicitly adopt the term “inevitable disclosure,” the case established that a court can enjoin a plaintiff’s former employee from working for a competitor in the absence of a noncompetition agreement.

Following *B.F. Goodrich*, the Delaware Court of Chancery decided *E.I. duPont de Nemours & Co. v. American Potash & Chemical Corp.* In *E.I. duPont de Nemours*, the plaintiff, E.I. duPont de Nemours, was the only company to successfully develop a chloridate process for producing

83. Id. at 101-03.
84. Id. at 102.
85. Id. at 104.
86. Id. at 104-05.
87. Id. at 103, 105.
88. Id. at 104-05.
89. Id. The court noted that another basis for the injunction would be to prevent the employee from violating a confidentiality agreement he had signed with his former employer. Id. at 105.
pigments. The defendant, American Potash & Chemical Corp., hired Donald Hirsch, an E.I. duPont employee who had an intimate knowledge of E.I. duPont's chloride process, to help American Potash develop its own chloride pigment production technology. E.I. duPont then sought a permanent injunction to prevent Hirsch from working for American Potash, arguing that such employment would inevitably result in the disclosure of E.I. duPont's trade secrets. The Chancery court denied summary judgment for Hirsch and American Potash, stating that "the degree of probability of disclosure, whether amounting to an inevitability or not, is a relevant factor to be considered in determining whether a threat of disclosure exists."

Finally, in Allis-Chalmers Manufacturing Co. v. Continental Aviation & Engineering Corp., the United States District Court for the Eastern District of Michigan became the first court to enjoin an employee from assuming his new job based solely on a conclusion that the employee would inevitably disclose a former employer's trade secrets. The plaintiff, Allis-Chalmers Manufacturing Company, was one of only four diesel engine manufacturers to successfully develop a distributor pump fuel injection system, and its design possessed noteworthy advantages over its competitors. The defendant, George Wolff, who headed Allis-Chalmers' fuel systems laboratory, was hired by Continental Aviation & Engineering Corporation to help develop a fuel injection distributor pump for the production of a tank engine. Immediately following Wolff's departure from Allis-Chalmers, the company sought and received a temporary restraining order prohibiting Wolff from working for Continental on the production of fuel injection pumps. The district court issued an injunction prohibiting Wolff from working on fuel injector pumps at Continental based on its determination that such employment would lead to "an inevitable and imminent danger of disclosure of Allis-Chalmers trade secrets to Continental."

B.F. Goodrich, E.I. duPont de Nemours, and Allis-Chalmers created the doctrine of inevitable disclosure and established that to successfully obtain an injunction prohibiting a former employee who had not

90. 200 A.2d 428, 430 (Del. Ch. 1964).
91. Id. at 430-31.
92. Id. at 431-32.
93. Id. at 436 & n.4.
95. Id. at 648-49.
96. Id. at 650-51.
97. Id. at 646.
98. Id. at 654.
signed a noncompetition agreement from working for a competitor, a
court must conclude that the employee would inevitably disclose the
trade secrets of his former employer while working in a similar capac-
ity for a competitor employer. Additionally, these cases reaffirmed a
policy discouraging employers from hiring employees of competing
companies in hopes of gaining access to competitors' trade secrets.


\[c.\] The Present Application of the Doctrine of Inevitable Disclo-

\[sure.\]

\[(1)\] PepsiCo, Inc. v. Redmond: Rekindling Interest in the Doc-

\[trine of Inevitable Disclosure.\]—Following Allis-Chalmers, B.F. Goodrich,
and E.I. duPont de Nemours, few trade secret cases were decided on
the basis of the doctrine of inevitable disclosure. Then, in 1995,
the Court of Appeals for the Seventh Circuit decided PepsiCo, Inc. v.
Redmond, the landmark case supporting the doctrine of inevitable
disclosure. The court in PepsiCo held that "a plaintiff may prove a
claim of trade secret misappropriation by demonstrating that a defen-
dant's new employment would inevitably lead him to rely on the plain-
tiff's trade secrets."102

Redmond worked as an employee at PepsiCo in its North Ameri-
can Division from 1984 to 1994. In 1994, Redmond served as the
General Manager of the business unit covering all of California. Red-
mond received access to confidential information and trade

\[\text{secrets including PepsiCo's marketing plans, financial goals, and man-
ufacturing, production, packaging, and distribution information
through 1997.}\] On November 8, 1994, Redmond accepted a posi-
tion with Quaker as Vice President of Gatorade's Field Operations. PepsiCo and Quaker were direct competitors in the new age and
sports drinks markets, but Quaker dominated both markets.107

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1963).

100. Allis-Chalmers, 255 F. Supp. at 654; E.I. duPont de Nemours, 200 A.2d at 436-37; B.F.
Goodrich Co., 192 N.E.2d at 105.

101. E.g., FMC Corp. v. Varco Int'l, Inc., 677 F.2d 500 (5th Cir. 1982); Teradyne, Inc. v.
Clear Communications Corp., 707 F. Supp. 353 (N.D. Ill. 1989); Emery Indus. Inc. v. Cot-
1982).

102. 54 F.3d 1262, 1269 (7th Cir. 1995).

103. Id. at 1264.

104. Id.

105. Id. at 1265.

106. Id. at 1264.

107. Id. at 1263-64.
Quaker produced the dominant sports drink, Gatorade, while PepsiCo produced its own sports drink, All Sport. Throughout the negotiation process, Redmond never informed his superiors at PepsiCo of his intentions to join Quaker. After accepting the offer, Redmond denied that he had accepted the position to his PepsiCo superiors and did not inform them of his decision to leave until November 10, 1994.

PepsiCo filed suit seeking to enjoin Redmond from working at Quaker, and the district court granted the injunction solely on the basis of the doctrine of inevitable disclosure.

On appeal, the Seventh Circuit recognized the difficulty in balancing the interest in commercial morality and the incentive to innovate underlying trade secret law against free competition and employee mobility. While the court ultimately upheld the trial court’s decision to grant an injunction on the theory of inevitable disclosure, it specifically noted that, “the mere fact that a person assumed a similar position at a competitor does not, without more, make it inevitable that he will use or disclose . . . trade secret information.” Accordingly, the court recognized that PepsiCo did not seek simply to prevent Redmond from using his general skills and knowledge at Quaker; rather, PepsiCo sought to prevent Redmond from using actual marketing plans and confidential information that PepsiCo disclosed to Redmond during his employment. Having concluded that Redmond possessed knowledge of PepsiCo’s trade secrets, the court looked at Redmond’s behavior at the time of his departure from PepsiCo, and agreed with the trial court that Redmond’s untruthfulness about his employment status and lack of candor demonstrated that he “could not be trusted to act with the necessary sensitivity and good faith” to preserve the confidentiality of PepsiCo’s trade secrets while working at Quaker. Accordingly, the Seventh Circuit upheld the district court’s finding of inevitable disclosure, and affirmed the injunction against Redmond.

108. Id. at 1264.
109. Id.
110. Id.
111. Id. at 1265.
112. Id. at 1267. The injunction prevented Redmond from assuming his position at Quaker for approximately six months and permanently prohibited him from using or disclosing any of PepsiCo’s trade secrets or confidential information. Id.
113. Id. at 1268.
114. Id. at 1269 (internal quotation marks omitted).
115. Id.
116. Id. at 1270.
117. Id. at 1272.
(2) The Factors Courts Consider in Applying the Doctrine of Inevitable Disclosure.—The doctrine of inevitable disclosure has been adopted by courts in eight states: Arkansas, Delaware, Illinois, Minnesota, New Jersey, Ohio, Utah, and Washington.\(^\text{118}\) In addition, courts in six states—Connecticut, Iowa, Massachusetts, New York, North Carolina, and Texas—have adopted slightly limited versions of the doctrine of inevitable disclosure.\(^\text{119}\) Courts following the doctrine of inevitable disclosure as established by the *PepsiCo* court will typically enjoin an employee from working for a competitor employer if the plaintiff can prove the following elements: (1) that the employee had access to a trade secret; (2) that the employee will inevitably use or disclose that trade secret while performing his or her new job; and (3) that the disclosure of the trade secret will cause irreparable harm to the employer.\(^\text{120}\)

To establish the second factor, that an employee will inevitably disclose a former employer’s trade secrets, many courts require that an employer show that the departing employee’s behavior demonstrates an intent to improperly use or disclose trade secrets while working for his new employer.\(^\text{121}\) Courts rely heavily on the former employee’s behavior and candor in determining intent.\(^\text{122}\) For in-

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\(^\text{121}\) E.g., *PepsiCo*, 54 F.3d at 1270-71 (considering evidence of an employee’s bad faith determinative in upholding an injunction issued under the doctrine of inevitable disclosure); *Merck*, 941 F. Supp. at 1457-61 & 1460 n.5, 1461 n.6 (noting that North Carolina would probably require an employer to show an employee’s bad faith before broadly enjoining an employee under the doctrine of inevitable disclosure).

\(^\text{122}\) *PepsiCo*, 54 F.3d at 1270-71.
stance, in *PepsiCo*, Redmond's lack of candor and the untruthfulness surrounding his decision to leave *PepsiCo* represented an important consideration in the court's finding that Redmond would inevitably disclose *PepsiCo*'s trade secrets.\(^{123}\)

Courts have generally shown a willingness to apply the doctrine of inevitable disclosure only in cases where the plaintiff has presented evidence that the employee acted in bad faith or an otherwise dishonest manner.\(^{124}\) As in *PepsiCo*, in *Merck & Co. v. Lyon*,\(^{125}\) a North Carolina federal district court, in its decision to issue an injunction based on inevitable disclosure against the defendant, Lyon, found it determinative that Lyon acted in a dishonest manner regarding his employment negotiations with the co-defendant employer, Glaxo, by misrepresenting the truth to gain a better severance package from the plaintiff, Merck.\(^{126}\) Accordingly, because Lyon's bad faith behavior created an inference that he would disclose his former employer's trade secrets, the court crafted an injunction that prohibited Lyon from working on a particular product line at Glaxo.\(^{127}\)

Similarly, in *DoubleClick, Inc. v. Henderson*, two employees were accused of misappropriating trade secrets from their former employer, an Internet advertising company, to assist in their plan to form a competing Internet advertising company.\(^{128}\) Based on the evidence of actual misappropriation and the defendants' "cavalier attitude" towards the fiduciary duties owed to their former employer, which included soliciting *DoubleClick*'s customers and using *DoubleClick*'s confidential business plans to help establish a competing business while still employed by *DoubleClick*, the court concluded that the defendants' behavior created a reasonable inference that they would use their former employer's confidential information improperly.\(^{129}\) For this reason, the *DoubleClick* court issued a preliminary injunction preventing

\(^{123}\) *Id.*


\(^{125}\) 941 F. Supp. 1443 (M.D.N.C. 1996).

\(^{126}\) *Id.* at 1461.

\(^{127}\) *Id.* at 1464-65.


\(^{129}\) *Id.* at *6*. As top executives of *DoubleClick*, the defendants had access to critical information regarding the company, including financial statements, future business plans, customer information and pricing strategies. *Id.* at *4*. The *DoubleClick* court found that the defendants misappropriated trade secrets largely based on the defendant's business plan, which contained large portions of information copied directly from *DoubleClick*'s business plans. *Id.* at *5* n.3.
the former employees from launching any company or working for a competing advertising company for a period of six months.\textsuperscript{130}

In addition to properly balancing the competing social policies of employee mobility and trade secret protection, courts have found that because an injunction issued under the doctrine of inevitable disclosure acts as a de facto covenant not to compete, it should be reasonable in its restraint of activity, geography, and time.\textsuperscript{131} For example, the PepsiCo and DoubleClick courts limited the terms of injunctions to approximately a six-month period, and the Merck and Allis-Chalmers courts issued injunctions that allowed the enjoined employee to work for his new employer, but not in a capacity that would involve the use or disclosure of his former employer's trade secrets.\textsuperscript{132}

\textbf{(3) States Rejecting the Doctrine of Inevitable Disclosure.—} While several states have adopted the doctrine of inevitable disclosure, courts in California, Florida, and Virginia have explicitly rejected the doctrine.\textsuperscript{133} The policy reasons typically expressed by courts rejecting the doctrine are outlined in the California case Whyte \textit{v.} Schlage Lock Co.\textsuperscript{134} The California Court of Appeals concluded that the doctrine permitted a court to enjoin a former employee without proof of the employee's actual or threatened use of the former employer's trade secrets based on an inference of future misappropriation.\textsuperscript{135} Furthermore, the court noted that the doctrine altered the employment relationship by using a judicially created after-the-fact noncompete agreement to enjoin an employee from working for the employer of his or her choice.\textsuperscript{136} Accordingly, the court rejected the doctrine holding that it acted as an injunction against employment and thus

\textsuperscript{130} Id. at \*8.

\textsuperscript{131} E.g., PepsiCo \textit{v.} Redmond, 54 F.3d 1262, 1272 (7th Cir. 1995) (affirming an injunction issued under the doctrine of inevitable disclosure that only prohibited an employee from working for a new employer for approximately six months); Allis-Chalmers Mfg. Co. \textit{v.} Cont'l Aviation \& Eng'g Corp., 255 F. Supp. 645, 654-55 (E.D. Mich. 1966) (crafting an injunction that allowed an enjoined employee to work for his new employer, but not in a capacity that would involve the use or disclosure of his former employer's trade secrets).

\textsuperscript{132} See supra notes 125-131 and accompanying text (discussing the terms of the injunctions in these cases).


\textsuperscript{134} 125 Cal. Rptr. 2d 277 (Ct. App. 2002).

\textsuperscript{135} Id. at 292.

\textsuperscript{136} Id. at 292-93.
violated California's strong public policy favoring employee mobility.\footnote{137}

(4) Maryland Courts' Analysis of Restrictive Covenants.—While Maryland courts have not issued a restraint on employment based on the doctrine of inevitable disclosure, the Court of Appeals held, in \textit{Becker v. Bailey},\footnote{138} that a restraint on employment will be considered valid if the restraint is no greater than what is reasonably necessary in terms of scope, geography, and duration.\footnote{139} In \textit{Becker}, an employee, who was an unskilled worker and who acted in good faith towards his former employer and did not possess any of his former employer's trade secrets, was restrained from working in the automobile title servicing industry for a period of two years in the Washington D.C. area. The court concluded that the restraint on employment was unenforceable because it was greater than necessary in terms of length and geography.\footnote{140} Furthermore, the \textit{Becker} court determined that while there is no justification for a restraint on employment when an employee leaves to become a good faith competitor, a reasonable restraint on employment is allowed for employees who seek to compete by abusing the confidential relationship with their former employer.\footnote{141}

Similarly, in \textit{Tawney v. Mutual System of Maryland, Inc.},\footnote{142} the Court of Appeals held that portions of a restrictive covenant that prohibited a former employee of a loan company from competing against his former employer in Baltimore City for a period of two years were invalid because the restrictions exceeded reasonableness in terms of time and geography.\footnote{143} Additionally, the \textit{Tawney} court concluded that restrictive covenants that exceed what is necessary to protect an employer's business and place an undue hardship on an employee, stifle competition and are therefore against the public interest.\footnote{144}

\footnotesize{137. \textit{Id.} at 292-94.  
139. \textit{Id.} at 96, 299 A.2d at 838. While the injunction in \textit{Becker} was not issued under the doctrine of inevitable disclosure, the \textit{Becker} court's guidelines for the reasonableness of a restrictive covenant on employment are frequently applied by Maryland courts to determine if a restrictive covenant is enforceable. See, e.g., \textit{Budget Rent A Car of Wash., Inc. v. Raab}, 268 Md. 478, 481-82, 302 A.2d 11, 13 (1973) (applying the \textit{Becker} court's holding on the reasonableness of restrictive covenants on employment in Maryland to determine if a restrictive covenant was enforceable).  
141. \textit{Id.} at 97, 101, 299 A.2d at 838, 840.  
142. 186 Md. 508, 47 A.2d 372 (1946).  
143. \textit{Id.} at 521, 47 A.2d at 379.  
144. \textit{Id.}}
3. The Court's Reasoning.—In LeJeune v. Coin Acceptors, Inc., the Court of Appeals of Maryland vacated the trial court's preliminary injunction that restricted the scope of LeJeune's employment and rejected the adoption of the doctrine of inevitable disclosure in Maryland. 145 The court determined that the doctrine restricts employee mobility, allows an employer to enjoin an employee without showing the actual or threatened disclosure of a trade secret, and subjects employees to a de facto noncompetition agreement. 146 As such, the court concluded that the trial court erred in using the doctrine as the basis for injunctive relief under MUTSA. 147

Judge Battaglia, writing for a unanimous court, began by addressing the threshold matter of whether the computer files taken by LeJeune, including budgeting software, marketing plans, and hard-copy documents—containing pricing and cost information, and product specifications—qualified as trade secrets under MUTSA. 148 After setting forth the definition of a “trade secret” under section 11-1201(e) of MUTSA and surveying several cases interpreting the MUTSA definition, the court concluded that for information to be considered a trade secret it must: (1) derive independent value from its secrecy; (2) not be readily ascertainable to persons who could benefit from the information; and (3) be subject to reasonable efforts to protect its secrecy. 149

The court determined that Coinco's cost and profit information derived value from its secrecy. 150 In particular, the court concluded that if Mars gained access to that information, it would gain an unfair economic advantage because, as Coinco's only major competitor in the coin acceptor business, it could use the information to undercut Coinco's prices and steal Coinco's customers. 151 The court also determined that knowledge of the technical specifications of Coinco's products had economic value to Mars, as it could use the specifications to improve its own products in the unique and highly competitive currency acceptor industry. 152

146. Id. at 321-22, 849 A.2d at 471.
147. Id. at 322-23, 849 A.2d at 471-72.
148. Id. at 306, 849 A.2d at 461-62. LeJeune claimed that Coinco failed to take the necessary steps to protect the secrecy of its information and, therefore, the information he retained did not qualify as trade secrets under MUTSA. Id., 849 A.2d at 462.
150. LeJeune, 381 Md. at 309-10, 849 A.2d at 464.
151. Id. at 310, 849 A.2d at 464.
152. Id.
Next, the court recognized that Mars could not obtain Coinco's cost and profit information in the marketplace because Coinco is a privately held company that is not required to disclose financial information through public Securities and Exchange Commission filings. Ultimately, this conclusion led the court to determine that Mars could not readily ascertain Coinco's information through proper means.

Finally, after determining that Coinco's information possessed economic value and could not be readily ascertained in the marketplace, the court dismissed LeJeune's contention that Coinco's information did not qualify as trade secrets because Coinco did not take reasonable measures to maintain their secrecy. Specifically, the court noted that Coinco took reasonable measures to protect the secrecy of its information by negotiating nondisclosure agreements with its customers to prevent them from discussing its tiered pricing information, marking company documents and product specifications as confidential, and informing its employees of the confidential nature of business methods and manufacturing processes in the company's handbook. Accordingly, the court held that Coinco's cost and pricing information and technical product specifications qualified as trade secrets under MUTSA because the information possessed economic value, the information could not be readily ascertained, and Coinco took reasonable measures to protect its secrecy.

The court next analyzed whether Coinco satisfied MUTSA's misappropriation requirements for seeking injunctive relief. To obtain injunctive relief under MUTSA, a plaintiff must establish that: the injunction will prevent either "(1) the actual or threatened acquisition of a trade secret by improper means or (2) the actual or threatened disclosure of a trade secret." The court concluded that LeJeune acquired Coinco's trade secrets through improper means, as LeJeune

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153. Id.
154. Id.
155. Id.
156. Id. at 310-11, 849 A.2d at 464-65.
157. Id. at 309-11, 849 A.2d at 464-65. While the court held that information contained in the files and documents taken by LeJeune, including the budgeting software, marketing plans, cost and profit information and technical specifications, constituted trade secrets, the court concluded that Coinco's preferred distributor list did not qualify as a trade secret. Id. at 310 n.6, 849 A.2d at 464 n.6. The court based its decision not to consider the preferred distributor list a trade secret on the ease through which Mars could obtain the information through proper means on the open market. Id.
158. Id. at 311, 849 A.2d at 465.
159. Id. at 312, 849 A.2d at 465-66; Md. Code Ann., Com. Law II § 11-1201(a), (c) (2000).
copied specific confidential files from his company laptop, erased evidence of his conduct, and lied about his possession of Coinco’s files and documents to his superiors at Coinco.  

Concluding that LeJeune misappropriated Coinco’s trade secrets, the court then examined section 11-1202(a) of MUTSA, which sets forth the instances when the misappropriation of a trade secret may be enjoined.  

The court determined that MUTSA did not permit the issuance of an injunction to remedy LeJeune’s past misappropriation of Coinco’s trade secrets; rather, MUTSA only permits a court to enjoin the actual or threatened acquisition of a trade secret by improper means, or the actual or threatened disclosure of a trade secret.  

Accordingly, the court concluded that because Coinco presented insufficient evidence to show that LeJeune continued or threatened to acquire more of Coinco’s trade secrets, it could only issue an injunction against LeJeune if the injunction protected Coinco from threatened disclosure or use of its trade secrets by LeJeune.  

The court observed that the evidence presented by Coinco did not demonstrate that LeJeune had disclosed Coinco’s trade secrets and, therefore, Coinco could not receive an injunction against LeJeune for the actual disclosure of its trade secrets.  

LeJeune’s comments and behavior relating to the misappropriation of Coinco’s trade secrets did create an inference that LeJeune would disclose trade secrets in the future.  

For this reason, the court concluded that Coinco would likely succeed on the merits of its claim of threatened misappropriation by disclosure of trade secrets against LeJeune.  

While the Court of Appeals held that Coinco would likely succeed in its claim of threatened misappropriation, the circuit court issued its preliminary injunction based on the theory of inevitable disclosure.  

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161. Id. at 315, 849 A.2d at 467.  
162. Id.  
163. Id.  
164. Id. The Court observed that section 11-1202(a) of MUTSA does not provide a remedy for previous misappropriations because an injunction could not undo the past misappropriation of a trade secret.  
165. Id.  
166. Id. at 315 n.8, 849 A.2d at 467 n.8.  
167. Id.  
168. Id. at 316, 849 A.2d at 468. In issuing a preliminary injunction based on the doctrine of inevitable disclosure, the trial judge stated:  

I know I don’t have to make a final ruling on whether the inevitable disclosure doctrine applies or not, but it is the court’s position that with the knowledge that [LeJeune] has, it would be inconceivable to the court how he could do his job as the national accounts representative for the amusement industry without consid-
As such, the Court of Appeals next considered whether Coinco could receive an injunction against Lejeune based on inevitable disclosure.\textsuperscript{169} Because this was an issue of first impression,\textsuperscript{170} the court examined whether Maryland should recognize or reject the doctrine of inevitable disclosure as a means for a plaintiff to seek an injunction under MUTSA.\textsuperscript{171}

In making its decision, the court reviewed the history and policy implications of the doctrine of inevitable disclosure.\textsuperscript{172} In doing so, the court relied mainly on California's rejection of the doctrine in Whyte, where the Court of Appeals of California concluded that the doctrine permitted an employer to enjoin a former employee from working for a competitor without proof of the employee's actual or threatened disclosure of trade secrets.\textsuperscript{173} Furthermore, the Court of Appeals observed that adopting the doctrine would allow an employer to seek not only an injunction against a former employee's use of trade secrets, but also an injunction restricting employee mobility.\textsuperscript{174} By restricting employee mobility, the court opined, the doctrine of inevitable disclosure violated Maryland's strong policy in favor of employee mobility, and would consequently allow employers the benefit of confidentiality agreements and covenants not to compete that were not bargained for with their employees.\textsuperscript{175} Accordingly, the court rejected the doctrine of inevitable disclosure, as it concluded that the doctrine inappropriately subordinated the public policy of employee mobility to trade secret protection.\textsuperscript{176} As such, the Court of Appeals vacated the preliminary injunction issued against LeJeune, and remanded the case.\textsuperscript{177}

4. Analysis.—In Lejeune v. Coin Acceptors, Inc., the Court of Appeals refused to adopt the doctrine of inevitable disclosure, reasoning that it allows a court to infer the inevitable disclosure of trade secrets

\textsuperscript{169} Id. at 316-18, 849 A.2d at 468-69.
\textsuperscript{170} Id. at 311, 849 A.2d at 465.
\textsuperscript{171} Id. at 315-22, 849 A.2d at 467-71.
\textsuperscript{172} Id. at 316-22, 849 A.2d at 468-71.
\textsuperscript{173} Id. at 320-22, 849 A.2d at 470-71 (citing Whyte v. Schlage Lock Co., 125 Cal. Rptr. 2d 277, 292 (Ct. App. 2002)).
\textsuperscript{174} Id. at 321, 849 A.2d at 471 (citing Whyte, 125 Cal. Rptr. 2d at 292).
\textsuperscript{175} Id. at 322, 849 A.2d at 471.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 323, 849 A.2d at 472.
merely from an individual's exposure to them and consequently does not correctly balance the social policies of employee mobility and trade secret protection. The decision, however, is inconsistent with the policy underlying the inevitable disclosure doctrine. The test for inevitable disclosure set forth in *PepsiCo*, and applied by courts following the doctrine, requires more than a mere showing that an individual received access to trade secrets before a court can enjoin an employee from working for a new employer. If applied correctly, the doctrine of inevitable disclosure carefully balances the competing social policies of employee mobility, trade secret protection, and commercial morality by only restricting the employment of individuals who show a propensity to disclose trade secrets through an injunction that meets reasonable standards of time, scope, and geography. In rejecting the doctrine of inevitable disclosure the court reasoned that the doctrine offends Maryland's social policy favoring employee mobility, and in so doing the court allowed for the potential of increased commercial immorality. For this reason, the court should have adopted the doctrine of inevitable disclosure and thus upheld the injunction preventing Lejeune from working for Mars.

a. The Court of Appeals Misconstrued the Doctrine of Inevitable Disclosure.—The Court of Appeals refused to adopt the doctrine of inevitable disclosure based in part on the mistaken belief that under the doctrine, an employer can enjoin a former employee from working for a competitor based solely on the employee's exposure to trade secrets. Specifically, the court concluded that an inevitable disclosure claim is based on the assertion that a former employee will, "even if acting in the utmost good faith—inevitably be required to use or disclose the former employer's trade secrets in order to perform the new job." In that regard, the court misconstrued precedent, which requires an employer to illustrate more than an employee's exposure to trade secrets in order to enjoin the employee from working for a competitor in a similar field.

178. *Id.* at 321-22, 849 A.2d at 471.
179. *See infra* notes 184-196 and accompanying text.
181. *See infra* notes 184-196 and accompanying text.
182. *See infra* notes 197-224 and accompanying text.
183. *See infra* notes 225-236 and accompanying text.
184. *Lejeune*, 381 Md. at 322, 849 A.2d at 471.
185. *Id.* at 317, 849 A.2d at 468.
186. *See PepsiCo*, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995) (observing that for a plaintiff to establish that a former employee will inevitably disclose its trade secrets, a
Contrary to the Court of Appeals’s understanding, courts applying the doctrine of inevitable disclosure have consistently held that evidence that an employee with access to his former employer’s trade secrets left the company to work for a competitor in a similar position is not enough to create an inference of the inevitable disclosure of a trade secret. Based on the standard set forth in *PepsiCo*, to obtain an injunction against a former employee under the doctrine of inevitable disclosure, an employer must show that: (1) the employee has knowledge of a trade secret; (2) the employee will inevitably disclose those trade secrets; and (3) the disclosure of the trade secrets will cause irreparable harm to his former employer. In that regard, the doctrine based on the *PepsiCo* standard does not, as the Court of Appeals concluded in *Lejeune*, allow the finding of inevitable disclosure based on an individual’s mere exposure to a trade secret.

Additionally, the Court of Appeals failed to consider that in establishing the second factor under the doctrine of inevitable disclosure, the employer must demonstrate the intent of the employee to disclose the secrets through the employee’s behavior or actions surrounding his departure from the employer’s business. Accordingly, based on the *PepsiCo* standard, the inevitability of disclosure is typically only found by courts in a limited set of circumstances, contradicting the Court of Appeals’s conclusion that the doctrine applies where the inevitability of disclosure can be inferred simply from an employee’s exposure to his employer’s trade secrets. Specifically, as established in *PepsiCo*, and subsequently interpreted by the *Merck* and *DoubleClick* courts, the inevitability of disclosure is generally inferred only where a high-level employee with access to trade secrets, whose disclosure would cause irreparable harm to the former employer, acts with such disregard for honesty and good faith dealing that there is a substantial

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187. *PepsiCo*, 54 F.3d at 1269.
188. See *supra* note 120 and accompanying text.
189. *Lejeune*, 381 Md. at 322, 849 A.2d at 471.
190. See, e.g., *PepsiCo*, 54 F.3d at 1269 (noting that to apply the doctrine of inevitable disclosure, courts typically require a plaintiff to show evidence that the former employee’s behavior creates an inference that he will not be able to act with the good faith necessary not to disclose the former employer’s trade secrets while working for a competitor).
191. See *id.* at 1268-71 (noting that cases involving the application of the doctrine of inevitable disclosure arise less often than traditional trade secret cases and discussing the limitations placed on the application of inevitable disclosure).
likelihood that the trade secrets will be disclosed in the future.\footnote{192} Furthermore, the requirement that an employer show an employee's bad faith limits the application of the doctrine to instances in which an employee affirmatively commits an action which is outside of the normal course of honest and good faith commercial dealing.\footnote{193} Nonetheless, in rejecting the doctrine of inevitable disclosure, the Court of Appeals reasoned that evidence of access to trade secrets is enough to create an inference of the inevitable disclosure of a trade secret.

For example, applying the \textit{PepsiCo} standard to the facts of \textit{LeJeune}, Coinco would be able to demonstrate an inference of inevitable disclosure if it could show not only that LeJeune had access to Coinco's trade secrets,\footnote{194} but also that LeJeune exhibited a dishonest and deceitful behavior towards Coinco,\footnote{195} and the disclosure of Coinco's trade secrets to Mars would potentially cripple Coinco's business.\footnote{196}

\textbf{b. The Doctrine of Inevitable Disclosure Does Not Offend Maryland's Social Policy Favoring Employee Mobility.}—In its decision rejecting the doctrine of inevitable disclosure, the Court of Appeals based its holding principally on the negative effects that the doctrine would have on employee mobility.\footnote{197} Based on its misinterpretation of the doctrine—finding that it permitted an employer to enjoin a former employee without proving that the employee actually disclosed or threatened to disclose his former employer's trade secrets—the

\footnotetext[192]{See \textit{id.} at 1264-71; see also \textit{Merck \& Co., Inc. v. Lyon}, 941 F. Supp. 1443, 1457-1462 (M.D.N.C. 1996) (relying on \textit{PepsiCo} to enjoin a high-level employee from working for a competitor based on the conclusion that the employee has access to his former employer's trade secrets and the employee's bad faith actions created an inference that he would disclose his former employer's trade secrets).}

\footnotetext[193]{See, e.g., \textit{PepsiCo}, 54 F.3d at 1270-71 (considering the affirmative bad faith actions as a determinant factor in upholding an injunction issued under the doctrine of inevitable disclosure).}

\footnotetext[194]{See \textit{Md. Metals Inc. v. Metzner}, 282 Md. 31, 38, 382 A.2d 564, 568 (1978) (finding that high-level employees are under an implied duty of loyalty and may not misuse their employer's trade secrets).}

\footnotetext[195]{\textit{LeJeune}, 381 Md. at 295-97, 849 A.2d at 455-57. After LeJeune accepted employment with Mars, he insinuated to co-workers at Coinco that he would use his knowledge of Coinco's trade secrets at Mars. \textit{Id.} at 296, 849 A.2d at 456. Also, prior to leaving Coinco, Coinco established that LeJeune physically misappropriated Coinco's trade secrets by stealing hard copies of company files and intentionally downloading Coinco files from his company computer. \textit{Id.} at 296-97, 849 A.2d at 456-57. Moreover, LeJeune lied to Coinco about his possession of company documents. \textit{Id.} at 297, 849 A.2d at 456-57.}

\footnotetext[196]{If LeJeune were to disclose Coinco's trade secrets, which included marketing strategies, pricing information, and technical specifications which were critical to Coinco's business operations, it would give Mars, Coinco's chief competitor, a competitive and unfair advantage over Coinco. \textit{Id.} at 298-99, 849 A.2d at 457-58.}

\footnotetext[197]{\textit{Id.} at 321-22, 849 A.2d at 471.
Lejeune court mistakenly concluded that the doctrine acted not only as an injunction against the use of trade secrets, but also an injunction against employment with competitors, and thus forced employees to accept a non-negotiated covenant not to compete. Accordingly, the court failed to recognize that when applied correctly, the doctrine of inevitable disclosure is a useful equitable tool through which courts can protect trade secrets and commercial morality, while at the same time allowing employees a reasonable degree of mobility.

Contrary to the Court of Appeals’s finding that the doctrine of inevitable disclosure acts as an injunction against employment with competitors, adhering to the PepsiCo standard, the doctrine of inevitable disclosure does not restrict employment based on a determination that the disclosure of a trade secret is inevitable simply because an employee has left to work for a competitor in a similar position. There are several limitations to the application of the doctrine. Based upon PepsiCo and its interpretations by the Merck and DoubleClick courts, the doctrine of inevitable disclosure will only apply to restrict the employment mobility of individuals in limited circumstances where a former high-level employee had access to a trade secret and through his lack of candor and bad faith displayed a willingness to use or disclose that trade secret. If the doctrine of inevitable disclosure is applied with judicial restraint, the doctrine will not restrict the mobility of most employees, as typically only high-level employees gain access to their employer’s important trade secrets.

The doctrine only restricts the employment of employees whose dishonest or bad faith behavior creates an inference that they will disclose their former employer’s trade secrets. For example, in PepsiCo, the circumstances surrounding the employee’s departure from PepsiCo and the employee’s lack of candor were determinative in the court’s decision to issue an injunction based on inevitable disclosure. In Merck, the court enjoined an employee based on the em-

198. Id.
199. PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1269 (7th Cir. 1995).
200. See supra notes 121-130 and accompanying text (discussing the doctrine of inevitable disclosure’s behavioral inference requirement).
201. See Edmund W. Kitch, The Expansion of Trade Secrecy Protection and the Mobility of Management Employees: A New Problem for the Law, 47 S.C.L. Rev. 659, 665-66 (1996) (observing that typically only high-level research, production, sales, and managerial employees gain access to their employer’s trade secrets and are thus subject to employment restraints under trade secret law).
203. PepsiCo, 54 F.3d at 1271.
ployee’s lack of forthrightness and underhanded dealing with regard to the employee’s decision to leave Merck to work for a competing company.\textsuperscript{204} Moreover, in DoubleClick, the court issued an injunction based on the defendants’ repeated breach of their fiduciary duty, and evidence that they had copied large portions of their former employer’s trade secret information to assist in the formation of a competing advertising company.\textsuperscript{205}

Finally, the Lejeune court overlooked that in applying the PepsiCo standard, an injunction can only be issued under the doctrine of inevitable disclosure if an employee’s disclosure of a former employer’s trade secret will cause irreparable harm to the former employer.\textsuperscript{206} For example, courts have found that the following disclosures would cause an employer irreparable harm: the disclosure of secret marketing plans in PepsiCo,\textsuperscript{207} the disclosure of cutting-edge fuel injection distributor pump technology in Allis-Chalmers,\textsuperscript{208} the disclosure of advanced space suit technology in B.F. Goodrich,\textsuperscript{209} and the disclosure of a complex chlorine pigment production process in E.I. duPont de Nemours.\textsuperscript{210} Thus, the court failed to recognize that the doctrine does not apply to protect every trade secret, but rather only those trade secrets that are crucial to the operation and financial success of a business and whose disclosure would cause a business irreparable harm.

The Court of Appeals reasoned that the doctrine of inevitable disclosure violates Maryland’s public policy favoring employee mobility. In actuality, the doctrine only restricts employment mobility in the limited instances in which an employee has breached the fiduciary duty owed to his or her former employer and thus, consistent with the Court of Appeals’s holdings in the Metzner line of cases, may be enjoined from working for a competitor employer.\textsuperscript{211} The Lejeune court failed to recognize that by limiting the application of the doctrine of inevitable disclosure to only those cases where an employee has knowledge or possession of a trade secret, has shown a willingness to improperly use that trade secret, and the disclosure of the trade secret

\textsuperscript{204} Merck, 941 F. Supp. at 1462 n.7.
\textsuperscript{205} DoubleClick, 1997 WL 731413, at *3-8.
\textsuperscript{206} See PepsiCo, 54 F.3d at 1269 (noting the importance of showing the inevitability of disclosure and a resulting irreparable injury).
\textsuperscript{207} Id. at 1269-71.
\textsuperscript{211} See supra notes 61-74 and accompanying text.
would cause the former employer irreparable injury, the doctrine will
doctrine will not apply in most trade secret cases, and thus would have only a
marginal effect on employee mobility.\textsuperscript{212}

By misinterpreting the scope of the doctrine of inevitable disclosure, the \textit{Lejeune} court failed to recognize that the doctrine actually
promotes employee mobility by allowing employees who leave their
employer on good terms and exhibit a good faith effort to maintain
the confidentiality of trade secret information to work for competitors.\textsuperscript{213} Thus, an employee acting in good faith cannot be enjoined
under the doctrine of inevitable disclosure simply for his decision to
exercise his long-recognized freedom to utilize the general skills and
knowledge he gained during the course of his employment in a new
job opportunity.\textsuperscript{214}

For example, if the doctrine of inevitable disclosure were applied
in \textit{Lejeune}, and LeJeune had acted in good faith towards Coinco, in
accord with the Court of Appeals’s holdings in \textit{Metzner} and \textit{Ritterpusch}
establishing the right of a former employee to compete in good faith
with his former employer, the doctrine could not have been used to
restrict his future employment at Mars.\textsuperscript{215} Accordingly, the doctrine
of inevitable disclosure is consistent with the Court of Appeals’s deci-
sions in the \textit{Metzner} line of cases, which established that an employee
has a right to compete with his former employer using his general
training and experience, but not using a former employer’s trade se-
cret information or otherwise violating his fiduciary duty.\textsuperscript{216}

Furthermore, while the Court of Appeals concluded that the doc-
trine of inevitable disclosure acts as an injunction against employment
with a competitor,\textsuperscript{217} the doctrine can in fact serve to fairly balance
the interests of a departing employee and his former employer when
employed with judicial restraint. For instance, if the court deter-

\textsuperscript{212} See supra notes 120-132 and accompanying text (describing the factors limiting the
application of the doctrine of inevitable disclosure to a small percentage of trade secret
cases).

\textsuperscript{213} See, e.g., \textit{PepsiCo}, 54 F.3d at 1270-71 (stating that an employee’s bad faith towards his
former employer is a determinative factor in the doctrine of inevitable disclosure analysis).

\textsuperscript{214} See id. at 1268-69 (reviewing case law where no injunctions were granted against
skilled employees seeking simply to take their skills elsewhere).

\textsuperscript{215} Md. Metals, Inc. v. Metzner, 282 Md. 31, 37-38, 382 A.2d 564, 567-68 (1978); Ritter-
pusch v. Lithographic Plate Serv., Inc., 208 Md. 592, 602, 119 A.2d 392, 396-97 (1956);
see also supra notes 190-193 and accompanying text (observing that to enjoin an employee
under the doctrine of inevitable disclosure an employer must show evidence of the em-
ployee’s behavior that creates an inference that he will disclose his former employer’s trade
secrets).

\textsuperscript{216} See supra notes 52-74 and accompanying text.

\textsuperscript{217} \textit{Lejeune}, 381 Md. at 321, 849 A.2d at 471.
mined that an employee would inevitably disclose the trade secrets of his former employer while working for a competitor, the court issuing the injunction need not permanently and completely prohibit the employee from accepting his new position. Rather, the length and scope of the injunction must conform to Maryland's requirements for a valid noncompetition agreement established in *Becker* and *Tawney*, and thus be reasonable in time, geography, scope, and not place an undue burden on the employee. An injunction issued for a reasonable period of time, such as the six-month injunctions in *PepsiCo* and *DoubleClick*, would give the employer time to prepare for the possibility that a former employee may disclose confidential information and change its business strategies appropriately.

As such, the *LeJeune* court failed to recognize that an injunction limiting LeJeune from working for Mars for a few months would have satisfied the requirements for the enforceability of a restraint of employment set forth in *Becker* and *Tawney*, and allowed Coinco time to alter its marketing strategies and tiered pricing scheme to mitigate possible damage caused by LeJeune's potential disclosure of its trade secrets. In that regard, a brief injunction would fairly balance the competing social policies of employee mobility and trade secret protection by giving the employer time to compensate for the misappropriation and likely disclosure of its trade secrets, while concurrently allowing a former employee to work for a competitor following a brief period of restraint.

Moreover, if the scope of an injunction is limited as in *Merck* and *Allis-Chalmers*, an employee may begin working for the competitor, but may be ordered by the court not to participate in the field with which he has knowledge of his former employer's trade secrets. In fact, in *LeJeune*, the circuit court's injunction against LeJeune, like the injunction in *Allis-Chalmers*, did not prohibit the employee from working for a competitor but only restricted him from participating in the very field in which he had knowledge of his former employer's trade secrets.

218. *E.g.*, Allis-Chalmers Mfg. Co. v. Cont'l Aviation & Eng'g Corp., 255 F. Supp. 645, 654-55 (E.D. Mich. 1966) (limiting an injunction to prevent an employee from producing or designing only one specific type of pump and noting that the duration of the injunction is limited to the time until a final hearing occurs or the confidential information comes to the employer by legitimate means).


221. *See* LeJeune, 381 Md. at 309-10, 849 A.2d at 464 (noting the irreparable harm Coinco might suffer if its trade secrets were immediately revealed by LeJeune).

222. *See supra* notes 131-132 and accompanying text; *see also* Kitch, *supra* note 201, at 665 (observing that managerial employees can often work for a company using their general skills and do not necessarily need to work in the exact same field in which they have knowledge of their former employer's trade secrets).
tions against the employees in *Merck* and *Allis-Chalmers*, did not cause him to miss a single day of work at Mars because he was allowed to work for Mars in industries where his knowledge of Coinco's trade secrets was not useful. These limitations placed on LeJeune's employment mobility are in accord with the Court of Appeals's holdings in the *Metzner* line of cases, which established that while employees have a right to compete against a former employer, that right is tempered by the implied duty to act in good faith and not disclose a former employer's trade secrets. As such, the doctrine of inevitable disclosure fairly balances the social policies of trade secret protection and commercial morality with Maryland's policy favoring employee mobility.

c. **Properly Applied, the Doctrine of Inevitable Disclosure Promotes Increased Commercial Morality.**—The *LeJeune* court failed to recognize that without the doctrine of inevitable disclosure, it is more difficult for employers to enjoin a former employee from disclosing trade secrets while working for a competitor. Thus, the commercial morality aspect of the court's analysis is not given due consideration. Under MUTSA, the employer must wait for the former employee to threaten to disclose or actually disclose trade secrets before a court will issue an injunction. In many cases, if a court waited for an employee to threaten to or actually disclose his former employer's trade secrets before enjoining the employee's conduct, the employee may have already caused substantial and irreparable harm to his former employer.

For instance, if LeJeune were allowed to disclose Coinco's tiered pricing system to Mars, Mars could immediately use that information to undercut Coinco's prices and steal Coinco's clients. At that point, relying on the Court of Appeals's interpretation of MUTSA in *LeJeune*, although Coinco would have a claim for damages, irreparable harm to its business may have already occurred. The *LeJeune* court failed to recognize that the doctrine of inevitable disclosure provides

224. *See supra* notes 52-74 and accompanying text.
225. *See supra* notes 161-163 and accompanying text (discussing what an employer must establish to receive an injunction for trade secret misappropriation under MUTSA); *see also* Peter B. Swann, Note, *Maryland Uniform Trade Secrets Act*, 49 Md. L. Rev. 1056 (1990) (providing a detailed explanation and analysis of MUTSA).
226. *See, e.g.*, *LeJeune*, 381 Md. at 309-10, 849 A.2d at 464 (discussing the potential devastating effects on a business that may result from a competitor discovering its trade secrets and confidential information).
227. *Id*.
228. *Id*.
employers and courts with a more effective and timely means of preventing dishonest employees from inappropriately disclosing trade secret information than the remedies available under MUTSA.

Additionally, the Court of Appeals overlooked the fact that the doctrine provides employers with a remedy to uphold Maryland’s judicially recognized principle that an employee is under an implied duty not to abuse the trust and confidence of his employer. In that regard, the doctrine of inevitable disclosure is in accord with the Court of Special Appeals’s holding in *Tabs Associates*, that even in the absence of an express agreement, an employee is under a duty not to use or disclose his former employer’s trade secrets. Further, the doctrine is consistent with the Court of Appeals’s decision in *Metzner*, which established that employees may not violate their fiduciary duty to gain an unfair commercial advantage as a competitor. While the *Lejeune* court largely ignored the issue of commercial morality, the doctrine of inevitable disclosure promotes increased commercial morality by upholding an employee’s fiduciary duty to act in the best interests of his employer. Accordingly, by failing to properly address the doctrine of inevitable disclosure’s beneficial impact on commercial morality, the *Lejeune* court overlooked the possibility that its decision would encourage individuals in Lejeune’s position to abuse their employer’s trust in order to gain a competitive advantage in the marketplace by making it more difficult to enjoin their behavior.

As recognized by the Court of Appeals in *Space Aero Products* and later by the Court of Special Appeals in *Tabs Associates*, an employer’s failure to have an employee sign a confidentiality agreement does not relieve the employee of his fiduciary obligations of good faith and honesty towards his employer. Accordingly, the *Lejeune* court missed an opportunity to illustrate to employers that good faith dealing and fair competition are judicially protected principles, and that hiring an employee from a competing firm to gain access to the former firm’s confidential information and trade secrets violates the principle of commercial morality and an employee’s fiduciary duty to

231. See *E.I. duPont de Nemours & Co. v. Am. Potash & Chem. Corp.*, 200 A.2d 428, 436 (Del. Ch. 1964) (asserting that a court will grant an injunction where there is a threat of a breach of confidence).
232. *See Tabs Assocs.*, 59 Md. App. at 341, 475 A.2d at 1209; *Space Aero Prods. Co., Inc. v. R.E. Darling Co., Inc.*, 238 Md. 93, 115-17, 208 A.2d 74, 85-87 (1965). It is certainly good practice, however, for employers to use express nondisclosure and noncompetition agreements with their employees to protect confidential information.
his employer.\footnote{233} By ignoring the positive impact that the doctrine of inevitable disclosure would have on commercial morality, the Court of Appeals overlooked the fact that the doctrine promotes increased commercial morality by rewarding employees who act in good faith towards their employers.\footnote{234} If an employee leaves a company to work for a competitor and acts in a fair and honest manner with regard to knowledge of his former employer's trade secrets, it is highly unlikely that a court would enjoin him from subsequent employment.\footnote{235} In that regard, by overlooking the bad faith element required by the doctrine, the Court of Appeals failed to recognize that the doctrine is consistent with the Court of Appeals' holdings in \textit{Metzner} and \textit{Ritterpusch} which recognized the right of an employee to compete with his former employer using his or her general skills and knowledge and good faith business practices.\footnote{236} On the other hand, when an employee steals company documents in an attempt to parlay that information into a better job, consistent with the principles established in the \textit{Metzner} line of cases, a court applying the doctrine likely would promote commercial morality by punishing that employee for violating his fiduciary duty by acting in bad faith towards his previous employer.

5. \textit{Conclusion}.—In \textit{LeJeune v. Coin Acceptors, Inc.}, the Court of Appeals held that the doctrine of inevitable disclosure cannot serve as the basis for an injunction under MUTSA because it allowed a court to enjoin an employee based only on the employee's exposure to a trade secret and would hinder Maryland's policy favoring employee mobility.\footnote{237} The court misconstrued the doctrine of inevitable disclosure and, by rejecting the doctrine, failed to properly balance the social policies of trade secret protection, commercial morality, and employee mobility. The court's conclusion that the doctrine restricts employee mobility and allows an injunction against an employee for mere exposure to trade secrets runs counter to precedent, which emphasizes great deference to employee mobility and limits the instances

\footnote{233} See supra notes 140-141 and accompanying text.\footnote{234} See supra notes 121-123 and accompanying text (describing that most courts require a showing of bad faith to enjoin an employee from working for a competitor).\footnote{235} See, e.g., \textit{PepsiCo, Inc. v. Redmond}, 54 F.3d 1262, 1270-71 (7th Cir. 1995) (concluding that to be awarded an injunction under the doctrine of inevitable disclosure, an employer must show more evidence that trade secret misappropriation is likely than the fact that a former employer has left and will use his general skills and knowledge at his new place of employment).\footnote{236} \textit{Md. Metals, Inc. v. Metzner}, 282 Md. 31, 37-38, 382 A.2d 564, 567-68 (1978); \textit{Ritterpusch v. Lithographic Plate Serv., Inc.}, 208 Md. 592, 602, 119 A.2d 392, 396-97 (1956).\footnote{237} See supra notes 173-175 and accompanying text.
in which the doctrine can be employed to enjoin an employee from working for a competitor. Consequently, by rejecting the doctrine of inevitable disclosure, the court missed an opportunity to strengthen trade secret protection and commercial morality in Maryland when it condoned the underhanded behavior of an employee who violated his fiduciary duty to his employer for his own personal economic benefit. The court’s decision actually encourages continued commercial immorality in Maryland by leaving the door open for competitors to compete through the misappropriation of trade secrets, rather than innovation and technological development.

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238. See supra notes 197-224 and accompanying text.
239. See supra notes 225-236 and accompanying text.
VI. PROPERTY

A. Maryland Simplifies Its Analysis of Implied Easements

In *Kobrine, L.L.C. v. Metzger*, the Court of Appeals considered whether lot owners in a waterfront subdivision had an implied recreational use easement in a parcel located within the subdivision on the Patuxent River. In a 4-3 decision, the court held that markings on the original plat of the subdivision created an implied easement because they clearly indicated the common grantor's intent to confer an easement over the parcel. By not requiring additional, subjective evidence to establish that an easement had been implicitly created, the court appropriately extended prior case law and demonstrated that, although a variety of subjective factors may be considered in an implied easement analysis, clear, objective evidence alone is sufficient for a court to find an easement. The court's holding in *Kobrine* was an efficient extension of the objective analysis of implied easements for abutting roadways, and a departure from prior case law where the court had taken all surrounding circumstances into account when determining whether an easement existed. The approach established in *Kobrine* will likely allow increased efficiency in Maryland courts' future analysis of implied easements.

1. The Case.—Bruce R. Metzger is the owner of a nonriparian residential lot located in Section Two of the Harbor Light Beach (HLB) subdivision, and Dr. and Ms. Kobrine are the owners of a waterfront lot in the same section of the HLB subdivision. This contro-

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2. Id. at 622, 846 A.2d at 404.
3. Id. at 641, 846 A.2d at 415. A plat is defined as, "[a] map describing a piece of land and its features, such as boundaries, lots, roads, and easements." *Black's Law Dictionary* 1188-89 (8th ed. 2004).
4. See *infra* notes 148-152 and accompanying text (describing how the *Kobrine* court restricted its analysis of the grantor's intent to clear evidence and found that evidence alone sufficient to establish an implied easement).
5. See *infra* notes 154-176 and accompanying text (analyzing the *Kobrine* decision in light of prior case law).
6. See *infra* notes 177-182 and accompanying text (discussing how a more objective analysis will save time).
7. By definition, a riparian property is located on the bank of a body of water. *Black's Law Dictionary*, *supra* note 3, at 1352. Owners of riparian properties, properties bordering a body of water, generally have the right to "make reasonable use of the water." *Id."
8. *Kobrine*, 380 Md. at 623, 846 A.2d at 404. The subdivision was divided into two sections, but the lot owners of Section One were not parties in this lawsuit. *See id.* at 623,
versy arose when Dr. and Ms. Kobrine purchased a waterfront parcel (the KLLC lot) through a limited liability company they created, Kobrine, L.L.C. (KLLC), and precluded the other lot owners from using the lot for recreational purposes.9

The HLB subdivision was originally developed by landowners J. Earl Brown and his wife, Ruth.10 In 1955, the Browns recorded a plat depicting Section One of the HLB subdivision.11 Section One consisted of twenty-two residential lots, seventeen of which bordered Mill Creek, a tributary of the Patuxent River.12 In 1958, the Browns recorded a second plat, Harbor Light Beach Subdivision Section Two.13 Section Two included thirty-nine numbered residential lots and two unnumbered parcels bordering the Patuxent River.14 The KLLC lot was one of the two unnumbered parcels in Section Two.15 The legend on the Section Two plat labeled the KLLC lot as an “Area Reserved For The Use Of Lot Owners.”16

After the Browns recorded the two plats in Calvert County, they sold several lots from Section One and one lot from Section Two to individual purchasers.17 In 1960, the Browns conveyed all but one of the remaining lots from Section One and all of the remaining lots from Section Two in the HLB subdivision to Beltway Industries, Inc. (Beltway).18 Twelve years after this conveyance, Beltway recorded a Declaration of Covenants, Restrictions and Conditions (Declaration) that was designed to protect the interests and investments of the lot owners in the HLB subdivision.19 Paragraph Five of the General Provisions section of the Declaration stated:

LOT OWNERS, their heirs and assigns of the said remaining
56 lots, will pay a 1/56th share per lot of said maintenance

846 A.2d at 405 (noting that Metzger was the only lot owner in the subdivision seeking a property interest in the Kobrines' lot). In its holding, the Court of Appeals concluded that the lot owners in Section One of the subdivision were not intended to be beneficiaries of an easement on the reserved area. Id. at 641, 846 A.2d at 415.

9. Id. at 623, 846 A.2d at 404.
10. Id., 846 A.2d at 405.
11. Id.
12. Id.
13. Id. at 624, 846 A.2d at 405.
14. Id.
15. Id.
16. Id. The legend on the plat omitted any specification regarding which lot owners would have access to the KLLC lot. Id.
17. Id.
18. Id. Overall, the deed to Beltway conveyed fifty-four numbered lots, four identified parcels, the roads and paths in the subdivision, and the KLLC lot. Id. at 625, 846 A.2d at 405-06.
19. Id. at 625, 846 A.2d at 406.
cost until such time as all 56 remaining lots are sold, at which
time the said LOT OWNERS, their heirs and assigns, will accept a
1/56th fee simple interest per lot in said roadways and reserved ar-
eas, thereby relieving DEVELOPER of all liabilities relative to
said roadways and beach areas.\textsuperscript{20}

The General Provisions of the Declaration did not refer to the KLLC
lot specifically, nor did the provisions clarify the reference to "re-
served areas."\textsuperscript{21} Furthermore, the final section of the General Provi-
sions stated that the developer had authorization to organize an
association for the community to enforce the covenants in the Decla-
ration, and that the organization would be governed by its members.\textsuperscript{22} However, the wording of that section did not suggest that an individ-
ual lot owner in the subdivision could independently create a home-
owner's association to enforce the Declaration.\textsuperscript{23}

In June 1976, Beltway conveyed six lots from Section One, thirty-
eight lots from Section Two, the two unnumbered parcels in Section
Two, and all roads, parks, and "shore and reserved areas" as design-
nated on the plats to Joseph Waters, Dorothy Owens, and Richard Al-
xander (the Waters group).\textsuperscript{24} Four years later, the Waters group
conveyed six lots in Section Two, along with a part of the unnum-
bered parcel adjacent to the KLLC lot, to Mr. and Ms. Mychalus.\textsuperscript{25} In
1984, the Waters group conveyed two of the roads in Section Two to
the County Commissioners of Calvert County.\textsuperscript{26}

Dr. and Ms. Kobrine purchased their first riparian lot in Section
Two of the HLB subdivision in 1991, and seven years later Bruce Metz-
berger was conveyed title to a nonriparian lot in the same subdivi-
sion.\textsuperscript{27} Neither deed mentioned anything about the reserved KLLC lot, but
both deeds did reference the original plat of Section Two in the prop-

\textsuperscript{20} Id. at 626, 846 A.2d at 406 (emphasis added). The Declaration's reference to "56
lots" was not entirely accurate; the drafters had likely combined the two unnumbered parcels
with the fifty-four numbered lots in reaching that number. Id. at 625, 846 A.2d at 406.
\textsuperscript{21} Id. at 646, 846 A.2d at 419 (Harrell, J., concurring in part and dissenting in part).
\textsuperscript{22} Id. at 626-27, 846 A.2d at 407.
\textsuperscript{23} Id. The final part of the Declaration provided:
DEVELOPER, or its agent, as agent for said LOT OWNERS, is authorized to cause a
community protective corporation or association to be organized for the purpose
of assuring the perpetuation of Harbor Light Beach as a desirable community
and the safeguarding the investment of all LOT OWNERS. The management of
said organization shall be governed by its members.

\textsuperscript{24} Id. at 627-28, 846 A.2d at 407.
\textsuperscript{25} Id. at 628, 846 A.2d at 407.
\textsuperscript{26} Id., 846 A.2d at 408.
\textsuperscript{27} Id. at 628-29, 846 A.2d at 408.
In September 1999, KLLC purchased the reserved KLLC lot from the Waters group. The deed described the lot as "[a]ll that land which is shown and designated as 'AREA RESERVED FOR THE USE OF LOT OWNERS' on a plat entitled 'Harbor Light Beach Subdivision, Section Two.'" The parties to the conveyance also expressly agreed to restrictions on the lot, which prohibited KLLC from erecting a residential dwelling on the property. Soon after the acquisition, the Kobrines installed a stone revetment to protect the lot from erosion, and posted a no trespassing sign on the property in response to loud parties and picnics held by other lot owners on the lot.

In November 1999, Metzger and the owners of six other lots filed suit against KLLC in the Circuit Court for Calvert County, claiming that all of the lot owners in the subdivision held title to the KLLC lot pursuant to the 1972 Declaration. Metzger and the six other lot owners also argued that the markings on the Section Two plat granted them an easement in the lot for lawful recreational purposes. By July 2000, when Metzger filed his Second Amended Complaint against KLLC, the other individual lot owners had dropped out of the lawsuit, and Metzger brought suit on behalf of himself and a homeowner's association that he created, HLB Home Owner's Association, Inc. (HOA). The complaint alleged that (1) the lot owners have a recreational use easement in the KLLC lot according to the recorded plat or, in the alternative, they have an easement by prescription, and (2) that KLLC must convey title of the KLLC lot either to HOA or in 1/56th interests to each of the lot owners.

At trial in the Calvert County Circuit Court, Metzger testified that he did not rely on the subdivision plat marking the KLLC lot as "Area Reserved For The Use Of Lot Owners," or the 1972 Declaration, when

28. Id. at 629, 846 A.2d at 408.
29. Id.
30. Id.
31. Id.
32. Id.
33. Id.
34. See id. (stating that the complaint sought "an injunction to restrain the defendant from interfering with their use of the KLLC lot").
35. Id. at 629, 846 A.2d at 405. Regarding the homeowner's association, the Court of Appeals noted that "HOA owns no property in the subdivision and has no contractual or other legally cognizable interest in any of the roads in the subdivision or in the KLLC lot." Id. Later in the opinion the court expressed serious doubt as to whether HOA had standing to assert any easement in the KLLC lot, but did not resolve the issue because Metzger, a lot owner, did have standing. Id. at 634, 846 A.2d at 411.
36. Id. at 630, 846 A.2d at 409.
he purchased his lot in the subdivision. Nevertheless, the circuit court held that the lot owners in the HLB subdivision had an express easement in the KLLC lot to access the river by relying on the markings in the legend of the Section Two plat, the deed from the Browns to Beltway referencing the plat, and the language in the Declaration. Judge Chappelle further authorized Metzger and HOA to remove the stone revetment the Kobrines had installed at Dr. Kobrine’s expense, and concluded that KLLC’s title to the KLLC lot was void. KLLC filed an appeal in the Court of Special Appeals challenging the decision.

In May 2003, the Court of Special Appeals affirmed the decision of the circuit court on every point except for the payment of costs associated with the removal of the revetment. The Court of Special Appeals found that Paragraph Five of the Declaration was intended to convey the KLLC lot to all of the lot owners when the fifty-six lots of the subdivision were sold. In addition, the court noted that the Declaration’s provisions were not unusual, because developers frequently set aside common areas for the members of the entire community to use and enjoy.

Addressing the easement issue, the Court of Special Appeals held that the circuit court was correct in finding an implied easement based on the general plan of the development. The court examined the intent of the grantor, and considered the recorded subdivision plat, the Declaration, and the historical use of the property before concluding that the Browns and Beltway intended to create an easement for the lot owners in the KLLC lot.

37. Id. at 648, 846 A.2d at 420 (Harrell, J., concurring in part and dissenting in part).
38. Id. at 630-31, 846 A.2d at 409.
39. Id. at 631, 846 A.2d at 409. The court then transferred title to the HLB lot owners who had purchased their lots since the Declaration was filed. Id.
40. Id.
41. Id. at 632, 846 A.2d at 410.
42. Id. With respect to the ownership issue, the Court of Special Appeals rejected KLLC’s argument that the conveyance in the Declaration violated the Rule Against Perpetuities and concluded that the developer intended to convey the property within a reasonable time. Id. at 631, 846 A.2d at 409.
43. Kobrine, L.L.C. v. Metzger, 151 Md. App. 260, 283, 824 A.2d 1031, 1044 (2003). The Court of Special Appeals specifically provided that the Declaration was “consistent with the common practice in the development of subdivisions for developers to convey common areas to the community as a whole, especially for use and maintenance.” Id.
44. Kobrine, 380 Md. at 631, 846 A.2d at 409-10. The Court of Special Appeals found it unnecessary to consider whether an express easement existed because it agreed with the circuit court that there was an implied easement. Id.
45. Metzger, 151 Md. App. 291-92, 824 A.2d at 1048-49.
KLLC appealed the decision, and the Court of Appeals granted certiorari in order to resolve whether all of the lot owners in the HLB subdivision had a right of entitlement and a recreational use easement in the KLLC lot.\textsuperscript{46}

2. \textit{Legal Background}.—The Court of Appeals has broadly defined an easement as a nonpossessory interest in another's real property, which arises from an express grant or implication.\textsuperscript{47} The creation of easements can be express or implied. Express easements can only be acquired in the manner prescribed by the recording statutes.\textsuperscript{48} In contrast, implied easements can be created by prescription, the filing of plats, estoppel, or by implied grant or reservation.\textsuperscript{49} Implied easements can also arise out of necessity.\textsuperscript{50} There are a variety of ways in which an implied easement can be created in Maryland.\textsuperscript{51} The Maryland courts' approach to determining whether an implied easement exists has varied depending on the facts of a case, but the predominant test has involved an analysis of the original grantor's intent.\textsuperscript{52} When assessing a grantor's intent, the Court of Appeals has examined many factors, including markings on a plat, the language in the deed(s) of the property in question, reliance on any assurances made to the grantees, the nature of the property conveyed, and whether the easement at issue involves an abutting right of way.\textsuperscript{53} The analysis

\textsuperscript{46} \textit{Kobrine}, 380 Md. at 632, 846 A.2d at 410.
\textsuperscript{48} \textit{Brehm v. Richards}, 152 Md. 126, 131-32, 136 A. 618, 620 (1927); \textit{see also} Baltimore & Hanover R.R. Co. v. Algire, 63 Md. 319, 323 (1885) (stating the general rule that an easement in land "must be acquired in the mode provided for the transfer of real estate"). In Maryland, an instrument granting an express easement must include "the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted." \textit{MD. CODE ANN., REAL PROP.} § 4-101(a)(1) (2003). The recording statutes specifically state that no words of inheritance are necessary to create an express easement, and that every grant or reservation of an easement passes or reserves an easement in perpetuity unless a contrary intention appears. \textit{REAL PROP.} § 4-105.
\textsuperscript{49} \textit{Boucher}, 301 Md. at 688, 484 A.2d at 635 (citations omitted).
\textsuperscript{51} \textit{See infra} notes 49-50 and accompanying text (noting the different types of implied easements, including easements by necessity, by the filing of plats, and by prescription).
\textsuperscript{52} \textit{See infra} notes 55-60 and accompanying text (describing case law establishing that an individual seeking an implied easement must show by clear and satisfactory proof that the original grantor of the property intended to create an easement for subsequent grantees).
\textsuperscript{53} \textit{See infra} notes 61-67 and accompanying text (providing examples of factors considered in ascertaining intent, such as oral conversations or written correspondence demonstrating intentions of the grantor).
courts use to determine whether an implied easement exists has varied depending upon whether the easement is being implied for the use of an abutting road or street, or for recreational purposes in a waterfront lot.\textsuperscript{54}

\textit{a. Law of Restrictions on Land Implied from a Uniform Plan of Development.}—To establish the existence of an implied easement arising out of a uniform plan of development, Maryland courts require a clear manifestation of the grantor's intent at the time of the conveyance.\textsuperscript{55} Maryland courts employ a similar analysis when determining whether a restrictive covenant can be implied from a common scheme of development.\textsuperscript{56} This test was used by the Court of Appeals of Maryland in \textit{McKenrick v. Savings Bank of Baltimore}, where the court assessed whether land restrictions existed on a parcel of property that the bank sold to Mr. McKenrick.\textsuperscript{57} In its analysis, the Court of Appeals stated that a restriction would exist on the land conveyed to a grantee provided it was established that the parties intended to create a restriction in the property.\textsuperscript{58} The \textit{McKenrick} court also noted that the burden is on the person seeking to enforce implicit land restrictions to show by clear and satisfactory proof that the grantor intended the restriction to affect the land in that manner, and that once a restriction is established, it is binding on all subsequent owners of the parcels of land involved.\textsuperscript{59} Ultimately, the court held that the common grantors, who owned the property before the bank, intended to impose restrictions on some of the lots in the development, but that the contract of sale with the bank was enforceable because there was no common scheme of development and thus no restrictions could be implied from the deeds to the other lots.\textsuperscript{60}

The determination of the parties' intention is a question of fact,\textsuperscript{61} and Maryland courts examine all of the surrounding circumstances of

\textsuperscript{54} See \textit{infra} notes 72-119 and accompanying text (describing the Court of Appeals' analysis in a variety of cases involving either right of ways or waterfront lots).

\textsuperscript{55} Williams Realty Co., Inc. v. Robey, 175 Md. 532, 539, 2 A.2d 683, 686 (1938); see also \textit{McKenrick v. Sav. Bank of Baltimore}, 174 Md. 118, 122, 197 A. 580, 582 (1938) (adopting the principle that an easement will be recognized if it appears that the grantor intended to reserve an easement in the property granted).

\textsuperscript{56} Easements and covenants are similar in that they create a "right or obligation that runs with the land or an interest in land." \textit{Restatement (Third) of Property: Servitudes} § 1.1 (1998). As such, the \textit{Restatement (Third) of Property} has created a servitude that encompasses both easements and covenants and thus employs the same rules for both. \textit{Id.}

\textsuperscript{57} 174 Md. 118, 120-21, 197 A. 580, 581 (1938).

\textsuperscript{58} \textit{Id.} at 122, 197 A. at 582.

\textsuperscript{59} \textit{Id.} at 128, 197 A. at 584-85.

\textsuperscript{60} \textit{Id.} at 131, 197 A. at 586.

\textsuperscript{61} Scholtes v. McColgan, 184 Md. 480, 489, 41 A.2d 479, 483 (1945).
the conveyance rather than focus only on the language of the deed.\textsuperscript{62} Thus, extrinsic matters, including conduct, conversations, and written correspondence are considered when determining intent.\textsuperscript{63} In \textit{Turner v. Brocato}, for example, the Court of Appeals was presented with the issue of whether a developer of the appellants' subdivision had implicitly placed restrictions against use for business on all of the lots within the residential development.\textsuperscript{64} The court held that the appellants demonstrated, by clear and satisfactory evidence, that the grantor intended all lots to be affected by the restrictions, according to a general plan of development.\textsuperscript{65} In reaching its conclusion regarding the grantor's intent, the court considered many factors extrinsic to the deed, including the existence of a general plan at the time the sales began, testimony of owners and the sales agent indicating that restrictions were a selling point on which the purchasers relied, and the words on the sign at the entrance to the property in question indicating that the development was restricted.\textsuperscript{66} In its opinion, the court also emphasized that an inference of intent from any source should be considered by the court.\textsuperscript{67}

Another element courts have required in prior case law regarding restrictions on land is a demonstration that the grantor of an easement intended to impose restrictions in order to benefit the land, and that the restrictions were not merely personal to the grantor.\textsuperscript{68} In \textit{Scholtes v. McColgan}, for example, the court held that certain restrictions in place in a residential development were not intended to be passed to subsequent grantees because there was no evidence that the grantor intended to pass on those restrictions with the land.\textsuperscript{69} The original grantor had written racial restrictions into the deeds of the properties in question, but the court found that the grantor had never intended the restrictions to bind the land, and that they would not be enforced against purchasers after the immediate grantees.\textsuperscript{70} Thus, the court's finding indicates that a person seeking to enforce an implied land restriction may be required to demonstrate that the origi-
nal grantor intended the restriction to benefit the property permanently after he conveyed it.\textsuperscript{71}

\textbf{b. Easements Implied from a Plat Reference.}—There are two types of plat references\textsuperscript{72} from which an easement can be implied. The first occurs when a deed instructs the reader to consult a plat, and the plat markings indicate that an easement was created;\textsuperscript{73} the second occurs when a deed itself mentions an area of land or a right of way that is described in the same way on a plat of the area.\textsuperscript{74} These references can be made regarding parcels of property,\textsuperscript{75} roads,\textsuperscript{76} or similar rights of way. Regardless of the type or content of the plat reference, the Court of Appeals has consistently approached these cases by assessing whether or not the reference indicates that the grantor intended to create an easement for the benefit of the land.\textsuperscript{77} Because the courts in the past have examined all of the circumstances surrounding a potential easement, the factors considered when assessing the grantors' intent have varied widely, depending on the circumstances surrounding the conveyance.

For example, in Williams Realty Co. \textit{v}. Robey, a case in which the Court of Appeals found an implied easement in a waterfront subdivision lot, the court considered many factors when assessing the intent of the common grantor of lots in the subdivision.\textsuperscript{78} In that case, the court considered whether lot owners in a residential development had an implied easement in an area marked "Community Beach and Park" on a subdivision plat they were shown before they purchased their lots.\textsuperscript{79} The court held that an easement did exist, and entered an injunction against the company who had divided the reserved space into

\begin{itemize}
  \item \textsuperscript{71} \textit{Id}. at 492, 41 A.2d at 485.
  \item \textsuperscript{72} A plat reference consists of a deed mentioning a plat in its description of the land being conveyed.
  \item \textsuperscript{73} See, e.g., Boucher \textit{v}. Boyer, 301 Md. 679, 689, 484 A.2d 630, 635 (1984) (explaining that a deed that does not specifically mention a right of way, but mentions a plat that depicts the right of way, creates a presumption that the parties intended to create an easement in that right of way).
  \item \textsuperscript{74} See, e.g., Williams Realty Co. \textit{v}. Robey, 175 Md. 532, 536-37, 2 A.2d 683, 684-85, 686 (1938) (noting that the deed to the subdivision property in question referred to the "Community Beach," and the plat of the subdivision included a lot labeled, "Community Beach and Park").
  \item \textsuperscript{75} See, e.g., \textit{id}. at 535, 2 A.2d at 684 (involving a lot within a subdivision labeled on the plat "Community Beach and Park").
  \item \textsuperscript{76} See, e.g., Boucher, 301 Md. at 684, 484 A.2d at 633 (concerning an easement for a fifty-foot-wide road depicted on a plat of the subdivision).
  \item \textsuperscript{77} See \textit{id}. at 688, 484 A.2d at 635 (stating that an implied easement is analyzed by examining the grantor's intent at the time of the conveyance).
  \item \textsuperscript{78} 175 Md. 532, 539-40, 2 A.2d 683, 686 (1938).
  \item \textsuperscript{79} \textit{id}. at 535, 2 A.2d at 684.
\end{itemize}
lots for sale and rented it out as a resort for the public.\footnote{80} The court applied equitable principles and reasoned that an easement should be implied when lot purchasers rely on assurances of the existence of an easement when buying property.\footnote{81} The court also observed that a waterfront subdivision is unique in that its nature and purpose is to provide the lot owners access to the water.\footnote{82}

Thus, in its analysis the court demonstrated that elements of fairness and the nature of property in question can be considered as factors when assessing whether an implied easement was intended by the grantor.

The Court of Appeals re-asserted the importance of the nature of a waterfront subdivision in \textit{Klein v. Dove},\footnote{83} where the court held that interior lot owners in a waterfront development were entitled to use a ten-foot right of way along the side of the appellant's lot in order to access a lake.\footnote{84} In \textit{Klein}, the appellants had obstructed the right of way for several years before the appellees filed a complaint seeking to enjoin the appellants from interfering with their use of the lake area.\footnote{85} In reaching its decision, the court first examined the plat of the subdivision and concluded that the only conceivable purpose of the ten-foot right of way between the main road of the development and the lake area was to provide the interior lot owners access to boating, bathing, swimming, and fishing.\footnote{86} The court further reasoned that even though the developer had not specifically marked the lake area as being reserved for the community, the developer's intent must have been to designate the property for the use of the lot owners so

\begin{footnotes}
\footnote{80} Id. at 539-40, 2 A.2d at 686.
\footnote{81} Id. The court stated:

[W]hen a buyer is persuaded, as in this case, by the assurances of restricted facilities in a community beach lying immediately across his front road or street, the advantages appear with sufficient clearness and certainty to have been sold to him as an incident, and in a court of equity repudiation must be prevented by injunction.

\textit{Id.}

\footnote{82} Id. at 539, 2 A.2d at 686. It noted that "[t]here is naturally a greater dependence, if, indeed, we should not say that access to the water is an essential, for in that access lies the purpose of the settlement and the purchase of lots in [the subdivision]." \textit{Id.}

\footnote{83} 205 Md. 285, 107 A.2d 82 (1954).

\footnote{84} Id. at 294, 107 A.2d at 87. The plaintiffs' lots were not contiguous to the right of way. \textit{Id.} at 288, 107 A.2d at 84. Although the recorded plat in this case was scantily marked, the court believed it was clear the plaintiffs had bought their lot in reliance on the plat, and in reliance on having access to the lake; it therefore found that the easement existed. \textit{Id.} at 294, 107 A.2d at 87.

\footnote{85} Id. at 288, 107 A.2d at 83-84.

\footnote{86} Id. at 291, 107 A.2d at 85.
\end{footnotes}
they would have access to the water. Overall, the court gave tremendous weight to the nature of waterfront property, and explained that individuals buying property in waterfront subdivisions generally expect to have access to the water.

Thirty years later, in the hallmark easement case *Boucher v. Boyer*, the Court of Appeals employed a different implied easement analysis than in *Williams Realty Co.* and *Klein* because the claimants were seeking an easement over a fifty-foot wide road providing access to their lots, rather than an easement in a waterfront property. The court concluded that the lot owners had an implied easement to use the road based on the delineations on the plat of the subdivision and their deed’s reference to the plat.

In *Boucher*, the appellants purchased property comprising the third lot within the Piper Estates subdivision in Frederick County, Maryland. The deed to the property directly referred to the original plat of the subdivision in describing the property. The plat of the subdivision depicted the appellants’ lot, and it also showed a right of way for the lot, labeled “George Street.” The plat indicated that George Street had been dedicated to public use, but the dedication was never completed. At trial, it was established that George Street was the only means of accessing the appellants’ lot, and the appellants argued that their use and maintenance of the street was sufficient to create an easement for them in the right of way. In opposition, the appellees sought to enjoin the appellants from using George Street, and they argued that they were the fee simple owners of the road. After affirming that the appellee lot owners each held fee simple title to the center of George Street, the Court of Appeals held that the

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87. Id. at 292, 107 A.2d at 86. The court referred to the lower court’s opinion, quoting “[w]hile [the developer] did not designate the Lake area and the piers as ‘community property,’ we all know they must have been intended for the use of all lot owners . . . for access to the water.” Id.
88. Id. The court wrote, “[i]f a purchaser of a lot in a waterfront development did not expect to get the right to use the water, few would purchase lots therein.” Id. (citations omitted).
89. 301 Md. 679, 691, 484 A.2d 630, 636 (1984) (explaining that a plat’s depiction of a right of way abutting a property is so probative that it creates a presumption that there is an easement in that right of way).
90. Id. at 694, 484 A.2d at 638.
91. Id. at 684, 484 A.2d at 633.
92. Id.
93. Id.
94. Id. at 685, 484 A.2d at 633.
95. Id.
96. Id.
97. Id. at 687, 484 A.2d at 635.
appellants had an implied easement to use George Street by virtue of the plat reference.  

Three key facts formed the basis of the Court of Appeals’ conclusion that the appellants in Boucher had an implied easement in the right of way. The first consideration was whether the deed contained a reference to a plat that depicted a right of way. In Boucher, the appellants’ deed did not mention the right of way, but it did refer to the plat of the subdivision, which depicted a right of way. The court found this was sufficient to create a rebuttable presumption that the grantor and grantees intended to include George Street in the conveyance. The court noted this finding was in accordance with the plat reference theory used by Maryland courts in prior case law, which provides that when a deed references a plat, that plat is incorporated as part of the deed. The court declined, however, to extend the plat reference theory beyond its application to abutting roads and right of ways. It stated that the purpose of the plat reference theory is to ensure that property owners have access to the property via some right of way.

The Court of Appeals then considered additional evidence of the intent of the grantor. The court found that because all of the lot owners were conveyed their property with a reference to the same plat, and all of their lots were either bound by or abutting George Street, there was additional evidence that the grantor intended to create an easement for the appellants in George Street.

The final fact that influenced the court’s decision regarding the implied easement was that the appellees had never submitted evidence of the grantor’s contrary intent. After considering these three facts, the court held that the appellants had an implied easement in the right of way by virtue of the plat reference in their deed to the property. Regarding the future implications of their decision, the court warned that their conclusion should not be applied to cases

98. Id. at 691, 484 A.2d at 636.
99. Id. at 688-89, 484 A.2d at 635.
100. Id. at 689, 484 A.2d at 635.
101. Id., 484 A.2d at 635-36.
102. Id., 484 A.2d at 636.
103. Id. at 694, 484 A.2d at 638.
104. Id. at 693-94, 484 A.2d at 638. Access to the property, according to the Court of Appeals, will in turn grant the property owners “full use and enjoyment” of the property. Id.
105. Id. at 691, 484 A.2d at 637.
106. Id.
107. Id.
108. Id. at 694, 484 A.2d at 638.
involving non-abutting properties, except in cases where the existence of the right of way was an essential factor in the purchasers' decision to buy the property in the first place.  

The considerations analyzed in Boucher, Williams Realty Co., and Klein were all discussed in the Court of Appeals' analysis in Koch v. Strathmeyer. In Koch the court held that two interior lot owners in a waterfront subdivision had an implied easement in a road abutting their properties that extended down to the water. The court reasoned that the water constituted the next public way, and access to the water had been considered essential in previous cases involving waterfront developments.

In its analysis, the court distinguished Koch from Williams Realty Co. and Klein, because in Koch, unlike in the two earlier cases, the easement in question existed over a road that abutted and bound the properties of the plaintiffs, and thus the general rule of easements for contiguous roadways could be applied. The general rule of easements for contiguous roadways provides that when an original grantor records a plat depicting lots with ways that bind certain properties, the owners of the bound properties have an implied easement in those abutting roadways. In contrast, the Koch court noted that in Klein the plaintiffs' lots did not abut the right of way at issue. Similarly, the court distinguished Koch from Williams Realty Co., because Williams Realty Co. involved a recreational easement in a beach

109. Id.  
110. Id. at 357 Md. 193, 742 A.2d 946 (1999).  
111. Id. at 203, 742 A.2d at 951. In its analysis, the Court of Appeals considered whether a clear manifestation of the grantor's intent existed to establish that the scope of the easement extended for the entire length of the road leading to the water. Id. at 198, 742 A.2d at 948. The parties did not dispute that all of the lot owners had an easement in the road. Id. at 199, 742 A.2d at 949.  
112. Id. at 203, 742 A.2d at 951.  
113. Id.  
114. Id. at 201-02, 742 A.2d at 950-51.  
115. Id. at 203, 742 A.2d at 951.  
116. Id. at 199, 742 A.2d at 949; see also Atlantic Const. Corp. v. Shadburn, 216 Md. 44, 51-52, 139 A.2d 339, 343-44 (1958) (explaining that an intention to convey an easement in abutting roadways is presumed by the court when the grantor made a plat of the streets and alleys and the lot and they border each other); Mullan v. Hochman, 157 Md. 213, 220-21, 145 A. 554, 557 (1929) ("[W]hen a person subdivides property in a city and lays down on a plat thereof, made or adopted by him, lots shown as bordering streets and alleys delineated upon the plat, and then sells any of the lots with reference to the plat . . . such act there passes from the grantor to the grantee an implied easement of way over the streets contiguous to the property sold."). The purpose of this rule, according to the Koch court, is to ensure that property owners obtain the full use and enjoyment of their properties. Koch, 357 Md. at 203, 742 A.2d at 951.  
117. Koch, 357 Md. at 201, 742 A.2d at 950.
property, and thus the general rule for contiguous roadways could not have been applied in that case.\textsuperscript{118} Thus, the Court of Appeals held that although the property involved in \textit{Koch} was located in a waterfront community, the court did not need to analyze this case under the plat reference theory as it had in \textit{Williams Realty Co.} or \textit{Klein}, because \textit{Koch} involved a road abutting the property conveyed.\textsuperscript{119}

3. The Court's Reasoning.—In \textit{Kobrine, L.L.C. v. Metzger}, the Court of Appeals held that the Section Two lot owners did not have a title interest or an express easement in the KLLC lot, but that they did have an implied easement to use the KLLC lot for recreational activities.\textsuperscript{120}

Writing for the majority,\textsuperscript{121} Judge Wilner began the opinion by addressing the issue of whether the lot owners of the HLB subdivision had a right of title in the KLLC lot pursuant to the provisions in the 1972 Declaration.\textsuperscript{122} In its analysis of this issue, the court first examined the language in Paragraph Five of the General Provisions of the Declaration, and concluded that the provision never required the developer to convey the KLLC lot to the lot owners.\textsuperscript{123} Instead, the court determined that the provision merely required the lot owners to accept the conveyance if the developer chose to convey the lot to them.\textsuperscript{124} Furthermore, the court concluded that actions of various lot owners in the subdivision, following the recordation of the 1972 Declaration, indicated that none of the owners regarded Paragraph Five of the General Provisions of the Declaration as a conveyance of the KLLC lot.\textsuperscript{125} For these reasons, the court held that the Declaration was not a covenant to convey.\textsuperscript{126}

\textsuperscript{118.} \textit{Id.} at 201, 742 A.2d at 950.
\textsuperscript{119.} \textit{Id.} at 203, 742 A.2d at 951. The Court was referring to the plat reference theory established in \textit{Boucher v. Boyer}, 301 Md. 679, 691, 484 A.2d 630, 636 (1984).
\textsuperscript{120.} \textit{Kobrine}, 380 Md. at 642, 846 A.2d at 416.
\textsuperscript{121.} Judge Raker, Judge Cathell, and Judge Eldridge joined in the majority opinion. \textit{Id.} at 632, 846 A.2d at 410.
\textsuperscript{122.} \textit{Id.} at 632, 846 A.2d at 410. "Title" is defined as "[t]he union of all elements (as ownership, possession, and custody) constituting the legal right to control and dispose of property; the legal link between a person who owns property and the property itself." \textit{Black's Law Dictionary}, supra note 3, at 1522.
\textsuperscript{123.} \textit{Kobrine}, 380 Md. at 632-33, 846 A.2d at 410; see supra note 20 and accompanying text (quoting language of Paragraph Five of the Declaration).
\textsuperscript{124.} \textit{Kobrine}, 380 Md. at 633, 846 A.2d at 410.
\textsuperscript{125.} \textit{Id.} at 634, 846 A.2d at 411. The actions indicating this fact included the Waters Group's conveyance of part of the other unnumbered parcel in Section Two, the conveyance of the roads by the Waters Group, and KLLC's purchase of the KLLC lot. \textit{Id.}
\textsuperscript{126.} \textit{Id.} The court also noted that as a result of its holding it was unnecessary to address whether the provision would have violated the Rule Against Perpetuities had it been an instrument of conveyance. \textit{Id.}
After determining that the Declaration did not include a covenant to convey, the Court of Appeals considered whether the HLB subdivision lot owners had an express easement to use the KLLC lot.\textsuperscript{127} Applying Maryland’s requirements for express easements, which require the names of the parties and a description of the property being conveyed, the court determined that no express easement was granted by the plat of Section Two, the deeds from the Browns to Beltway and from Beltway to the Waters, the Declaration, or the deeds to the individual lot owners.\textsuperscript{128}

The Court of Appeals then addressed whether the lower courts were correct in finding an easement in the KLLC lot by an implied grant or reservation.\textsuperscript{129} The court began its analysis by stating the general rule in Maryland that easements by implication are based on the presumed intent of the parties at the time of the conveyance, and that the intent can be inferred from extraneous factors rather than solely from the language in the deed.\textsuperscript{130} The relevant circumstances surrounding the conveyance in this case, according to the majority, were the plat of Section Two, the deeds from the Browns to Beltway and from Beltway to the Waters group, the Declaration, and the deeds held by the individual lot owners in Section Two.\textsuperscript{131}

After discussing the applicable doctrine for implied easements and the relevant circumstances in the case, the court discussed prior Maryland case law involving implied easements.\textsuperscript{132} The court first described how the rules of implied easements had mainly been applied to disputes concerning abutting roadways and alleys, but then noted that the doctrine had also been extended to include circumstances involving waterfront subdivisions.\textsuperscript{133} Following this discussion, the court concluded that the legend of the Section Two plat clearly indicated that the original grantor intended future lot owners to use the KLLC lot, because the legend could serve no other purpose.\textsuperscript{134}

Finding no indication that the lot owners in Section One of the HLB subdivision were intended beneficiaries of the easement, the

\textsuperscript{127} Id. at 634-35, 846 A.2d at 411-12.
\textsuperscript{128} Id. at 636-38, 846 A.2d at 412-13; see also Md. Code Ann., Real Prop. \textsection 4-101(A)(1) (2003) ("Any deed containing the names of the grantor and grantee, a description of the property sufficient to identify it with reasonable certainty, and the interest or estate intended to be granted, is sufficient, if executed, acknowledged, and, where required, recorded.").
\textsuperscript{129} Kobrine, 380 Md. at 638, 846 A.2d at 414.
\textsuperscript{130} Id. (citing Boucher v. Boyer, 301 Md. 679, 688, 484 A.2d 630, 635 (1984)).
\textsuperscript{131} Id. at 638-39, 846 A.2d at 414.
\textsuperscript{132} Id at 639, 846 A.2d at 414.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 641, 846 A.2d at 415.
court limited the benefits of the easement to the lot owners of Section Two. Additionally, the majority agreed with the circuit court that the scope of the easement in the KLLC lot should be limited to accessing the river and enjoying normal waterfront activities, which is consistent with the court's decision in *Klein v. Dove.*

Judge Harrell wrote an opinion concurring in part and dissenting in part. In his opinion, while agreeing with the majority that Metzger was not entitled to right of title in the KLLC or an express easement, Judge Harrell argued that the majority departed from prior case law and incorrectly granted Metzger a limited implied recreational use easement. Judge Harrell argued that Metzger did not demonstrate "clear and satisfactory proof" that the common grantor intended the KLLC lot to be reserved for the HLB subdivision lot owners.

In reaching this conclusion, Judge Harrell first emphasized that the Declaration and the deeds to the Metzger and Kobrine lots never referred to the KLLC lot, and thus an express easement was never granted to the lot owners. Judge Harrell then criticized the approach used by the majority in determining whether there was an implied easement, claiming the court inappropriately relied on *Williams Realty Co.* and *Klein,* and that both cases were easily distinguishable from *Kobrine.* He argued that *Williams Realty Co.* was distinguishable because in that case the original grantees had bought their property in reliance on a plat depicting a lot labeled, "Community Beach," and in *Kobrine* there was no such reliance. Also, in *Williams Realty Co.,* he noted all of the deeds to the lots in the subdivision referenced the Community Beach that was marked on a plat of the subdivision, unlike in *Kobrine* where Metzger's deed did not contain any reference to the KLLC lot. Judge Harrell then distinguished *Klein,* emphasizing that *Klein* also involved reliance on the part of the original grantees.

135. *Id.*
136. *Id.*
137. *Id.* at 645, 846 A.2d at 418 (Harrell, J., concurring in part and dissenting in part). Chief Judge Bell and Judge Battaglia joined this opinion. *Id.*
138. *Id.* at 645-46, 846 A.2d at 418-19 (Harrell, J., concurring in part and dissenting in part).
139. *Id.* at 646, 846 A.2d at 419 (Harrell, J., concurring in part and dissenting in part).
140. *Id.* (Harrell, J., concurring in part and dissenting in part).
141. *Id.* at 646-47, 846 A.2d at 419 (Harrell, J., concurring in part and dissenting in part).
142. *Id.* at 647-49, 846 A.2d at 419-21 (Harrell, J., concurring in part and dissenting in part).
143. *Id.* at 649, 846 A.2d at 421 (Harrell, J., concurring in part and dissenting in part).
which *Kobrine* did not. Judge Harrell argued that without reliance, there was no need for the court to imply an easement in the KLLC lot. He also added that Metzger had ample means of accessing the water other than using the KLLC lot, and that no other lot owners in the subdivision were also seeking use of the reserved parcel. He believed this provided further evidence that the easement should not have been implied. Judge Harrell concluded his opinion by stating that he would have required Metzger to prove that he relied on either the recorded plat or the Declaration when he purchased his lot before finding an implied easement.

4. **Analysis.—** In *Kobrine L.L.C. v. Metzger*, the Court of Appeals held that there was an implied recreational use easement in a subdivision lot because the plat of the subdivision indicated the original grantor had intended to create an easement for the subsequent grantees. The court appropriately extended its doctrine of implied easements by applying an objective analysis and limiting its assessment of the grantor’s intent to clear evidence from the recorded plat of the HLB subdivision. By focusing on the actions and writings of the original grantor, rather than interpreting the actions and expectations of grantees, the Court of Appeals established that an implied easement in a non-abutting lot could be created solely on the basis of clear markings on a recorded plat. Indeed, the court reduced the essential elements for an implied easement to clear markings on a plat and a reference to the plat in the deed, and demonstrated that where these two elements exist, additional considerations of the surrounding circumstances may be unnecessary. This was a departure from prior Maryland case law that instructed courts to consider all of the surrounding circumstances when determining whether a restriction

144. *Id.* at 647, 846 A.2d at 420 (Harrell, J., concurring in part and dissenting in part).
145. *Id.* at 649, 846 A.2d at 420 (Harrell, J., concurring in part and dissenting in part).
146. *Id.* at 650, 846 A.2d at 421 (Harrell, J., concurring in part and dissenting in part).
147. *Id.* (Harrell, J., concurring in part and dissenting in part).
149. *Id.* at 636, 846 A.2d at 412. This approach is very similar to the court’s approach to implying easements over contiguous roadways. *See supra* note 116 and accompanying text (discussing the general rule for implying easements over contiguous roadways).
150. *See Kobrine*, 380 Md. at 641, 846 A.2d at 415 (holding that the recorded plat of Section Two of the HLB subdivision alone establishes an implied easement).
151. *See id.* at 636, 846 A.2d at 412 ("The ultimate source of any easement under the facts in this case . . . must be the legend, 'Area Reserved For The Use Of Lot Owners,' shown on the unnumbered parcel that became the KLLC lot on the plat of Section Two.").
on land was implicitly granted.\textsuperscript{152} The future application of this test by the Maryland courts will increase administrative efficiency.\textsuperscript{153}

\begin{quote}
a. \textit{The Court Properly Extended the Doctrine of Implied Easements.}—The \textit{Kobrine} court properly extended Maryland precedent by holding that easements in non-abutting parcels can be implied solely on the basis of clear, objective markings on a plat, which demonstrate that the original grantor intended to convey an easement in the parcel.\textsuperscript{154} The holding was consistent with \textit{McKenrick}, which required a clear manifestation of the grantor's intent at the time of conveyance.\textsuperscript{155} The \textit{Kobrine} holding strayed from earlier holdings in which the Maryland courts demonstrated a preference to consider all of the circumstances surrounding a conveyance when ascertaining the intent of the grantor,\textsuperscript{156} including the extrinsic matters of conversation, conduct, and written correspondence set forth in \textit{Turner}.\textsuperscript{157} By looking solely to the clear, objective markings on a plat to demonstrate the intent to convey an easement, the \textit{Kobrine} court avoided addressing the \textit{Scholtes} requirement that the grantor intended the restrictions to benefit the land and not the landowner.\textsuperscript{158} Prior to \textit{Kobrine}, the court had never recognized an implied easement in a waterfront lot within a subdivision where the claimants had not relied on any of the documents creating the easement.\textsuperscript{159}

The \textit{Kobrine} holding demonstrated that it is not necessary to consider factors such as the reliance of the grantees where there are clear indications of the grantor's intent on the recorded plat of the property at issue. While the \textit{Williams Realty Co.} court suggested that reliance was a factor in the creation of implied easements,\textsuperscript{160} \textit{Kobrine} indicated that clear indications of the intent of the grantor are

\begin{itemize}
\item \textsuperscript{152} See \textit{infra} notes 154-176 and accompanying text.
\item \textsuperscript{153} See \textit{infra} notes 177-182 and accompanying text (providing a discussion of the future implications of the court's decision).
\item \textsuperscript{154} \textit{Kobrine}, 380 Md. at 641, 826 A.2d at 415.
\item \textsuperscript{155} \textit{McKenrick} v. Sav. Bank of Baltimore, 174 Md. 118, 128, 197 A. 580, 584-85 (1938).
\item \textsuperscript{156} See \textit{Turner} v. Brocato, 206 Md. 336, 351, 111 A.2d 855, 863 (1955) (noting that any indication of the grantor's intent should be examined by the court); see also \textit{Boucher} v. \textit{Boyer}, 301 Md. 679, 688, 484 A.2d 640, 635 (1984) (explaining that the circumstances surrounding a conveyance are examined when determining whether an implied easement was conferred upon a grantee).
\item \textsuperscript{157} \textit{Turner}, 206 Md. at 346-47, 111 A.2d at 861.
\item \textsuperscript{158} \textit{Scholtes} v. \textit{McColgan}, 184 Md. 480, 492, 41 A.2d 479, 485 (1945).
\item \textsuperscript{159} \textit{Kobrine}, 380 Md. at 646, 846 A.2d at 419 (Harrell, J., concurring in part and dissenting in part).
\item \textsuperscript{160} See \textit{Williams Realty Co.} v. \textit{Robey}, 175 Md. 532, 540, 2 A.2d at 686 (1938) (stressing that the court's finding of an implied easement was partially due to the buyer's reliance on that easement at the time of purchase).
\end{itemize}
enough to warrant finding an easement. In *Williams Realty Co.*, the Court of Appeals held that there was an implied easement in an area within a waterfront subdivision based on equitable principles because the lot purchaser had relied on assurances made to them by the grantor that there would be an easement in the parcel in question. The facts of the case, however, also involved a recorded plat where the area in question was labeled "Community Beach and Park." Because the court did not weigh the markings on the plat very heavily, and focused most of its reasoning on the reliance, the analysis of the court in *Williams Realty Co.* suggested that reliance was a necessary factor for implied easements.

In *Kobrine*, the court was able to limit its analysis to the consideration of evidence that clearly and objectively reflected the grantor's intent, such as the legend on the plat, and the language in the deeds. In so doing, it demonstrated that where clear objective evidence of the original grantor's intent is available, it is not necessary to require the reliance of the grantees on assurances about an easement before finding an easement.

The *Kobrine* court's determination of the existence of an easement in a waterfront property also differed from the analysis it applied in *Klein* because it implied an easement based solely on evidence of the grantor's intent, disregarding actions of subsequent grantees. When deciding whether to grant an easement in *Klein*, the court was greatly influenced by the nature of the property, and reasoned that having access to water was the principle reason why individuals purchased property in waterfront subdivisions. In *Kobrine*, the Court of Appeals discussed the analysis in *Klein*, but ultimately relied solely on the plat that was recorded by the original grantor to hold that there was an implied easement in the KLLC lot. Thus, the *Kobrine* court limited its analysis to the actions of the grantor, rather than considering the thoughts and actions of the subsequent grantees of the subdivision lots.

161. See *Kobrine*, 380 Md. at 636, 846 A.2d at 412 (concluding the source of the implied easement was the legend on the Section Two plat).
162. 175 Md. at 540, 2 A.2d at 686.
163. Id. at 535, 2 A.2d at 684.
164. Id. at 540, 2 A.2d at 686.
165. See *Kobrine*, 380 Md. at 641, 846 A.2d at 415 (asserting that the markings on the recorded plat indicate that the original grantor intended to convey an easement in the KLLC lot).
166. See id. at 638, 846 A.2d at 414 (stating the rule that an easement is implied where the parties at the time of the original conveyance intended to confer an easement).
The Kobrine court's decision to limit its analysis of implied easements to clear, objective evidence was more consistent with its analysis in Boucher and Koch, cases involving easements over contiguous roadways rather than non-abutting parcels of land. The Kobrine court extended the reasoning from Boucher and applied a strictly objective inferred intent test when assessing whether an implied easement existed in a waterfront parcel. In Boucher, the court held that the appellants had an implied easement to use the abutting street under the plat reference theory, because their deed referred to the plat of the subdivision, and the plat depicted the street as a contiguous roadway. The Kobrine court essentially used the same analysis, despite the fact that the Boucher court had declined to extend the application of the plat reference theory to cases involving non-abutting properties where the right of way had not had an essential role in the decision of the claimant to purchase the property. In Kobrine, the Court of Appeals applied the plat reference theory from Boucher by focusing on the legend of the plat and the language of the deeds associated with Section Two of the subdivision. The court held that the markings on the plat could have no other purpose than to establish the grantor's intent to create an easement in the KLLC lot.

The Kobrine court's objective analysis of whether an easement existed in the KLLC lot was also consistent with its analysis in Koch. In Koch, the court implied an easement in a sixteen-foot road because the unrecorded plat of the subdivision established that the road abutted the parties' properties, and the deed to the properties referred to the plat. In its analysis, the Koch court focused only on objective, written evidence of the original grantor's intent to determine whether an easement existed. Similarly, in Kobrine, the Court of Appeals focused principally on the legend of the recorded plat of the subdivision before concluding that the lot owners had an easement in the KLLC lot. Overall, the Kobrine court's limited focus on objective evidence of the grantor's intent and disregard for the actions and thoughts of

169. See id. (finding that the determining factor for implying an easement in this case was the assertion on the legend of the plat, identifying the KLLC lot as an area reserved for the lot owners).
171. See id. at 694, 484 A.2d at 638 ("Our conclusion should not be construed to include non-abutting properties, except in those cases where the ownership of the property made the right of way an essential factor in the purchase of the property in the first instance.").
172. Kobrine, 380 Md. at 641, 846 A.2d at 415.
173. Id.
175. Id. at 199, 742 A.2d at 949.
176. Kobrine, 380 Md. at 641, 846 A.2d at 415.
the subsequent grantees extends Maryland precedent in cases involving easements in non-abutting parcels of land.

b. Relying Solely on Objective Evidence of a Grantor’s Intent Whenever Possible Will Prove Administratively Efficient for the Courts.—As a result of the Court of Appeals’ decision in Kobrine, Maryland courts will not need to analyze all of the surrounding circumstances in cases involving potential implied easements in subdivision lots where there is clear objective evidence the grantor intended to create an easement. A clear indication of the intent of the common grantor in an extrinsic document such as a plat is sufficient for the court to acknowledge an implied easement. By applying the inferred intent test to the circumstances in Kobrine, and not shifting the focus to the element of reliance and the subsequent actions of the grantee, the Court of Appeals established a more administratively efficient test for future decisions.

In its efforts to apply an objective approach to implied easements, the Kobrine court simplified the test in a cost-effective manner. The court’s holding will reduce the determination of whether an implied easement exists to an assessment of clear, objective evidence of the grantor’s intent in cases where such evidence exists. As a result, Maryland courts will now be able to disregard subjective considerations, such as reliance of the grantees, when there is other objective evidence sufficient to establish that the grantor intended to create an easement.

The objective inferred intent approach to implied easements will also reduce the administrative burden on the courts and the parties. Taking into consideration evidence of intent from any source increased the court’s burden considerably. The variety of considerations the courts had to consider under prior precedent, including the

177. See id. (finding that the markings on the plat of the KLLC lot clearly established an implied easement).

178. See id. at 636, 641, 846 A.2d at 412, 415 (concluding that the only source of an easement in Kobrine is the plat of the subdivision, and holding that it alone established an easement).

179. See supra notes 62-67 and accompanying text (describing how Maryland courts have conducted an extensive investigation into all surrounding circumstances when determining whether an easement exists). As a result of Kobrine, it will not be necessary for Maryland courts to consider anything beyond the writings on the plat and deed of the property where the language and markings on those documents clearly indicate the grantor intended to convey an easement.

180. See supra notes 61-67 and accompanying text (referring to Turner v. Brocato and explaining that courts generally examine all of the circumstances surrounding a conveyance).
actions, intent, and reliance of the subsequent grantees, likely required substantial time and effort on the part of the courts and litigants. In addition, implying an easement in a subdivision on the basis of subjective actions of some grantees raises concerns about which grantees are entitled to the easement, and how the easement can be enforced.\textsuperscript{181} It also created the potential for multiple lawsuits by individual lot owners seeking easements in the same property.\textsuperscript{182} For these reasons, the \textit{Kobrine} court's decision to apply a strictly objective test, limited to the language in the deeds and the markings on the original plat of the subdivision, resulted in an administratively efficient approach to apply to future easement cases where the evidence clearly indicates the intent of the grantor.

5. \textit{Conclusion}.—In \textit{Kobrine, L.L.C. v. Metzger}, the Court of Appeals vacated the lower courts' decisions and held that the lot owners in Section Two of the Harbor Light Beach subdivision had an implied recreational use easement in the KLLC lot bordering the Patuxent River.\textsuperscript{183} In reaching this conclusion, the majority did not require the lot owners seeking the easement to have relied on the documents creating it.\textsuperscript{184} The court established that an easement in a parcel should be implied whenever there is clear evidence that the common grantor intended the grantees to have an easement in the parcel.\textsuperscript{185} Thus, where clear, objective evidence of the grantor's intent exists, courts can limit their analysis to that evidence alone, and will no longer need to consider all of the surrounding circumstances of the case.\textsuperscript{186} This is an extension of the prior case law, because the court had never

\begin{footnotes}
\item[181.] For example, if a court were to decide that a recreational use easement existed in a subdivision lot based on the fact that five out of twenty-five subdivision lot owners relied on assurances that there would be an easement when they purchased their lots, would the easement be implied only for those five residents or for the entire subdivision? Furthermore, how would the community prevent the other twenty lot owners from using the lot?
\item[182.] If courts were to grant an implied easement based solely on subjective actions of grantees, and multiple individuals were seeking an easement in the same property but had not joined into one lawsuit, presumably they could each bring separate actions seeking an easement in the same property.
\item[183.] \textit{Kobrine}, 380 Md. at 641, 846 A.2d at 415.
\item[184.] \textit{See id.} at 650, 846 A.2d at 421 (Harrell, J., concurring in part and dissenting in part) (dissenting judges expressed that they would have required the plaintiff to have relied on the plat and the Declaration before purchasing their subdivision lots in order to grant them an easement in the KLLC lot).
\item[185.] \textit{See id.} at 641, 846 A.2d at 415 (implying that because the plat clearly indicates that the grantor intended to create an easement in the KLLC lot, an easement must be granted).
\item[186.] \textit{See supra} notes 148-152 and accompanying text; Turner v. Brocato, 206 Md. 336, 351, 111 A.2d 855, 863 (1955) (noting that any indication of the grantor's intent should be examined by the court); \textit{see also} Boucher v. Boyer, 301 Md. 679, 688, 484 A.2d 690, 635
\end{footnotes}
before granted an implied easement in a subdivision lot where the lot purchasers had not relied on written documents depicting the easement.\textsuperscript{187} Kobrine's emphasis on objective analysis wherever possible will result in increased administrative efficiency in the courts.\textsuperscript{188}

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\cite{187} Kobrine, 380 Md. at 646, 846 A.2d at 419; \textit{see supra} notes 154-176 and accompanying text.

\cite{188} \textit{See supra} notes 177-182 and accompanying text (providing a discussion of the future implications of the Kobrine decision).
VII. STATUTORY INTERPRETATION

A. The Use of Canons of Construction to Ignore Legislative Intent

Weakens the Consumer Protection Purpose of Maryland's
Secondary Mortgage Loan Law

In *Drew v. First Guaranty Mortgage Corp.*, the Court of Appeals of Maryland considered whether, under Maryland's Secondary Mortgage Loan Law (MSMLL), a lender who creates a balloon payment must notify the borrower in writing on the loan agreement that the lender must postpone the maturity date of the balloon payment one time at the borrower's request. In a 4-3 decision, the court held that MSMLL does not require the lender to state in writing that the statutory postponement period of six months is available to borrowers. Although the court stated that it looked to the statute's plain language and legislative history, in actuality it used various canons of construction to reach its decision and ignored the legislature's intent that the postponement provision protect consumers from unscrupulous lenders. Instead, the court should have used the canons of construction as a tool to ascertain legislative intent. Had the court taken this approach and interpreted the statute in light of its context, looking to legislative history and reading the statute as a whole and from a common-sense perspective, it would have discovered that the legislature's intent was to protect consumers; this intent would be better served by requiring lenders who create balloon payments to state in writing that the statutory postponement period of six months is available to borrowers. Given the consumer protection purpose of MSMLL, the court should have considered its remedial nature and liberally construed the post-

4. *Id.* at 321, 842 A.2d at 3.
5. *Id.* at 323, 842 A.2d at 4.
6. *See infra* notes 180-200 and accompanying text.
8. *See infra* notes 201-220 and accompanying text (finding that legislative history evinces an intent to protect consumers).
9. *See infra* notes 221-231 and accompanying text (reading the statute as a whole to determine legislative intent).
10. *See infra* notes 232-239 and accompanying text (discussing that a common-sense reading supports protecting consumers).
11. *See infra* notes 201-239 and accompanying text (demonstrating that a consumer protection purpose supports giving consumers written notice).
ponent provision to effectuate the statute's intent. Furthermore, the court should have considered past Maryland court interpretations of MSMLL, which also found a consumer protection intent, and thus provide further support for the requirement that the postponement provision be in writing.

1. The Case.—The plaintiffs, Alton and Verne Drew, purchased a new home from a builder, Ryan Homes. The Drews signed a loan agreement on December 15, 2000, in order to pay part of the purchase price. The loan consisted of a note secured by a first mortgage in favor of First Guaranty Mortgage Corporation, and a junior note secured by a secondary mortgage in favor of NVR Mortgage Finance, Inc., which is now held by Wilshire Credit Corporation. The secondary mortgage contained both a balloon payment, which was not due until 2016, as well as the accompanying disclosure form at issue in the instant case.

As required by sections 12-404(c)(2)(i) and (ii) of the Commercial Law Article, the balloon payment provision was expressly disclosed to the Drews, who agreed to the provision in writing. However, the loan documents did not reveal that section 12-404(c)(2)(iii) of the Commercial Law Article requires lenders to

12. See infra notes 240-262 and accompanying text (arguing that liberally construing the statute would support its remedial nature).
13. See infra notes 243-250, 261 and accompanying text (discussing past court decisions that found consumer protection intent).
14. Drew, 379 Md. at 322, 842 A.2d at 3.
15. Id.
16. Id. at 322 & n.3, 842 A.2d at 3 & n.3.
17. Id. at 322-23, 842 A.2d at 3-4.
18. Md. Code Ann., Com. Law II § 12-404(c)(2)(i), (ii) (2000). These provisions state the following:

A lender, including a seller who takes a mortgage or deed of trust to secure payment of all or a portion of the purchase price of a residence sold to a borrower, may make a loan for the purpose of aiding the borrower in the sale of the borrower's residence or the purchase price of a new residence, and may create a balloon payment at maturity of this loan if the balloon payment is: (i) Expressly disclosed to the borrower; (ii) Agreed to by both the borrower and the lender/seller in writing . . . .

19. Drew, 379 Md. at 322, 842 A.2d at 3.
20. Com. Law II § 12-404(c)(2)(iii). This section provides that the balloon payment is (iii) Required to be postponed one time, upon becoming due, at the borrower's request, for a period not to exceed 6 months, provided that the borrower continues to make the monthly installments provided for in the original loan agreement, and no new closing costs, processing fees or similar fees are imposed on the borrower as a result of the extension . . . .
postpone the maturity date of a loan one time for a period not to exceed six months at the borrower's request. Instead, the balloon payment provision stated in part:

Unless otherwise expressly disclosed in the Note, or in an Addendum or a Rider to the Note, THE LENDER IN THIS TRANSACTION IS UNDER NO OBLIGATION TO REFINANCE THE OUTSTANDING PRINCIPAL BALANCE OF THIS LOAN DUE ON MATURITY DATE. You may be required to payoff the entire principal balance, plus any unpaid interest due thereon, on the maturity date using personal assets. If this Lender, or any other Lender, agrees to refinance the outstanding balance due on the maturity date, you may be required to pay the then prevailing interest rate, which may be higher or lower than the interest rate specified in the Note, plus loan origination costs and fees as are typically incurred when creating a new loan.

As a result, the Drews filed a complaint in the United States District Court for the District of Maryland, claiming that Wilshire Credit Corporation violated MSMLL because it failed to inform the Drews in writing that they had the right to postpone the balloon payment for six months, without penalty, at maturity. The district court submitted a certification order to the Court of Appeals to decide whether the postponement provision under section 12-404(c)(2)(iii) of the Commercial Law Article must be in writing on the loan document, and if the answer was in the affirmative, whether the penalty provisions in section 12-413 of the Commercial Law Article applied to the

21. Drew, 379 Md. at 322, 842 A.2d at 3.
22. Id. at 322-23, 842 A.2d at 3-4.
23. Id. at 318-21, 842 A.2d at 1-3.
24. A certification order is set forth pursuant to Md. Rule 8-305 and the Maryland Uniform Certification of Questions of Law Act, Md. Code Ann., Cts. & Jud. Proc. § 12-603 (2002). "[A] certifying court, on motion of any party or on its own initiative, may submit to the Court of Appeals a question of law of this State . . . by filing a certification order." Md. Rule 8-305(b). "The Court of Appeals of this State may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State." Cts. & Jud. Proc. § 12-603.
25. Com. Law II § 12-413. The penalty provision states:

Except for a bona fide error of computation, if a lender violates any provision of this subtitle he may collect only the principal amount of the loan and may not collect any interest, costs, or other charges with respect to the loan. In addition, a lender who knowingly violates any provision of this subtitle also shall forfeit to the borrower three times the amount of interest and charges collected in excess of that authorized by law.

Id.
Drews’ loan.\textsuperscript{26}

2. \textit{Legal Background}.—In order to determine whether the legislature intended for the postponement provision in section 12-404(c)(2)(iii) to be in writing, it is necessary to examine the history of MSMLL, the rules and goals of statutory construction, the liberal construction of remedial statutes, and previous court interpretations of MSMLL. MSMLL was designed to regulate the persons and loans in the secondary mortgage business and to provide penalties for violations of such regulations.\textsuperscript{27} Canons of statutory interpretation require that this history be analyzed, and in addition, that the statute be read as a whole and not construed contrary to common sense.\textsuperscript{28} Statutes that are remedial in nature must also be liberally construed in order to achieve their legislative objective.\textsuperscript{29} Furthermore, prior judicial interpretations of the legislative intent underlying MSMLL are consistent with the statute’s history, with interpreting the statute in accordance with the rules and goals of statutory construction, and with MSMLL’s remedial nature.\textsuperscript{30}

\textit{a. The History of Maryland’s Secondary Mortgage Loan Law}.—In 1967, the General Assembly of Maryland enacted the Secondary Mortgage Loan Law.\textsuperscript{31} The purpose was to regulate the secondary mortgage loan business, provide penalties for violations, and protect consumers against lenders.\textsuperscript{32} The statute prohibited balloon payments in secondary mortgage loans and established maximum interest rates.\textsuperscript{33}

As part of the ongoing process of Code revision in Maryland, MSMLL was recodified in 1975 in its original form as part of the Commercial Law Article.\textsuperscript{34} Later that year, the General Assembly revised MSMLL to allow balloon payments to facilitate business and commercial investment and to aid borrowers in the sale of their own resi-
dence. However, for a balloon payment to be valid, the payment had to be: "(I) expressly disclosed to the borrower, and (II) agreed to by both the borrower and the lender/seller in writing."36

The General Assembly again revised MSMLL in 1982, in House Bill 305,37 in order to increase the availability of mortgages and encourage home ownership during a period of heightened interest rates.38 Opponents of the legislation argued that House Bill 305 eliminated the consumer protection requirements in its companion legislation, House Bill 1853,39 and provided for potential abuse of borrowers.40 The Attorney General also expressed his strong opposition to House Bill 305, calling it an "end-run around" the consumer protections of House Bill 1853 that were crafted with broad industry and consumer support.41 Three days after the Attorney General expressed his opposition to the Chairman of the Senate Economic Affairs Committee, the Committee adopted an amendment to House Bill 305, and added the postponement provision as an additional requirement to be met for balloon payments.42 The provision stated that balloon payments are:

[r]equired to be postponed one time, upon becoming due, at the borrower's request, for a period not to exceed 24 months, provided that the borrower continues to make the monthly installments provided for in the original loan agreement, and no new closing costs, processing fees or similar fees are imposed on the borrower as a result of the extension.43

35. 1975 Md. Laws 574; Drew, 379 Md. at 325, 842 A.2d at 5.
37. House Bill 305 established maximum interest rates, allowed collection of certain fees, allowed balloon payments in some instances, required the option of an extension of payments in some instances, and provided for certain consumer protection provisions, along with other provisions relating to secondary mortgage loans. Md. H.B. 305, 1982 Sess.
40. Hearing, supra note 38 (testimony of Del. Sklar, Member, Senate Economic Affairs Committee and Eleanor Carey, Associate Deputy Attorney General).
42. Substitute Comm. Amend. No. 4 to H.B. 305 (Apr. 10, 1982).
43. Id.
Subsequently, this amendment was incorporated into section 12-404(c)(2) of the Commercial Law Article.  

In 1985, the General Assembly changed the statutory postponement period from twenty-four to six months to resolve an inconsistency in the law between section 12, and sections 9 and 10 of the Commercial Law Article. During this session, the Committee Report noted that, “balloon payment transactions must give the consumer the right to request a postponement of the balloon payment once for a period not to exceed six months.” MSMLL’s provisions on balloon payments have remained unchanged since 1985.

b. Canons of Statutory Construction.—In interpreting statutes, Maryland courts have declared that the “paramount goal is to identify and effectuate the legislative intent underlying the statute at issue.” In its search for legislative intent, courts attempt to determine the statute’s “purpose, aim, or policy.” To achieve this end, courts begin by examining the words of the statute, otherwise known as the plain-meaning rule. In some instances, the language itself may convey legislative intent, which makes further scrutiny unnecessary. However, the plain-meaning rule is not an all-encompassing rule for determining legislative intent. When the statute’s language is ambiguous and fails to express any clear legislative intent, courts must look beyond the statute’s plain meaning. In this regard, courts turn to the context within which the statutory language appears, including legislative history and reading the statute as a whole.

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45. 1985 Md. Laws 597, § 1(c)(2)(iii). Section 12 of the Commercial Law Article added a twenty-four month postponement period in 1982, and sections 9 and 10 of the Commercial Law Article added a six month postponement period in 1983. Floor Statement on H.B. 195 (Md. 1985). This discrepancy became a problem because, in 1984, Senate Bill 418 redefined credit grantor to include homeowners selling a home, thus encompassing sellers under section 12 of the Commercial Law Article. Id. Therefore, the reduction in the postponement period to six months conforms the older law with the newer credit provisions. Id.
47. 1985 Md. Laws 597; Com. Law II § 12-404(c)(2).
50. Id.
52. Id. at 604, 573 A.2d at 1349.
53. Pak, 378 Md. at 323, 835 A.2d at 1189.
54. Kaczorowski, 309 Md. at 514-15, 525 A.2d at 632.
dition, courts should take a common-sense approach to statutory interpretation and avoid results that are unreasonable or inequitable.\textsuperscript{55} While these canons of statutory construction are used to determine legislative intent, courts have recognized that they are not themselves rules of law, and thus should never be applied to override an otherwise clear intent.\textsuperscript{56}

\textbf{(1) Legislative History.—}Courts first consult legislative history in order to determine legislative intent. In \textit{Kaczorowski v. Mayor and City Council of Baltimore}, for example, the Court of Appeals considered the legislative history of the statutes at issue in order to determine their purpose.\textsuperscript{57} The court found that the General Assembly did not intend to repeal the statute establishing the Industrial Development Authority of the Mayor and City Council of Baltimore (Baltimore Authority), even though a literal interpretation of the statutes indicated otherwise.\textsuperscript{58} Although the express language of the statutes in question did away with the Baltimore Authority, the court turned to the legislative history to determine whether this was the General Assembly's actual intent.\textsuperscript{59} The court found that the legislature intended for the statutes to enhance the effectiveness of the industrial revenue bond process, but that something went awry during their enactment.\textsuperscript{60} As a result, the court concluded that the legislature did not intend to do away with the Baltimore Authority.\textsuperscript{61}

\textsuperscript{57.} 309 Md. at 515, 525 A.2d at 632.
\textsuperscript{58.} \textit{Id.} at 517, 525 A.2d at 634. In \textit{Kaczorowski}, the Baltimore Authority, which authorized Baltimore City to create industrial development authorities and allowed these authorities to issue revenue bonds to fund various industrial projects, was created under sections 266A-1 to A-3 of Article 41 of the Annotated Code. \textit{Id.} at 507, 525 A.2d at 629; \textit{Md. ANN. CODE art. 41, § 266A-1 to A-3 (1978)}. In 1982, legislators sought to enhance the industrial development authorities' powers by repealing section 266A-1 of Article 41 and enacting new section 266A-1 by Chapter 791 of the Acts of 1982. \textit{Kaczorowski}, 309 Md. at 508, 525 A.2d at 629. However, through the amendment process, the language repealing sections 266A-1 to A-3 was deleted from the bill, and thus there were parallel provisions pertaining to the Baltimore Authority. \textit{Id.} at 509, 525 A.2d at 629. In 1983, the General Assembly determined that there had been an error, and that Chapter 73 of the Acts of 1983 repealed sections 266A-1 to A-3, thus doing away with the Baltimore Authority itself. \textit{Id.}, 525 A.2d at 630. Seemingly, in the midst of this confusion, the legislature did not re-enact new legislation enhancing the Baltimore Authority's power as originally contemplated by Chapter 791 of the Acts of 1982. \textit{Id.} at 511, 525 A.2d at 631. Therefore, the appellant claimed that the Baltimore Authority was defunct and that the revenue bonds that it had issued were invalid. \textit{Id.} at 510, 525 A.2d at 630.
\textsuperscript{59.} \textit{Kaczorowski}, 309 Md. at 517, 525 A.2d at 633.
\textsuperscript{60.} \textit{Id.}, 525 A.2d at 634.
\textsuperscript{61.} \textit{Id.} at 520, 525 A.2d at 635.
Derry v. State provides a similar example of the Court of Appeals interpreting statutory language in light of legislative history in order to determine intent. There, the court considered, among other issues, whether the language "alleged to have been seized in violation of the Constitution..." modifies both 'evidence offered by the State' and 'property' or, conversely, qualifies only the latter term" in section 12-302(c)(3) of the Courts and Judicial Proceedings Article. The State's interlocutory appeal from the trial court's exclusion of evidence depended upon the latter interpretation. The court, however, concluded that the statute did not provide the State with the right to appeal, as this right only existed for constitutionally based exclusions. Analyzing legislative history, the court found that this interpretation was consistent with the long-time unavailability of interlocutory appeals. This unavailability served as precedent to section 12-302(c)(3)'s passage, which created the State's right of interlocutory appeal in only limited circumstances. The court also examined the bill file on Senate Bill 39, the legislative proposal that became section 12-302(c)(3), which stated that "[t]he bill allows the State to appeal from a pretrial ruling by the Court to exclude evidence obtained in violation of the defendant's constitutional rights." Thus, the court determined that section 12-302(c)(3) applied only to constitutional issues, and that this reading was consistent with the legislature's cautious approach.

(2) Reading the Statute as a Whole.—In order to determine the legislature's true intent, courts will also read all sections of a statute together and in conjunction with one another. State v. Crescent Cities Jaycees Foundation, Inc. provides an example. The Jaycees court

63. Id. at 338-39, 748 A.2d at 485; MD. CODE ANN., CTS. & JUD. PROC. § 12-302(c)(3) (1998). That section provides that the State may appeal from a decision of a trial court that excludes evidence offered by the State or requires the return of property alleged to have been seized in violation of the Constitution of the United States, the Constitution of Maryland, or the Maryland Declaration of Rights.

Id.
64. Derry, 358 Md. at 339, 748 A.2d at 485.
65. Id. at 339, 748 A.2d at 485.
66. Id. at 340, 748 A.2d at 486.
67. Id.
68. Id. at 341, 748 A.2d at 486.
69. Id.
72. Id. at 468, 624 A.2d at 959.
considered whether sections 255(b)(1)\(^73\) and 258B\(^74\) of the Maryland Code prohibited workers at casino night events in Prince George’s County from receiving tips from patrons.\(^75\) Section 255(b)(1) does not specifically apply to casino nights, but it does prohibit individuals from benefiting financially from certain charitable events.\(^76\) In contrast, section 258B applies to casino nights, but does not expressly prohibit individuals from benefiting financially from these events.\(^77\)

In its attempt to determine the legislative intent as to whether section 255(b)(1) applied to casino nights, the court reasoned that section 255(b)(1) could not be read in isolation, and that a reading of the entire statute demonstrated that it did apply to casino nights.\(^78\) The court turned to section 255(b)(2), which mentioned various gaming devices of the type used at casino nights, and section 255(f)(5), which prohibited casino nights in Baltimore County.\(^79\) The court also determined that the General Assembly implicitly included the restrictions stated in section 255(b) into section 258B because these statutes were part of a single statutory scheme.\(^80\) The court found that these interpretations were consistent with the rule against construing sections of a statute in isolation from one another without regard to actual legislative intent, and concluded that section 255(b)(1) prohibited tips to casino night workers.\(^81\)

As further support for determining legislative intent by reading the statute as a whole, the *Jaycees* court considered an opinion of the Attorney General of Maryland.\(^82\) The Attorney General noted that because sections 255(b) and 258B were enacted in the same General

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that it is not unlawful for a charitable organization “to conduct or hold a carnival, bazaar, or raffle for [its] exclusive benefit . . . , if no individual or group of individuals benefits financially from the holding of any [such event] or receives or is paid any of the proceeds from [the event], for personal use or benefit.”

*Jaycees*, 330 Md. at 463, 624 A.2d at 957 (quoting Md. Code Ann. art. 27, § 255(b)(1)).

\(^74\) Md. Ann. Code art. 27, § 258B (1992). “[C]asino night” is defined as “a benefit performance conducted under the provisions of this section at which card games, wheels of fortune, or roulette are played and prizes are awarded.” § 258B(c)(2) (quoted in *Jaycees*, 330 Md. at 464, 624 A.2d at 957). Moreover, section 258B(a) permits charitable organizations in Prince George’s County “to conduct and operate any benefit performance . . . at which the public is invited or admitted . . . .” Id. § 258B(a) (quoted in *Jaycees*, 330 Md. at 464, 624 A.2d at 957).

\(^75\) *Jaycees*, 330 Md. at 463, 624 A.2d at 957.

\(^76\) Id.

\(^77\) Id. at 465, 624 A.2d at 958.

\(^78\) Id. at 470, 624 A.2d at 960.

\(^79\) Id. at 470-71, 624 A.2d at 960-61.

\(^80\) Id. at 472, 624 A.2d at 961.

\(^81\) Id.

\(^82\) Id. at 469, 624 A.2d at 960.
Assembly session, they should be read together. Given this cumulative reading and effectuating of the restrictive provisions in section 255(b), the Attorney General also argued that tips by patrons to casino night workers violated section 255(b).

Likewise, in *Toler v. Motor Vehicle Administration*, the Court of Appeals recognized that section 16-405(b) of the Transportation Article could not be read in isolation to determine legislative intent. Section 16-405(b) requires the accumulation of sixteen points for a license suspension when a licensee "is required to drive a motor vehicle in the course of his regular employment." In considering whether this exception is limited to persons whose very job is driving a motor vehicle or also includes persons who drive incidentally to their work, the court read all parts of the statute dealing with the point system together. The court determined that to construe section 16-405(b) to apply only to persons whose very job is driving a motor vehicle would conflict with other provisions of the statute that specifically apply to "professional drivers." Based on this holistic reading, and the statute's legislative history, the court embraced the broader interpretation of the statute, and concluded that section 16-405(b) also includes persons who must drive in order to perform significant duties of their employment.

(3) Common-Sense Approach.—While legislative history and reading the statute as a whole are important ways to discern legislative intent, the Court of Appeals has also advocated for a common-sense approach to statutory interpretation. The court in *Tucker v. Fireman's Fund Insurance Co.*, took this approach when considering whether a person, injured by an automobile while sitting on a stool in a parking lot attendant's booth, was a "pedestrian" under section 539 of the Maryland Code and therefore eligible to receive personal in-

83. *Id.* at 470, 624 A.2d at 960.
84. *Id.* at 469, 624 A.2d at 960.
87. *Toler*, 373 Md. at 221-23, 817 A.2d at 233-34.
88. *Transp. II § 16-405(b)* (quoted in *Toler*, 373 Md. at 221, 817 A.2d at 233).
89. *Toler*, 373 Md. at 221-28, 817 A.2d at 233-37.
90. *Id.* at 222-23, 817 A.2d at 234.
91. *Id.* at 228, 817 A.2d at 238.
93. 308 Md. 69, 517 A.2d 730 (1986).
94. This section states that, "[a]mong the individuals who may receive [personal injury] benefits are: . . . 'pedestrians injured in an accident in which the insured motor vehicle is involved.'" *Id.* at 71, 517 A.2d at 730-31 (quoting *Md. Ann. Code* art. 48A, § 539(a) (1986)).
The court rejected the literal definition of "pedestrian," a person traveling on foot, as applied in the context of section 539, given the inequitable consequences that would result from such an interpretation. In holding that the term pedestrian applied to all persons outside of the motor vehicle, the court recognized that in determining legislative intent it may consider the consequences resulting alternate constructions and adopt the construction "which avoids an illogical or unreasonable result, or one which is inconsistent with common sense.

The court also employed the common-sense approach in Tracey v. Tracey. In Tracey, the court considered whether, for a determination of an alimony award, the term "all income" in section 11-106(b)(11) of the Family Law Article included income from temporary, part-time employment. The court found that to construe "all income" to include temporary, part-time work in addition to a person's principle, full-time employment would be inconsistent with the legislature's equitable objectives in deriving alimony awards. The court further determined that requiring the appellee to work sixty to sixty-five hours per week at two jobs would defeat these objectives and would be unduly burdensome for the appellee. Thus, the court excluded temporary, part-time employment from the term "all income" and recognized that statutory construction, which is inequitable or contradictory to common sense should be avoided.

(4) Canons Shall Not Be Used to Override Legislative Intent.—The canons of statutory construction that courts utilize to discern legislative intent vary from case to case. In addition, opposing parties

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95. Id. at 71-72, 517 A.2d at 731. Personal injury protection benefits afford "minimal medical, hospital, lost income, and disability benefits to covered persons" injured in any car accident. Id. at 71, 517 A.2d at 730.  
96. Id. at 74, 517 A.2d at 732. For example, a literal definition of pedestrian would deny recovery to a person who was struck by a motor vehicle while seated on the steps of a building in front of a public highway, but another person walking on the steps of the same building would be covered. Id. at 74-75, 517 A.2d at 732.  
97. Id. at 75, 517 A.2d at 732.  
100. Tracey, 328 Md. at 387, 614 A.2d at 594.  
101. Id. at 388, 614 A.2d at 594-95.  
102. Id. at 390, 614 A.2d at 595.  
103. Id. at 387, 389, 614 A.2d at 594-95.  
104. See State v. Bell, 351 Md. 709, 717-23, 720 A.2d 311, 315-18 (1998) (using various canons of interpretation to ascertain the legislative intent behind the statute in question,
often advocate conflicting canons of construction. The court in Kaczorowski recognized this situation when the parties in that case invoked competing canons of construction to support each of their positions regarding the legitimacy of the Baltimore Authority. As a result, Maryland courts have recognized that these canons should never be used as the sole basis for overriding legislative intent.

The Court of Appeals in Kirkwood v. Provident Savings Bank of Baltimore, for example, refused to apply the rule of statutory construction *expressio unius est exclusio alterius* ("the expression of one thing implies the exclusion of another thing not mentioned") to override legislative intent. The court rejected the appellants' argument, which relied on this canon, that an act authorizing mutual savings banks to establish branches outside the City of Baltimore with the approval of the Bank Commissioner repealed an earlier act, granting the appellee this right without requiring the Bank Commissioner's approval. The court determined that the legislature gave no indication of an intention to repeal the earlier act. The court found that this canon was not a rule of law, but was only a rule of construction used to assist in determining legislative intent. Thus, the court concluded that canons should be used with caution and should never be applied to override legislative intent.

Similarly, in Toler, the court noted that the canon of construction stating 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" is not an absolute rule of construction. The court in Employment Security Administration v. Weimer set forth this position when it found that the canon stating that "a qualifying clause ordinarily is confined to the immediately pre-
ceeding words or phrase" is not an absolute rule. In Weimer, the Employment Security Administration argued that in section 6(h) of Article 95A, the qualifying clause "under a private pension plan" modified only the preceding word "annuity," and not "pension," which would have reduced the plaintiff's unemployment compensation. The Weimer court recognized that this canon should only be used to assist in discovery of legislative intent and is not a rigid rule. Based on the language of the statute and its context, the court concluded that the qualifying clause "under a private pension plan" was not confined to the immediately preceding word "annuity," but encompassed both annuity and pension, and as a result section 6(h) did not apply to the plaintiff. Therefore, canons are not to be followed when the resulting interpretation would be inconsistent with legislative intent.

c. Remedial Statutes Must Be Liberally Construed.—Remedial statues are those designed to "correct existing law, to redress existing grievances and to introduce regulations conducive to the public good." Remedial statutes also "provide a remedy, or improve or facilitate remedies already existing for the enforcement of rights and the redress of injuries." In Pak v. Hoang, the court determined that section 8-203(e) of the Maryland Security Deposit Act, which provides remedies for tenants seeking return of their security deposits, was remedial in nature because it provided a remedy not available at common law. Similarly, the court in Williams v. Standard Federal Savings & Loan Ass'n, found that MSMLL was remedial in nature because it provided remedies to borrowers.

115. Id. at 102, 400 A.2d at 1104 (quoting Sullivan v. Dixon, 280 Md. 444, 451, 373 A.2d 1245, 1249 (1977)).
116. Section 6(h) states that, only retirement benefits from "a pension or annuity under a private pension plan" result in reduction of unemployment compensation. Md. Ann. Code art. 95A, § 6(h) (1979) (quoted in Weimer, 285 Md. at 98, 100, 400 A.2d at 1102-03).
117. Weimer, 285 Md. at 100, 400 A.2d at 1104.
118. Id. at 102, 400 A.2d at 1104-05 (citing 2A J. Sutherland, Statutes and Statutory Construction § 47.35 (4th ed. 1973)).
119. Weimer, 285 Md. at 102, 400 A.2d at 1104-05.
120. Id.
122. Id. at 324, 835 A.2d at 1190.
126. Id. at 455-56, 545 A.2d at 709.
Once a statute is found to be remedial in nature it "must be liberally construed in order to effectuate [its] broad remedial purpose." In Breitenbach v. N.B. Handy Co., the Court of Appeals held that section 9-660(a)(1) of the Workers' Compensation Act required employers to reimburse employees for reasonable transportation costs incurred with their medical treatment, even though there was no express mention of transportation costs in the statute. The court determined that it was unclear whether the language in section 9-660(a)(1), "medical, surgical, or other attendance or treatment," included transportation costs. Given this uncertainty and the remedial nature of the act, the court applied the rule of liberal construction, and found that section 9-660(a)(1) included transportation costs.

The court in Pak also liberally construed the remedial statute at issue in that case. The court determined that "reasonable attorney's fees" in section 8-203(e)(4) of the Maryland Security Deposit Act included fees for postjudgment motions to recover security deposits. Due to the small dollar amount of security deposits and the difficulties often encountered by tenants seeking their return, landlords could effectively thwart section 8-203(e)(4)'s remedial purpose if reasonable attorney's fees were not awarded for postjudgment motions. As a result, the court found that the statute's reference to reasonable attorney's fees must be liberally construed to include fees for postjudgment motions, and that any other interpretation would diminish the remedial nature of the statute.

d. Maryland Courts Recognize the Consumer Protection Purpose of MSMLL.—While Maryland courts have not interpreted the statutory postponement provision of MSMLL, they have interpreted the overall

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127. Pak, 378 Md. at 326, 835 A.2d at 1191.
128. Md. Code Ann., Lab. & Empl. § 9-660(a)(1) (2000). This section states that "(a) . . . if a covered employee has suffered an accidental personal injury, compensable hernia, or occupational disease the employer or its insurer promptly shall provide to the covered employee, as the Commission may require: (1) medical, surgical, or other attendance or treatment."
130. Id. at 483-84, 784 A.2d at 578-79.
131. Id. at 484, 784 A.2d at 579.
133. See id. at 324, 835 A.2d at 1189 ("If the landlord, without a reasonable basis, fails to return any part of the security deposit, . . . after the termination of the tenancy, the tenant has an action of up to threefold of the withheld amount, plus reasonable attorney's fees.").
134. Id. at 321, 835 A.2d at 1188.
135. Id. at 327-29, 335, 835 A.2d at 1192-93, 1196.
136. Id. at 335, 835 A.2d at 1196.
purpose of the statute. In Duckworth v. Bernstein, the Duckworths, borrowers, filed a complaint against Bernstein, a lender, and alleged that he intentionally violated several provisions of MSMLL and that he fraudulently required them to sign false statements indicating that their loans were for commercial purposes when they were not. The Court of Special Appeals found that MSMLL was intended to protect unwitting borrowers or those already under severe financial pressure. The Duckworth court found that to achieve this purpose, MSMLL punishes even the unsuspecting violator, which is consistent with the State’s strong policy on usury and consumer protection. Given the legislature’s intent to protect the borrower, the court determined that the statute’s purpose was protective.

The court in Williams also recognized the consumer protection purpose of MSMLL, and in addition, the court noted the remedies available to borrowers whose rights under the statute have been violated. In Williams, the borrowers filed suit against Standard Federal Savings and Loan Association alleging that Standard charged points in excess of those permitted by the Commercial Law Article. The court, relying on Duckworth, found that MSMLL was intended to protect consumers and, as a result, was remedial in nature.

3. The Court’s Reasoning.—In Drew v. First Guaranty Mortgage Corp., the Court of Appeals held that section 12-404(c)(2)(iii) of the Commercial Law Article does not require a seller or lender who takes a secondary mortgage or deed of trust in order to secure all or a portion of a residence’s purchase price and creates a balloon payment, to state in writing that the statutory postponement period of six months is available to borrowers. In a 4-3 decision, the majority rejected

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139. Id. at 724, 466 A.2d at 524.
140. Id.
141. Id. at 725, 466 A.2d at 524-25.
143. Id. at 453, 545 A.2d at 708.
144. Id. at 455-56, 545 A.2d at 709.
145. Drew, 379 Md. at 821, 842 A.2d at 3. Based on this outcome, the court did not reach the question of whether the penalty provisions in section 12-413 were applicable to the Drews’ loan. Id.
the Drews' argument that the borrower's postponement rights must be disclosed in writing.\textsuperscript{146}

Writing for the majority,\textsuperscript{147} Judge Battaglia began her discussion by noting that balloon payment transactions have long been troublesome for consumer borrowers.\textsuperscript{148} The court also acknowledged that state statutes restricting balloon payment transactions were designed to provide borrowers with the knowledge and ability to refinance their balloon payments without penalty, and to protect consumer borrowers.\textsuperscript{149} The court, detailing the history of MSMLL, noted that the statute was first enacted during a period when consumer protection reform was sweeping the country; in this enactment, balloon payments were prohibited in secondary mortgages.\textsuperscript{150}

After looking to the history and reviewing the rules and goals of statutory construction, the court turned to the statutory language of the postponement provision, section 12-404(c)\textsuperscript{(2)},\textsuperscript{151} and determined that sections (i) and (ii) require lenders to expressly disclose to borrowers, in writing, that the loan contains a balloon payment.\textsuperscript{152} However, the court found that it was unclear whether the postponement provision in section (iii) was subject to the express disclosure provisions in sections (i) and (ii).\textsuperscript{153} To ascertain the legislature's intent, the court relied on the canon of construction, \textit{expressio unius est exclusio alterius}, which means that "the expression of one thing implies

\begin{scriptsize}
\begin{enumerate}
\item \textsuperscript{146} Id. at 321, 323-27, 842 A.2d at 3-6.
\item \textsuperscript{147} Judge Battaglia was joined by Judges Eldridge, Raker, and Cathell. Id. at 318-19, 842 A.2d at 1-2.
\item \textsuperscript{148} Id. at 323, 842 A.2d at 4 (describing the risk involved in balloon payments where consumers must refinance the principal with a new loan or sell the house in order to cover the balloon payment).
\item \textsuperscript{149} Id. at 324-25, 842 A.2d at 4-5.
\item \textsuperscript{150} Id.
\item \textsuperscript{151} MD. CODE ANN., COM. LAW II § 12-404(c)(2) (2000). This section states that a lender, including a seller who takes a mortgage or deed of trust to secure payment of all or a portion of the purchase price of a residence sold to a borrower, may make a loan for the purpose of aiding the borrower in the sale of the borrower's residence or the purchase of a new residence, and may create a balloon payment at maturity of this loan if the balloon payment is:

(i) Expressly disclosed to the borrower;

(ii) Agreed to by both the borrower and the lender/seller in writing; and

(iii) Required to be postponed one time, upon becoming due, at the borrower's request, for a period not to exceed 6 months, provided that the borrower continues to make the monthly installments provided for in the original loan agreement, and no new closing costs, processing fees or similar fees are imposed on the borrower as a result of the extension . . . .

\textit{Id.}
\end{enumerate}
\end{scriptsize}
the exclusion of another." The court concluded that, because the
legislature required express written notice in the first two sections of
the statute, the fact that it did not expressly require written notice in
the third section reveals an intent to exclude written notice for that
section.

In support of its reasoning, the court gave several examples of
consumer protection statutes that require that written notice be given
to the consumer. The majority noted that a statute outlining proce-
dures for automobile consumers to claim warranties required notice
to be conspicuously disclosed to the consumer in writing at the time
of the sale. The majority also noted that a statute containing car
lease termination provisions required a dated written statement to be
furnished to the lessee. Thus, relying on the canon, "[i]n order for
one statute to alter or limit another, the intention of the legislature
to do so must be clear and manifest," the court concluded that the legis-
lature did not clearly manifest any intent to read the disclosure provi-
sions found in sections (i) and (ii) into section (iii), and held that the
postponement provision did not need to be in writing.

In its analysis, the majority noted in a footnote that the Commit-
tee Report to House Bill 195, which amended section 12-
404(c)(2)(iii), stated that "balloon payment transactions must give the
consumer the right to request a postponement of the balloon pay-
ment once for a period not to exceed six months." Although the
court recognized that this statement could be interpreted as requiring
written disclosure, the court concluded that the term "transaction"
was ambiguous, and thus the Legislature did not clearly manifest an
intention to read the disclosure provisions found in sections (i) and
(ii) into section (iii).

The court also rejected the Drews' argument that the Attorney
General's opinion from 1985 required the lender to give the borrower
written notice of the postponement right. The Attorney General
determined that section 12-404(c)(3), which controls balloon pay-

154. Id.
155. Id.
156. Id. at 329-30, 842 A.2d at 8.
157. Id. at 330, 842 A.2d at 8 (citing Gen. Motors Corp. v. Schmitz, 362 Md. 229, 236,
764 A.2d 838, 841 (2001)).
158. Id. (citing Anderson v. Ford Motor Credit Corp., 323 Md. 327, 335, 593 A.2d 678,
682 (1991)).
159. Id. (citing Mayor of Baltimore v. Clerk of Superior Court, 270 Md. 316, 319, 311
A.2d 261, 263 (1973)).
160. Id. at 330-31 n.9, 842 A.2d at 8-9 n.9.
161. Id.
162. Id. at 331-32, 842 A.2d at 8-9.
ments in commercial loans, required the loan transaction to give the borrower clear notice of the postponement provision, which was consistent with section 12-404(c)(2)(iii) and the history and remedial nature of MSMLL. The Drew court, however, concluded that it was not bound by opinions of the Attorney General. The court disagreed with the Attorney General that section 12-404(c)(2)(iii) and section 12-404(c)(3)(i) are parallel. The court found that the language "if the borrower is authorized" in section 12-404(c)(3)(i) placed the burden of notice with the lender, while the language "[r]equired to be postponed one time, upon becoming due, at the borrower's request" in section 12-404(c)(2)(iii) placed the burden with the borrower. Again relying on a canon of construction, the court explained 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 concluded that section 12-404(c)(2)(iii) did not require written notice.

In a dissenting opinion, Judge Wilner recognized the consumer protection purposes of MSMLL and reasoned that the majority failed to take into account its remedial nature. He also found that the balloon payment provision in the Drews' mortgage actually negates their right to postpone the balloon payment at maturity. Judge Wilner further determined that the majority's interpretation of the statute does not comport with the "commonsensical" approach to statutory interpretation advocated by the majority. As a result, Judge Wilner concluded that the legislature intended for the lender to disclose to the borrower in writing that the postponement provision exists.

163. Id. at 331, 842 A.2d at 9.
164. Id. at 332, 842 A.2d at 9.
165. Id.
166. Id.
167. Id.
168. Judge Wilner was joined by Chief Judge Bell and Judge Harrell. Id. at 333, 842 A.2d at 10 (Wilner, J., dissenting).
169. Id. (Wilner, J., dissenting).
170. Id. at 334, 842 A.2d at 10 (Wilner, J., dissenting). The Drews' balloon payment provision stated in capital letters that the lender is not obligated to refinance the loan at maturity. Id. (Wilner, J., dissenting); see supra note 22 and accompanying text (detailing the Drews' balloon payment provision).
171. Drew, 379 Md. at 335, 842 A.2d at 11 (Wilner, J., dissenting). Judge Wilner asked, "How are borrowers with fewer resources or less luck than the Drews supposed to know that they have the right to a one-time postponement when the balloon payment comes due [if this right is not disclosed in the agreement]" Id. (Wilner, J., dissenting).
172. Id. (Wilner, J., dissenting).
4. Analysis.—In Drew v. First Guaranty Mortgage Corp., the Court of Appeals held that MSMLL does not require a lender who creates a balloon payment to state in writing that the statutory postponement period of six months is available to borrowers. In doing so, the court failed to utilize the canons of construction as a tool to determine legislative intent. As a result, the court weakened MSMLL's consumer protection purpose. The court should have examined the statute in light of its context, and looked to legislative history while reading the statute as a whole and from a common-sense perspective. If the court had taken this approach, it would have determined that the legislative intent to protect consumers would be better served by requiring lenders to notify borrowers, in writing, about the statutory postponement period. Given the consumer protection purpose of MSMLL, the court should have considered its remedial nature and liberally construed the postponement provision to effectuate the statute's intent. Furthermore, the court should have considered past Maryland court interpretations of MSMLL, which also found a consumer protection intent and thus provide additional support for the postponement provision to be in writing.

a. The Court Improperly Applied the Canons of Statutory Construction and Failed to Ascertain Legislative Intent.—The Drew court misapplied the canons of statutory construction because it failed to effectuate the legislative intent underlying the postponement provision of MSMLL. The court did not use the canons of statutory interpretation as a tool to determine the legislature's purpose, but instead ignored this intent and reached the conclusion that MSMLL does not require a lender to notify the borrower in writing of the one-time postponement period. The Drew court misinterpreted the statutory language contained in section 12-404(c)(2), which states that "A

173. *Id.* at 321, 842 A.2d at 3.
174. See *infra* notes 180-200 and accompanying text (finding that the court erroneously relied on the canons of construction and ignored legislative intent).
175. See *infra* notes 240-262 and accompanying text.
176. See *infra* notes 201-239 and accompanying text (employing this approach to ascertain the legislative intent of MSMLL).
177. See *infra* notes 201-262 and accompanying text (discussing how legislative intent is better served by requiring the postponement provision to be in writing).
178. See *infra* notes 240-262 and accompanying text (demonstrating how remedial purpose supports liberal construction of statute).
179. See *infra* notes 243-250, 261 and accompanying text (showing that past court decisions support written notice).
180. See *Drew*, 379 Md. at 327-32, 842 A.2d at 6-9 (ignoring the legislative intent when analyzing the statute).
lender . . . may create a balloon payment at maturity . . . if the balloon payment is: (i) Expressly disclosed to the borrower; (ii) Agreed to by both the borrower and the lender/seller in writing; and (iii) Required to be postponed one time, upon becoming due, at the borrower’s request.”

Although the court in *Drew* recognized that the statutory language was ambiguous, and that it needed to look beyond the plain meaning of the statute to determine legislative intent, the court did not follow its own advice. Instead, the court used the canons of construction to reach its conclusion without analyzing the legislature’s purpose. In relying on these canons without support from the legislature’s intent, the court undermined the goal of statutory interpretation.

In concluding that MSMLL does not require that the postponement provision be put into writing, the *Drew* court relied in large part on the canon *expressio unis est exclusio alterius*. However, in so doing the court failed to state how this canon or result supports the legislature’s intent. In fact, the court made no mention of the statute’s purpose or objective in its analysis. The court ignored its prior decision in *Kirkwood*, where it held that this canon is not a rule of law and should only be used to assist in determining legislative intent. The *Kirkwood* court also found that this canon should be used with caution, and should never be applied to override the manifest intention of the legislature. Had the court in *Drew* taken this approach, it would have considered how the application of the canon would have effectuated the intent of the legislature and would have explained how this intent is not served by failing to require that the postponement provision be in writing.

In its further analysis, the *Drew* court continued to ignore legislative intent, and supported its decision by relying on other canons of

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183. *See id.* at 327-32, 842 A.2d at 6-9.
184. *See supra* notes 48-56 and accompanying text (discussing the rules and goals of statutory interpretation).
186. *Id.* at 327-32, 842 A.2d at 6-9.
187. *Id.*
189. *Id.*
190. *See id.* (finding that the conditions do not warrant the application of this canon).
construction.\footnote{191} The court noted that legislative history lends some support to the proposition that balloon payment transactions must give borrowers the right to request postponement.\footnote{192} However, the court gave a cursory look to this history and instead relied on the canon "[i]n order for one statute to alter or limit another, the intention of the legislature to do so must be clear and manifest."\footnote{193} The \textit{Drew} court determined that the legislature had not clearly manifested any intent to read the disclosure provisions found in section 12-404(c)(2)(i) and (ii) into section 12-404(c)(2)(iii), and thus the court held that the postponement provision does not need to be in writing.\footnote{194} Although the court concluded that the legislature had not clearly manifested any such intent, it did not attempt to discover this intent in its analysis.\footnote{195} In concluding that the postponement provision did not need to be in writing, the court failed to use the canons to inquire into the legislature's intent.\footnote{196} This analysis is contrary to the rules and goals of statutory interpretation: to effectuate legislative intent by determining the statute's purpose.\footnote{197}

Finally, the court, to support its decision, relied on the canon "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."\footnote{198} Again, the \textit{Drew} court took this misguided approach even though in \textit{Toler} the court had found that this canon is not absolute and should not override legislative intent.\footnote{199} As a result, the \textit{Drew} court used the canons of statutory construction to reach its conclusion and ignored the legislature's intent, which is contrary to the well-established principles of statutory interpretation.\footnote{200}

\textit{b. The Court Should Have Looked to the Statutory Context.---}If the \textit{Drew} court used the canons of construction as a tool, by interpreting the statutory language in light of its context, looking to legislative history and reading the statute as a whole and from a common-sense

\begin{itemize}
  \item 191. \textit{See Drew}, 379 Md. at 332, 842 A.2d at 9 (noting the canon of interpretation that states "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").
  \item 192. \textit{Id.} at 330-31 n.9, 842 A.2d at 8-9 n.9.
  \item 193. \textit{Id.} at 330, 842 A.2d at 8.
  \item 194. \textit{Id.}
  \item 195. \textit{Id.}
  \item 196. \textit{Id.}
  \item 198. \textit{Drew}, 379 Md. at 332, 842 A.2d at 9.
  \item 200. \textit{Drew}, 379 Md. at 327-28, 842 A.2d at 6-7; Pak, 378 Md. at 323, 835 A.2d at 1189.
\end{itemize}
perspective, it would have concluded that MSMLL was designed to protect consumers and that this legislative intent would be better served by requiring the postponement provision to be put in writing.

(1) Legislative History.—In effectuating legislative intent while interpreting an ambiguous statute, Maryland courts have often analyzed legislative history.201 The court in Kaczorowski followed this approach, analyzing legislative reports, draft legislation, and the enactment process when it held that the legislature did not intend to repeal the code provisions creating the Baltimore Authority even though the statutes in question indicated otherwise.202 The court in Drew detailed MSMLL’s history, but it did not use this history to ascertain the legislature’s intent.203 MSMLL was enacted during a time when consumer protection reform was sweeping the country.204 Its purpose was to regulate the secondary mortgage loan business, provide penalties for violations, and protect consumers against lenders.205 The Drew court failed to analyze this history to determine legislative intent; instead it used various canons of construction to reach its conclusion without discussing intent.206 Had the Drew court examined the legislative intent, it would have concluded that

202. Id. at 517, 525 A.2d at 633-34.
203. See Drew, 379 Md. at 324-27, 842 A.2d at 4-6 (discussing the history of MSMLL).
204. Id. at 325, 842 A.2d at 5.
205. 1967 Md. Laws 390. As evidence of its consumer protection purpose, balloon payments were prohibited in secondary mortgage loans under the law’s initial enactment in 1967. Id. § 61. It was not until 1975 that the General Assembly revised MSMLL to allow for balloon payments under two limited circumstances: (1) for business or commercial investment and (2) to aid a borrower in the sale of his own residence. 1975 Md. laws 574. In 1982 the General Assembly again revised MSMLL to increase the availability of mortgages and encourage home ownership during a period of heightened interest rates, and it added the postponement provision. Hearing, supra note 38 (testimony of Del. Sauerbrey and Del. Quade, Members, Senate Economic Affairs Comm.) (testifying that the bill was enacted to increase the availability of mortgages to encourage home ownership); see also Pamela Constable, Second-Mortgage Bill Attacked as overkill, BALT. SUN, Apr. 8, 1982 at D1 (discussing arguments for and against the bill). This provision was added to MSMLL after the Attorney General and other opponents of the legislation advocated that House Bill 305 eliminated the consumer protection provisions in its companion legislation, House Bill 1853, and provided for potential abuse of borrowers. Hearing, supra note 38 (testimony of Del. Sklar, Member, Senate Economic Affairs Comm. and Eleanor Carey, Associate Deputy Attorney General) (advocating against the bill); see also Constable, supra (summarizing the position of bill opponents). Even though the legislature chose to change MSMLL to allow for balloon payments, it did so only under limited circumstances and added the postponement provision. Drew, 379 Md. at 325-27, 842 A.2d at 5-6.
206. See supra notes 180-200 and accompanying text (discussing the court’s failure to determine legislative intent).
the intent was to protect consumers and that this intent would be better served by requiring the postponement provision to be in writing. This writing would provide borrowers with the knowledge and ability to make informed decisions about refinancing and protect them from deceitful lenders who might pressure them into unfavorable refinancing agreements.\textsuperscript{207} This interpretation is also consistent with the goal of similar statutes enacted in other states.\textsuperscript{208} However, as the dissent in \textit{Drew} recognized, if the postponement provision is not disclosed to borrowers in writing, then they will not know that this right exists.\textsuperscript{209} Borrowers may even be led to believe that this right does not exist.\textsuperscript{210}

The court in \textit{Drew} should have also followed the lead of the court in \textit{Derry}, and should have taken a cautionary approach to statutory interpretation given the long-time unavailability of balloon payments.\textsuperscript{211} The court in \textit{Derry} considered the long-time unavailability of interlocutory appeals when it determined that section 12-302(c)(3) of the Courts and Judicial Proceedings Article did not provide the state with a right to appeal from a trial court's exclusion of evidence.\textsuperscript{212} Although the General Assembly later created a right of interlocutory appeal for the state, this right, like the balloon payment in \textit{Drew}, was only available in limited circumstances.\textsuperscript{213} The \textit{Derry} court, therefore, determined that section 12-302(c)(3) applied only to constitutional issues, and that this reading was consistent with the legislature's cautionary approach.\textsuperscript{214} If the court in \textit{Drew} considered MSMLL's legislative history, including the long-time unavailability of balloon payments, the court should have taken a cautionary approach and determined that the legislature's intent would be better served by requiring that the postponement provision be in writing.\textsuperscript{215}

The court in \textit{Drew} did, in fact, recognize that legislative history provided support for the postponement provision to be in writing, but

207. \textit{Drew}, 379 Md. at 324, 842 A.2d at 5; see also Duckworth v. Bernstein, 55 Md. App. 710, 717, 466 A.2d 517, 520 (1983) (stating that the Act was "[o]bviously intended to protect . . . consumers from unscrupulous lenders" and to afford other protections).

208. \textit{Drew}, 379 Md. at 324, 842 A.2d at 4 ("balloon payment provisions are allowed only if the contract gives the consumer the right to refinance") (quoting \textsc{Me. Rev. Stat. Ann. Tit. 9-A, § 3-308 (2002); Kan. Stat. Ann. § 16a-3-308 (1995) ("the borrower has the right to refinance the amount of a balloon payment at maturity without penalty")}).


210. \textit{Id.}, 842 A.2d at 10-11 (Wilner, J., dissenting).


212. \textit{Id.} at 340, 748 A.2d at 486.

213. \textit{Id.}

214. \textit{Id.} at 341, 748 A.2d at 486.

215. \textit{See supra} notes 31-47 and accompanying text (detailing MSMLL's history).
did not accord the legislative history proper weight.\textsuperscript{216} The court noted that the Committee Report to House Bill 195,\textsuperscript{217} which amended section 12-404(c)(2)(iii), stated that "balloon payment transactions must give the consumer the right to request a postponement of the balloon payment once for a period not to exceed six months."\textsuperscript{218} Although the \textit{Drew} court determined that this statement could be interpreted as requiring written disclosure, it decided that the statement was too ambiguous to support this assertion.\textsuperscript{219} However, in light of the entire history of MSMLL, this report illustrates that the postponement provision should be in writing.\textsuperscript{220}

\begin{itemize}
  \item (2) \textit{Reading the Statute as a Whole.}- The \textit{Drew} failed to interpret MSMLL as a whole, and instead read section 12-404(c)(2), its subsections, and section 12-404(c)(3) in isolation from each other without regard to actual legislative intent.\textsuperscript{221} The court in \textit{Drew} should have taken an approach similar to the court in \textit{Jaycees}, and should have read the statute as a whole.\textsuperscript{222} As a condition of creating a balloon payment, section 12-404(c)(2)(ii) requires the borrower and lender to agree to the balloon payment in writing, and the next section, section 12-404(c)(2)(iii), requires the balloon payment to be postponed one time at the borrower's request.\textsuperscript{223} These sections should be read together along with the other provisions of MSMLL, which provide for regulation of the secondary mortgage loan business, place restrictions on lenders, and provide remedies to borrowers, all aimed at protecting consumers.\textsuperscript{224} If read as a single statutory scheme, the \textit{Drew} court would have concluded that MSMLL's purpose was to protect consum-
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  \item 216. \textit{Drew}, 379 Md. at 330-31 n.9, 842 A.2d at 8-9 n.9.
  \item 218. \textit{Drew}, 379 Md. at 330-31 n.9, 842 A.2d at 8-9 n.9.
  \item 219. \textit{See id.} at 330, 842 A.2d at 8 (stating that "the [l]egislature has not clearly manifested any intention to read the disclosure provisions found in parts (i) and (ii) into part (iii)").
  \item 220. \textit{See supra} notes 31-47 and accompanying text (examining the history of MSMLL).
  \item 221. \textit{See Drew}, 379 Md. at 332, 842 A.2d at 9 (analyzing each section of the statute independently).
  \item 222. \textit{See State v. Crescent Cities Jaycees Found., Inc.} 330 Md. 460, 470, 624 A.2d 955, 960 (1993). In \textit{Jaycees}, the court reasoned that sections 255(b)(1) and 258B of Article 27 of the Maryland Code should be read together to give full effect to each other. \textit{Id.} at 470-71, 624 A.2d at 960-61. Section 255(b)(2) mentioned various gaming devices of the type used at charity-run casino nights and section 255(4)(5) prohibited casino nights in Baltimore County. \textit{Id.} Given this reading, the court concluded that section 255(b)(1) applied to casino nights and that it implicitly included the restrictions on tipping into section 258B. \textit{Id.} at 472, 626 A.2d at 961.
  \item 223. MD. CODE ANN., COM. LAW II § 12-401(c)(2)(ii), (iii) (2000).
  \item 224. \textit{Id.} §§ 12-401 to -415.
\end{itemize}
ers against lenders and that this intent would be furthered by requiring the postponement provision to be in writing.

As an example of how to read a statute as a whole, the court in *Drew* should have relied upon the Attorney General’s opinion, as the court in *Jaycees* did.\(^{225}\) In *Jaycees*, the Attorney General noted that sections 255(b) and 258B of Article 27 of the Maryland Code were enacted in the same General Assembly session, and that therefore they should be read together.\(^{226}\) The Attorney General’s opinion in *Drew* also read the provisions of section 12-404(c) together and determined that the loan transaction must clearly give the borrower the right to postpone the balloon payment at maturity.\(^{227}\) The Attorney General found that the language in section 12-404(c)(3)(i) is substantially parallel to section 12-404(c)(2)(iii), and that in order to comply with these sections, the lender must notify the borrower of the right to postpone.\(^{228}\) In interpreting these sections, the Attorney General also considered the history of MSMLL, which supported his holistic reading and concluded that the postponement provision should be in writing.\(^{229}\) Had the court in *Drew* taken this approach, as opposed to ignoring legislative intent, it would have also reached the same result as the Attorney General.\(^{230}\) However, the *Drew* court failed to read the statute as a whole and did not even refute the Attorney General’s interpretation of legislative intent.\(^{231}\)

(3) **Common-Sense Approach.**—Finally, the majority in *Drew* did not apply the common sense approach to statutory interpretation that it advocated.\(^{232}\) In contrast to *Tucker*, where the court rejected the ordinary definition of pedestrian, which is a person traveling on foot, because interpreting the statute in this manner would have resulted in the denial of benefits to a parking attendant sitting on a stool, and would be inconsistent with common sense,\(^{233}\) the *Drew* court’s interpretation of the statute produced an illogical result.

\(^{225}\) *Jaycees*, 330 Md. at 469, 624 A.2d at 960.
\(^{226}\) *Id.* at 470, 624 A.2d at 960.
\(^{228}\) *Id.* at 88-89.
\(^{229}\) *Id.*
\(^{230}\) See supra notes 181-200 and accompanying text (discussing how the *Drew* court ignored legislative intent).
\(^{231}\) See *Drew*, 379 Md. at 331-32, 842 A.2d at 8-10 (failing to challenge legislative intent).
\(^{232}\) See *id.* at 328, 842 A.2d at 7 (noting that “our role is to apply a ‘commonsensical’ approach to the information available to us so that we may best effectuate the General Assembly’s intent”).
Holding that MSMLL does not require the postponement provision to be in writing is contrary to common sense because a postponement right has little meaning if borrowers do not know that it exists. The Drew court's interpretation results in the borrower not knowing about the postponement right, and possibly leading the borrower to believe that the right does not exist; this essentially deprives borrowers of this right. This interpretation produces an illogical result given the consumer protection purpose of MSMLL. Borrowers may be forced to refinance their loans, pay additional fees, and make uninformed decisions, all of which cut against the consumer protection purposes of MSMLL. These dangers are heightened by the fact that the transactions in question involve consumers' homes, the largest asset that most people own. Interpreting the statute consistent with common sense would have led the court to conclude that MSMLL requires the postponement provision to be in writing.

c. The Court Should Have Liberally Construed MSMLL to Facilitate Its Remedial Nature.—Given the consumer protection purpose of MSMLL, the Drew court should have considered its remedial nature and liberally construed the postponement provision to effectuate the legislature's consumer protection intent. Remedial statutes are those designed to "correct existing law, to redress existing grievances and to introduce regulations conducive to the public good." MSMLL fits this description because it was enacted to regulate the secondary mortgage loan business, provide penalties for violations, and protect consumers against lenders. Specifically, the postponement provision was added in an effort to make the MSMLL more conducive to the public good after opponents argued that amendments to the statute would provide for potential abuse by lenders.
Past Maryland courts have also recognized the statute’s remedial nature. In Duckworth, the borrowers alleged that the lender deliberately violated several provisions of MSMLL. The court determined that MSMLL was “intended to guard the foolish or unsophisticated borrower, who may be under severe financial pressure, from his own improvidence.” The court also found that the statute’s purpose was consistent with the state’s strong policy on usury and consumer protection. The Court of Special Appeals in Williams also declared that MSMLL was remedial in nature. In its analysis, the court, relying on Duckworth, found that MSMLL was intended to protect consumers and, as a result, that it was remedial in nature.

Further supporting the statute’s remedial nature is the Attorney General’s 1985 opinion, which recognized the remedial nature of MSMLL. At some level, the court in Drew understood the remedial nature of the statute, as it noted that MSMLL was passed at a time when consumer protection reform was sweeping the country. However, the Drew court ignored MSMLL’s remedial nature in its analysis of legislative intent, even though its own discussion and past precedent indicated a contrary intent.

Once a statute is determined to be remedial in nature it “must be liberally construed in order to effectuate the statute’s broad remedial purpose.” For example, the court in Breitenbach liberally construed section 9-660(a)(1) of the Workers’ Compensation Act to include transportation costs even though there was no express mention of these costs in the statute. Similarly, in Pak, the Court of Appeals

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244. Duckworth, 55 Md. App. at 717, 466 A.2d at 520-21.
245. Id. at 712, 466 A.2d at 518.
246. Id. at 724, 466 A.2d at 524.
247. Id.
248. Williams, 76 Md. App. at 455, 545 A.2d at 709.
249. Id. at 454, 545 A.2d at 709.
250. Id. at 455-56, 545 A.2d at 709.
252. Drew, 379 Md. at 325, 842 A.2d at 5.
liberally construed "reasonable attorney's fees" in section 8-203(e)(4) of the Maryland Security Deposit Act\(^{255}\) to include fees for postjudgment motions to recover security deposits.\(^{256}\) In applying a liberal construction, the court recognized that landlords could defeat the purpose of section 8-203(e)(4) because many tenants would potentially decide that legal action is not feasible given the cost of an attorney versus the relatively small dollar amounts involved and the difficulties in obtaining the return of a security deposit.\(^{257}\)

The court in \textit{Drew} recognized the remedial nature of MSMLL, but instead of liberally construing the statute to serve the legislature's consumer protection intent, the court ignored the statute's remedial nature by using various canons of construction to reach its conclusion that the postponement provision need not be in writing.\(^{258}\) In \textit{Drew}, unlike the transportation costs in \textit{Breitenbach}, there was express mention of written notice in the statute, and thus \textit{Drew} provides a stronger case for notice in light of the statute's remedial purpose.\(^{259}\) Further, like the provision on attorney's fees in \textit{Pak}, not requiring the postponement provision to be in writing would effectively negate its remedial purpose because borrowers would not know about this right.\(^{260}\) Additionally, past Maryland courts have specifically recognized the remedial nature of MSMLL, but the \textit{Drew} court failed to take the reasoning of these courts into consideration.\(^{261}\) The \textit{Drew} court itself acknowledged that balloon payments have long been problematic for consumer borrowers; therefore, it should have liberally construed MSMLL to protect these consumers by requiring the postponement provision to be in writing.\(^{262}\)

5. \textit{Conclusion}.—In \textit{Drew}, the court held that MSMLL does not require a lender who creates a balloon payment to state in writing that the statutory postponement period of six months is available to bor-

\(^{255}\) \textsc{Md. Code Ann., Real Prop. §§ 8-203(e)(4) (2003)}.  
\(^{256}\) \textit{Pak}, 378 Md. at 321, 835 A.2d 1188.  
\(^{257}\) \textit{Id.} at 327-29, 835 A.2d at 1192-93.  
\(^{258}\) \textit{Drew}, 379 Md. at 333, 842 A.2d at 10 (Wilner, J., dissenting).  
\(^{259}\) \textit{See id.} at 329, 842 A.2d at 7 (stating that "the disclosure provisions listed in (i) and (ii) explicitly require lenders to expressly inform borrowers in writing that a balloon payment provision is included within the loan").  
\(^{260}\) \textit{See id.} at 334-35, 842 A.2d at 11 (Wilner, J., dissenting) (noting the statute's remedial purpose).  
\(^{262}\) \textit{See Drew}, 379 Md. at 323, 842 A.2d 4 (describing balloon payments as "particularly problematic for consumer borrowers").
rowers. In doing so, the court used various canons of construction to reach its conclusion and ignored the legislature’s true intent. The court failed to interpret the statute in context by examining legislative history and reading the statute as a whole and from a common-sense perspective. Had the court taken this approach, it would have discovered that the legislature’s intent of protecting consumers would be better served by requiring lenders to provide written disclosure to borrowers about their postponement right. Given MSMLL’s consumer protection purpose, the court should have liberally construed this remedial statute to effectuate its intent. Furthermore, the court should have considered past Maryland court interpretations of the statute, which have also found a consumer protection intent and thus provide additional support for the postponement provision to be in writing.

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263. Id. at 321, 842 A.2d at 3.
264. See supra notes 180-200 and accompanying text (discussing the court’s use of the canons of construction to ignore legislative intent).
265. See supra notes 201-239 and accompanying text (discussing legislative history and reading statutes as a whole and from a common-sense approach to ascertain legislative intent).
266. See supra notes 201-262 and accompanying text (finding that legislative intent supports written disclosure).
267. See supra notes 240-262 and accompanying text (construing the statute liberally to effectuate intent).
268. See supra notes 243-250, 261 and accompanying text (finding that past decisions support the statute’s consumer protection purpose).
VIII. Torts

A. The Court of Appeals Paints a New Canvas: Imposing Stricter Standards on Landlords to Abate Lead Paint Poisoning in Children

In Brooks v. Lewin Realty III, Inc.,¹ the Court of Appeals of Maryland considered whether a tenant was required to show that her landlord had notice of the peeling, flaking paint in her leased house in order to establish a prima facie case of negligence under the Baltimore City Housing Code for lead paint poisoning to her child.² In a 5-2 decision, the court held that the tenant had no duty to show that her landlord had notice of the peeling paint, thereby overruling Richwind v. Brunson.³ In overruling precedent, the court properly declined to follow the doctrine of stare decisis,⁴ in that (1) it recognized that the Baltimore City Housing Code actually superseded the common law, despite its holding to the contrary in Richwind;⁵ (2) the increased knowledge and awareness of the effects of lead paint poisoning in children provided a reason to depart from precedent;⁶ and (3) it abandoned a standard that would have been too harsh on the tenant.⁷ The court’s decision to overturn precedent and make it easier for tenants to recover will positively impact the health and safety of Maryland children and will help abate lead paint poisoning in the future.⁸

1. The Case.—In August 1988, Shirley Parker rented a house at 1202 North Patterson Park Avenue, in Baltimore City.⁹ Fresh paint was applied to the interior of the house before her tenancy began.¹⁰ Soon after Shirley rented the house, her daughter, Sharon Parker,

¹. 378 Md. 70, 835 A.2d 616 (2003).
². Id. at 72, 835 A.2d at 617.
³. Id. In Richwind, the court held that a tenant must prove that a landlord had notice of a lead paint violation in order for the court to find the landlord liable for negligence. 335 Md. 661, 673, 645 A.2d 1147, 1152 (1994).
⁴. Stare decisis is Latin for “to stand by things decided”; it is a “doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise, again in litigation.” BLACK’S LAW DICTIONARY 1443 (8th ed. 2004).
⁵. See infra notes 173-182 and accompanying text.
⁶. See infra notes 187-196 and accompanying text.
⁷. See infra notes 197-202 and accompanying text.
⁸. See infra notes 203-208 and accompanying text.
⁹. Brooks, 378 Md. at 72, 835 A.2d at 617.
¹⁰. Id.
moved in with her. On December 6, 1989, Sharon gave birth to the minor appellee, Sean, who also lived at that address.

Sometime in February or March of 1991, an auction was held, during which Lewin Realty (Lewin) purchased the house. Before the purchase, Marvin Sober, on behalf of Lewin Realty, conducted a walk-through inspection of the interior. Sharon accompanied Sober as he inspected the house and later testified that at the time of the inspection, there was peeling, chipping, and flaking paint present in numerous areas of the interior of the house, including in Sean’s bedroom. After Lewin purchased the house, the agency entered into a new lease with Shirley and did not apply new paint to the interior of the house. In February 1992, Sean was diagnosed with an elevated blood-lead level, although Sharon did not learn about his condition until four months later when a nurse from the Baltimore City Health Department (BCHD) came to the house to speak with Sharon about the situation. After BCHD inspected the house, they found fifty-six areas of peeling, chipping, and flaking lead paint. Shortly thereafter, BCHD issued a lead paint violation notice for the property to Lewin. Sober testified that Shirley never complained to him about peeling paint in the house.

Sharon filed a complaint in the Circuit Court for Baltimore City against Lewin, alleging, inter alia, that Lewin was negligent in maintaining and inspecting the premises. The claim was based on several factors, including: (1) Lewin’s violation of the Baltimore City Housing Code; (2) Sean’s exposure to an unreasonable risk of harm from the

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11. Id.
12. Id.
13. Id. Lewin Realty is owned by four stockholders, one of whom is Marvin Sober, who was in charge of carrying out the company’s daily business and managing the company. Id.
14. Id.
15. Id. at 72-73, 835 A.2d at 617.
16. Id. at 73, 835 A.2d at 617.
17. Id. Two expert witnesses testified that Sean’s exposure to lead paint caused permanent brain damage, with the result that “Sean had trouble with organization, sustaining attention, following directions, and controlling his behavior.” Lewin Realty III, Inc. v. Brooks, 138 Md. App. 244, 280-81, 771 A.2d 446, 467 (2001).
18. Brooks, 378 Md. at 73, 835 A.2d at 617.
20. Id., 835 A.2d at 617.
22. Brooks, 378 Md. at 73, 835 A.2d at 618.
23. BALTIMORE, MD., HOUSING CODE §§ 705(b)(3), 706(b)(1)-(2) (2000). Sharon alleged that Lewin violated section 703(3), which provides that to be considered in good repair and safe condition, all walls and ceilings shall be “kept clean and free of any flaking, loose, or peeling paint.” Brooks, 378 Md. at 83, 835 A.2d at 623. In addition, Sharon alleged that Lewin violated section 706(b)(1), which states that “all interior loose or peeling
lead-based paint while Lewin knew that Sean had no knowledge of its danger and could not discover the danger, even in the exercise of reasonable care; (3) Lewin’s failure to exercise reasonable care in properly maintaining the interior painted surfaces, despite actual and constructive knowledge of the paint’s flaking condition; and (4) Lewin’s failure to exercise reasonable care by inspecting the paint in the interior of the house, when the flaking paint condition would have been revealed upon a reasonable inspection.\textsuperscript{24}

Before the case went to trial, Lewin filed a motion in limine to exclude from evidence five lead paint violation notices issued in the 1980s by BCHD, in reference to Lewin’s other properties, which were not involved in the instant case.\textsuperscript{25} Lewin argued that the notices were irrelevant and were overly prejudicial to its case.\textsuperscript{26} The court denied the motion and the notices were admitted into evidence at trial.\textsuperscript{27}

The jury found that Lewin was liable for negligence to Sean and awarded $750,000 worth of damages to Sharon on Sean’s behalf.\textsuperscript{28} Lewin appealed the case to the Court of Special Appeals.\textsuperscript{29} The arguments made to the Court of Special Appeals centered on whether the circuit court had properly admitted the notices.\textsuperscript{30} The Court of Special Appeals held that the admission of the notices was prejudicial error because the notices did not provide insight into the presence of

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\item \textsuperscript{24} Brooks, 378 Md. at 73–74, 835 A.2d at 618.
\item \textsuperscript{25} Id. at 74, 835 A.2d at 618. Each document was entitled “Emergency Violation Notice and Order to Remove Lead Nuisance.” Id.
\item \textsuperscript{26} Id. Lewin also argued that the documents should be deemed inadmissible as evidence of other bad acts and that because Sober testified to having knowledge of the danger of lead paint, the issue of his knowledge and the notices were irrelevant. Id.
\item \textsuperscript{27} Id.
\item \textsuperscript{28} Id.
\item \textsuperscript{29} Id. Before appealing the case, Lewin filed a motion for judgment notwithstanding the verdict, which the circuit court denied. Id.
\item \textsuperscript{30} Id.
\end{itemize}
\end{footnotesize}
peeling, chipping, or flaking paint in the rented property at issue. Accordingly, the Court of Special Appeals reversed the circuit court’s holding and remanded the case for a new trial. Sharon then appealed on Sean’s behalf. The Court of Appeals granted certiorari to elucidate the notice requirement in lead paint poisoning negligence actions stemming from landlord violations of the Baltimore City Housing Code.

After the initial briefing and oral argument, the Court of Appeals amended its previously granted writ of certiorari and issued an order directing the parties to file briefs that specifically considered three main issues. The court asked the parties to consider: (1) whether a landlord should have an affirmative duty to inspect his properties to determine if there is flaking, chipping, or peeling paint, either before or during a tenant’s lease period; (2) whether plaintiffs in lead paint negligence actions should have to prove that the landlord had notice of a lead paint condition in the interior of the premises in order to establish a prima facie case; and (3) whether a landlord should be presumed to have notice of a lead paint condition when such a condition exists in the leased property.

2. Legal Background.—Since 1979, the Court of Appeals has utilized the following standard for determining when it would be appropriate to depart from the principle of stare decisis and overrule precedent: the common law must have “become unsound in the circumstances of modern life.” Since then, the court has utilized this standard, or a less stringent means of analysis, to overturn precedents that the court found were no longer applicable. The standard in lead paint negligence cases since 1994 has required tenants to prove that the landlord had notice of a violation in order to establish a prima facie case of negligence. More recently, however, the awareness of lead paint poisoning has substantially increased in Maryland—

31. Id.
32. Id.
33. Id.
34. Id. at 72, 835 A.2d at 617.
35. Id. at 74-75, 835 A.2d at 618-19.
36. Id. at 75-76, 835 A.2d at 619.
37. See, e.g., Lewis v. State, 285 Md. 705, 714-15, 404 A.2d 1073, 1078 (1979). While this standard was first articulated in White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966), the Court of Appeals did not actually utilize the standard to overturn precedent until 1979 in Lewis.
38. See infra note 61 (noting two cases in which the Court of Appeals overturned precedent due to changing conditions rendering precedent inapplicable).
and generally in the United States—catalyzing several states such as Massachusetts, New York, and Connecticut to try to abate lead poisoning by holding landlords liable to tenants for negligence without the tenant proving that the landlord had notice of a violation.\footnote{See infra notes 118-136 and accompanying text (describing other states' efforts to abate lead paint poisoning in children).}

a. The Doctrine of Stare Decisis and the Court's Standard for Overruling Precedent.—The doctrine of stare decisis, meaning "to stand by things decided," is a doctrine of precedent requiring a court to follow earlier judicial decisions when the same points arise in litigation in order to ensure consistency and predictability within the courts.\footnote{285 Md. 705, 715, 404 A.2d 1073, 1078-79 (1979) (quoting White v. King, 244 Md. 348, 354, 223 A.2d 763, 767 (1966)). In \textit{White}, the Court of Appeals examined whether the principle lex loci delicti, meaning the law of the place where a tort or wrong took place, should be abandoned in light of scholarly criticism. \textit{White}, 244 Md. at 354-55, 223 A.2d at 767. The court stated that "the doctrine of \textit{stare decisis}, important as it is, is not to be construed as preventing us from changing a rule of law if we are convinced that the rule has become unsound in the circumstances of modern life;," and that stare decisis would therefore not prohibit the court from determining that lex loci delicti should be overruled. \textit{Id.} at 354, 223 A.2d at 767. However, after analyzing the laws of other states, the court determined that the present state of the law was such that any changes, if necessary, should be made by the legislature and not the court. \textit{Id.} at 354-55, 223 A.2d at 767.} In most cases, the Court of Appeals follows the principle of stare decisis to promote the consistent and predictable development of legal principles.\footnote{See Williams v. State, 292 Md. 201, 217, 438 A.2d 1301, 1308-09 (1981) (explaining when the court should abandon stare decisis).} However, the Court of Appeals has adopted standards for abandoning stare decisis in situations where common-law principles can no longer serve as the basis for a decision.\footnote{Id. at 354, 223 A.2d at 767.}

In 1979, in \textit{Lewis v. State}, the Court of Appeals abandoned precedent after it determined that the common law "ha[d] become unsound in the circumstances of modern life."\footnote{Lewis, 285 Md. at 707, 404 A.2d at 1074.} In \textit{Lewis}, the defendant was convicted as an accessory before the fact to first degree murder.\footnote{Id.} The defendant appealed on the grounds that under the common law, an accessory before the fact cannot be tried before the principal is sentenced.\footnote{Id. at 707, 404 A.2d at 1074.} The Court of Appeals acknowledged that the technical common-law procedural rule, adopted in 1776, did require the sentencing of the principal before an accessory before the fact could be tried and that under that rule, the defendant was wrongly tried be-
cause the principal had not yet been sentenced. However, the court cited its reasoning from White v. King, decided thirteen years earlier, and abandoned the common-law rule on the basis that it had become unsound in the circumstances of modern life and needed to be changed. The court reasoned that when the English courts originally adopted the common-law rule in the fifteenth century, the rule acted as a means of easing the severity of the death penalty, but in contrast, the rule only acts today to shield accessories from punishment and reduce judicial efficiency. As such, the court abandoned the common-law rule requiring that a principal be sentenced before an accessory can be tried.

Similarly in 1981, in Williams v. State, the Court of Appeals adopted its reasoning from Lewis to change precedent, after finding that the circumstances that gave rise to the common-law principles of the precedent case no longer existed to a degree that rendered common-law principle applicable. In Williams, the defendant challenged his convictions of murder and assault with intent to murder in a post-conviction proceeding. The trial court held that the defendant's right to be present at every stage of trial was violated because the jury voir dire was conducted during a bench conference, while the defendant remained at the trial table, even though he had not waived his right to be present. On appeal, the Court of Appeals examined whether the common-law principle that counsel's action or inaction could never waive a criminal defendant's right to be present at all stages of his trial was still applicable.

In its analysis, the court recognized that there had been some significant changes to the role of counsel since the time that this common-law principle was first established. According to the court, the greatest change was the establishment of an absolute right to counsel when there is a danger of incarceration, while in the past the right to counsel was not absolute. In its analysis, the court cited Lewis, stating "that the common law is not static and is subject to modification in

47. Id. at 713, 404 A.2d at 1078.
48. Id. at 715, 404 A.2d at 1078-79 (citing White, 244 Md. at 354, 223 A.2d at 767).
49. Id., 404 A.2d at 1079.
50. Id. at 716, 404 A.2d at 1079.
52. Id. at 203, 438 A.2d at 1302.
53. Id. at 203-04, 438 A.2d at 1302.
54. Id. at 217-20, 438 A.2d at 1308-10.
55. Id. at 217, 438 A.2d at 1309.
56. Id. at 217-18, 438 A.2d at 1309.
light of changing circumstances or increased knowledge."\textsuperscript{57} It also cited \textit{White} and repeated the proposition that even though \textit{stare decisis} is an important legal principle, it does not prevent the court from changing the law when it has become unfit for modern circumstances.\textsuperscript{58} As such, the court decided that because the primary function of mandated appointed counsel is to assert or waive the rights of defendants, including the right to be present at trial, the common-law rule that counsel's action or inaction could never waive a criminal defendant's right to be present at all stages of his trial no longer applied.\textsuperscript{59} The court thus overturned precedent, finding that the right to be present will be waived unless the defendant, himself, affirmatively asks to be present or fails to object to such occurrences and his attorney consents or fails to address the issue.\textsuperscript{60}

In subsequent cases, the Court of Appeals applied the reasoning used in \textit{Williams} to similar cases to examine whether the common-law principle in question was still applicable in light of the circumstances and the court overturned precedent in situations where the circumstances had changed significantly enough to alter the effects of the law.\textsuperscript{61}

In addition to applying the test used in \textit{Williams}, the Court of Appeals has applied less restrictive standards for overturning common-law rules. In 1998, in \textit{Mayor and City Council of Baltimore v. Schwing}, the court abandoned the rule that it used to decide a case two years prior after determining that it had wrongly decided the previous case.\textsuperscript{62} In the prior case, the court held that an employee who suffers from an occupational disease and who receives a workers' compensation award for that condition may not pursue a new claim based on an aggravation of the original condition due to additional exposure to the same occupational hazards that produced the original condi-

\textsuperscript{57.} \textit{Id.} at 217, 438 A.2d at 1308 (citing Lewis v. State, 285 Md. 705, 715, 404 A.2d 1073, 1078-79 (1979)).

\textsuperscript{58.} \textit{Id.}, 438 A.2d at 1309 (citing White v. King, 244 Md. 348, 354, 223 A.2d 763, 766-67 (1966)).

\textsuperscript{59.} \textit{Id.}

\textsuperscript{60.} \textit{Id.} at 220, 438 A.2d at 1310.

\textsuperscript{61.} See Bozman v. Bozman, 376 Md. 461, 485, 496-97, 830 A.2d 450, 464-65, 471 (2003) (abolishing the doctrine of interspousal tort immunity after finding it was a vestige of the past and was unsound in the circumstances of modern life); Jones v. State, 302 Md. 153, 160-61, 486 A.2d 184, 188 (1985) (abrogating the common-law rule that an accessory cannot be convicted of a crime greater than the principal because the court determined that allowing the accessory to avoid the consequences of his actions was no longer sound in modern life).

\textsuperscript{62.} 351 Md. 178, 197, 717 A.2d 919, 928 (1998).
tion. In *Schwing*, the court realized that its prior holding caused an unfair result, and was contrary to the positions taken by many other states, and thus found that an employee who suffers from an occupational disease may file a new claim for an aggravation in the condition caused by new exposures to workplace hazards, thereby overruling its prior holding.

The above cases demonstrate that the Court of Appeals has overturned precedent when a change in circumstances rendered precedent unsound for the circumstances of modern life and when it has determined that its logic had been faulty in an earlier case.

*b. The Increased Awareness of the Frequency and Severity of the Effects of Lead Paint Poisoning in Children.—*

(1) *Awareness and Action in Maryland.*—Lead paint exposure is incredibly dangerous and can cause permanent neurological damage or even death. The consequences are more severe in children under the age of six, where the lead slows the development of the central nervous system and brain because their neurological systems are still developing.

The General Assembly realized that because federal law prohibits the sale of lead paint for the interior of homes, the dangers of childhood lead poisoning stem from old paint applied many years ago. Thus, requiring homes to be properly maintained and free from flaking or peeling paint prevents the lead-based paint from breaking into chips and deteriorating into dust accessible to children, essentially eliminating childhood lead poisoning. As a result, the Maryland legislature enacted the Lead Poisoning Prevention Act in 1994 to reduce the incidence of childhood lead poisoning. As part of the Act, the

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63. *Id.* at 187, 717 A.2d at 923.
64. *Id.* at 197, 717 A.2d at 928.
65. *Id.* at 206, 717 A.2d at 932-33.
67. *Md. Dep't of the Env't Lead Poisoning Prevention Program, at* http://www.mde.state.md.us/Programs/LandPrograms/LeadCoordination/index.asp (last visited Dec. 13, 2005) [hereinafter Md. Dep't of the Env't].
The legislature required the establishment of a Lead Paint Poisoning Commission that would meet at least quarterly to discuss the progress of lead paint abatement efforts including certain lead poisoning protection programs and studies, satisfaction of the risk reduction standards by landlords of affected properties, lead contamination testing and inspection programs, and blood tests of tenants. In addition, the legislature has proposed and enacted several measures in an attempt to increase the public's awareness of the harmful effects of lead and of methods of preventing lead paint poisoning in children. For example, in 1997, the Maryland State Legislature enacted the Childhood Lead Screening Program designed to require universal blood-lead prevention screening for children under the age of six in areas of Maryland classified as high risk. It also required that all children under age six be screened for lead poisoning within thirty days of entering a childcare facility.

In 2002, the Maryland House of Delegates proposed the Maryland Lead Poisoning Protection Act to further abate lead poisoning in children. This act would have required, inter alia, lead reduction treatments to be included in certain risk reduction standards, reports to include testing of lead-contaminated dust, and the establishment of certain lead reduction procedures and guidelines by the Department of the Environment.

(2) Awareness and Action by the Federal Government.—In response to the lead poisoning problem facing children in the United States, Congress passed the Residential Lead-Based Paint Hazard Reduction Act of 1992, also known as Title X, which mandated the creation of an infrastructure to correct lead paint hazards existent in homes, redefined lead paint hazards, and articulated how they can be controlled. The Act ensured that lead paint problems are disclosed...
before the sale or lease of a residential property, developed national and local education programs, required inspectors and abatement contractors to become licensed, and provided the impetus for other governmental acts against lead paint poisoning. In addition, in recognition of the problem of childhood lead paint poisoning, President Clinton issued Executive Order 1304583 in April 1997, directing each federal agency to make it a high priority to assess, identify, and address the risks of childhood lead paint poisoning. To accompany the Order, President Clinton created the Task Force on Environmental Health Risks and Safety Risks to Children to develop a set of recommendations and strategies to protect the environmental health and safety of children in the United States. Through research, the task force determined that lead poisoning is a completely preventable disease, and that residential lead paint hazards in homes where children live could be eliminated in ten years. President Clinton made the ultimate goal for the Task Force the elimination of childhood lead poisoning as a major public health problem in the United States by 2010.

c. The Maryland Standard for Establishing Negligence in Lead Paint Cases.—In order to establish a negligence cause of action under the common law, a plaintiff must prove that the defendant had a duty to protect the plaintiff from injury, that the defendant breached that duty, that the plaintiff suffered an actual loss or injury and that the loss or injury was proximately caused by the defendant’s breach of duty. In addition, the common law provides that a landlord is not liable to a tenant for negligence for a defective condition on the premises unless the landlord knew or had reason to know of the condition and had a reasonable opportunity to correct it.

Since 1994, when it decided Richwind, the Court of Appeals has held that the lead paint provisions of the Baltimore City Housing Code do not alter or supersede the common-law requirement that a

82. Id.
84. Id. § 1-101(a).
85. Id. § 3-301.
86. PRESIDENT’S TASK FORCE ON ENV’T HEALTH RISKS & SAFETY RISKS TO CHILDREN, ELIMINATING CHILDHOOD LEAD POISONING: A FEDERAL STRATEGY TARGETING LEAD PAINT HAZARDS (2000).
87. Id. at 1.
88. Id. at i.
90. Id. at 673, 645 A.2d at 1153 (citations omitted).
landlord receive notice of a defect before he is held liable to the tenant for failing to correct it. Section 301 of the Housing Code required the Commissioner of Housing and Community Development to give landlords notice of any discovered violations and section 303 mandated that the Commissioner order the required corrections by notice and service. In addition, section 702 provided that every building in Baltimore City containing a dwelling had to be in "good repair, safe condition, and fit for human habitation," while section 703 detailed the standards for good repair and safe condition and required that all walls, ceilings, woodwork, doors and windows were clean and free of flaking, loose, or peeling paint. Lastly, section 706 prohibited the use of lead paint in the interior of homes and required that all interior loose or peeling paint be removed.

In Richwind v. Brunson, a tenant brought a negligence action on behalf of her minor children against her landlord for injuries sustained by her children as a result of their exposure to lead-based paint. The Court of Appeals examined both the common-law negligence standard in Maryland and the requirements imposed by the Baltimore City Housing Code and determined that both the code and the common law required that the landlord had notice and/or actual knowledge of the dangerous condition on the property and a reasonable chance to fix it before being held responsible. It therefore determined that a private cause of action in a landlord-tenant context could arise from a lead paint violation of any type of statutory duty or implied warranty created by the Baltimore City Housing Code, but that sections 301 and 303 required that a landlord have adequate notice of the lead paint violation before being held liable. The court determined that under the Housing Code, a landlord has a duty to

91. See, e.g., id. at 675-76, 645 A.2d at 1154 (holding that a tenant had a duty to prove that the landlord had notice of a defective condition to establish a prima facie case for negligence).
92. BALTIMORE, MD., HOUSING CODE § 301 (2000).
93. Id. § 303.
94. Id. § 702.
95. Id. § 703.
96. Id. § 706.
97. 335 Md. 661, 668-69, 645 A.2d 1147, 1150 (1994).
98. Id. at 674-75, 645 A.2d at 1153. The court stated that the primary difference between the code and the common law was that the code seemed to require the Commissioner to provide the landlord with notice, whereas the common law just requires that the landlord receive notice from any source. Id. at 675, 645 A.2d at 1153.
99. Id. at 671, 645 A.2d at 1151-52. The court quoted language from section 301, which required the Commissioner of Housing and Community Development to give notice of a lead paint violation to a landlord once it had been determined that such a violation existed. Id. at 673, 645 A.2d at 1152. It then quoted language from section 303, which
protect his tenants from injuries caused by lead paint, that the landlord in the case breached his duty and that he proximately caused the tenant's injury. The court determined that even though the Housing Code required notice by the Commissioner, the landlord was still liable for negligence under the common-law standard because he received notice of the condition from the tenants and the management company knew the age of the building and the dangers of lead paint. Importantly, it held that the Baltimore City Housing Code did not alter or supersede the common-law notice requirements, but instead reinforced the requirement that the landlord have notice before he can be held liable.

The Court of Appeals decided Scroggins v. Dahne on the same day as Richwind. The Court examined whether a landlord could be held liable for lead poisoning when the landlord had no knowledge of the flaking lead paint in a rented apartment. The court drew upon its reasoning in Richwind and stated that in order to impose liability on a landlord, the landlord must have notice and an opportunity to repair the defective condition before the plaintiff sustained injuries from that condition. Accordingly, the court held that because the landlords did not have notice of flaking lead-based paint and because they were not given a reasonable opportunity to correct the condition, they were not negligent as a matter of law.

The court established less stringent standards than those set forth in Richwind six years later in Brown v. Dermer, when a mother, on behalf of her minor children, sued her landlords for negligence and sought damages for lead paint poisoning suffered by the children. The Court of Appeals held that in lead poisoning negligence actions based on violations of the Baltimore City Housing Code, the tenants had to show that the landlord had "reason to know" of a condition on the property that may pose harm to the tenants. Specifically, in order to satisfy this standard, the tenants had to show (1) that there was flaking paint in the premises and (2) that the landlord had notice.

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100. Id. at 670-71, 645 A.2d at 1151-52.
101. Id. at 679-80, 645 A.2d at 1155-56.
102. Id. at 674-75, 645 A.2d at 1153.
103. 335 Md. 688, 645 A.2d 1160 (1994).
104. Id. at 690, 645 A.2d at 1161.
105. Id. at 693, 645 A.2d at 1162.
106. Id., 645 A.2d at 1163.
108. Id. at 349-50, 744 A.2d at 50.
109. Id. at 362, 744 A.2d at 57.
of the condition. In meeting this standard, the tenant did not have to show that the paint was lead based. In Brown, the court held that the landlord could be liable for negligence to the tenant because the landlord had “reason to know” of the peeling, flaking paint based on complaints to the landlord about the deteriorating condition of the paint.

Lastly, in Jones v. Mid-Atlantic Funding Co., a tenant brought a lead paint poisoning negligence action against the landlords on her own behalf and on behalf of her minor children. The Court of Appeals examined whether the lower court properly granted summary judgment in favor of the landlords. It determined that the case should have been submitted to the jury to determine (1) whether the landlords had reason to know of the flaking paint condition; and (2) whether landlords of ordinary intelligence with the same knowledge would have realized the risk of lead poisoning, in accordance with the test established in Brown. The court therefore reversed and remanded the case with instructions that the jury hear the case.

d. Other States’ Attempts at Lead Paint Poisoning Prevention.— In addition to the legislative and judicial actions of Maryland and the legislative actions of the United States government, Massachusetts, Connecticut, and New York have taken judicial action to combat lead paint poisoning in children by imposing strict standards upon landlords in negligence cases of lead paint poisoning.

(1) Massachusetts.—In 1984, in Bencosme v. Kokoras, the Massachusetts Supreme Judicial Court concluded that landlords were strictly liable for any compensatory damages resulting from violations of the state’s lead paint laws. In Bencosme, the court examined section 199 of the Massachusetts General Laws which created landlord liability, and it determined that neither negligence nor knowledge of

110. Id.
111. Id. The court found that the language of the Baltimore City Housing Code required the tenant to show a presence of flaking, loose, or peeling paint to establish a violation and it contained no express language requiring a further showing of the content of the paint. Id.
112. Id. at 367, 744 A.2d at 60.
114. Id. at 670, 766 A.2d at 621-22.
115. Id. at 665, 766 A.2d at 619.
116. Id. at 685-87, 766 A.2d at 630-31.
117. Id. at 687-88, 766 A.2d at 631.
118. 507 N.E.2d 748 (Mass. 1987).
119. Id. at 750.
120. MASS. GEN. LAWS ANN. ch. 111, § 199 (West 1984).
the risk is an element of liability. Instead, the court found that the owner is liable for any damages caused by his failure to perform the duties required of him by statute, including removing or covering lead paint when a child under the age of six resides in the premises. The court concluded that the statute did not require a showing of notice to the landlord before the landlord could be held liable to the tenant for injuries caused by the lead paint violation.

(2) Connecticut.—In 1989, in Hardy v. Griffin, the Superior Court of Connecticut held landlords strictly liable for injuries to minor tenants caused by the ingestion of lead paint. The court determined that the tenant’s son suffered from lead paint poisoning and that this condition resulted from his exposure to the lead-based paint present in the apartment rented from the landlords. The court found that because section 16-49 of the New Haven, Connecticut, Code of General Ordinances imposes a duty on landlords to maintain rental premises free of lead paint and make all necessary repairs to put and keep the premises in a fit and habitable condition, the landlords in the case were liable for the injuries incurred by the tenant’s son. The court relied on the traditional rule that violation of an ordinance enacted for the protection of the public is negligence as a matter of law. The court concluded that the landlords were liable for the tenant’s condition because of their negligent failure to keep the premises free of lead paint and because they should have known of the presence of lead paint at the time they rented out the premises.

(3) New York.—The Court of Appeals of New York’s 1996 decision, Juarez v. Wavecrest Management Team Ltd., charged landlords with notice of all of the hazardous conditions in the rental premises in

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121. Benkosme, 507 N.E.2d at 750.
122. Id.
123. Id.
125. Id. at 51.
126. Id. at 50.
127. Id. at 50-51.
128. Id. (citing Panaroni v. Johnson, 256 A.2d 246, 253 (Conn. 1969)).
129. Id. at 51.
131. Id.
question. In its analysis, the court examined the Administrative Code of New York, specifically Local Law 1 and determined that it required landlords to remove or cover paint containing specified levels of lead if the landlord had been notified that a child six years old or younger was living in the dwelling. The court also determined that Local Law 1 further established a presumption that peeling paint in a dwelling unit occupied by a child six years of age or under comprises a hazardous lead condition in any building erected prior to 1960. The court specifically stated that the law did not create an additional standard of care because it imposed a reasonableness standard that allowed a landlord to argue that a lead paint hazard existed despite his reasonable attempts to prevent it, meaning that he would not be held liable for negligence if he could prove that he exercised reasonable care in maintaining the premises.

3. The Court's Reasoning.—In Brooks v. Lewin Realty III, Inc., the Court of Appeals examined the Baltimore City Housing Code and the relevant common-law rules and held that a tenant does not have to prove that her landlord had notice of a lead paint violation in order to establish a prima facie case of negligence. Judge Eldridge, writing for the majority, determined that Sharon Parker, the tenant, did not need to show that Lewin, the landlord, had notice of the Housing Code violations in order to establish a prima facie case of negligence, overruling Richwind and its progeny. The court then held that because Sharon did not need to show that Lewin had notice of the violation, notices of past violations were irrelevant to the case and were erroneously admitted into evidence at trial and therefore remanded the case for a new trial.

The court examined the Baltimore City Housing Code, which imposes obligations and duties upon landlords who rent residential property to tenants. The court determined that sections 702, 703, and 706 of the Housing Code place an affirmative duty on landlords

132. Id. at 137.
133. NEW YORK CITY, N.Y., ADMIN. CODE § 27-2013(h) (1982).
134. Juarez, 672 N.E.2d at 143.
135. Id.
136. Id. at 141-42.
137. 378 Md. 70, 72, 835 A.2d 616, 617 (2003).
138. Judge Eldridge's opinion was joined by Chief Judge Bell and Judges Cathell, Harrell, and Battaglia. Id. at 70-71, 835 A.2d at 616-17.
139. Id. at 72, 835 A.2d at 617.
140. Id. at 72, 99, 835 A.2d at 617, 627.
141. Id. at 81, 835 A.2d at 622. The court noted that section 103(b) required that the Housing Code be liberally construed. Id.
to continuously keep the dwellings free of loose or peeling paint.\textsuperscript{142} The court lastly noted that if the Commissioner of Housing and Community Development determined that a code violation existed, section 301 required him to give notice of the violation to the landlord, and section 303 required him to order the necessary corrections by means of notice and service.\textsuperscript{143}

The court next analyzed the general rule that under the common law, and in absence of a statute, a landlord has no duty to inspect the rented premises or keep the rented premises in good repair.\textsuperscript{144} The court noted that under Maryland common law, where there is an applicable statutory provision specifically designed to protect a class of people to which the plaintiff belongs, violation of the statute or ordinance by the defendant is evidence of negligence.\textsuperscript{145} In examining the Baltimore City Housing Code against the facts of the case, the court determined that the injured child, Sean, was within the class of people that the Baltimore City Housing Code was designed to protect; the City Council, by enacting sections 702 and 703 of the Housing Code, intended to protect children from lead paint poisoning by putting landlords on notice of conditions that could increase the risk of such injuries.\textsuperscript{146} Because the Housing Code applied, the court determined that this case was an exception to the common-law principle that a landlord has no duty to inspect and maintain the premises.\textsuperscript{147} Moreover, the court determined that two separate sections, sections 703 and 706 of the Housing Code, required removal of flaking, loose, or peeling paint in order for the dwelling to be considered safe and therefore reasoned that the common-law rule was inapplicable and that landlords did have a duty to inspect the property.\textsuperscript{148}

The court examined case law and concluded that in order to establish a prima facie case of negligence, a plaintiff must only show that

\begin{itemize}
\item \textsuperscript{142} Id. at 83-84, 835 A.2d at 623-24. Section 702 requires that a dwelling be kept in safe condition, good repair, and fit for human habitation. BALTIMORE, Md., HOUSING CODE § 702 (2000). Section 703 mandates that all walls, ceilings, woodwork, doors, and windows be kept free of loose, flaking, or peeling paint. \textit{Id.} § 703. Section 706 required the removal of loose and peeling paint from interior surfaces and that all newly applied paint be lead free. \textit{Id.} § 706. The court reasoned that landlords should not have trouble meeting the requirements because section 909 of the Housing Code required dwelling occupants to grant access to landlords at all reasonable times. \textit{Brooks}, 378 Md. at 84, 835 A.2d at 624. In the event that the landlord could not comply, section 1001 prohibited the lease of the dwelling. BALTIMORE, Md., HOUSING CODE § 1001 (2000).
\item \textsuperscript{143} \textit{Brooks}, 378 Md. at 87, 835 A.2d at 626.
\item \textsuperscript{144} \textit{Id.} at 78, 835 A.2d at 620.
\item \textsuperscript{145} \textit{Id.}, 835 A.2d at 620-21.
\item \textsuperscript{146} \textit{Id.} at 81, 835 A.2d at 622.
\item \textsuperscript{147} \textit{Id.} at 78-81, 835 A.2d at 621-22.
\item \textsuperscript{148} \textit{Id.} at 81-84, 835 A.2d at 623-24.
\end{itemize}
there existed a violation of a statute or ordinance designed to protect a specific class of persons of which the plaintiff is a part and that the violation proximately caused the injury.\textsuperscript{149} The court noted that none of the relevant cases imposed the additional burden of proving that the defendant was aware that he or she violated the applicable statute.\textsuperscript{150} It further stated that if the violation of the statute proximately caused the plaintiff's injury, evidence of the violation was enough to warrant the court's submission of the question of the defendant's negligence to the jury, and the jury will then evaluate whether the defendant's actions were reasonable under all of the circumstances.\textsuperscript{151}

Because a landlord's liability for injury to a child caused by lead paint poisoning depends on the jury's evaluation of the landlord's actions under all circumstances, the court explicitly stated that landlords were not subject to a strict liability regime.\textsuperscript{152}

In addition, the court rejected the argument that imposing upon a landlord a duty to inspect property during a tenancy would be too burdensome because it would require the landlord to inspect the property on a frequent basis.\textsuperscript{153} The court relied on the fact that peeling and flaking of paint is a gradual, prolonged process that a landlord can detect with reasonable periodic inspections.\textsuperscript{154} Further, because section 909 of the Housing Code requires that tenants allow access of their rented property to their landlords, the court rejected Lewin's argument that the tenant might object to the landlord's inspections.\textsuperscript{155}

The court next recognized that its present holding conflicted with its 1994 holding in \textit{Richwind v. Brunson}, which, in addressing a negligence claim based on a landlord's alleged lead paint violation, held that the Housing Code did not modify the common-law notice requirement because violations of sections 301 and 303 of the Housing Code explicitly contemplated notice to the landlord.\textsuperscript{156} The court noted that section 301 required that the Commissioner give notice to the landlord when he discovered a Housing Code violation and that section 303 required the Commissioner to order the necessary corrections by notice and service.\textsuperscript{157}

\begin{itemize}
  \item \textsuperscript{149} \textit{Id.} at 79, 835 A.2d at 621.
  \item \textsuperscript{150} \textit{Id.} at 80, 835 A.2d at 622.
  \item \textsuperscript{151} \textit{Id.} at 79, 835 A.2d at 621.
  \item \textsuperscript{152} \textit{Id.} at 84-85, 835 A.2d at 624.
  \item \textsuperscript{153} \textit{Id.} at 85, 835 A.2d at 625.
  \item \textsuperscript{154} \textit{Id.}
  \item \textsuperscript{155} \textit{Id.} at 86, 835 A.2d at 625.
  \item \textsuperscript{156} \textit{Id.} at 86-88, 835 A.2d at 625-27.
  \item \textsuperscript{157} \textit{Id.} at 87-88, 835 A.2d at 626-27.
\end{itemize}
the court found that each of these code provisions mandated that the landlord be served with notice and afforded a reasonable opportunity to correct the defect.\textsuperscript{158} The court explained that its opinion in \textit{Richwind} was flawed because it wrongly extended these two provisions to apply to tenants, despite the fact that the Housing Code, in reference to notice, refers to members of government and fails to make any mention of tenants in its description of duties.\textsuperscript{159}

In dissent, Judge Raker, joined by Judge Wilner, opposed the majority's conclusion that the Housing Code abolishes the common-law notice requirement as a precursor to negligence liability and disagreed with the majority's decision to abandon the principles of stare decisis and overrule \textit{Richwind.}\textsuperscript{160} Judge Raker argued that the majority wrongly interpreted the Housing Code as abolishing the notice requirement and therefore incorrectly abrogated Maryland's well-established common-law principle that requires the plaintiff to demonstrate that the landlord knew or had reason to know that the premises had flaking or peeling paint before being held liable.\textsuperscript{161} Judge Raker opposed the majority's decision on the basis that it makes it possible for tenants to establish a prima facie case for negligence if they have flaking paint in their homes and a person in the class protected by the Housing Code has suffered a lead paint injury, regardless of whether the landlord acted reasonably. Judge Raker contended that in doing so, the majority's holding abolished the common-law principle that traditionally forgave landlords who had valid excuses for their transgressions in not fixing the problem, including lack of notice, and did not hold the landlords liable for the injury. Judge Raker also disagreed with the majority's establishment of what she characterized as a strict liability standard, which relegates landlords to the status of insurers for any lead-based paint injury sustained by a child.\textsuperscript{163} Finally, Judge Raker argued that because the tenant is in

\textsuperscript{158} \textit{Id.}, 645 A.2d at 626.
\textsuperscript{159} \textit{Id.} at 87-88, 645 A.2d at 626. The court also mentioned that other jurisdictions have charged landlords with notice of conditions that could be found through a reasonable inspection. \textit{Id.} at 89 n.7, 645 A.2d at 627 n.7.
\textsuperscript{160} \textit{Id.} at 90 & n.1, 835 A.2d at 627-28 & n.1 (Raker, J., dissenting).
\textsuperscript{161} \textit{See id.} at 92-94, 835 A.2d at 629-30 (Raker, J., dissenting) (discussing the long line of cases, as well as the \textit{Restatement (Second) of Property} § 17.6, which states that a tenant's prima facie case for negligence includes proof that the landlord knew or had reason to know of the flaking paint).
\textsuperscript{162} \textit{Id.} at 90-91, 835 A.2d at 628 (Raker, J., dissenting).
\textsuperscript{163} \textit{Id.} at 91, 835 A.2d at 628 (Raker, J., dissenting).
\textsuperscript{164} \textit{Id.} (Raker, J., dissenting).
a better position to observe flaking or chipping paint, it should be the tenant's responsibility to notify the landlord of this condition.165

4. Analysis.—In Brooks v. Lewin Realty III, Inc., the Court of Appeals imposed strict standards upon landlords in negligence cases involving lead paint poisoning in children by eliminating the tenant's burden of proving that the landlord had notice of peeling, flaking paint on the premises.166 In doing so, the court overruled Richwind and its progeny, which required the tenant to prove that the landlord had notice of the violation in order to establish a prima facie case of negligence.167 The court's decision to overturn precedent was proper because (1) it recognized that the Baltimore City Housing Code superseded the common law, despite its holding in Richwind to the contrary;168 (2) awareness and knowledge of the harm caused by lead paint in children has increased, rendering the precedent standard inapplicable;169 and (3) it abandoned a standard that would have been too harsh on the tenant and the children of Maryland.170 The court's decision to overturn precedent and impose more stringent standards upon landlords will impact positively the health and safety of children and will help abate future cases of lead paint poisoning in Maryland.171

a. The Court Properly Abolished the Notice Element in Common-Law Negligence Actions for Injuries Resulting from Lead Paint Violations.—The court in Brooks properly interpreted the Baltimore City Housing Code as modifying or superseding the common law because there was clear evidence that the City Council intended the Housing Code to supersede the common law.172 The court properly recognized that at common law, and in the absence of a statute, a landlord has no duty to keep rental premises in good repair or to inspect the rented property at any time before or during the lease.173 The court also recognized that in construing a statute, the Court of Appeals has traditionally assumed that the statute was not intended to modify, nullify, or supersede the common law unless there is clear indication to

165. Id. at 97, 835 A.2d at 632 (Raker, J., dissenting).
166. Id. at 89, 835 A.2d at 627.
167. Id. at 72, 835 A.2d at 617.
168. See infra notes 173-182 and accompanying text.
169. See infra notes 187-196 and accompanying text.
170. See infra notes 197-202 and accompanying text.
171. See infra notes 203-208 and accompanying text.
172. Brooks, 378 Md. at 81, 835 A.2d at 622.
173. Id. at 78, 835 A.2d at 620.
the contrary. The Brooks court properly found that the City Council intended the Housing Code to supersede the common law. Section 103(b) of the Housing Code explicitly states that it is intended to be remedial and should be liberally construed to accomplish its goals, which is a clear indication that the City Council intended the Housing Code to supersede the common law. In addition, Maryland law states that where there is an applicable statutory scheme designed to protect a class of people of which the plaintiff is a part, the defendant's duty is prescribed by the statute, which further indicates that the Brooks court properly determined that Lewin had a duty to inspect the property and keep it free of flaking paint.

As in Schwing, where the Court of Appeals examined a prior case, determined that its prior holding was incorrect and therefore abandoned precedent, the Court of Appeals in Brooks properly overturned Richwind after finding that its reasoning in Richwind was flawed. The Brooks court determined that Richwind mistakenly interpreted the language of section 303 of the Housing Code to require tenants to provide the landlord with notice after discovering a violation, while the plain language of the Housing Code fails to make any mention of tenants in its description of duties and instead refers only to members of the government. Thus, the court properly abandoned its erroneous interpretation from Richwind. As such, the court in Brooks permissibly abolished the common-law notice requirement.

Lastly, while Judge Raker, in dissent, argued that the majority imposed a strict liability regime upon landlords in lead paint negligence actions by abolishing the notice requirement, the new standard cannot reasonably be characterized as a strict liability regime. Because the Brooks majority still requires the jury to determine whether the landlord acted reasonably in his efforts to abate the flaking paint condition, the majority did not establish a strict liability regime that

174. *Id.* at 86-87, 835 A.2d at 625-26; see Richwind v. Brunson, 335 Md. 661, 672, 645 A.2d 1147, 1152 (1994).
175. *See Brooks,* 378 Md. at 81, 835 A.2d at 622.
177. In *Schwing,* a workers' compensation claimant filed a second claim for benefits stemming from an occupational heart disease, which was rejected because it was not based on a new disability, as was required by precedent. Mayor of Baltimore v. Schwing, 351 Md. 178, 197, 717 A.2d 919, 928 (1998). In its analysis, the Court of Appeals felt that it was appropriate to revisit precedent and determined that it had reached the wrong result in its prior holding. *Id.*
178. *Brooks,* 378 Md. at 88, 835 A.2d at 626.
179. *Id.* at 87-88, 835 A.2d at 626.
180. *Id.* at 91, 835 A.2d at 628 (Raker, J., dissenting).
181. *Id.* at 84-85, 835 A.2d at 624-25.
would hold the landlord liable without determining whether he acted reasonably.\textsuperscript{182}

\begin{itemize}
  \item[b.] \textit{It Was Proper for the Court of Appeals to Overturn Precedent and Find That Notice Was No Longer Required Because Increased Knowledge of Lead Paint Dangers Rendered Precedent Inapplicable and the Precedent Standard Would Have Been Too Harsh on Plaintiffs.}—Instead of upholding its standard that tenants must demonstrate that their landlord had notice of a lead paint violation before establishing a prima facie case of negligence, the court in Brooks properly held that a plaintiff can establish a prima facie case of negligence absent any proof that the landlord had notice of the existence of flaking and peeling paint.\textsuperscript{183} In doing so, the court properly abandoned its holdings from the Richwind line of cases,\textsuperscript{184} where it stated that the tenant had the burden of proving that the landlord had such notice.\textsuperscript{185} As a result, the Brooks court established a standard whereby tenants no longer bear the burden of proving that their landlord had notice of a violation in order to establish a prima facie case for negligence.\textsuperscript{186}

\end{itemize}

\begin{itemize}
  \item[1] \textit{The Court Appropriately Overruled Precedent Because of the Increased Knowledge and Awareness of Lead Paint Dangers.}—The Brooks court properly abandoned precedent by following its holding in Lewis, which determined that it is appropriate to abandon precedent and adopt new standards when changed circumstances and increased knowledge render precedent unsuitable to current circumstances.\textsuperscript{187} In Lewis, the court determined that accessories could be tried before the principal to a crime was sentenced because the circumstances had changed since the fifteenth century, when the law was in place to lessen the instances of the death penalty.\textsuperscript{188} Likewise, in Williams, the court examined the common-law principle that action or inaction by counsel could never waive a criminal defendant’s right to be present at all stages of his trial and determined that because criminal defendants facing incarceration now have an absolute right to counsel that

\end{itemize}

\textsuperscript{182} \textit{Id.} at 85, 835 A.2d at 624-25.\textsuperscript{183} \textit{Id.} at 72, 835 A.2d at 617.\textsuperscript{184} E.g., Jones v. Mid-Atlantic Funding Co., 362 Md. 688, 766 A.2d 617 (2001); Brown v. Dermer, 357 Md. 344, 744 A.2d 47 (2000); Scroggins v. Dahne, 335 Md. 668, 645 A.2d 1160 (1994); Richwind v. Brunson, 335 Md. 661, 645 A.2d 1147, 1153-54 (1994).\textsuperscript{185} \textit{Richwind}, 335 Md. at 674-75, 645 A.2d at 1153-54.\textsuperscript{186} See Brooks, 378 Md. at 81, 835 A.2d at 622.\textsuperscript{187} \textit{Id.}\textsuperscript{188} Lewis v. State, 285 Md. 705, 716, 404 A.2d 1073, 1078 (1979).
was not present at the time that the common-law rule was established, the common-law principle was no longer applicable.\footnote{189. Williams v. State, 292 Md. 201, 217-18, 438 A.2d 1301, 1309 (1981); see also Bozman v. Bozman, 376 Md. 461, 467-68, 830 A.2d 450, 454 (2003) (abrogating the doctrine of interspousal tort immunity after finding that it went against the prevailing social norms and was therefore useless); Jones v. State, 302 Md. 153, 160-61, 486 A.2d 184, 188 (1985) (determining that because it had abrogated the common-law rule in \textit{Lewis} that an accessory before the fact cannot be tried before a principal, the common-law principle that an accessory cannot be convicted of a crime greater than the principal had become obsolete).}

Just like in these cases, circumstances have changed since the notice requirement was read into lead paint negligence cases in 1994, in that there is an increased knowledge and awareness of the harms of lead paint poisoning. The Maryland Legislature’s enactment of the 1994 Lead Paint Prevention Act to reduce the incidence of childhood lead poisoning increased the knowledge and awareness of the harmful effects of childhood lead paint poisoning.\footnote{190. See \textit{MD. CODE. ANN., ENVIR.} §§ 6-801 to -852 (2000).} The legislature’s main goal in enacting this law was to increase the public’s awareness of the harmful effects of lead and the methods required for preventing lead paint poisoning in children.\footnote{191. See \textit{MD. LEAD PAINT REPORT}, \textit{supra} note 69.} The legislature further increased the public’s knowledge and awareness of lead paint by proposing and enacting several other bills designed to do exactly that.\footnote{192. See \textit{supra} notes 76-80 and accompanying text.} Action by the federal government has also increased public knowledge and awareness of the ill effects of lead paint poisoning.\footnote{193. For example, in 1992 Congress passed the Residential Lead-Based Paint Hazard Reduction Act, also known as Title X, which mandated that landlords disclose lead paint problems before the sale or lease of a residential property and developed national and local education programs to help make the public aware of the devastating effects of lead paint. \textit{Pub. L. No. 102-550, 106 Stat. 3672 (1992) (codified as amended at 42 U.S.C. §§ 4851-4856 (2000)).}}

In addition to the increased knowledge and awareness of lead paint poisoning provided by both the Maryland and federal legislatures, the trends of other states to attempt to abate lead paint poisoning by abolishing the notice requirement further illustrate the general increased knowledge of the dangers of lead paint. The \textit{Brooks} court properly supported its decision by noting that other jurisdictions have also charged landlords with notice of the conditions that a reasonable inspection would have revealed.\footnote{194. \textit{Brooks}, 378 Md. 70, 89 n.7, 835 A.2d 616, 627 n.7 (2003).} In particular, it explained that in \textit{Juarez}, the Court of Appeals of New York charged landlords with notice of any hazardous conditions existing in the rental premises of a tenant.\footnote{195. \textit{Id}.} As further demonstration of the changed circumstances,
courts in Connecticut and Massachusetts have established a strict liability regime in lead paint negligence cases against landlords.\textsuperscript{196}

Thus, it is clear that state and federal legislation, along with the judicial decisions of other states, have increased the public knowledge and awareness of the effects of lead paint poisoning over the past decade, rendering \textit{Richwind}, which required tenants to prove that their landlords had notice of the lead paint condition, no longer practical because landlords now have sufficient reason to be aware of the dangers of lead paint.

\textbf{(2) The Court Properly Overruled Precedent by Abandoning a Standard That Increased the Likelihood of Lead Paint Injuries.}—Lastly, the Court of Appeals properly abandoned precedent consistent with the standard established in \textit{Schwing}, where it overruled precedent because it determined that the prior standard would have been harmful to the plaintiff and others similarly situated.\textsuperscript{197} The \textit{Schwing} court abandoned a rule that barred the plaintiff from making a second workers’ compensation claim for benefits not based on a new disability because the consequences were too harsh in that they left the plaintiff without a remedy for the injuries suffered as a result of additional exposure to occupational hazards.\textsuperscript{198}

As in \textit{Schwing}, the \textit{Brooks} court determined that the harm to Sean and future minor tenants would have been greater under the prior standard than that which the court chose to adopt because the tenant’s prima facie case would be more difficult to prove.\textsuperscript{199} Under \textit{Richwind}, Sharon would have had to prove that Lewin Realty had notice of the lead paint violations and would likely have had difficulty doing so because Lewin’s manager was the only person who had examined the house, there was no evidence that he actually saw the flaking, peeling paint, and no evidence that Sharon ever complained to Lewin about the paint condition.\textsuperscript{200} Had the Court of Appeals therefore followed precedent, it would have been difficult for Sharon to establish her negligence case by proving that Lewin had notice of the defective condition. The court’s rejection of precedent allowed Sharon to prove her prima facie case without demonstrating that

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{197} \textit{Mayor of Baltimore v. Schwing}, 351 Md. 178, 197, 717 A.2d 919, 928 (1998).
\item \textsuperscript{198} \textit{Id.} at 178, 717 A.2d at 919. The court reasoned that the plaintiff would be barred from asserting a claim based on new workplace hazards that did not arise until long after the statute of limitations had run. \textit{Id.} at 197, 717 A.2d at 928.
\item \textsuperscript{199} \textit{Brooks}, 378 Md. at 89, 835 A.2d at 627.
\item \textsuperscript{200} \textit{See id.} at 72-73, 835 A.2d at 617-18.
\end{enumerate}
\end{footnotesize}
Lewin had notice of the defective condition, making it easier for her to sue for negligence on her minor son's behalf.\(^{201}\) Because the Court of Appeals overruled precedent to avoid a harmful result to the plaintiff, it did not abuse its discretionary powers and properly eliminated the notice requirement in negligence actions involving lead paint poisoning in children.\(^{202}\)

In addition to abandoning a standard that would have been harmful to the plaintiff in the instant case, the court's decision will also impact positively the health and safety of the children of Maryland and will help abate the severe effects of lead paint poisoning in the future. The court's new standard will make landlords more cautious because they will now be held liable for lead paint violations even if the tenant did not give them notice of the condition, thus providing them with an incentive to keep their units free of lead paint. By decreasing the tenant's burden in lead paint poisoning cases, the Court of Appeals adopted a standard that will likely prevent future generations of children from experiencing the devastating effects of lead paint poisoning.\(^{203}\)

Children under the age of six are most vulnerable to lead paint because their neurological systems are in the process of developing.\(^{204}\) Continued exposure to lead in adults and children is incredibly dangerous and can cause permanent neurological damage and even death.\(^{205}\) However, in young children, lead slows the development of the central nervous system and brain, which causes, among other things, a lowered IQ, reading and learning disabilities, attention deficit disorder, and several behavioral problems.\(^{206}\) In turn, these

\(^{201}\) Id. at 72, 835 A.2d at 617.

\(^{202}\) See Schwing, 351 Md. at 197, 717 A.2d at 928 (abandoning precedent to avoid consequences that would too harshly affect the plaintiff).

\(^{203}\) Since 1991, childhood lead poisoning has been the number one preventable environmental health risk facing children in the United States and in other industrialized countries. See Md. Lead Paint Report, supra note 68; Press Release, Office of the Vice President, Tipper Gore Unveils New Steps to Eliminate Lead Hazards (Oct. 22, 1999) [hereinafter Press Release], available at 1999 WL 965798. According to the Centers for Disease Control, almost half a million children in the United States have levels of lead in their bodies that are high enough to cause "irreversible damage to their health." Centers for Disease Control, CDC's Lead Poisoning Prevention Program, http://www.cdc.gov/ncbh/lead/factsheets/leadfacts.htm (last visited Dec. 15, 2005). As of 1994, the federal government estimated that at least three million children in the United States, approximately seventeen percent of all children, were at risk of lead poisoning. Jane Schukoske, The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard, 45 S.C. L. Rev. 511, 516 (1994).

\(^{204}\) Md. Dep't of the Env't, supra note 67.


\(^{206}\) Press Release, supra note 203.
problems have resulted in lower educational achievement, higher high school dropout rates, behavioral problems, and an estimated tripling of the number of children requiring special education services.\footnote{207}

As demonstrated by these statistics, the court’s holding has the ability to impact significantly the public health of the children of Maryland. In addition, the court’s new standard will require landlords to be more cautious when inspecting properties because tenants will be able to establish a prima facie case of negligence simply by showing that someone was injured and that there was flaking paint on the premises.\footnote{208}

5. Conclusion.—The Court of Appeals in Brooks v. Lewin Realty III, Inc., held that tenants do not need to show that their landlord had notice of peeling, flaking paint in order to establish a prima facie case of negligence in lead paint cases, overruling the Richwind line of cases.\footnote{209} In doing so, the court properly overturned precedent because (1) it recognized that the City Council intended the Baltimore City Housing Code to supersede the common law, despite its holding to the contrary in Richwind;\footnote{210} (2) increased knowledge and awareness of the effects of lead paint poisoning in children rendered precedent no longer applicable;\footnote{211} and (3) it abandoned a standard that would have been too harsh on the tenant.\footnote{212} The court’s decision to depart from stare decisis in this manner, and thus make it easier for tenants to recover, will affect positively the health and safety of Maryland children and will help abate lead paint poisoning in the future.\footnote{213}

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\footnote[207]{Gore, 665 A.2d at 1355 n.24.}
\footnote[208]{Brooks, 378 Md. at 72, 835 A.2d at 617.}
\footnote[209]{See id. at 76, 835 A.2d at 619.}
\footnote[210]{See supra notes 173-182 and accompanying text.}
\footnote[211]{See supra notes 187-196 and accompanying text.}
\footnote[212]{See supra notes 197-202 and accompanying text.}
\footnote[213]{See supra notes 203-208 and accompanying text.}
\end{footnotes}
Recent Decisions

THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

I. CONSTITUTIONAL LAW

A. Tipping the Balance of Qualified Immunity Against the Interests of Government Officials

In *Love-Lane v. Martin*, the United States Court of Appeals for the Fourth Circuit considered whether a public school district superintendent was entitled to qualified immunity from a free speech retaliatory action claim when he transferred an assistant principal after she voiced concern over disciplinary practices she perceived to be racially discriminatory. The court held that the superintendent was not entitled to qualified immunity because he allegedly violated his employee’s clearly established right to free speech, and a reasonable public school superintendent would have known that his action violated this right.

In its holding, the Fourth Circuit did not pay proper regard to its own and the United States Supreme Court’s precedents for qualified immunity defenses raised in response to free speech claims. The court ruled that a public school superintendent should have been able to perform precisely an intricate balancing test and determine that he would be liable for transferring a public school administrator who criticized disciplinary practices she perceived as racially discriminatory. By subjecting the superintendent to liability, the court now forces public officials to become proficient in the nebulous enterprise

2. *Love-Lane*, 355 F.3d at 783.
3. Id. at 784-85.
4. Id. at 801-02 (Wilkinson, J., dissenting); *see infra* notes 178-218 and accompanying text (discussing how the court ignored or misconstrued controlling authority regarding qualified immunity).
5. *Love-Lane*, 355 F.3d at 784-85 (holding that a reasonable school administrator would know that demoting an assistant principal to a teaching position after she spoke out about racial discrimination falls within "the ambit" of a clearly established free speech violation); *see infra* notes 219-232 and accompanying text (providing a discussion of how the court inappropriately expected a superintendent to perform flawlessly an intricate balancing test to determine whether his actions violated constitutional law).
of constitutional balancing before making basic management decisions.\(^6\)

I. *The Case.*—Decoma Love-Lane began working for the Winston-Salem/Forsyth County Board of Education in North Carolina in 1974.\(^7\) In 1995, she became an assistant principal at Lewisville Elementary, partly because School Board Superintendent Donald Martin believed the school needed an African-American presence.\(^8\) During her first year at Lewisville, Love-Lane developed concerns about discriminatory disciplinary practices.\(^9\) Instead of publicly questioning the school's policies,\(^10\) however, she concentrated on fostering good relationships with her colleagues.\(^11\)

In her second year, Love-Lane began expressing her concerns to Principal Blanchfield but was always "rebuffed or ignored."\(^12\) Love-Lane then voiced her concerns at faculty meetings and School Im-

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\(^6\) See *Love-Lane*, 355 F.3d at 799 (Wilkinson, J., dissenting) (noting that, because of the difficult nature of applying the balancing test established in *Pickering v. Board of Education*, 391 U.S. 563 (1968), denying qualified immunity to officials like Martin will paralyze their administrative discretion); see infra notes 233-247 and accompanying text (noting that public officials now face a more difficult task in applying complex doctrines when making operational decisions that may have constitutional implications).

\(^7\) *Love-Lane*, 355 F.3d at 769. Love-Lane worked as a high school teacher from 1974 to 1988, and as an assistant principal thereafter. *Id.* Until 1995, she received excellent or superior evaluations for her work as an assistant principal. *Id.*

\(^8\) *Id.* Lewisville Elementary served mostly middle to upper class white children, as well as some poor and working class African-American children. *Id.* Almost all of the school's staff was white. *Id.* at 770. The school administration and its white principal, Brenda Blanchfield, had a reputation for racial insensitivity. *Id.* at 769.

\(^9\) *Id.* at 770.

\(^10\) Love-Lane was principally concerned about the schools "time-out" room, a place teachers sent misbehaving students. *Id.* African-American students, especially boys, were sent to the time-out room in disproportionate numbers. *Id.* Moreover, teachers frequently asked white girls to escort these students to the time-out room, which Love-Lane perceived as a source of unnecessary embarrassment. *Id.* Love-Lane also felt that some teachers used the time-out room excessively, in lieu of making an extra effort to deal with the misbehavior in a more constructive manner. *Id.* Finally, once students reached the time-out room, they often received inadequate instruction. *Id.*

Love-Lane also had more general concerns about teachers treating African-American and poorer students more strictly than others. *Id.* at 770-71. For example, Love-Lane seriously disagreed with teachers who excluded several poor white and African-American students from participating in a field trip based on minor disciplinary infractions alone. *Id.* at 770. Love-Lane further maintained that many Lewisville staff members were insensitive to African-American culture. *Id.* at 771. These particular concerns stemmed from parental complaints, negative staff reactions to diversity training, and staff members like one particular fifth grade teacher who barred a student from her classroom because the teacher claimed that her "jelly-curl or what y'all call it, stinks." *Id.* (internal citations omitted).

\(^11\) *Id.* at 771. Love-Lane received a superior evaluation from Principal Blanchfield after her first year at Lewisville. *Id.*

\(^12\) *Id.*
provement Team (SIT) meetings, as well as directly to Superintendent Martin. At the end of Love-Lane's second year, Principal Blanchfield gave Love-Lane low communication skills ratings on her evaluation, recommended an atypically short contract for Love-Lane, and expressed a desire not to work with her. Consequently, Love-Lane requested a transfer.

Instead of granting Love-Lane's transfer request, at the start of their third year together Martin simply encouraged Blanchfield and Love-Lane to cooperate and warned Love-Lane that he did not want to hear from her that year. Love-Lane, however, continued to voice concerns about racial discrimination, and her relationship with Blanchfield and other teachers deteriorated. Because of Love-Lane's failure to adhere to Martin's recommendations and her continued communication problems with Blanchfield and other staff members, Martin declared Love-Lane's career as a school administrator over and subsequently assigned her to a teaching position in a high school for the 1998-99 school year.

In response, Love-Lane filed a grievance with the Winston-Salem/Forsyth County Board of Education challenging the reassignment. A panel of three members voted two to one to uphold Martin's decision to reassign Love-Lane. Love-Lane then appealed to the full Board, which upheld the panel's decision.

13. Id. at 771-72. Martin discounted Love-Lane's concerns because he did not agree with her observations. Id. at 772.
14. Id.
15. Id. Love-Lane was also involved in an altercation with a teacher at the end of her second year. Id. Based on an independent investigative report, Martin sent Love-Lane a letter warning that another similar incident would lead him to recommend her dismissal. Id. at 772-73.
16. Id. at 773.
17. Id. The fifth grade teachers requested another administrator to work with them, and Blanchfield rated Love-Lane "below standard" and "unsatisfactory" in her communication skills and efforts in a draft evaluation she sent to Martin. Id. at 773-74. Additionally, teachers and administrators, regardless of their race, found Love-Lane's demeanor "unprofessional and contentious." Id. at 791 (Wilkinson, J., dissenting). Love-Lane's difficulties with Blanchfield also involved conflicts over bus loading policies, recess supervision, kindergarten care, and custodial staff. Id. at 792 (Wilkinson, J., dissenting).
18. Id. at 774. Martin also transferred Blanchfield from Lewisville to the school system's central office. Id. He said he did not know, or consider, that Love-Lane was engaging in constitutionally protected free speech activities. Id.
19. Id.
20. Id. at 775. Despite the presence of counsel at the Board meeting, Love-Lane did not present any evidence regarding her right to free speech. Id. at 793 (Wilkinson, J., dissenting). Instead, she argued that she was harassed and sabotaged by Blanchfield. Id. (Wilkinson, J., dissenting).
21. Id. at 775.

Love-Lane then sued Superintendent Martin and the Board in the United States District Court for the Middle District of North Carolina. Her suit alleged discrimination on the basis of race under Title VII of the Civil Rights Act of 1964 and contends that, in violation of 42 U.S.C. § 1981, 42 U.S.C. § 1983, and Article I, §§ 14 and 19 of the North Carolina Constitution, she was denied her rights to free speech, equal protection, and due process. The district court granted the defendants' motion for summary judgment, holding that Love-Lane failed to demonstrate a prima facie case of racial discrimination and could not show a violation of her rights to free speech and due process of law.

In dismissing Love-Lane's free-speech claim against the Board, the district court determined that Love-Lane voiced her concerns more in her capacity as Lewisville's Assistant Principal than as a private citizen speaking out about a matter of public concern. Furthermore, the court noted that any First Amendment interest Love-Lane may have had was outweighed by the Board's interest in operating public schools in an efficient manner. The district court then concluded that the federal constitutional claims against Martin in his official capacity were redundant and dismissed them as well. Finally, the court granted Martin qualified immunity in his individual capacity. Specifically, the court determined that Martin could not have
known his conduct violated Love-Lane's clearly established constitutional rights of free speech, equal protection, or procedural due process.\textsuperscript{35}

Love-Lane appealed all but the due process decisions to the Fourth Circuit.\textsuperscript{36} The court considered, inter alia, whether Martin could have violated Love-Lane's First Amendment rights, and whether Martin was entitled to the defense of qualified immunity.\textsuperscript{37}

2. \textit{Legal Background}.—The United States Supreme Court has determined that government officials enjoy immunity from liability for civil damages as long as their actions do not violate clearly established statutory or constitutional rights of which another similarly situated reasonable official would be aware.\textsuperscript{38} To evaluate the applicability of a qualified immunity defense, the Fourth Circuit requires a court to (1) identify the right allegedly violated; (2) consider whether at the time of the alleged violation the right was clearly established; and (3) determine whether a reasonable person in the government official's position would have known that his actions would violate that right.\textsuperscript{39} An employee can establish a First Amendment claim of retaliatory demotion if the employee speaks as a citizen rather than as an employee upon a matter of personal interest.\textsuperscript{40} The employee must show that, first, his interest in speaking on a matter of public concern outweighs the employer's interest in providing effective services and, second, that his speech is a substantial factor in the employer's decision to reassign him.\textsuperscript{41} Amidst these balancing standards, however, there is a dearth of clearly established law setting forth constitutionally protected activities.\textsuperscript{42}

\textsuperscript{35} \textit{Id.} at 583-85. The court found that it was not clear whether Love-Lane's speech was as a private citizen addressing a matter of public concern, or whether the school system's interest in operating Lewisville Elementary efficiently outweighed Love-Lane's interest in free expression. \textit{Id.} at 583-84.

\textsuperscript{36} \textit{Love-Lane}, 355 F.3d at 775.

\textsuperscript{37} \textit{Id.} at 775, 782. Additionally, the court considered whether the Board violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 1981 or 1983 by discriminating on the basis of race. \textit{Id.} It also addressed racial discrimination and free speech claims arising under the North Carolina Constitution. \textit{Id.}

\textsuperscript{38} \textit{Harlow v. Fitzgerald}, 457 U.S. 800, 818 (1982).

\textsuperscript{39} \textit{Wilson v. Layne}, 141 F.3d 111, 114 (4th Cir. 1998).

\textsuperscript{40} \textit{McVey v. Stacy}, 157 F.3d 271, 277 (4th Cir. 1998).

\textsuperscript{41} \textit{Id.} at 277-78.

\textsuperscript{42} \textit{DiMeglio v. Haines}, 45 F.3d 790, 806 (4th Cir. 1995) (noting that public employee speech on matters of public concern will only rarely be clearly established as receiving constitutional protection).
a. The Development of Qualified Immunity Jurisprudence: From the Supreme Court to the Fourth Circuit.—State government officials may be held personally liable for actions that breach the constitutional rights of others. But the Supreme Court has also consistently held that, as recognized at common law, public officials require some form of immunity from suits for damages in order to perform the responsibilities of their positions without "undue interference" or "threats of liability." Thus, a limited class of government officials is totally immune from suits for damages. Most others, however, enjoy qualified immunity from suits while performing discretionary functions within the scope of their office. To protect an individual’s constitutional rights and protect the government and its officials from costly and distracting litigation, qualified immunity is used to protect public officials from certain constitutional tort actions. Furthermore, qualified immunity is employed to ensure citizens are not deterred from entering public office and officials are not prevented from resolutely discharging their duties.

In Harlow v. Fitzgerald, the Supreme Court established its modern, objective approach to qualified immunity defenses. The Court held two former senior aides to President Nixon eligible for qualified immunity after they allegedly conspired to violate the constitutional and statutory rights of an Air Force employee. The Court declared that officials “performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a rea-

45. Id. at 807. These officials’ special functions or constitutional status require complete protection from suit. Id. They include legislators in their legislative functions, judges in their judicial functions, and certain executive officials. Id.
46. Id. at 818. The Supreme Court first recognized the defense of qualified immunity in Pierson v. Ray, when it extended common-law good faith immunity, traditionally granted to police officers, to constitutional tort claims. 386 U.S. 547, 557 (1967). Later, in Wood v. Strickland, the Court announced that it would deny an official qualified immunity where he “knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury.” 420 U.S. 308, 322 (1975). Thus, the Court’s early qualified immunity jurisprudence involved both objective and subjective inquiries. Harlow, 457 U.S. at 815.
47. Harlow, 457 U.S. at 818 & n.30. These constitutional tort actions include suits brought under 42 U.S.C. § 1983, a statue allowing a citizen to sue state and local officials who, under color of state law, violate that citizen’s constitutional rights. Id.
48. Id. at 814.
50. Id. at 802-03, 813.
sonable person would have known." The Court specifically rejected its prior approach of also reviewing the subjective good faith of government officials, because questions of subjective intent can rarely be decided at summary judgment. Thus, by relying solely upon the objective reasonableness of an official's conduct, according to clearly established law, the Court concluded that courts may dismiss many insubstantial claims that could disrupt the government and its employees.

Questions about the proper application of the Harlow Court's test—how to determine when conduct does and does not violate clearly established law—reached the Court in Anderson v. Creighton. An issue of particular concern to the Anderson Court was whether the phrase "clearly established" meant that, to defeat a qualified immunity defense at summary judgment, a plaintiff merely needs to cite a long-established constitutional right, or whether a plaintiff must address whether, given the actual circumstances surrounding a defendant's particular conduct, the defendant acted in an objectively legally unreasonable manner. Specifically, the Court addressed whether an FBI officer who conducted an objectively reasonable, but ultimately illegal, search could receive qualified immunity at summary judgment from a Fourth Amendment claim for damages. The United States Court of Appeals for the Eighth Circuit held it could not resolve the question of qualified immunity at summary judgment, because unresolved factual issues existed as to whether the officer violated the Plaintiffs' Fourth Amendment rights, which it found clearly established. In reversing and allowing qualified immunity, the Supreme Court emphasized the need to inquire beyond the legality of the alleged violation in the abstract, and instead review whether the defendant's actual conduct, under the specific circumstances of the case, would appear clearly illegal to a reasonable officer. The Court rejected the lower court's approach of denying qualified immunity de-

51. Id. at 818. The Court recognized the need to protect society from "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" and to avoid dampening "the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." Id. at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).
52. Harlow, 457 U.S. at 816.
53. Id. at 816, 818.
55. Id. at 640-41.
56. Id. at 637-38.
57. Id.
58. Id. at 640-41.
fenses at summary judgment in the face of vaguely asserted but long-established constitutional rights.\textsuperscript{59} Instead, the Court held that for an official to be held liable for violating a constitutional right, the right's contours must be so clear that a reasonable official would understand that his conduct would violate it.\textsuperscript{60} Qualified immunity should thus protect a public officer whose conduct, though objectively reasonable, ultimately turns out to violate the law.\textsuperscript{61}

In \textit{Saucier v. Katz},\textsuperscript{62} the Court reaffirmed its holding in \textit{Anderson} and reversed a denial of qualified immunity to an officer who used force to arrest a protestor at a forum where Vice President Al Gore was speaking.\textsuperscript{63} The Court rejected the United States Court of Appeals for the Ninth Circuit's approach of avoiding a qualified immunity inquiry simply because it found a potential constitutional violation based on a reasonableness inquiry.\textsuperscript{64} Instead, the Court re-emphasized that conducting a threshold reasonableness inquiry does not preclude the need for courts to conduct another more specific and individualized fact inquiry to determine whether a reasonable officer, within the particular context, would have clearly known his conduct was illegal.\textsuperscript{65}

The Fourth Circuit's approach to finding that law is clearly established, which would afford no immunity to most public officials who transgress that law, has traditionally struck a balance between federal circuits that look to a wide group of jurisdictions and factual scenarios,\textsuperscript{66} and those that require case law involving nearly identical factual scenarios from a strictly limited number of jurisdictions.\textsuperscript{67} For

\textsuperscript{59} Id. at 639-40.
\textsuperscript{60} Id. at 640.
\textsuperscript{61} Id. at 636-37, 640-41.
\textsuperscript{62} 533 U.S. 194 (2001).
\textsuperscript{63} Id. at 197, 200.
\textsuperscript{64} Id. at 200.
\textsuperscript{65} Id. at 202-03.
\textsuperscript{66} See Kelley v. Borg, 60 F.3d 664, 666-67 (9th Cir. 1995) (finding the right at issue did not have to be clearly established as to every single fact in the instant case, but at a more general level); Romero v. Kitsap County, 931 F.2d 624, 629 (9th Cir. 1991) (allowing courts to look to case law from any other jurisdiction in the absence of binding precedent in order to determine whether the right to shellfish was clearly established).
\textsuperscript{67} See Thomas v. Roberts, 323 F.3d 950, 955 (11th Cir. 2003) (reaffirming the Eleventh Circuit's strict approach of only looking to cases from the Supreme Court, the Georgia Supreme Court, and itself, when deciphering clearly established law); Mozzochi v. Borden, 959 F.2d 1174, 1178-81 (2d Cir. 1992) (requiring a more particularized right to have been violated in a more factually analogous case to satisfy the clearly established law requirement). The Fourth Circuit's approach accords with the Supreme Court's decision in \textit{Hope v. Pelzer}, 536 U.S. 730 (2002). The Supreme Court indicated that courts of appeal could look to sources other than its own jurisprudence in finding clearly established law. \textit{Id.} at 741-45. It would also require government officials to look to the reasoning, and not
instance, in *Pinder v. Johnson*, the Fourth Circuit noted that for law to be clearly established the facts from prior cases need not be "on all fours" with the facts of the current case. Later, in *Edwards v. City of Goldsboro*, the court noted that district courts usually should not need to look beyond the U.S. Supreme Court, the Fourth Circuit Court of Appeals, and the highest court of the state in which the case arose. Thus, at least ordinarily, an official may retain immunity even though he would not in another federal circuit. But the court will, nevertheless, recognize clearly established law in the absence of identical conduct from its traditional sources of authority. Indeed, the court in *Pinder* canvassed decisions from other federal circuits in reaching its decision that at the time of the events in question there was no clearly established duty to protect individuals outside of the custodial context. Furthermore, in *Doe v. Broderick*, the Fourth Circuit noted that, in order to find clearly established law, the very act in question need not have previously been held unlawful, but must be apparently illegal in light of preexisting law. The court therefore upheld the denial of qualified immunity to an officer who conducted a search without probable cause, even though no court had previously found that a person has a legitimate expectation of privacy in his methadone treatment records.

While the Fourth Circuit may look to a wide number of jurisdictions and factual scenarios in deeming law clearly established, it emphasized in *Wilson v. Layne* that qualified immunity should protect "all but the plainly incompetent or those who knowingly violate the law." The court further asserted that even though the existence of clearly established law did not require a government official's precise actions to have been ruled illegal, case law should render the illegality of the challenged conduct manifest. Thus, the court reversed the denial of

just the holdings, of qualified immunity case law for guidance on the constitutionality of their actions. *Id.* at 743.

68. 54 F.3d 1169 (4th Cir. 1995) (en banc).
69. *Id.* at 1173.
70. 178 F. 3d 231 (4th Cir. 1999).
71. *Id.* at 251 (citing Jean v. Collins, 155 F.3d 701, 709 (4th Cir. 1998) (en banc)).
72. *Id.*
73. *Id.*
74. Pinder v. Johnson, 54 F.3d 1169, 1176-78 (4th Cir. 1995).
75. 225 F.3d 440 (4th Cir. 2000).
76. *Id.* at 455 (citing Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
77. *Id.*
79. *Id.*
qualified immunity to officers who illegally permitted reporters to accompany them on the execution of an arrest warrant because, at the time they acted, they could have reasonably presumed their actions legal, given the absence of case law to the contrary. 80 Indeed, the Fourth Circuit has determined that in the interest of encouraging officials to exercise reasonable discretion without hesitation, reasonable mistakes should not be actionable. 81 Its qualified immunity doctrine aims to allow government officials to exercise freely their fair judgment without fearing the consequences of lawsuits based on unclear law. 82

b. Retaliatory Free Speech Claims.—A public employee may sue his employer when the government retaliates against him for exercising his First Amendment right to speak about matters of public concern. 83 But in order to succeed, the employee must demonstrate that his interest in speaking about a matter of public concern outweighs the government’s interest in serving the public efficiently. 84 Furthermore, employers need not wait for an employee’s speech to become disruptive before taking action. 85

The Supreme Court first held in Pickering v. Board of Education that unless a teacher knowingly or recklessly makes false statements, he may not be dismissed from public employment because of his speech. 86 In Pickering, the Court reversed and remanded the Illinois State Supreme Court’s judgment that a school board justifiably fired a teacher after he criticized the board’s revenue-raising methods. 87 However, the Court also noted that a balance must be struck between the teacher’s interest in speaking about issues of public concern and the state’s interest in efficiently serving the public. 88 The Court later made clear, in Connick v. Myers, that speech about racial discrimina-

80. Id. at 115-16.
81. Torchinsky v. Siwinski, 942 F.2d 257, 260-61 (4th Cir. 1991) (affirming the grant of summary judgment to a deputy sheriff who acted with objective reasonableness even though his actions might have been illegal).
82. Pinder v. Johnson, 54 F.3d 1169, 1173 (4th Cir. 1995) (en banc).
86. 391 U.S. 563, 574 (1968).
87. Id. at 564-65.
88. Id. at 568. This test became known as the Pickering balancing test. Cromer v. Brown, 88 F.3d 1315, 1325-27 (4th Cir. 1996). Increased deference to the employer’s judgment is necessary when close working relationships serve the public interest. Connick, 461 U.S. at 151-52. On the other hand, a government may have to demonstrate a more compelling efficiency interest when the speech more substantially involves a matter of public concern. Id. at 152. More recently, the Court has announced that:
tion that relates to political, social, or other community matters involves a matter of public concern. The Court also reaffirmed that an employee does not forfeit his right to protest discrimination simply because he conveys his views in a private manner.

In Stroman v. Colleton County School District, the Fourth Circuit determined that public schools cannot dismiss employees because they engage in protected speech. Then, in McVey v. Stacy, the court formally articulated its test for determining whether an employee has a cause of action for retaliatory demotion under the First Amendment. A court must decide:

1. whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest;
2. whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and
3. whether the employee's speech was a substantial factor in the employee's termination decision.

Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's efficient operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.


89. 461 U.S. 138, 146 (1983). In Connick, the Court reversed the United States Court of Appeals for the Fifth Circuit's judgment and held that an Orleans Parish Assistant District Attorney did not violate his employee's right to free speech when he fired her, in part, for distributing a questionnaire to other Assistant District Attorneys regarding office employment policies. Id. at 140-41, 154.

90. Id. at 148 & n.8.
91. 981 F.2d 152 (4th Cir. 1992).
92. Id. at 155-56. In Stroman, the court affirmed a summary judgment ruling in favor of a school district that discharged a teacher for circulating a letter that criticized the school district and encouraged teachers to engage in a "sick-out" during the week of final examinations. Id. at 154. The court also noted that, in order to remain protected, an employee's speech must be about a matter of public concern, and not outweighed by the state's interest in serving the public. Id. at 156.

93. 157 F.3d 271, 277-78 (4th Cir. 1998). The court in McVey affirmed the United States District Court for the Western District of Virginia's denial of the defendant airport commissioner's motion to dismiss the plaintiff's retaliatory free speech action on the basis of qualified immunity. Id. at 273-74. It also noted that public officials do not have a duty to resolve difficult constitutional issues. Id. at 277. It further resolved that public officials should be liable for crossing bright lines, but not for making wrong choices in gray areas. Id.

94. Id. at 277-78. The second part of this analysis is known as the Pickering balancing test. Connick, 461 U.S. at 158.
Further, as noted in *Stroman*, school officials need not wait until an employee's speech becomes manifestly problematic before taking action to prevent employees from continuing to play a disruptive role. This approach accords with the Supreme Court's decision in *Rankin v. McPherson*. In determining whether a constable violated an employee's right to free speech by firing the employee for commenting on a failed presidential assassination attempt, the *Rankin* Court noted that the time, place, and manner of an employee's speech are relevant to considering that speech's impact on office efficiency.

c. Qualified Immunity and Free Speech Converge.—In determining whether or not a public official is entitled to qualified immunity from a retaliatory free speech claim, a court must do more than simply find that an employee's right to speak, in the abstract, is clearly established. The court must also determine, first, whether the employee spoke out about a matter of public concern, and second, whether the government's efficiency interest outweighed the employee's interests in free speech. Because this test is fact-intensive and difficult to apply, a court will infrequently find that a public employee's speech on a matter of public concern is clearly established law. Thus, a public official will typically avoid personal liability for acting in his official capacity.

The Supreme Court, in *Crawford-El v. Britton*, suggested that under the doctrine of qualified immunity a defendant may be immune from suit, even though the rule barring retaliation against pro-

95. 981 F.2d at 158 (citing *Connick*, 461 U.S. at 152, where the Court failed to see "the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"). The Fourth Circuit has applied the same rule in the law enforcement context. See Jurgensen v. Fairfax County, 745 F.2d 868, 882 n.21 (4th Cir. 1984). Other circuits have also agreed. See Fales v. Garst, 235 F.3d 1122, 1124 (8th Cir. 2001) (finding that a school's interest in avoiding disharmony among staff outweighed the teachers' interest in speaking); Cochran v. City of Los Angeles, 222 F.3d 1195, 1200-01 (9th Cir. 2000) (upholding preventative action in the law enforcement employment context); Derrickson v. Bd. of Educ., 738 F.2d 351, 352-53 (8th Cir. 1984) (finding that the interest in preventing disruptive and frequent internal criticisms outweighed a teacher's free speech rights).


97. Id. at 388.


100. DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995).

101. See id. (noting that public employees should usually be entitled to qualified immunity from free speech actions, and be able to act without fear of lawsuits from their subordinates).
tected speech has existed for thirty years. The Court noted that in the free speech context, a court must determine whether or not the defendant’s conduct was manifestly illegal. An employer should win in the absence of proof that it would not have fired the employee if the employee had never engaged in protected speech.

In accordance with the Supreme Court’s statements on this issue, the Fourth Circuit, in DiMeglio v. Haines, encountered the difficulty of finding clearly established law in retaliatory free speech cases. In DiMeglio, the court reversed the United States District Court for the District of Maryland’s denial of summary judgment and granted qualified immunity to a zoning commissioner who reassigned a zoning inspector after he gave legal advice. The court held that the inspector’s claim—that his reassignment was in retaliation for his exercise of free speech—failed because, first, it was not clear that the inspector spoke as a private citizen and, second, the state’s interest in efficiently operating its offices might have outweighed the inspector’s interest in expressing himself. The court specifically noted that “only infrequently will it be ‘clearly established’ that a public employee’s speech on a matter of public concern is constitutionally protected, because the relevant inquiry requires a ‘particularized balancing’ that is subtle, difficult to apply, and not well-defined.”

On the other hand, in Cromer v. Brown, the Fourth Circuit reversed the United States District Court for the District of South Carolina’s grant of qualified immunity at summary judgment to a sheriff who demoted a police officer from captain to lieutenant after the officer signed a letter the Black Officers’ Association sent to sheriffs con-

102. 523 U.S. 574, 592-93 (1998); see Pickering, 391 U.S. at 574 (establishing the rule barring retaliation against protected speech in 1968).
103. Crawford-El, 523 U.S. at 593. There may be doubt, for instance, whether the plaintiff spoke about a matter of public concern. Id.
104. Id.
105. 45 F.3d 790 (4th Cir. 1995).
106. Id. at 806 (stating that infrequently will it be clearly established that an employee’s speech is constitutionally protected).
107. Id. at 793.
108. Id. at 805-06. The court noted that “a government employer, no less than a private employer, is entitled to insist upon obedience to the legitimate, day-to-day decisions of the office without fear of reprisal in the form of lawsuits from disgruntled subordinates who believe that they know better than their supervisors how to manage office affairs.” Id. at 806.
109. Id.
110. 88 F.3d 1315 (4th Cir. 1996).
cerning racial discrimination within their offices. The court determined this was an infrequent occasion when the employee enjoyed a clearly established right to speak. The court justified its unique finding, in part, because Cromer had joined thirty other black officers in complaining about racial discrimination in a private letter, without affecting the sheriff's efficiency interests.

In summary, a court must not only determine whether a government employer illegally retaliated against its employee's right to free speech, but also make an additional fact-sensitive inquiry into whether a competent and law-abiding government official should have realized that he was violating clearly established law. As a result, qualified immunity defenses, once asserted, will usually withstand First Amendment attacks.

Indeed, cases involving free speech and qualified immunity from various federal circuits demonstrate just how sparse clearly established law is. For example, in Rakovich v. Wade, the United States Court of Appeals for the Seventh Circuit discussed the difficulty of finding clearly established law amidst balancing tests like those involved in First Amendment cases, and granted qualified immunity to a police chief and police officers who investigated a civil employee after the employee criticized the police department. Similarly, in Noyola v. Texas Department of Human Resources, the United States Court of Appeals for the Fifth Circuit granted qualified immunity to welfare services supervisors who fired a technician after he complained about his caseload. The court emphasized that because of the case-by-case balancing involved in free speech employee rights cases, courts should rarely make a priori judgments that retaliating against an employee violates clearly established constitutional rights.

111. Id. at 1318. Cromer is the only Fourth Circuit retaliatory free speech case of good authority in which the court has denied qualified immunity at summary judgment to a defendant who retaliated only after an employee spoke.

112. Id. at 1326. The court cited case law outside the Fourth Circuit that protected speech by police officers concerning racial discrimination and animus in their own offices. Id. at 1329.

113. Id. at 1320, 1328. The sheriff's efficiency interests were not affected partly because Cromer communicated his concerns in a nonconfrontational manner. Id. at 1320 n.11.

114. See DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995) (discussing the difficulty of applying the Pickering balancing test in the context of qualified immunity).

115. Id.

116. 850 F.2d 1180 (7th Cir. 1988).

117. Id. at 1213-14.

118. 846 F.2d 1021 (5th Cir. 1988).

119. Id. at 1026.

120. Id. at 1025.
The United States Court of Appeals for the Eight Circuit made another instructive note about the rarity of clearly established law in *Grantham v. Trickey.* In *Grantham,* the court affirmed the grant of qualified immunity to officials of the Missouri Sexual Offender Program who fired a caseworker after he criticized the program's operation. In affirming the grant of immunity to the defendants, the court cited its reasoning from an earlier case where it noted, inter alia, that at least five circuits have emphasized the difficulty of finding clearly established law when conducting the fact-intensive *Pickering* balancing test. Not surprisingly, the United States Court of Appeals for the Ninth Circuit recognized the same difficulty a few years later in *Lytle v. Wondrash.* The court in *Lytle* reversed the United States District Court for the District of Nevada's decision to deny qualified immunity to school administrators who allegedly retaliated against a school teacher who sued the school district. The court reached its decision because it was not demonstrably unreasonable for the officials to conclude that they did not violate the school teacher's right to free speech.

In *Denno v. School Board of Volusia County,* the United States Court of Appeals for the Eleventh Circuit also noted the difficulty of finding clearly established law in First Amendment cases. It thus affirmed the grant of qualified immunity to school officials who disciplined a student for displaying a Confederate flag. Finally, in *Fabianno v. Hopkins,* the United States Court of Appeals for the First Circuit granted qualified immunity from a free speech claim to the City of Boston's Corporation Counsel after she fired her employee, a pro se attorney, for failing to follow city policy in his challenge to the renewal of a zoning variance. The court specifically noted the difficulty of finding clearly established law in the midst of the fact-intensive *Pickering* balancing test. Thus, as case law demonstrates in this context, the shield of qualified immunity will seldom break.

121. 21 F.3d 289 (8th Cir. 1994).
122. Id. at 296.
123. Id. at 293.
124. 182 F.3d 1083 (9th Cir. 1999).
125. Id. at 1089.
126. Id.
127. 218 F.3d 1267 (11th Cir. 2000).
128. Id. at 1275.
129. Id. at 1278.
130. 352 F.3d 447 (1st Cir. 2003).
131. Id. at 458.
132. Id. at 457.
133. DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995).
3. The Court's Reasoning.—In Love-Lane v. Martin, the Fourth Circuit vacated the district court's grant of summary judgment to Martin in his individual capacity and found that he was not entitled to a qualified immunity defense against Love-Lane's claim that he retaliated against her exercise of free speech.\(^{134}\) The court initially addressed Love-Lane's free speech claim.\(^{135}\) Writing for the majority,\(^{136}\) Judge Michael determined that Love-Lane's speech pertained to a matter of public concern because of its content and context.\(^{137}\) Specifically, the court found that the content of Love-Lane's speech dealt with racially discriminatory disciplinary practices, which is a concern to much of the Lewisville school community.\(^{138}\) The court also maintained that although Love-Lane repeatedly spoke about such practices in the context of public meetings, she did not forfeit her right to protest discrimination simply because she spoke about the policies in private settings as well.\(^{139}\) Therefore, the court found that Love-Lane spoke about a matter of public concern.\(^{140}\)

The court then held that Love-Lane's free speech interest outweighed the Board and Martin's interests in operating the school system efficiently.\(^{141}\) The court noted that the community's strong interest in Love-Lane's speech about discriminatory practices placed a heavier burden on the Board and Martin to show that their efficiency concerns outweighed Love-Lane's right to free speech.\(^{142}\) The court, therefore, discounted both of the defendant's arguments—that Love-Lane’s speech adversely affected school administration and caused poor working relationships between Love-Lane and Blanchfield and

\(^{134}\) Love-Lane, 355 F.3d at 789. The Fourth Circuit also affirmed the district court's grant of summary judgment to the Board and Martin in his official capacity on Love-Lane's free speech claim and to both defendants on Love-Lane's federal race discrimination claims and claims under the North Carolina Constitution. \textit{Id.} The court later denied Martin's motion for a hearing en banc. E-mail from Douglas S. Punger, School Attorney, Winston Salem/Forsyth County Schools to Author (Nov. 9, 2004, 17:23:48 EST) (on file with author).

\(^{135}\) Love-Lane, 355 F.3d at 775-76.

\(^{136}\) Judge Gregory joined Judge Michael in the 2-1 decision. \textit{Id.} at 768. Judge Michael began by noting that summary judgment requires a court to view the facts in the light most favorable to the nonmoving party, and draw all reasonable inferences in Love-Lane's favor. \textit{Id.} at 775.

\(^{137}\) \textit{Id.} at 777. Judge Michael noted that Love-Lane often spoke about race discrimination, a public issue, at public forums. \textit{Id.} at 776-77.

\(^{138}\) \textit{Id.}

\(^{139}\) \textit{Id.} at 777.

\(^{140}\) \textit{Id.}

\(^{141}\) \textit{Id.} at 779.

\(^{142}\) \textit{Id.} at 778.
The court emphasized that, in fact, many individuals in the Lewisville community found Love-Lane's speech professional and helpful, not disruptive. The court concluded that Love-Lane's speech did not affect the delivery or quality of the educational services at Lewisville. Further, the court stipulated that even if Love-Lane's speech did have these effects, its bearing on such a substantial issue of public concern still outweighed the school's efficiency interests. In dismissing the complaints of the teachers and administrators, the court noted that the same people also took offense at the content of Love-Lane's speech opposing race discrimination in discipline. The court maintained that because Love-Lane asserted she had voiced her complaints in a respectful way, her statements must be credited when considering summary judgment.

The court concluded that there was a genuine issue of material fact whether Love-Lane's speech was a substantial factor in Martin's decision to transfer Love-Lane from her job as an Assistant Principal at Lewisville to a high school teaching position. The court emphasized that as Love-Lane amplified her criticism of racially discriminatory discipline practices at Lewisville, Blanchfield and Martin's assessments of her became increasingly negative. The court further stated that Love-Lane's history of good working relationships before she came to work at Lewisville cast doubt on the notion that Martin demoted her for attitude and communication problems. The court determined that Love-Lane had offered enough evidence for a reasonable jury to conclude that Love-Lane's speech was a substantial factor in her demotion, which would violate the First Amendment.
Next, after determining that Love-Lane had a potential First Amendment claim for retaliatory demotion, the court reversed the district court’s grant of qualified immunity to Martin in his individual capacity. In doing so, the court maintained that Martin might have violated Love-Lane’s right to free speech. The court then noted that this right to speak out on racially discriminatory discipline practices at public schools was clearly established well before 1997 and 1998. Dismissing case law that suggested otherwise, the court determined that it was still possible for an employee’s right to speak out on matters of public concern to be clearly established. Finally, the court concluded that a reasonable person in Martin’s position should have known that transferring Love-Lane in retaliation for speaking out would violate her free speech rights.

In short, the court found that Martin was not entitled to qualified immunity because case law established Love-Lane’s right to speak and the Pickering balancing test tipped convincingly in her direction. The court held that Martin was not entitled to summary judgment in his favor on the basis of qualified immunity because any reasonable superintendent in his position would have realized that he would violate the Constitution by taking adverse employment action against Love-Lane because she spoke out about race discrimination.

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153. *Id.* at 783. The court upheld the district court’s dismissal of Love-Lane’s free speech claim against Martin in his official capacity as redundant. *Id.* The court also held that the Board could not be held liable for violating Love-Lane’s free-speech rights. *Id.* The court noted that Love-Lane failed to produce enough evidence to demonstrate that the Board was aware of the denial of her free speech rights and either participated in, or otherwise condoned, that denial. *Id.*

154. *Id.* at 784-85. The court emphasized that Love-Lane would have to prove that her reassignment came in retaliation for her exercise of free speech. *Id.*

155. *Id.* at 784. The court noted that the right of a teacher to speak out on public issues without facing adverse employment action was well established, and that statements about racial discrimination at public schools were for many years recognized as involving matters of public concern. *Id.* It also maintained that because Martin admitted Love-Lane was not a threat to the safety of students, her right to speak out outweighed his interest in running the school system in an efficient manner. *Id.*

156. The court effectively dismissed case law that suggested that courts will rarely find it clearly established that public employee speech on matters of public concern should receive constitutional protection, because the Pickering balancing test is fact-intensive, subtle, nebulous, and difficult to apply. *Id.*

157. *Id.*

158. *Id.* at 784. The court also defended itself against the dissent’s criticism that its decision will hamper the ability of school administrators to make personnel decisions. *Id.* at 785. It asserted that administrators could simply hear out but not retaliate against lower-level administrators who raised concerns about racial discrimination. *Id.*

159. *Id.* at 784.

160. *Id.* at 783-84. The majority also addressed several of the dissent’s other concerns in its opinion. *Id.* at 785-86. The court first argued that protecting Love-Lane’s speech about
In dissent, Judge Wilkinson suggested that the majority's decision ignored Supreme Court and Fourth Circuit precedent, and harmed public education in the process.\textsuperscript{161} Judge Wilkinson began by construing the facts to argue that the district court was correct in holding that the relationship between Blanchfield and Love-Lane became so dysfunctional that Martin had to reassign them both.\textsuperscript{162} Judge Wilkinson determined that Love-Lane did not have a viable claim for retaliatory demotion under the First Amendment.\textsuperscript{163} He maintained that the speech that spurred Love-Lane's transfer came in her capacity as an employee, not as a concerned public citizen.\textsuperscript{164} Judge Wilkinson also contended that Martin had a stronger interest in maintaining efficiency at Lewisville than Love-Lane had to speak.\textsuperscript{165}

Next, Judge Wilkinson vigorously attacked the majority's decision to strip Martin of his qualified immunity.\textsuperscript{166} First, he maintained that precedent showed that since Love-Lane presented her concerns in a confrontational manner, Martin's interest in operating Lewisville Elementary School efficiently outweighed Love-Lane's interest in First Amendment expression.\textsuperscript{167} Second, because there was no clearly established law, Martin could not have known that transferring Love-Lane because she had made allegations about racial discrimination would violate her First Amendment rights.\textsuperscript{168}

discrimination fostered good disciplinary practices more than hampered them. \textit{Id.} at 785. It also maintained that allowing the free speech claim to proceed before a jury would subject causal issues but not, as the dissent suggested, disciplinary policy to the results of litigation. \textit{Id.} at 785-86. Finally, the court emphasized that its decision would not drive good educators to private schools, but encourage them to speak up for underprivileged students instead. \textit{Id.} at 786.

\textsuperscript{161.} \textit{Id.} at 790 (Wilkinson, J., dissenting).
\textsuperscript{162.} \textit{Id.} at 791-93 (Wilkinson, J., dissenting).
\textsuperscript{163.} \textit{Id.} at 798 (Wilkinson, J., dissenting).
\textsuperscript{164.} \textit{Id.} at 794-95 (Wilkinson, J., dissenting). The dissent noted that Love-Lane and her counsel argued to the Board that Love-Lane and Blanchfield's difficulties were personal, while failing to raise any argument about retaliation for her public speech. \textit{Id.} at 795 (Wilkinson, J., dissenting). Further, she and her fellow employees differed over a wide variety of topics unrelated to public concerns. \textit{Id.} (Wilkinson, J., dissenting).
\textsuperscript{165.} \textit{Id.} (Wilkinson, J., dissenting). Judge Wilkinson first observed that Love-Lane disrupted Lewisville's operation through her manner, and not just her speech. \textit{Id.} at 795-96 (Wilkinson, J., dissenting). He then remarked that the majority failed to show any deference to Martin's judgment even though Martin was not, according to precedent, required to ignore Love-Lane's allegedly inappropriate methods of communication. \textit{Id.} at 796-97 (Wilkinson, J., dissenting). Finally, he asserted that Love-Lane failed to show that her speech was a substantial factor in Martin's decision to reassign her, because Blanchfield, and not Martin, was upset by Love-Lane's speech about racial discrimination. \textit{Id.} at 797-98 (Wilkinson, J., dissenting).

\textsuperscript{166.} \textit{Id.} (Wilkinson, J., dissenting).
\textsuperscript{167.} \textit{Id.} at 798-99 (Wilkinson, J., dissenting).
\textsuperscript{168.} \textit{Id.} at 799 (Wilkinson, J., dissenting).
Judge Wilkinson ended his discussion of qualified immunity by arguing that denying Martin qualified immunity would render school administrators ineffective because of a heightened threat of litigation.\(^{169}\) In particular, Judge Wilkinson argued that the majority's decision would subject the disciplinary efforts of school communities, like Lewisville, to increased litigation.\(^{170}\) Thus, he continued, it will become even harder for teachers to maintain order, and harder for students to learn in less orderly environments.\(^{171}\) Judge Wilkinson also asserted that the majority imprudently removed school decisions from the hands of administrators and placed them into the hands of courts, thereby threatening public education itself.\(^{172}\) He concluded that incorrectly denying the protection of qualified immunity to school administrators like Martin will hurt the communities and students that educators serve.\(^{173}\)

4. **Analysis.**—In *Love-Lane v. Martin*, the Fourth Circuit held that a reasonable school superintendent should have recognized that transferring an assistant principal who alleged that her school's disciplinary practices were discriminatory would clearly violate her right to free speech.\(^{174}\) The court misapplied both its own and the Supreme Court's standards for qualified immunity defenses asserted in response to free speech claims.\(^{175}\) Moreover, despite a muddled factual context, the court determined that even though the law applicable to his actions was not clearly established, a public school superintendent did not enjoy immunity from suit under the doctrine of qualified immunity because he failed to act in accordance with clearly established law of which a reasonable person should have known.\(^{176}\) Consequently, government officials must now flawlessly perform precise bal-

\(^{169}\) *Id.* (Wilkinson, J., dissenting). Judge Wilkinson noted that Martin had in fact, as the majority suggested would be proper, repeatedly heard out Love-Lane's concerns. *Id.* (Wilkinson, J., dissenting).

\(^{170}\) *Id.* at 800 (Wilkinson, J., dissenting).

\(^{171}\) *Id.* (Wilkinson, J., dissenting).

\(^{172}\) *Id.* at 800-01 (Wilkinson, J., dissenting).

\(^{173}\) *Id.* at 801-02 (Wilkinson, J., dissenting).

\(^{174}\) *Id.* at 782.

\(^{175}\) *Id.* at 790 (Wilkinson, J., dissenting); see infra notes 178-218 and accompanying text (discussing how the court ignored or misconstrued good authority on qualified immunity).

\(^{176}\) *Love-Lane*, 355 F.3d at 784-85 (holding that Martin was not entitled to summary judgment because his conduct fell "within the ambit" of illegality, despite the infrequency of such conduct violating the *Pickering* balancing test); see infra notes 207-232 and accompanying text (providing a discussion of how the court inappropriately expected a superintendent to perform flawlessly an intricate balancing test to determine whether his actions violated constitutional law).
ancing tests before making operational decisions with constitutional implications. 177

a. The Fourth Circuit Ignored Both the Supreme Court's and Its Own Jurisprudence in Holding That Superintendent Martin Disregarded Clearly Established Law.—In finding that Martin violated clearly established law, and thus denying him qualified immunity from Love-Lane's free speech claim, the court disregarded Supreme Court precedent and its own jurisprudence. 178 Because of its oversight, the court concluded that Love-Lane's was the infrequent case where, even after a Pickering balancing test, the employer's actions violated clearly established law. 179 The court did not give due regard to the difficult process involved in concluding that a public employee's speech deserves constitutional protection. 180 The court did not recognize that pre-existing law had not clearly established Martin's decision to transfer Love-Lane as unlawful. 181

(1) The Court Ignored Key Precedents in Misapplying the Pickering Balancing Test.—In deciding whether Love-Lane's free speech rights were violated, the court mistakenly concluded that Love-Lane's claim met the threshold Pickering requirement 182 of a free speech retaliatory action claim in that she had spoken about public concerns rather than on matters of personal interest. 183 It ignored the fact that Love-Lane's speech covered a wide range of other private employment-related issues. 184 The Supreme Court in Connick held that an employee who distributed a questionnaire regarding intra-office employment policies did not speak out upon a matter of public con-

177. See Love-Lane, 355 F.3d at 790 (Wilkinson, J., dissenting) (noting that because of the majority's holding, the threat of federal lawsuits will restrict the latitude and discretion of superintendents and principals); see infra notes 241-238 and accompanying text (discussing how government officials will face unreasonable decisionmaking demands as a result of the court's decision).

178. Love-Lane, 355 F.3d at 790 (Wilkinson, J., dissenting).

179. See id. at 785. Courts rarely find clearly established law after employing the Pickering balancing test because the relevant inquiry requires a fact-intensive balancing that is subtle, nebulous, and difficult to apply. DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995).

180. See DiMeglio, 45 F.3d at 806 (discussing the difficulty of applying the Pickering balancing test in the context of qualified immunity).

181. Love-Lane, 355 F.3d at 798 (Wilkinson, J., dissenting).

182. An employee must demonstrate that his interest in speaking about a matter of public concern outweighs the government's interest in efficiently serving the public. Goldstein v. Chesnut Ridge Volunteer Fire Co., 218 F.3d 337, 351 (4th Cir. 2000).

183. See Love-Lane, 355 F.3d at 777-78. Love-Lane's frequent speech about race discrimination buttresses this conclusion. Id. at 776.

184. Id. at 794-95 (Wilkinson, J., dissenting).
Employees who speak about a number of private employment-related topics, as opposed to only one matter of public concern, may therefore not qualify as having spoken out about public concerns, and will not be able to sustain their free speech retaliatory action claims. Love-Lane’s difficulties at Lewisville involved various matters not of public concern such as bus-loading policies, recess supervision, kindergarten care, a disagreement within the custodial staff, and a heated confrontation with a teacher. Nonetheless, the court’s focus on Love-Lane’s speech about discriminatory practices at Lewisville allowed it to conclude that she spoke out about a matter of public concern, and further conclude that a reasonable public official should have clearly recognized her speech as protected.

In concluding that Love-Lane’s interest in free speech outweighed the school system’s interest in efficiency and thus satisfied the second requirement of Pickering, the court first misapplied words of caution from the Supreme Court in Connick. The Court, in Connick, warned that “a stronger showing may be necessary if the employee’s speech more substantially involved matters of public concern.” In its opinion in Love-Lane, however, the Fourth Circuit read Connick to state that “the government employer must make a stronger showing of the potential for inefficiency or disruption when the employee’s speech involves a ‘more substantial[ ] matter of public concern.’” By changing “may” to “must,” and “substantially” to “substantial,” the court manipulated the Supreme Court’s doctrine, forcing public officials always to demonstrate greater efficiency concerns when employees speak out on issues that relate, even tangentially, to issues of public concern. Under Connick, a stronger showing was not necessary where an employee distributed a questionnaire that focused on predominantly personal office issues. By contrast, however, a fire company employee’s speech about training for emergency personnel, adherence to safety regulations, and unsafe crewmember conduct did merit a greater degree of First Amendment protection. The Fourth Circuit’s distortion of Connick’s warning will now require the government to make a greater efficiency showing not just when an employee’s speech touches mostly on issues of public concern, but also

186. Id.
188. Id. at 776-78.
189. Connick, 461 U.S. at 152 (emphasis added).
190. Love-Lane, 355 F.3d at 778 (emphasis added).
191. Id. at 151-52.
when the employee happens to speak out on any matter of "substantial" public concern, no matter how sparingly. By deeming race discrimination a matter of "substantial" public concern, the Love-Lane court managed to force Martin to demonstrate his efficiency interest to a degree previous case law did not require.

The court also misapplied the second prong of the Pickering analysis by failing to consider fully the manner and tone of Love-Lane's speech, factors a reasonable public official might have considered in deciding whether Love-Lane was a disruptive influence at Lewisville. For instance, a reasonable superintendent should be able to take action when teachers and administrators of all genders and races find an administrator's demeanor unprofessional and contentious.

While the court credited Love-Lane's own statements that she always acted professionally, it ignored substantial evidence to the contrary provided by four investigations of an incident between Love-Lane and another employee, and the collective statements of both the entire Lewisville administration and the school system's central office. Despite its claims to the contrary, the court did not apply the law stated in Connick that employers are not required to ignore employees who disrupt their offices.

The court compounded its misapplication of the second Pickering factor by disregarding its own rule from Stroman that school officials need not wait until an employee's speech becomes manifestly problematic before taking action to prevent employees from disrupting the workplace. Instead, the court suggested that a reasonable superintendent should continue to tolerate troublesome behavior without

193. Love-Lane, 355 F.3d at 796-97 (Wilkinson, J., dissenting). Surprisingly, the court instead chose to focus on Martin's admission that Love-Lane never threatened the students' safety. Id. at 779.
194. Id. at 791 (Wilkinson, J., dissenting).
195. Id. at 779.
196. Id. at 797 (Wilkinson, J., dissenting).
197. Id. at 779. The majority, without citing any cases itself, claimed it examined the manner of Love-Lane's speech in a way that fell within the ambit of cases cited by the dissent. Id.
198. Id. at 797-98 (Wilkinson, J., dissenting).
199. 981 F.2d at 58 (quoting Connick v. Myers, 461 U.S. 138, 152); see also Fales v. Garst, 235 F.3d 1122, 1124 (8th Cir. 2001) (finding that a school's efficiency interest in avoiding disharmony among staff outweighed the teachers' interest in speaking); Cochran v. City of Los Angeles, 222 F.3d 1195, 1200-01 (9th Cir. 2000) (upholding preventative action in the law enforcement employment context); Derrickson v. Bd. of Educ., 738 F.2d 351, 352-53 (8th Cir. 1984) (finding that the interest in preventing disruptive and frequent internal criticisms outweighed a teacher's free speech rights). The Fourth Circuit has noted the same rule in the law enforcement context. Jurgensen v. Fairfax County, 745 F.2d 868, 882 n.21 (4th Cir. 1984).
taking any action that could be deemed retaliatory.200 Thus, even when an official like Martin, before taking action, spends two years listening to an administrator’s concerns and coping with the difficulties arising from her employment within the school system, the court, in spite of Stroman, may determine that he has somehow violated clearly established law.201 Moreover, the Court found in Cromer that a reasonable public official should not have to tolerate confrontational speech, unprofessional behavior and ineffective working relationships simply because an employee wants to speak her mind.202 But the court in Love-Lane found the opposite, without citing any cases within its analysis of Martin’s qualified immunity defense, by concluding, based on its initial analysis of the free speech claim, that Love-Lane’s speech interests weighed heavily in her favor.203

The court further exacerbated the misapplication of its Pickering efficiency analysis by ignoring Connick’s clearly established rule that a wider degree of deference to the employer’s judgment is appropriate when close working relationships are essential to fulfilling public responsibilities.204 The court did not cite this rule, and thus neglected to consider the possibility that the interest in having an assistant principal and a principal cooperate is essential to educating elementary school students.205 The court’s oversight allowed it to conclude that Love-Lane’s speech caused Lewisville’s educational community no harm, rendering Martin’s efficiency concerns inconsequential.206 Again, properly adhering to, or at least acknowledging, the Supreme Court’s reasoning in Connick would have led the court to recognize that a superintendent’s interest in saving one of his district’s schools from distracting and costly employee disputes outweighed Love-Lane’s free-speech interest.

200. Love-Lane, 355 F.3d at 785.
201. Id.
202. See Cromer v. Brown, 88 F.3d 1315, 1330 n.11 (4th Cir. 1996) (noting the limited nature of a holding denying qualified immunity to a Sheriff, because the speech for which an employee was fired was communicated in a nonconfrontational manner).
203. Love-Lane, 355 F.3d at 784.
204. Connick, 461 U.S. at 151-52; see also Waters v. Churchill, 511 U.S. 661, 674-75 (1994) (plurality opinion) (noting that public agencies must have the power to restrain employees who detract from the agency’s effective operation).
205. See Love-Lane, 355 F.3d at 795-96 (Wilkinson, J., dissenting) (noting that the majority disregarded the disruptive nature of Love-Lane’s behavior in concluding that educational services remained unaffected).
206. See id. at 779 (holding that Love-Lane’s free speech interest outweighed Martin’s efficiency concerns).
(2) The Court Ignored Precedent Requiring It to Perform an Individualized, Fact-Specific Investigation into the Reasonableness of a Public Official’s Actions.—The court in Love-Lane ignored precedent by finding that a reasonable superintendent would clearly understand that transferring Love-Lane violated her free speech rights.\(^{207}\) In so finding, the court did not conduct an individualized fact-specific inquiry to determine the legality of the defendant’s conduct as required by the Supreme Court in \textit{Saucier} and \textit{Anderson}.\(^{208}\) \textit{Saucier} requires that the court, following its determination that Martin could have illegally retaliated against Love-Lane’s exercise of free speech, should have considered whether superintendent Martin’s conduct was reasonable in light of clearly established law.\(^{209}\) \textit{Anderson} requires that courts review a defendant’s particular conduct within the actual circumstances surrounding it;\(^{210}\) the Fourth Circuit should have therefore analyzed superintendent Martin’s decision in the context of other undisputed evidence that militated in favor of his decision to transfer Blanchfield and Love-Lane.\(^{211}\) Instead, the court ignored both \textit{Saucier} and \textit{Anderson} and concluded merely that, in light of its initial discussion of whether Love-Lane’s free speech rights would have been violated on the facts alleged, Love-Lane’s right to speak out about race discrimination was clearly established.\(^{212}\) The court, therefore, did not analyze Martin’s conduct in the context in which he acted, as required by \textit{Anderson} and \textit{Saucier}.\(^{213}\)

Had it followed \textit{Saucier} and \textit{Anderson}, the court may have recognized that a reasonable superintendent could not have understood the contours of Love-Lane’s right to free speech well enough to know

\(^{207}\) Id. at 798-99 (Wilkinson, J., dissenting).

\(^{208}\) Petition for a Writ of Certiorari at 8-10, Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004) (No. 03-1569); see Saucier v. Katz, 533 U.S. 194, 202-03 (2001) (emphasizing that conducting a threshold reasonableness inquiry does not preclude the need for courts to conduct another more specific and individualized fact inquiry to determine whether a public official, within the particular context, would have clearly known his conduct was illegal); Anderson v. Creighton, 483 U.S. 635, 636-37, 640-41 (1987) (holding that qualified immunity should protect a public official whose conduct, though objectively reasonable, ultimately turns out to violate the law).

\(^{209}\) Petition for a Writ of Certiorari at 8-10, Love-Lane (No. 03-1569).

\(^{210}\) Anderson, 483 U.S. at 640-41.

\(^{211}\) Id. at 11-16. This evidence included the views of many teachers and administrators who, contrary to the majority’s conclusion that Love-Lane must be assumed to have acted professionally, found Love-Lane’s conduct offensive. Id.

\(^{212}\) Love-Lane, 355 F.3d at 784.

\(^{213}\) Saucier, 533 U.S. at 202-03; Anderson, 483 U.S. at 640-41.
that his conduct would clearly violate that right. The Fourth Circuit has granted qualified immunity to a defendant who transferred employees whose speech threatened a public office's interest in orderly management. The court has also denied qualified immunity to a defendant who fired his employee after the employee joined private speech efforts in a manner that did not affect close working relationships or office efficiency. But the court's rulings have failed to establish any clearly established rule under which Martin, as a reasonable superintendent, should have known that transferring Love-Lane would violate her right to free speech. Thus, in spite of the majority's decision to deny Martin qualified immunity, the unlawfulness of his conduct was far from manifest, and Martin's conduct violated no clearly established constitutional standard that a reasonable superintendent should have known.

b. The Fourth Circuit Inappropriately Expected a School Administrator to Perform Perfectly Intricate Constitutional Balancing Tests to Determine Whether His Actions Violated Clearly Established Constitutional Law.—Under the doctrine of qualified immunity, public officials must perform multiple balancing tests to determine the constitutionality of any action they might take that could compromise the constitutional rights of another. The difficulty of this determination is demonstrated by the varying conclusions of the four federal judges who heard Love-Lane's suit. While Judge Michael and Gregory found that Martin was not entitled to qualified immunity, Judge Wilkinson and

214. See Anderson, 483 U.S. at 640 (holding that for an officer to be held liable for violating a constitutional right, the right's contours must be so clear that a reasonable official would understand that his conduct would violate it).

215. DiMeglio v. Haines, 45 F.3d 790, 805-06 (4th Cir. 1995) (granting qualified immunity to a zoning commissioner who reprimanded an inspector whose statements could have reasonably been believed to have disrupted the function of the employer).


217. For instance, Love-Lane spoke out as an employee on matters of both public and private concern. Love-Lane, 355 F.3d at 776-78. Love-Lane also acted unprofessionally during a hallway confrontation with a teacher. Id. at 792 (Wilkinson, J., dissenting). Moreover, there is evidence that her speech had a negative effect on at least one of her close working relationships, and brought further acrimony to the workplace. Id. at 798-99 (Wilkinson, J., dissenting).

218. Indeed, Superintendent Martin's conduct was so far from manifestly illegal that two out of three school board panel members, and subsequently the full board, approved of it. Love-Lane, 355 F.3d at 775.

219. See DiMeglio v. Haines, 45 F.3d 790, 806 (4th Cir. 1995) (noting the difficulty in determining whether conduct is clearly illegal after conducting two fact-intensive balancing tests).

220. Love-Lane, 355 F.3d at 753.
District Court Judge Osteen reached the opposite conclusion.\textsuperscript{221} Courts should not hold administrators liable when the law, as applied to a certain set of facts, leads two federal judges to reach one result, and two others to reach the opposite.\textsuperscript{222} If it was clearly established that Martin acted illegally, at least a majority of federal judges should agree.

Unfortunately, the court in \textit{Love-Lane} effectively requires public officials, before they make managerial decisions that could affect another's constitutional rights, to hazard a guess as to whether or not any court that might review their actions would find their judgment in violation of clearly established law.\textsuperscript{223} As demonstrated by the differing opinions of the four federal judges in \textit{Love-Lane}, however, applying qualified immunity and divining clearly established law is a difficult task.\textsuperscript{224} Courts expect doubt and error from those officials who conduct constitutional balancing tests.\textsuperscript{225} Therefore, although appellate judges should review and criticize the \textit{Pickering} analyses of trial court judges, the analyses of other public officials should not be subject to the same scrutiny. Indeed, case law holds that if a public official reasonably but mistakenly assumes his efficiency interest in dealing with an employee outweighs that employee’s right to free speech,\textsuperscript{226} the public official should enjoy immunity.\textsuperscript{227} Especially in difficult factual scenarios, appellate courts should not penalize the same officials for failing to predict the legality of their actions. \textit{McVey} does require courts to ascertain whether employees speak as citizens about matters of public concern or as employees about personal inter-

\begin{footnotesize}
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\item[221.] \textit{Id.} at 790 (Wilkinson, J., dissenting); \textit{Love-Lane I}, 201 F. Supp. 2d 566, 584-85 (D. N.C. 2009).
\item[222.] See Wilson v. Layne, 526 U.S. 603, 618 (1999) (arguing that “[i]f judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy”).
\item[223.] See \textit{Love-Lane}, 355 F.3d at 785 (arguing that public officials like Martin should either wait and hear out complaints by employees like Love-Lane, or risk losing their immunity from suit).
\item[224.] Charles S. Wilson, \textit{“Location, Location, Location”: Recent Developments in the Qualified Immunity Defense}, 57 N.Y.U. ANN. SURV. AM. L. 445, 447 (2000). A member of the Eleventh Circuit Court of Appeals, Judge Wilson regards the task of adjudicating qualified immunity questions as one of the most ethically and philosophically daunting tasks a federal judge will face. \textit{Id.} He points out that judges face a moral dilemma when resolving qualified immunity issues: choosing between ensuring justice for a potential victim of humiliating conduct and holding a public servant who appeared liable to act in good faith. \textit{Id.}
\item[225.] See Crawford-El v. Britton, 523 U.S. 574, 592-93 (1998) (noting that, within the free speech context, even when a constitutional right has been long established, a defendant’s particular conduct might not constitute a clear violation of the law).
\item[227.] See \textit{supra} notes 75-82 and accompanying text (discussing the discretion qualified immunity affords government officials).
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ests, and whether the employees' interests in speaking about public concerns outweigh the government's interest in providing effective public services. But when an official makes a reasonable error in determining that his employee spoke out on a matter of public rather than private concern, the employing official should, again, receive protection from suit.

The court in *Love-Lane* placed too much of a burden on a superintendent's ability to divine clearly established law. The Fourth Circuit should instead have aligned itself with other circuits and recognized that in the situation of free speech the contours of the rights are typically not clearly enough established to warn reasonable public officials that their conduct has crossed a legal threshold.

The court should have also noted the standards set by analogous federal case law holding that public officials should not be required to delay taking action in resolving acrimonious disputes and other human resource crises until their employees threaten to cause tangible harm. The majority in *Love-Lane* made no notice of these precedents. By basing its decision on a method of balancing that is so difficult to apply, the Fourth Circuit imposes a responsibility upon public officials that they cannot be reasonably expected to discharge effectively.

228. McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998). The court in *McVey* also noted that public officials should only be held liable when they cross bright lines. *Id.* Balancing tests are not so bright. *Id.*


230. See, e.g., Fabiano v. Hopkins, 352 F.3d 447, 457 (1st Cir. 2003) (noting the difficulty of finding clearly established law in the midst of a *Pickering* balancing analysis); Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1275 (11th Cir. 2000) (discussing the difficulty of finding clearly established law in the free-speech arena); Lytle v. Wondrash, 182 F.3d 1083, 1089 (9th Cir. 1999) (reversing a district court's denial of qualified immunity to school officials because it was not demonstrably unreasonable for them to conclude that they did not violate the First Amendment); Grantham v. Trickey, 21 F.3d 289, 293 (8th Cir. 1994) (noting the infrequency of finding clearly established law amidst the *Pickering* balancing test); Noyola v. Texas Dep't of Human Resources, 846 F.2d 1021, 1025 (5th Cir. 1988) (same); Rakovich v. Wade, 850 F.2d 1180, 1213-14 (7th Cir. 1988) (same); *see supra* notes 98-133 and accompanying text (providing a discussion of just how sparse clearly established law is among federal cases involving free speech and qualified immunity).

231. See, e.g., Fales v. Garst, 235 F.3d 1122, 1124 (8th Cir. 2001) (finding that a school's efficiency interest in avoiding disharmony among staff outweighed the teachers' interest in speaking); Cochran v. City of Los Angeles, 222 F.3d 1195, 1200-01 (9th Cir. 2000) (upholding preventative action in the law enforcement employment context); Derrickson v. Bd. of Educ., 738 F.2d 351, 352-53 (8th Cir. 1984) (finding that the interest in preventing disruptive and frequent internal criticisms outweighed a teacher's free speech rights).

232. On the other hand, while Martin may ultimately be held personally liable, Martin's school board will indemnify him. E-mail from Douglas S. Pungre, *supra* note 134. Indemnification will thus eliminate the pecuniary threat placed upon officials who work for similarly generous government employers. Nevertheless, it will not eliminate the burden...
c. Subjecting Martin to Individual Liability Forces Government Officials to Worry About How to Balance Complex Doctrines when Making Operational Decisions That May Have Constitutional Implications.—The Fourth Circuit’s decision in Love-Lane poses a threat to government officials, both current and future. Under the standard established by the Fourth Circuit in Wilson, the facts of Love-Lane do not suggest that Superintendent Martin is either plainly incompetent or knowingly violated the law. Absent malice or incompetence, a reasonable public official like Martin should not have known that his actions would violate clearly established law. Martin should therefore enjoy immunity. The court’s decision does not allow government officials to exercise their fair judgment. The court failed to consider that Superintendent Martin spent two years working with Blanchfield and Love-Lane to resolve their difficulties, and that ultimately, he decided not to deal solely with Love-Lane, but, in the interest of the school, to transfer both her and Blanchfield. Further, the court did not give proper weight to the fact that upon review, the Winston Salem/Forsyth County Board of Education did not deem his actions incompetent, but approved them. The Fourth Circuit’s opposing decision in Love-Lane takes decisionmaking power away from public officials and, as a result, government and the citizens who pay for and receive its services will suffer.

Forcing public officials to perform public-versus-private as well as value-of-speech versus employer-efficiency balancing tests, without any assurance that their judgment will be respected, fails to serve the goals that qualified immunity aims to achieve. Qualified immunity is designed to protect public officials’ actions except when they recklessly or knowingly infringe upon the constitutional rights of others. The court’s decision in Love-Lane upsets that balance. The Love-Lane court’s approach discourages officials from exercising their discretion
government officials will bear in responding to lawsuits, or the costs that taxpayers, in turn, might have to assume.

233. See Love-Lane, 355 F.3d at 799 (Wilkinson, J., dissenting) (asking what public officials are supposed to do in the wake of the majority’s opinion).
234. 141 F.3d 111, 114 (4th Cir. 1998); see supra notes 78-82 and accompanying text (discussing Wilson).
235. Love-Lane, 355 F.3d at 799 (Wilkinson, J., dissenting).
236. Id. at 798 (Wilkinson, J., dissenting).
237. See id. at 774. Superintendent Martin also could not have knowingly violated Love-Lane’s free speech rights because he was never, in fact, aware of them. Id.
238. This result is exacerbated when public officials are indemnified. Taxpayers will inevitably have to pay for the litigation and costs arising from more lawsuits, in either increased taxes or the loss of services.
239. Wilson, 141 F.3d at 114.
with conviction and from taking timely, productive action in constitutionally related contexts. This decision may even discourage capable superintendents like Martin from pursuing public service altogether.  

Courts should heed the Supreme Court’s call in Harlow and dismiss insubstantial claims that disrupt the government and its employees before such claims reach trial. Unfortunately, in Love-Lane, the Fourth Circuit ignored Harlow’s objectives of protecting society from litigation costs and from distracted and impotent government officials; it instead requires administrators to guess how courts will resolve difficult constitutional balancing tests.

Finally, the Fourth Circuit’s decision in Love-Lane has even greater potential for harming public school administration due to the recent enactment of the local accountability standards required in the No Child Left Behind Act of 2001. One of the Act’s purposes is to “hold schools, local educational agencies, and States accountable for improving the academic achievement of all students.” The court’s decision has made it even harder for schools to meet this standard by making it more difficult for school administrators to resolve personnel difficulties that might affect the administration of education. In-


But because of the nature of their jobs, public officials, as opposed to private employees, are particularly vulnerable to constitutional tort actions. See, e.g., 42 U.S.C. § 1983 (2000) (holding liable only those who undertake state action). Thus, when a federal circuit makes it easier for citizens within its district to sue public officials, potential officeholders may notice. They may recognize that despite the best intentions, much of their time at work could become occupied by defending lawsuits, and they could lose a significant portion of their public sector salaries if they are not successful. They might also recognize that if they are to avoid suits, they must tread so lightly, and act so meekly, that even their best-planned and best-intentioned initiatives might never come to fruition.

241. Love-Lane, 355 F.3d at 801 (Wilkinson, J., dissenting).
242. Harlow v. Fitzgerald, 457 U.S. 800, 814, 818 (1982). Judge Wilkinson implied that Love-Lane’s free speech claim was in fact insubstantial by pointing out that Love-Lane did not raise free speech issues before the Board. Love-Lane, 355 F.3d at 793 (Wilkinson, J., dissenting).
instead, the court should recognize that public school administrators need a strong shield of qualified immunity to allow them to make tough choices and deliver the educational services children and parents expect and deserve.\footnote{247}

5. Conclusion.—In Love-Lane, the Fourth Circuit Court of Appeals denied a school superintendent qualified immunity when he allegedly violated an assistant principal’s right to free speech by transferring her as a result of her complaints about race discrimination.\footnote{248} In refusing to grant qualified immunity to Superintendent Martin after he made a difficult yet reasonable administrative decision, the Fourth Circuit ignored the Supreme Court and its own qualified immunity jurisprudence.\footnote{249} The court incorrectly decided to hold Superintendent Martin responsible for failing to perform precisely complicated constitutional balancing tests to determine whether his actions violated clearly established constitutional law.\footnote{250} As a result, the court forced him, and will in the future force other public officials, to become experts in the difficult methods of constitutional balancing before making management decisions.\footnote{251}

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\footnote{247. No Child Left Behind also aims to increase local flexibility and control in making education decisions. THE WHITE HOUSE, FACT SHEET: NO CHILD LEFT BEHIND ACT (Jan. 2002), available at http://www.whitehouse.gov/news/releases/2002/01/20020108.html. Reducing the discretion of top-level administrators to make staffing decisions appears to flout this purpose.}

\footnote{248. Love-Lane, 355 F.3d at 783.}

\footnote{249. Id. at 790 (Wilkinson, J., dissenting); see supra notes 178-218 and accompanying text (discussing how the court ignored or misconstrued good authority about qualified immunity).}

\footnote{250. Love-Lane, 355 F.3d at 784-85 (holding that Martin was not entitled to summary judgment because his conduct should have seemed illegal, even though such conduct rarely violates the Pickering balancing test); see supra notes 219-232 and accompanying text (providing a discussion of how the court inappropriately expected a superintendent to perform flawless balancing tests in determining clearly established constitutional law).}

\footnote{251. Love-Lane, 355 F.3d at 790 (Wilkinson, J., dissenting) (noting that because of the majority’s holding, principals and superintendents will become haunted by an ever-present specter of federal lawsuits); see supra notes 233-247 and accompanying text (noting that public officials now face a more difficult task in applying complex doctrines when making operational decisions with potential constitutional implications).}
II. Copyright Law

A. The Role of the ISP in Copyright Infringement: Applying the 1976 Copyright Act to the Internet by Fusing a Flawed Interpretation of Precedent into a Flawed Interpretation of the Act

In CoStar Group, Inc. v. LoopNet, Inc., the United States Court of Appeals for the Fourth Circuit considered whether an Internet service provider (ISP) was liable for direct copyright infringement when it engaged in a brief screening process before allowing users to post infringing material on its website. The court held that an ISP, acting as a passive conduit of information despite this brief screening process, is not directly liable for the infringing material posted by its users. Specifically, the court concluded that when an ISP temporarily stores material in its random access memory (RAM) while transmitting material over the Internet, it does not create "copies" as defined by the Copyright Act. In doing so, the court departed from the precedent it claimed to follow and misinterpreted the statutory definition of "copies." Rather than acknowledge the inapplicability of the Copyright Act to the Internet, the Fourth Circuit fused a judicially created liability scheme intended solely for ISPs into the legislative liability scheme.

1. 373 F.3d 544 (4th Cir. 2004) [hereinafter CoStar II].
2. There is no standard definition of ISP. Congressional attempts to construct a definition have created ambiguity in the statutory provisions that refer to an ISP. Compare The Communications Decency Act (CDA), 47 U.S.C. § 230(f) (2) (2000) (defining an ISP as an "interactive computer service"), with The Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(k)(1)(B) (2000) (defining an ISP as a "service provider"). The CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions." 47 U.S.C. § 230(f) (2). The DMCA defines a "service provider" as "a provider of online services or network access, or the operator of facilities therefor." 17 U.S.C. § 512(k)(1)(B).
4. Id. at 556.
6. CoStar II, 373 F.3d at 550-51; see also 17 U.S.C. § 101 (defining "copies" as "material objects . . . in which a work is fixed . . . and from which the work can be perceived").
7. See CoStar II, 373 F.3d at 549-51, 555 (claiming to agree with the analysis in Religious Technology Center v. Netcom On-Line Communications Services, Inc., 907 F. Supp. 1361, 1368 (N.D. Cal. 1995), which accepted the opposite proposition that copies are created when material is transmitted through an ISP's RAM); see also infra notes 142-162 and accompanying text (identifying the court's misinterpretation of the statutory definition of "copies").
8. See CoStar II, 373 F.3d at 556 (holding that LoopNet cannot be liable under the Copyright Act, as it is not a "copier").
governing all of copyright law. Applying the Copyright Act to a scenario not contemplated by the legislature that enacted it, the Fourth Circuit failed to defer to the constitutional purpose of copyright law. As a result, its decision threatens the constitutionally protected interests of artists and the public, sets a dangerous precedent for subsequent courts determining liability for copyright infringement in contexts other than ISPs, and impedes the development of a field of law that is meant to adapt to advances in technology.

1. The Case.—Plaintiff, CoStar Group, Inc. (CoStar), is a provider of commercial real estate information services and maintains a comprehensive real estate database that contains copyrighted photographs of commercial properties. Defendant, LoopNet, Inc. (LoopNet), is an ISP that offers its users the ability to post listings of commercial real estate. LoopNet operates a website that contains over one hundred thousand commercial real estate listings, including thirty-three thousand photographs, all of which are uploaded onto its website by subscribers, mostly real estate brokers. Subscribers posting purely textual listings have their information automatically uploaded onto LoopNet’s server for display. Subscribers who wish to include a photograph in their listing must agree that they have “all necessary rights and authorizations” from the copyright owner of the photographs and then a LoopNet employee must review the photograph to ensure it in fact depicts commercial real estate and to check for any obvious indication of copyright infringement before it is uploaded onto the server for display.

Following CoStar’s identification of over three hundred of its copyrighted photographs on LoopNet’s website, CoStar filed suit in the United States District Court for the District of Maryland for copy-

9. See infra notes 164-168 (analyzing the court’s attempt to interpret Netcom’s liability scheme, which was created outside the scope of the Copyright Act and intended to remedy the inadequacies of the Act as applied to ISPs, as a statutory interpretation of the Act’s definition of “copies”).

10. See infra notes 169-175 (establishing the judiciary’s role in considering the constitutional purpose of copyright law when technological change renders the Copyright Act obsolete and discussing the implications of the failure to do so). Article I, section 8 of the United States Constitution serves as the source for this inherent tension and provides the foundation for copyright law by granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. Const. art. I, § 8, cl. 8.

12. Id. at 547.
13. Id.
14. Id.
15. Id.
right infringement and several state law causes of action. After the parties stipulated to the dismissal of all claims except for direct copyright infringement, the district court entered a final judgment on that issue in favor of LoopNet.  

The district court relied on *Religious Technology Center v. Netcom On-Line Communication Services, Inc.* a Ninth Circuit case that concluded that an ISP cannot be held liable for direct copyright infringement initiated by its users without some element of volition or causation, which is absent when an ISP merely creates a copy in an involuntary process initiated by a third party. The district court found that because third parties used LoopNet's system to create copies, LoopNet lacked the element of either volition or causation that *Netcom* required to establish direct copyright infringement. CoStar asserted that LoopNet directly copied and distributed its photographs in violation of their exclusive rights under § 106 of the Copyright Act, and that LoopNet's process of physically screening each photograph before uploading it to the website was evidence of volitional conduct that caused the copies to be created and distributed. However, the court agreed with LoopNet and concluded that LoopNet merely allowed users to upload and download photographs and did not "reproduce" those photographs on LoopNet's website. Despite its screening process, the district court qualified LoopNet as a passive conduit of information, and thus under *Netcom*, allowed it to escape liability for direct copyright infringement. CoStar appealed the district court's award of summary judgment on the issue of direct copyright infringement to the United States Court of Appeals for the Fourth Circuit. The court considered whether an ISP that screens each of the photographs posted by users

17. *CoStar II*, 373 F.3d at 547.  
20. *Id.* at 696. The district court noted that the Fourth Circuit previously expressed its preference for the *Netcom* approach in *ALS Scan, Inc. v. RemarQ Cmtys., Inc.*, 239 F.3d 619 (4th Cir. 2001). *Id.*  
21. 17 U.S.C. § 106 (2000). This section provides authors the exclusive right to reproduce, create derivative works, distribute, display, and publicly perform their copyrighted works. *Id.*  
23. *Id.* at 695-96.  
25. *Id.* at 547.
on its system is directly liable for photographs posted in violation of existing copyright law.\(^{26}\)

2. **Legal Background.**—The United States Constitution gives Congress the power to grant exclusive rights to authors of original works in order to encourage such creations and ultimately advance the public welfare.\(^{27}\) Accordingly, Congress enacted the Copyright Act of 1976,\(^{28}\) awarding authors of artistic and literary creations the exclusive right to reproduce their copyrighted material.\(^{29}\) As such, to establish a prima facie case of direct copyright infringement, a plaintiff need only present evidence of unauthorized copying of a copyrighted work.\(^{30}\) The 1976 statutory definition of "copies"\(^{31}\) includes the product of an ISP's display of a user's material on the Internet.\(^{32}\) Consequently, under a strict interpretation of "copies," the mere existence of a website that contains unauthorized copyrighted material is sufficient to hold an ISP liable for direct copyright infringement, regardless of the ISP's negligible role in the infringement.\(^{33}\) Courts recognized that imposing liability on ISPs that merely transmit material to the Internet without an ability to monitor the content of that material undermines the constitutional purpose of copyright law by restricting the public dissemination of original works.\(^{34}\) To prevent the constitutional implications involved in strictly applying the Copyright Act to ISPs, courts have adopted a judicially created liability

\(^{26}\) *Id.* at 546.

\(^{27}\) U.S. Const. art. I, § 8, cl. 8; see also *infra* notes 36-49 and accompanying text (discussing the constitutional purpose behind copyright law).


\(^{29}\) *Id.* § 106. Authors are also granted the exclusive right to create derivative works, and to distribute, display, and publicly perform their copyrighted works. *Id.*

\(^{30}\) Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 361 (1991). As ownership and copying are the only two elements required under the Copyright Act, direct copyright infringement is a strict liability offense, imposing liability on the infringing party regardless of that party's lack of intent or knowledge of the infringement. 17 U.S.C. § 501(a); see also *infra* notes 40-55 and accompanying text (examining the Copyright Act's statutory framework).

\(^{31}\) 17 U.S.C. § 101. "Copies" are defined as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." *Id.*

\(^{32}\) See *infra* notes 57-75 and accompanying text (examining the cases establishing that an ISP creates "copies" under the statutory definition).

\(^{33}\) Courts initially relied upon a strict liability theory when applying the Copyright Act to ISPs accused of copyright infringement initiated by their users. See *infra* notes 76-80 and accompanying text (discussing the application of the statutory framework to determine that an ISP is strictly liable for direct copyright infringement).

\(^{34}\) See *infra* notes 76-80 and accompanying text (describing the constitutional implications of designating ISPs as copiers).
theory for ISPs based on causation, whereby an ISP is not liable for direct copyright infringement without evidence of volition or causation.\textsuperscript{35}

\textit{a. The Constitutional and Statutory Foundation of Copyright Law.}—The Constitution establishes the field of copyright law by giving Congress the power to protect an individual's intellectual works with the ultimate goal of disseminating those works to the public. Effectuating this purpose, Congress enacted a statutory framework that motivates artistic creation by placing a limited monopoly in the hands of a copyright owner.

The Constitution grants Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."\textsuperscript{36} Congress then created the field of copyright law, granting authors of artistic and literary creations certain exclusive rights to their original works.\textsuperscript{37} Granting a property right for intellectual works rewards an author for his or her creative work and as a result, "promote[s] the Progress of Science and useful Arts."\textsuperscript{38} Thus, at the core of copyright law is the struggle to balance an author’s exclusive rights to his copyrighted works against the public’s interest in accessing those works.\textsuperscript{39}

In effectuating the constitutional purpose of protecting both private creativity and public welfare, Congress enacted the Copyright Act of 1976.\textsuperscript{40} Congress anticipated that the grant of a limited monopoly in an author’s original works would achieve the private motivation necessary to reach the ultimate goal of disseminating intellectual works to the public.\textsuperscript{41} As such, the Copyright Act gives authors the exclusive right to reproduce, create derivative works, distribute, display, and publicly perform their copyrighted material.\textsuperscript{42}

\textsuperscript{35. See infra notes 81-99 and accompanying text (discussing the judicially created liability scheme intended to replace the strict liability scheme for ISPs).}  
\textsuperscript{36. U.S. Const. art. I, § 8, cl. 8.}  
\textsuperscript{37. 17 U.S.C. § 106. Namely, the rights to reproduce, create derivative works, distribute, display, and publicly perform their copyrighted material. Id.}  
\textsuperscript{38. U.S. Const. art. I, § 8, cl. 8; see also Mazer v. Stein, 347 U.S. 201, 219 (1954) (explaining that encouraging individual creativity is the best way to advance public welfare).}  
\textsuperscript{39. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (describing the competing claims upon the public interest: private motivation must ultimately serve the public welfare by allowing for broad access to original works of art).}  
\textsuperscript{40. Copyright Act, 17 U.S.C. §§ 1-1332.}  
\textsuperscript{41. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (establishing that the primary purpose of the Copyright Act is not to provide a private benefit but rather to promote the creation and dissemination of original works).}  
\textsuperscript{42. 17 U.S.C. § 106.}
In *Sony Corp. of America v. Universal City Studios*, the Supreme Court interpreted the limited monopoly that copyright law confers on authors by way of exclusive rights as a means to the ultimate end of benefiting the public. In *Sony*, Universal City Studios, which owned exclusive rights to television programs broadcasted on public airwaves, alleged contributory copyright infringement against Sony because it manufactured and sold video tape recorders used by the public to make unauthorized copies of television programs. In finding Sony not liable for contributory copyright infringement because its recorders were capable of substantial noninfringing uses, the Court emphasized its reluctance to expand copyright protections without explicit legislative guidance. The Court reasoned that this situation, involving a product capable of substantial noninfringing uses, could not have been contemplated by Congress when it enacted the Copyright Act in 1976, and thus deferred to the underlying constitutional purpose of copyright law—stimulating artistic creativity in order to benefit the public. As such, the Court relieved Sony of liability by creating the doctrine of "substantial noninfringing uses" in order to balance the interest of authors in controlling their art with the competing interest of the public in the free flow of ideas.

Violation of any of the exclusive rights granted to authors under the Copyright Act is considered copyright infringement. In considering whether a publishing company infringed on the copyright of a telephone company by using its listings without their consent, the Supreme Court in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.* identified only two elements as necessary to establish a prima facie case of direct copyright infringement: (1) ownership of a copyrighted work; and (2) unauthorized copying of that work by the de-

44. *Id.* at 429.
45. *Id.* at 419-20.
46. *Id.* at 456. The issue of substantial, noninfringing uses was not argued in *CoStar II*.
47. *Id.* at 431. If the Court had enforced Universal City Studios’ exclusive rights to certain television programs against Sony, the manufacturer of a product not primarily used to infringe on copyrights, it would have expanded copyright protection beyond what Congress authorized in the language of the Copyright Act. *Id.*
48. *See id.* at 430-32 (noting that copyright law develops in response to changes in technology); *see also* Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (finding that courts must defer to the basic purpose of copyright law when technological change has created ambiguity in the literal terms of the Copyright Act).
49. *Sony*, 464 U.S. at 429.
Direct copyright infringement is thus a strict liability offense, whereby a plaintiff need only prove that an individual created an unauthorized copy of his or her work, regardless of the copier's lack of intent or knowledge of the infringement.53

Under the Copyright Act, "copies" are defined as "material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."54 The Act further provides that a work is "fixed" if it is "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."55

b. Applying the Statutory Framework of the Copyright Act to the Internet.—Under the Copyright Act, because the transmission of copyrighted material, even in an action initiated by third parties, creates a "copy" of the material, all ISPs would be strictly liable for direct copyright infringement in their role of instantaneously and unknowingly transmitting the copyrighted material to the Internet. Such a scenario undermines the constitutional purpose of copyright law by unduly valuing its private benefit over the ultimate goal of public dissemination of intellectual works.56

(1) The Designation of an ISP as a Copier.—In order to create a copy of a work, as defined by the Copyright Act, that copy must be fixed in such a way that it can be perceived for more than a period of transitory duration.57 As applied to material transmitted through computers, most courts have deferred to the example set by the Ninth Circuit in MAI Systems Corp. v. Peak Computer, Inc.58 MAI, a computer

52. Id. at 361. The Fourth Circuit noted its agreement with Feist in Trandes Corp. v. Atkinson Co., 996 F.2d 665, 660 (4th Cir. 1993).
53. 17 U.S.C. § 501 (a). While the Copyright Act does not explicitly distinguish between direct, contributory, or vicarious copyright infringement, the Supreme Court has implied this distinction through general principles of law. Sony, 464 U.S. at 435. The Court explained that vicarious and contributory liability are imposed in nearly all areas of the law and that copyright law should not be an exception, despite the absence of such provisions in the copyright statute. Id.
55. Id.
56. See infra notes 76-80 and accompanying text (discussing the constitutional implications of designating ISPs as copiers).
58. 991 F.2d 511, 519 (9th Cir. 1993); see infra note 64 (citing cases that followed MAI). However, some courts avoid the issue of proving copying altogether by applying the traditional inference test where a plaintiff can create an inference of "copying" by proving that
and software manufacturer, brought a copyright infringement claim against former employees after they used MAI's copyrighted software at their new employment with Peak Computer. Peak Computer argued that it did not violate MAI's copyright by merely loading software from a disk into a computer's RAM because RAM is not a tangible medium where a copy of the software can be fixed. The Ninth Circuit, however, found that under the Copyright Act, a copy is created when a computer program is transferred from a permanent storage device to a computer's RAM because the representation created in RAM may then be perceived on the computer for a period of more than transitory duration. Thus, in concluding that Peak Computer did engage in copyright infringement, the MAI court found the ability to be perceived in any tangible medium fixes a copy, not the medium in which the copying takes place.

Courts have consistently applied MAI to copyright infringement cases involving material transferred through the Internet, holding that a copy is created when a third party transfers material to an ISP's server which then transmits that material over the Internet. For instance, the United States District Court for the Northern District of Illinois, in Marobie-FL, Inc. v. National Ass'n of Fire Equipment Distributors & Northwest Nexus, Inc., found copying when material was uploaded from a personal computer's storage device to an ISP's storage media, or RAM. In particular, the court noted that when a user transmits

\[ \text{the defendant had access to the copyrighted work and that the two works are "substantially similar." See Playboy Enters., Inc. v. Russ Hardenburgh, Inc., 982 F. Supp. 503, 509 (N.D. Ohio 1997). Courts have even found copying where there is no proof of access if the allegedly infringing material is "strikingly similar" to the copyrighted material. See Playboy Enters., Inc. v. Webbworld, Inc., 991 F. Supp. 543, 551 (N.D. Tex. 1997).} \]

\[ 59. \text{MAI, 991 F.2d at 513.} \]

\[ 60. \text{See supra note 5 (defining RAM, or random access memory, as a computer component that temporarily records data).} \]

\[ 61. \text{MAI, 991 F.2d at 518.} \]

\[ 62. \text{Id. at 518-19 (citing Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 260 (5th Cir. 1988), which found that a copy is created when loading a program from a storage medium to a computer's memory).} \]

\[ 63. \text{Id. at 519; see also 17 U.S.C. § 101 (2000) (defining copies as fixed material objects that can be "communicated, either directly or with the aid of a machine or device" (emphasis added)).} \]


\[ 65. \text{983 F. Supp. at 1177. Third parties, or "users," transfer information over their Internet connection from a personal computer, typically a hard drive, to a storage device on the ISP. Sega, 857 F. Supp. at 683. This process, known as "uploading," records the} \]
material over the Internet to post on a website, a copy is created on
the computer of the website operator and the ISP's computer.66
Thus, the court found that the user's initial act of posting material on
the Internet results in the automatic copying of this material from the
website operator's computer to the ISP's computer, allowing that ma-
terial to be viewed by other users, and consequently fixes the copies.67

In Marobie-FL, the owner of copyrighted clip art pictures brought
a suit against an ISP for copyright infringement after finding its
images available for download on the defendants' website.68 The de-
fendants argued that the instantaneous transmission of information in
electronic form through a computer's RAM cannot be considered
copying, as the information is never "fixed" in an ISP's RAM.69 Re-
jecting this argument, the court explained that the speed with which
material is duplicated during an Internet transmission has no rele-
vance to the material's ability to be perceived for more than a "transi-
tory duration."70 Although the transmission process breaks
information down into "bytes" which are typically not contained in an
ISP's RAM in totality,71 the court determined that the material is still
"fixed" under the statutory definition because those bytes eventually
reach an Internet site which can assemble and display the file in its
entirety on a computer for more than a period of transitory dura-
tion.72 As such, the court concluded that by merely transmitting infor-
mation through a computer's RAM, the defendants did create copies
of the material, emphasizing that such material need not be "fixed" in
the medium of transmission but rather the medium of
communication.73

Additional courts have followed Marobie-FL and concluded that
when assessing the statutory definition of "copies," the ability to be
perceived must be of more than transitory duration and the duration

66. Marobie-FL, 983 F. Supp. at 1177. As a result, copyright infringement actions are
often brought against both the website operator and the ISP. Id.
67. Id.
68. Id. at 1171.
69. Id. at 1176-77.
70. Id. at 1177-78.
71. Rather, the information is transmitted so instantaneously that only a portion exists
in RAM at any one time. Id. at 1177.
72. Id. at 1177-78.
73. Id. at 1178.
of the copying process is irrelevant. Under this interpretation, all ISPs create "copies" when material is instantaneously transferred through its RAM to be displayed on the Internet.

(2) Constitutional Implications of Designating ISPs as Copiers.—As copying is a necessary component of the process by which an ISP displays images on the Internet, the mere existence of unauthorized copyrighted material on a website is sufficient to establish a prima facie case of direct copyright infringement against an ISP. For example, the first decision applying copyright principles to infringement occurring on the Internet used the statutory strict liability scheme to find an operator of an electronic bulletin board service (BBS) liable for material posted by its users, regardless of whether the operator had knowledge of the infringement or an intent to infringe. As such, an ISP is strictly liable under the Copyright Act for the unauthorized copying of copyrighted material without ever directly participating in the copying process that causes the infringement. However, courts have recognized that imposing liability on all ISPs whose users post infringing material would effectively cripple the Internet, hinder the public's ability to access copyrighted works, and ultimately impede the constitutional purpose of advancing public welfare.

c. Restoring the Constitutional Purpose: A Judicially Created ISP Liability Scheme to Replace the Statutory Liability Scheme.—Various courts rejected the idea of holding all ISPs strictly liable for direct copyright infringement for their passive role in creating "copies" and instead have adopted a causation liability theory, whereby an ISP is not held liable for creating copies unless it has engaged in an element of volition or causation. This causation liability theory was introduced in 1995 by the Northern District of California in Religious Technology

76. See supra note 30 and accompanying text (setting forth the elements of a prima facie claim of copyright infringement).
77. A BBS is a type of website that offers users the ability to upload and download material. Netcom, 907 F. Supp. at 1369 n.11.
79. Id.
80. See Netcom, 907 F. Supp. at 1369 (finding that this conflict would result in unreasonable liability affecting every ISP in the "worldwide link of computers").
Center v. Netcom On-Line Communication Services, Inc.81 Faced with a defendant ISP that provided Internet access to a BBS whose users posted infringing material, the court departed from the statutorily required strict liability scheme requiring only ownership of a copyright and copying by the defendant and instead imposed a requirement of volition or causation in order to find an ISP liable for direct copyright infringement.82 The court concluded that the elements of volition and causation do not exist where an ISP's system incidentally and automatically creates copies in a process initiated by a third party.83 In doing so, the court made the crucial distinction between creating a copy and causing a copy to be created.84 The court concluded that where an ISP's system can be used solely to create a copy by a third party, it would be unfair from a policy perspective to hold an ISP directly liable when it has not caused a copy to be created.85

Although the court acknowledged that Netcom did maintain a system that allowed users to automatically post material and thus created a copy of the plaintiff's work, Netcom's system could operate without human intervention.86 In emphasizing this fact, the court concluded that Netcom did not cause the copy to be created.87 The court was unwilling to hold Netcom directly liable for its passive conduct.88 As a result, the court created a standard of causation liability whereby the two statutory elements of unauthorized copying of copyrighted material may be satisfied and yet a defendant ISP can avoid liability if it has not engaged in voluntary infringement.89

Following Netcom, most courts have recognized that where the elements of volition or causation are lacking, an ISP should not be held liable for the infringing material posted by its users. The Fourth Circuit has, in dicta, expressed its preference for Netcom's causation liabil-

81. Id. at 1370-71. Netcom has become the seminal case dealing with copyright infringement on the Internet and has fundamentally altered the way courts address whether an ISP should be held liable for direct copyright infringement initiated by its users.
82. Id. The Netcom court explicitly identified the issue it set out to resolve: "whether possessors of computers are liable for incidental copies automatically made on their computers using their software as part of a process initiated by a third party." Id. at 1368 (emphasis added).
83. Id. at 1368-69.
84. Id.
85. Id. at 1369.
86. Id. at 1368-69 & n.12.
87. Id. In the court's analysis, the touchstone for causation was human intervention. Id.
88. Id. at 1372.
89. Id. at 1370. The court emphasized that a passive ISP does not create, control, or monitor the content of the material it transfers to the Internet. Id. at 1372.
ity theory over a strict liability theory, while other courts have expressly adopted the Netcom approach. For example, in Sega Enterprise, Ltd. v. MAPHIA, the Northern District of California allowed a BBS operator to escape liability for direct copyright infringement by relying on Netcom's distinction between creating a copy and causing a copy to be created. While the BBS operator had solicited subscribers to upload Sega video games onto the Internet and charged other subscribers a fee to download those games onto their computer, the court found this insufficient to prove that the operator caused the copying, despite acknowledging that the BBS operator created the copies in posting material on its system.

Just as courts have used Netcom to allow passive ISPs to escape liability, several courts have imposed liability on ISPs for direct copyright infringement where the ISPs have exercised some element of volition or causation. For example, the Northern District of Ohio, in Playboy Enterprises, Inc. v. Russ Hardenburgh, Inc., used two crucial facts to determine that a BBS operator was liable for the copyright infringing adult pictures posted by its users. First, the defendants solicited users to upload photographs. Second, the defendants conducted a screening process during which an employee viewed each photograph and moved them into a file that could be accessible to subscribers. As such, the human interaction involved in the screening process, in particular, allowed the court in Hardenburgh to find the defendants liable for direct copyright infringement.

3. The Court's Reasoning.—In CoStar Group, Inc. v. LoopNet, Inc., the Fourth Circuit concluded that an ISP automatically transmitting material on its system and storing that material in its RAM does not create "copies" as defined by the Copyright Act. Instead, the court

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90. See ALS Scan, Inc. v. RemarQ Cmty's., Inc. 239 F.3d 619, 622 (4th Cir. 2001) (noting that the Netcom reasoning is more persuasive than strict liability but deciding the case based on the Digital Millennium Copyright Act).
92. Id. at 932.
93. Id.
95. Id. at 512-13.
96. Id.
97. Id. The court found that these two facts transformed the defendants from a passive conduit of information into an active participant in copyright infringement. Id. at 513.
98. Id. at 511-12.
99. 373 F.3d at 550-51. The court stated that:
When an electronic infrastructure is designed and managed as a conduit of information and data that connects users over the Internet, the owner and manager of the conduit hardly "copies" the information and data in the sense that it fixes a
reasoned that Netcom's elements of volition and causation are derived from the statute and required to prove the creation of copies in all copyright infringement cases, not to determine the liability of an ISP by distinguishing between creating copies and causing copies to be created. The court then applied this reasoning to conclude that LoopNet's screening process was not substantial enough to be considered volitional conduct and, as such, was insufficient to amount to copying.

Writing for the majority, Judge Niemeyer first discussed the nature of the Netcom decision before applying it to the instant case. CoStar argued that the holding in Netcom—an ISP cannot be held liable for direct copyright infringement without some evidence of volition or causation—was a pragmatic and temporary limitation to the statutorily required strict liability scheme. Further, CoStar contended that the causation liability scheme developed in Netcom was a judicially created doctrine intended as a policy-based judgment to prevent crippling the Internet. The Fourth Circuit, however, did not interpret Netcom as introducing a new liability theory and refused to accept that the policy implications involved in holding all ISPs liable for the infringing conduct initiated by its users had any effect on Netcom's holding. While the court acknowledged that Netcom discussed the consequences of applying a strict liability scheme that required only proof of unauthorized copying of copyrighted material, it stated that such considerations were not the impetus for Netcom's introduction of the elements of volition and causation.

Instead, the Fourth Circuit decided that Netcom grounded its decision in a rational interpretation of § 106 of the Copyright Act. The

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100. Id. at 549-50.
101. Id. at 556.
102. Id. at 546. Judge Michael joined Judge Niemeyer. Id.
103. Id. at 548-53. CoStar raised the issue of whether Netcom was applicable due to the post-Netcom enactment of the Digital Millennium Copyright Act (DMCA). Id. at 548. CoStar argued that the DMCA preempted Netcom because it codified much of the Netcom decision. Id. at 552. The court relied on the express language of the DMCA, rules of statutory construction, and the legislative history to conclude that the DMCA did not supplant case law and that the DMCA's safe harbor provisions served as a floor and not a ceiling for defenses to copyright infringement on the Internet. Id. at 552-55.
104. Id. at 548.
105. Id. at 549.
106. Id.
107. Id.
108. Id.
court noted that the Act explicitly requires proof of two elements to establish copyright infringement. 109 The court then found that the Act implicitly required that there be a "sufficiently close and causal" nexus between the infringing conduct and the illegal copying, and interpreted Netcom's requirement of volition or causation as a manifestation of this nexus. 110 Thus, the court reasoned that Netcom's elements of volition and causation are statutorily required to prove the creation of copies in all cases involving copyright infringement. 111

The Fourth Circuit then interpreted the statutory definitions of "copies" and "fixed" to conclude that a passive ISP that automatically transmits material to the Internet does not create copies of that material and so cannot be held liable for direct copyright infringement. 112 According to the court, a passive conduit that transmits material over the Internet does not make fixed copies because the transmission process does not last for more than a period of "transitory duration." 113 The court cited the Copyright Act's definitions of the term "copies" as "material objects ... in which a work is fixed," and the term "fixed" as "sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 114 The court then described an ISP as a conduit that connects users over the Internet, making temporary electronic copies and downloading information as a fleeting, automatic response to a user's request. 115 The court concluded that an ISP does not create "copies" because the copying process is too transitory. 116 Such an automatic transmission, the court concluded, could not possibly fix a copy in its system for a period of more than transitory duration. 117

Recognizing that this conclusion conflicts with the holding of MAI—a copy is created when material is transferred to a computer's RAM—the Fourth Circuit next attempted to distinguish the transmission process that occurs on an ISP's computer from the same process that occurs for all other computers, such as the personal computer of the defendant in MAI. 118 The court made this distinction by characterizing the use of the term "transitory duration" in the definition of

109. Id. (1) Unauthorized copying of (2) copyrighted material. Id.
110. Id. at 550.
111. Id.
112. Id. at 550-51.
113. Id.
114. Id. at 550 (quoting 17 U.S.C. § 101 (2000)).
115. Id. at 550-51.
116. Id. at 551.
117. Id.
118. Id.; see MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518-19 (9th Cir. 1993).
“fixed” as both quantitative and qualitative.\textsuperscript{119} The court described the quantitative aspect as the duration of the copying process and the qualitative aspect as the status of the copying process, or the ability of the copied material to serve the computer owner.\textsuperscript{120} Thus, while the quantitative \textit{duration} of the copying process may be identical between an ISP’s computer and all other computers, the qualitative \textit{status} of the transition differs.\textsuperscript{121} The Fourth Circuit reasoned that an ISP automatically retransmits material through its RAM to the Internet and so the qualitative status of this process remains transitory.\textsuperscript{122} On the other hand, the court asserted that non-ISP computers and their users would now have access to the material in their RAM, which makes the copying process exceed a transitory duration and constitute a “copy” as defined by the statute.\textsuperscript{123}

The Fourth Circuit then applied its interpretation of \textit{Netcom} to the case at hand, determining whether LoopNet’s screening process involved in uploading the copyrighted work to the Internet had the requisite levels of volition or causation to conclude that it created “copies” under the Copyright Act.\textsuperscript{124} The court summarily dismissed LoopNet’s screening process, in which an employee briefly screened each photograph to ensure that it depicted real estate and did not have any explicit evidence of copyright protection before uploading it to the Internet, as insufficient to amount to copying.\textsuperscript{125} The court found LoopNet’s conduct too cursory to be significant.\textsuperscript{126} As the screening process only takes a few seconds, the court concluded that it was too transitory to create “copies,” as defined by the Copyright Act.\textsuperscript{127} As a result, the Fourth Circuit held that LoopNet did not violate the Copyright Act and was not liable for direct copyright infringement.\textsuperscript{128}

\begin{itemize}
  \item \textsuperscript{119} CoStar \textit{II}, 373 F.3d at 551.
  \item \textsuperscript{120} \textit{Id}.
  \item \textsuperscript{121} \textit{Id}.
  \item \textsuperscript{122} \textit{Id}.
  \item \textsuperscript{123} \textit{Id}. The court explained that:
    \begin{itemize}
      \item when the copyrighted software is downloaded onto the [non-ISP] computer, because it may be used to serve the computer or the computer owner, it no longer remains transitory. This, however, is unlike an ISP, which provides a system that automatically receives a subscriber’s infringing material and transmits it to the Internet at the instigation of the subscriber.
    \end{itemize}
  \item \textsuperscript{124} \textit{Id}. at 555-56.
  \item \textsuperscript{125} \textit{Id} at 556.
  \item \textsuperscript{126} \textit{Id}.
  \item \textsuperscript{127} \textit{Id}.
  \item \textsuperscript{128} \textit{Id}. Note that the court analyzed the \textit{Netcom} argument in terms of whether LoopNet’s volitional conduct would make it liable as a “copier” under the Copyright Act, rein-
In dissent, Judge Gregory disagreed with the majority's characterization of LoopNet as a passive conduit of information. Instead, Judge Gregory argued that LoopNet's nonpassive, volitional conduct in screening each photograph before uploading it to the Internet disqualified it from protection under Netcom. Judge Gregory reasoned that the majority inappropriately extended the nonvolitional defense beyond Netcom and its progeny and consequently gave ISPs greater protection than their analogues in print and other traditional media.

Judge Gregory began by distinguishing the actions in Netcom from LoopNet's actions, asserting that the nonvolitional defense should not be extended beyond ISPs that are truly passive, automatic transferors of information. He explained that the court in Netcom meant for its decision only to apply to such ISPs and explicitly memorialized this intent. Citing Netcom directly, Judge Gregory argued that the court in Netcom extended immunity only to ISPs that automatically transfer information and whose sole responsibility is to maintain a system whereby users upload material without any supervision by the ISP. In the instant case, however, Judge Gregory asserted that LoopNet's screening process is a volitional action that causes the photographs to be displayed on the Internet. Consequently, Judge Gregory argued that the majority mistakenly relieved LoopNet of liability and thereby extended the Netcom defense to afford ISPs greater protection than would be afforded to its traditional print equivalent.

4. Analysis.—In CoStar Group, Inc. v. LoopNet, Inc., the Fourth Circuit held that an ISP does not create “copies” when it transmits

forcing its interpretation of Netcom's elements of volition and causation as a strict statutory interpretation rather than a policy-driven result.

129. Id. at 557 (Gregory, J., dissenting).
130. Id. (Gregory, J., dissenting).
131. Id. (Gregory, J., dissenting).
132. Id. at 558 (Gregory, J., dissenting).
133. Id. (Gregory, J., dissenting).
134. Id. (Gregory, J., dissenting) (citing Netcom, 907 F. Supp. at 1369-70). Judge Gregory noted that the defendants in Netcom were a bulletin board operator (BBO) and the ISP that provided access to the Internet for the BBO; neither party possessed the ability to screen messages posted by its users. Id. at 557-58 (Gregory, J., dissenting).
135. Id. at 558-59 (Gregory, J., dissenting). Judge Gregory noted a flaw in the majority's argument that the user's initial direct infringement negated liability for LoopNet's cursory screening process by applying the same factual situation to a publisher of a free print version of LoopNet's website. Id. at 559-61 (Gregory, J., dissenting). Judge Gregory argued that a magazine publisher, controlling the content of its publication in the same manner as LoopNet, would indisputably be directly liable for distributing infringing material. Id. at 560 (Gregory, J., dissenting).
136. Id. at 560-61 (Gregory, J., dissenting).
material over the Internet,\textsuperscript{137} thus fundamentally misinterpreting the Copyright Act and departing from the precedent that it claimed to follow. The court first misinterpreted the statutory definition of "copies" by applying the phrase "transitory duration" to the copying process instead of the ability of the copied material to be perceived.\textsuperscript{138} Next, the court refused to interpret Netcom's causation liability scheme as a policy-driven departure from the statutorily required strict liability scheme that would have held all ISPs liable for copyright infringement.\textsuperscript{139} Rather than acknowledge the inapplicability of copyright infringement principles to the Internet, the court fused a policy-driven judicially created liability scheme intended solely for application to ISPs into the legislative liability scheme governing all of copyright law.\textsuperscript{140} Without deferring to the underlying constitutional purpose of copyright law when applying the Copyright Act to a scenario not contemplated by the legislature that enacted it, the decision threatens the interests that copyright law seeks to protect and sets a dangerous precedent if followed by other courts applying its statutory interpretation outside the scope of ISP liability.\textsuperscript{141}

\textbf{a. The Fourth Circuit's Statutory Misinterpretation: Applying "Transitory Duration" to the Copying Process Instead of the Ability to Be Perceived.}—The Fourth Circuit misinterpreted the term "transitory duration" as used in the Copyright Act's definition of "fixed" as referring to the copying process instead of the ability of the copies to be perceived, which allowed it to conclude that an ISP does not create "copies" when material is instantaneously transferred through its RAM.\textsuperscript{142}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 555.
\item See id. at 550-51; see also infra notes 142-161 and accompanying text (examining the court's statutory misinterpretation).
\item See CoStar II, 373 F.3d at 551 ("[W]e conclude that Netcom made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct—specifically, the act constituting infringement—to become a direct infringer."). But see 3 MELVILLE B. NIMMER \\ & DAVID NIMMER, NIMMER ON COPYRIGHT § 12B.01(A) (1) (2005) ("At bottom, . . . [Netcom] reflects a policy judgment as to where the line of liability should be drawn.").
\item See infra notes 164-168 and accompanying text.
\item See infra notes 169-175 and accompanying text (discussing the implications of the Fourth Circuit's decision).
\item See CoStar II, 373 F.3d at 550-51. The court stated that: When an electronic infrastructure is designed and managed as a conduit of information and data that connects users over the Internet, the owner and manager of the conduit hardly 'copies' the information and data in the sense that it fixes a copy in its system of more than transitory duration. Id. But see supra notes 58-63 and accompanying text (discussing MAI, which established that a copy need not be fixed in the medium from which the copying occurs, but rather the medium from which the copy can be perceived).
\end{enumerate}
\end{footnotesize}
Under the Copyright Act, there are two elements necessary to prove direct copyright infringement: (1) a plaintiff's ownership of a copyright and (2) unauthorized copying by the defendant.\textsuperscript{143} The statute defines "copies" as material objects in which a work is "fixed."\textsuperscript{144} A work is "fixed," when it is "sufficiently permanent or stable to permit it to be perceived . . . for a period of more than transitory duration."\textsuperscript{145} The Fourth Circuit, however, applied the "transitory duration" modifier to describe the copying process—in this case, the transmission function of an ISP—instead of the ability of the copied material to be perceived, as the statute intended from its plain language.\textsuperscript{146} The CoStar court departed from Marobie-FL, which properly interpreted the definition of "fixed."\textsuperscript{147} Marobie-FL explained that the determination of whether a copy is "fixed" turns on the capability of that copy to be perceived for more than a transitory duration, not the duration of the process by which the copy is created.\textsuperscript{148} Nonetheless, the Fourth Circuit mistakenly concluded that the copying process by which material is transmitted through an ISP's RAM is too temporary and automatic to be fixed for more than a period of transitory duration.\textsuperscript{149}

Contradicting the Ninth Circuit's holding in \textit{MAI}—a copy is created when material is transmitted to a computer's RAM\textsuperscript{150}—the Fourth Circuit attempted to distinguish itself by qualifying "transitory

\textsuperscript{143} See \textit{Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.}, 499 U.S. 340, 361 (1991) (interpreting the Copyright Act to require these two elements for a prima facie case of direct copyright infringement).


\textsuperscript{145} Id.

\textsuperscript{146} See \textit{CoStar II}, 373 F.3d at 550-51. \textit{But see MAI Sys. Corp. v. Peak Computer, Inc.}, 991 F.2d 511, 519 (9th Cir. 1993) (applying the statutory language to conclude that material downloaded to a computer's RAM can afterwards be perceived for a fixed amount of time and thus, creates a copy under the Copyright Act). According to the plain meaning of the statute's definition of "fixed," the material must be perceivable for a period of more than transitory duration. 17 U.S.C. § 101.


\textsuperscript{148} See id. ("The fact that a copy is transmitted \textit{after} it is created, or even \textit{as} it is created, does not change the fact that once an Internet user receives a copy, it is capable of being perceived and thus 'fixed.'").

\textsuperscript{149} \textit{CoStar II}, 373 F.3d at 551. As the court concluded:

Even if the information and data are "downloaded" onto the owner's RAM or other component as part of the transmission function, that downloading is a temporary, automatic response to the user's request . . . . While temporary electronic copies may be made in this transmission process, they would appear not to be "fixed" in the sense that they are "of more than transitory duration," and the ISP therefore would not be a "copier" to make it directly liable under the Copyright Act.

\textit{Id.}

\textsuperscript{150} \textit{MAI}, 991 F.2d at 519.
duration” as both qualitative and quantitative, even further confusing the statutory language.\footnote{151. \textit{CoStar II}, 373 F.3d at 551; \textit{see also supra} notes 118-123 (explaining the court’s distinction).} Attempting to resolve the conflict presented by recognizing the creation of “copies” where a computer owner downloads copyrighted material into that personal computer’s RAM but not when an ISP completes the same process, the court introduced the entirely new and unprecedented concept that transitory duration refers to both the duration and status of the copying process.\footnote{152. \textit{Id.} No other court has found that transitory duration refers to the copying process. \textit{See, e.g.}, \textit{Marobie-FL}, 983 F. Supp. at 1177-78 (applying “transitory duration” solely to the ability to perceive a copy and negating the argument that it applies to the copying process).} The Fourth Circuit reasoned that while the quantitative duration of the copying process is identical for both a non-ISP and ISP computer,\footnote{153. A non-ISP computer for purposes of this analysis is any computer that does not automatically retransmit the material out of its RAM.} the fact that a non-ISP computer now has access to the transferred material whereas an ISP computer re-transfers that material to the Internet is the qualitative aspect of “transitory duration” that “fixes” a copy in the former but not the latter.\footnote{154. \textit{CoStar II}, 373 F.3d at 551; \textit{see supra} notes 118-123 and accompanying text (discussing the court’s reasoning).} However, as the statute illustrates, the distinction is irrelevant because “transitory duration” does not refer to the copying process; it refers to the temporal length of the copied material’s capability of being perceived.\footnote{155. \textit{See} 17 U.S.C. § 101 (2000) (establishing that a work is “fixed” when it can “be perceived, reproduced, or otherwise communicated for a period of more than transitory duration”); \textit{see also supra} notes 64-75 (noting the application of the statutory definition of “fixed” to ISPs transmitting material to the Internet).}

The distinction between the quantitative and qualitative aspects of “transitory duration” undermines the Fourth Circuit’s own reasoning. The court initially stated that the quantitative duration of the transfer to an ISP’s RAM is too instantaneous to constitute a fixed “copy.”\footnote{156. \textit{CoStar II}, 373 F.3d at 551.} Following this logic, no computer could create copies because they all engage in identical instantaneous transmission processes.\footnote{157. \textit{Religious Tech. Ctr. v. Netcom On-line Communication Servs., Inc.}, 907 F. Supp. 1361, 1368 (N.D. Cal. 1995) (acknowledging that the transmission process that occurs for personal computers is identical to that of ISP computers).} However, the court then contradicted this logic by finding that non-ISP computers do create copies despite the fact that the duration of the transmission process is identical to that of ISP computers.\footnote{158. \textit{CoStar II}, 373 F.3d at 551.
duc ing a qualitative aspect of transitory duration. The court reasoned that once material is downloaded to the RAM of a non-ISP computer, the qualitative status of transition lasts for more than a period of transitory duration because that material may now serve the computer or computer owner.\textsuperscript{159} Thus, the court asserted that "transitory duration" refers to both the duration of the transmission (the quantitative element) and the status of the transmission (the qualitative element).\textsuperscript{160} However, this reasoning renders the quantitative element of "transitory duration" meaningless, as the duration of the copying process is identical for an ISP and a non-ISP computer. As a result, "transitory duration" must consist wholly of the qualitative element, as this is the only distinction between an ISP and a non-ISP computer.\textsuperscript{161} Therefore, the court's previous analysis concluding that an ISP does not create copies specifically because the quantitative duration of the copying process is too transitory is undermined by its subsequent analysis introducing the qualitative element, which renders the quantitative element meaningless.\textsuperscript{162}

\textit{b. The Fourth Circuit's Misinterpretation of Precedent: Fusing Netcom into the Copyright Act.}—In the first federal court of appeals decision explicitly analyzing and applying the precedent set by \textit{Netcom}—an ISP should not be held liable for creating copies of copyrighted material without evidence of volition or causation—to an ISP for direct copyright infringement initiated by its users, the Fourth Circuit fused a judicially created liability scheme meant to be applied solely to

\begin{footnotesize}
\begin{itemize}
\item[(159)] Id.
\item[(160)] Id.
\item[(161)] That is, if the court characterizes "transitory duration" as both qualitative and quantitative and both computers engage in the same quantitative element, then the qualitative element is the only distinguishing characteristic of "transitory duration."
\item[(162)] Note that if the court correctly interpreted "transitory duration" as referring to the ability to be perceived and kept the same framework for its subsequent analysis, the substituted argument would still fail, however this time not due to a flaw in the logic but instead due to the application of the Copyright Act. This substituted argument, a corollary of its qualitative distinction between ISPs and non-ISPs, would be that an ISP does not create copies because the ISP operator has no ability to perceive the material during the instantaneous transfer through its RAM whereas a non-ISP computer does create copies because the computer owner can perceive the material in its RAM for more than a period of transitory duration and thus is fixed. However, the analysis remains inconsistent with the Copyright Act because the statutory definition of "fixed" makes no reference in regard to who must be able to perceive the copy. 17 U.S.C. § 101 (2000). As such, it makes no difference whether an ISP operator has the ability to view the copy as long as the third party to whom that operator transmits the copy to over the Internet has the ability to perceive the copy for more than a transitory duration. \textit{See} Marobie-FL v. Nat'l Ass'n of Fire Equip. Distribs. & N.W. Nexus, Inc., 983 F. Supp. 1167, 1178 (N.D. Ill. 1997) (explaining that a copy is still created even if the ability to perceive it occurs sometime after its creation).
\end{itemize}
\end{footnotesize}
ISPs into the legislative liability scheme governing all of copyright law. The court refused to acknowledge that Netcom introduced its causation liability scheme as a response to the inadequacies of the Copyright Act as applied to ISPs for direct copyright infringement. As a result, the Fourth Circuit was forced to misapply the express language of the Copyright Act in order to conclude that Netcom created its liability scheme based on CoStar’s flawed interpretation of the statute.

The Fourth Circuit viewed Netcom’s introduction of the elements of volition and causation as a statutory interpretation rather than a judicially created supplemental rule. The court was unwilling to acknowledge that Netcom based its decision outside of the scope of the applicable law. As such, the court failed to recognize that the Netcom decision was a purely policy-driven response to the inapplicability of copyright principles to the Internet and the crippling results that would occur if ISPs were held strictly liable for any infringing material appearing on the Internet without any inquiry into their relative degrees of control over the posting of such infringing material. Ultimately unwilling to interpret a judicial decision as policy-driven and not based on a rational interpretation of the law, the Fourth Circuit attempted to interpret Netcom’s ISP liability theory based on volition and causation to be required by a statute that the Netcom court explicitly rejected as an impractical theory of copyright infringement.

c. The Implications: Ignoring the Constitutional Purpose and Undermining the Judiciary’s Role.—In CoStar, the Fourth Circuit lost sight of the constitutional purpose behind copyright law and the responsibility of the courts to defer to that purpose when confronted with a scenario


164. CoStar II, 373 F.3d at 550-51 (“The Netcom court described §§ 501 and 106 of the Act as requiring some aspect of volition or causation.”).

165. See id. at 551 (“[W]e conclude that Netcom made a particularly rational interpretation of § 106 when it concluded that a person had to engage in volitional conduct . . . to become a direct infringer.”).

166. But see Netcom, 907 F. Supp. at 1372 (finding that the statutory liability theory is unreasonable as applied to ISPs).

167. 3 NIMMER & NIMMER, supra note 139, § 12B.01(A)(1) (recognizing Netcom as a policy-driven decision).

168. See Netcom, 907 F. Supp. at 1372 (concluding that “[t]he court does not find workable a [statutorily required] theory of infringement that would hold the entire Internet liable”).
not contemplated by the framers of the Copyright Act. The CoStar court failed to consider that at the foundation of copyright law are two interests in competition with one another: private rights that incentivize creativity and the public benefit afforded by the dissemination of creative works. CoStar also ignored the precedent set by the Supreme Court in situations where technological change upsets the balance of this tenuous relationship. The Supreme Court requires courts to defer to the constitutional purpose behind protecting those interests: private motivation used to stimulate creativity must serve the ultimate goal of advancing the public welfare. The court in Netcom acknowledged this mandate by deferring to public policy considerations, holding that the statutorily required strict liability theory would lead to unreasonable liability and ultimately cripple the Internet as a tool for the free flow of information. The Fourth Circuit, on the other hand, ignored any mention of the underlying constitutional purpose of copyright law and instead undermined the holding of the most influential case determining ISP liability by fusing its judicially created liability scheme into a statutory liability theory that it expressly rejected.

The Fourth Circuit fused the elements of volition and causation that Netcom introduced as necessary to find an ISP liable for direct copyright infringement into the statute governing all of copyright law, making it more difficult to prove copyright infringement. Under the Copyright Act, the only element necessary to prove direct copyright infringement is unauthorized copying of a copyrighted work. Under the Fourth Circuit's interpretation, in order to even qualify as a copier, the individual must engage in some act that demonstrates volition or causation. While this theory works well for determining the liability of ISPs, who often have no ability to monitor the content

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170. Id. at 429.
171. See Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose."); see also supra notes 46-49 and accompanying text (discussing the Supreme Court's reluctance to apply the Copyright Act in situations not contemplated by the legislature and instead requiring the judiciary to appeal to the constitutional purpose).
173. See CoStar II, 373 F.3d at 550-51 (determining that the elements of volition and causation are required by the Copyright Act).
175. CoStar II, 373 F.3d at 551.
of the material they transfer to the Internet, applying it to all realms of copyright infringement would relieve many traditional “copiers” of liability for blatant copyright infringement. For instance, under the Fourth Circuit’s interpretation, a newspaper that automatically reproduces images submitted by others onto its publication does not create “copies,” and therefore could not be held liable for any of those images that infringe on another’s copyright. Similarly, a radio station that broadcasts copyrighted material without permission would not have “copied” that material if the transmission was merely an automatic response to a listener’s request.

5. Conclusion.—In holding that an ISP does not create copies when it transmits material over the Internet, the Fourth Circuit in CoStar Group, Inc. v. LoopNet, Inc. misinterpreted the Copyright Act’s definition of “copies” and improperly fused a judicially created liability scheme into the statute. In doing so, the court incorporated Netcom’s elements of volition and causation, intended solely to determine the liability of ISPs for direct copyright infringement, into the statute governing all of copyright law. Ultimately, the court struggled to apply the Copyright Act to a scenario that the legislature could not have contemplated when they enacted it, and did so while ignoring the constitutionally protected interests at the foundation of copyright law. As a result, the Fourth Circuit’s decision represents a patent disregard for the constitutional purpose of copyright law, sets a dangerous precedent for subsequent courts using its statutory interpretation in contexts other than ISP liability, and threatens to impede the development of a field of law that is meant to change as fast as advances in technology.

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176. Id. at 556.
177. See supra notes 142-162 and accompanying text.
178. See supra notes 163-168 and accompanying text.
179. See supra notes 169-175 and accompanying text.
A. Holding an Employer Liable for a Hostile Work Environment Existing Prior to an Employee’s Hire

In *Ocheltree v. Scollon Productions, Inc.*, the United States Court of Appeals for the Fourth Circuit considered whether an employee satisfied the “because of sex” requirement for a hostile work environment claim under Title VII of the Civil Rights Act of 1964 when the work environment about which the employee complained had existed before the employee began working for the employer. In a 10-2 decision, the court held that a sexually charged environment that exists prior to an employee’s hire can be considered directed at the employee because of the employee’s sex. As such, the court concluded that Ocheltree satisfied the “because of sex” requirement for a hostile work environment claim under Title VII. In reaching this conclusion, the court examined the incidents of alleged harassment as well as the context in which they occurred. The court’s approach followed the Supreme Court’s directive in *Harris v. Forklift Systems, Inc.*, to consider the totality of the circumstances in determining whether a work environment is hostile. The court’s decision is also consistent with the spirit of the Equal Employment Opportunity Commission’s (EEOC) regulations in that it provides an incentive for employers to
improve hostile work environments. However, the court's decision is troubling insofar as it charged Scollon Productions with the knowledge of its employees' treatment of Ocheltree, and thus concluded the company was liable for compensatory damages for the Title VII claim, but did not charge Scollon Productions with the knowledge that the conduct was prohibited by statute, and thus concluded that the company was not liable for punitive damages under the Civil Rights Act of 1991. Further, in setting aside the punitive damages award, the court failed to consider the elements it set forth in *Harris v. L & L Wings, Inc.* to determine whether the employer possessed the requisite level of malice or reckless indifference toward sexual harassment in the workplace.

1. The Case.—

   a. Background.—In 1971, Bill Scollon established Scollon Productions, which creates costumes for cartoon characters and mascot costumes for universities. Scollon Productions is located in White Rock, South Carolina and employs approximately fifty workers—from sculptors to sewers to design artists. Scollon and his wife own the corporation. Ellerly Locklear is the Senior Vice-President of the company and has worked there since 1975. Scollon and Locklear are the corporation's only managers.

9. See 29 C.F.R. § 1604.11(f) (2004) (offering employers an inexhaustive list of affirmative steps to take to prevent sexual harassment); see also infra notes 221-231 and accompanying text (discussing the way in which the *Ocheltree II* court's decision will encourage remedial action consistent with the EEOC regulations).

10. 42 U.S.C. § 1981 (2000). The statute states that "a complaining party may recover punitive damages under this section . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." *Id.* § 1981(b)(1). In *Kolstad v. American Dental Ass'n*, the Court stated that the terms malice and reckless indifference "pertain to the employer's knowledge that it may be acting in violation of federal law, not its awareness that it is engaging in discrimination." 527 U.S. 526, 535 (1999).

11. 132 F.3d 978, 983 (4th Cir. 1997).

12. See infra notes 232-247 and accompanying text.

13. *Ocheltree II*, 335 F.3d at 328; *Ocheltree v. Scollon Prods., Inc.*, 308 F.3d 351, 353 (4th Cir. 2002) [hereinafter *Ocheltree I*]. Scollon Productions manufactured the costumes for the mascots at Clemson University and the University of South Carolina. Brief for Appellant at 5, *Ocheltree I*, 308 F.3d 351 (4th Cir. 2002) (No. 01-1648).

14. *Ocheltree I*, 308 F.3d at 353; Brief for Appellant at 6, *Ocheltree I* (No. 01-1648).

15. Brief for Appellant at 6, *Ocheltree I* (No. 01-1648).

16. *Ocheltree II*, 335 F.3d at 328; see Brief for Appellant at 6, *Ocheltree I* (No. 01-1648) (noting that as of 2001, Locklear had been with the corporation for twenty-seven years).

17. *Ocheltree II*, 335 F.3d at 328.
Lisa Ocheltree began work at Scollon Productions in the production shop in February 1994. Scollon Productions terminated Ocheltree because of her poor work performance in August 1995. Before she was terminated, Ocheltree worked alongside approximately ten men and was the only female in the production shop. Ocheltree described the atmosphere when she began work at Scollon Productions as "fun" and "friendly." During her first year of work, however, Ocheltree became the target of increased sexual banter and other forms of sexual conduct. Brian Hodge, a co-worker, confirmed the increase in sexual conduct during Ocheltree's employment. Hodge began work in the production shop several months after Ocheltree, and he testified that although the atmosphere seemed "okay" initially, the atmosphere became increasingly coarse over time.

b. Incidents of Harassment.—On April 25, 1996, Ocheltree filed a claim against Scollon Productions alleging sexual harassment under Title VII in the United States District Court for the District of South Carolina. Ocheltree cited three specific incidents in addition to the general atmosphere of the production shop as evidence of sexual harassment. First, one morning when Ocheltree arrived at work, two male co-workers were demonstrating sexual techniques with a mannequin. One of the co-workers was pinching the mannequin's nipples while the other simulated oral sex on the mannequin. Ocheltree told the two employees: "You guys are disgusting. This needs to stop." The men laughed in response. Second, a male co-worker approached Ocheltree in the production shop and sang in an opera-like fashion: "Come to me, oh baby, come to me, your breath smells like come to me." The male co-workers in the production shop laughed at this incident. Third, while Ocheltree was seated at her workstation, a man brought a book to Ocheltree containing pic-
tures of men with pierced genitalia. The co-worker opened the book to a centerfold photograph showing a man’s genitalia. Hoops pierced the man’s scrotum and chains were attached to the top of his penis. The co-worker asked Ocheltree, “Lisa, what do you think about this?” The co-worker and men in the surrounding area responded to the incident with laughter.

In addition to these specific incidents, Ocheltree complained of other offensive behavior that created a sexually charged environment. Ocheltree’s co-workers regularly engaged in open and explicit conversations about their sex lives, made comments about the sexual habits of other employees, and told sexually explicit jokes. Ocheltree also claimed that some of the men would perform sexual acts with the mannequins whenever she was present. The use of sexually tinged profanity was prevalent, as Ocheltree’s co-workers used such words as “motherf____r,” “faggot,” “d__khead,” “p_ssy,” and “ass” when talking to each other. Some employees also engaged in hand gestures toward their genital area, and told other employees to “suck it.” Ocheltree cited this atmosphere as evidence of harassment.

c. Scollon Productions’ Failure to Have a Policy on Sexual Harassment.—In June 1994, one of Ocheltree’s co-workers, Steve Zourass, told Scollon that an employee told a sexually explicit joke to Ocheltree and that Ocheltree was offended by it. Locklear asked Ocheltree about the incident and Ocheltree confirmed that it had occurred. Scollon immediately terminated the offending employee and apologized to Ocheltree for the incident. Ocheltree told Scollon...
that she did not want the employee to be terminated. Scollon responded, “I am sorry; that is the way it is; we won’t stand for it.” Following this incident, Ocheltree attempted to speak with both Scollon and Locklear about the work environment on several additional occasions without success. By the admission of Scollon he turned her away because he believed that whatever she wanted to talk about was not important.

Ocheltree was never able to properly put management at Scollon Productions on notice of the harassing behavior, despite her repeated attempts to discuss the atmosphere with both Scollon and Locklear. Scollon Productions’s employee handbook outlined a procedure to address verbal abuse; it stated that verbal abuse was prohibited and was grounds for discharge. In another section captioned “Open Door Policy,” the handbook stated that if an employee had a complaint or a problem, the employee should attempt to resolve the matter with her immediate supervisor first and thereafter Scollon and Locklear were available to address any grievances. In Ocheltree’s case, her immediate supervisor was Harold Hirsch, who made active attempts to prevent Ocheltree from reaching management.

47. Brief for Appellant at 8, Ocheltree I (No. 01-1648).
48. Id.
49. Ocheltree II, 335 F.3d at 329. On one occasion, Scollon told Ocheltree that he did not have time to speak with her and instructed her to talk with Locklear. Id. There is no indication whether Ocheltree made Scollon aware that she wanted to speak to him about the work environment. Id. On another occasion, Ocheltree went to speak to Locklear, but he was on the phone, so she left a note stating “Ellery [Locklear], Need to talk to you, very important, Lisa.” Id. at 330. When Locklear concluded his telephone conversation, he saw the note but did not talk to Ocheltree. Id. Ocheltree made numerous other attempts to speak to management about the environment but her attempts were actively prevented by Hirsch, the shop supervisor. Id. at 330. Ocheltree stated that on several occasions she took refuge in the bathroom and Hirsh would follow her to prevent her from talking to Locklear. Id. He would often wait outside the bathroom and then tell her to go back to work and continue to follow her. Id.
50. Id. at 329-30.
51. Id. at 330. The only time that Ocheltree complained about any behavior was at a safety meeting where she addressed everyone saying “the sexual conduct, pictures, the gestures, the imitating of sex to mannequins and all that” should stop. Id. at 330 (internal quotation marks omitted). Ocheltree testified she believed the supervisor would be taking minutes of the meeting and that those minutes would be passed along to Scollon and Locklear. Id.
52. Id. at 329.
53. Id.
54. Id. at 330; see also supra note 49 (discussing Hirsh’s attempts to prevent Ocheltree from talking to Locklear).
d. Termination of Ocheltree’s Employment.—Management at Scollon Productions did not consider Ocheltree a model employee.\(^5^5\) During her eighteen-month tenure at Scollon Productions, Ocheltree received at least five written warnings and additional oral warnings for her excessive absences and telephone usage in violation of company policy.\(^5^6\) In August 1995, Scollon Productions terminated Ocheltree for excessive phone use, excessive absences, and her husband’s physical threats to Locklerner.\(^5^7\)

e. Litigation.—In response to Ocheltree’s claim of sexual harassment, the South Carolina District Court granted summary judgment for Scollon Productions on all claims.\(^5^8\) The magistrate judge found that there was no basis for imposing liability on Scollon Productions because neither Scollon nor Locklerner were aware, or should have known, of the alleged harassment.\(^5^9\) Ocheltree filed a pro se appeal with the United States Court of Appeals for the Fourth Circuit.\(^6^0\) After the parties had briefed and argued the first appeal, the Supreme Court decided *Burlington Industries v. Ellerth*\(^6^1\) and *Faragher v. City of Boca Raton*,\(^6^2\) holding that an employer is vicariously liable for a hostile work environment created by a supervisor, subject to an affirmative defense that allows the employer to avoid strict liability for one employee’s sexual harassment of another.\(^6^3\) On August 11, 1998, the Fourth Circuit vacated the district court’s decision in *Ocheltree* based on *Burlington Industries* and *Faragher* and remanded the case for further proceedings consistent with the opinions.\(^6^4\)

\(^5^5\) *Ocheltree I*, 308 F.3d 351, 354 (4th Cir. 2002).

\(^5^6\) Brief for Appellant at 7, *Ocheltree II* (No. 01-1648). Ocheltree testified that once while she was using the phone, Locklerner stated, “You always have an excuse, I don’t care if someone is dying in your family, you are not to be on the phone and you must be here at work.” *Ocheltree I*, 308 F.3d at 357 n.3 (internal quotation marks omitted). Ocheltree also testified that Locklerner told her that “if I didn’t like it there that I ought to go home and be a housewife, that maybe I am not cut out to be here, to be at this job.” *Id.* (internal quotation marks omitted).

\(^5^7\) *Ocheltree I*, 308 F.3d at 354; see also Brief for Appellant at 7-8, *Ocheltree I* (No. 01-1648) (noting that on one occasion, Ocheltree’s husband went to Locklerner’s office and told Locklerner that he would “kick his ass” if Locklerner upset his wife again) (citation omitted).

\(^5^8\) *Ocheltree II*, 335 F.3d at 330.

\(^5^9\) *Ocheltree I*, 308 F.3d at 354.

\(^6^0\) *Id.* at 355.

\(^6^1\) 524 U.S. 742 (1998).


\(^6^3\) *Burlington Indus.*, 524 U.S. at 766; *Faragher*, 524 U.S. at 810.

\(^6^4\) *Ocheltree II*, 335 F.3d at 330; see also *Ocheltree I*, 308 F.3d at 355 (noting the reason the case was remanded).
On remand, Scollon Productions filed three separate motions for summary judgment. The district court denied each motion. The case went to trial, and the jury returned a special verdict in favor of Ocheltree for $7,280 in compensatory damages and $400,000 in punitive damages. Scollon Productions filed a motion for judgment as a matter of law requesting that the district court set aside the jury verdict. Scollon Productions requested that, if the court did not set aside the jury verdict, it should reduce the damage award based on the statutory cap on punitive damages and compensation under 42 U.S.C. §1981a(b)(3). Although the district court denied the motion to set aside the jury verdict, the court reduced the punitive and compensatory damages award to $42,720 pursuant to § 1981a(b) (3) (a). Scollon Productions timely appealed.

The Fourth Circuit granted certiorari to consider whether Ocheltree presented sufficient evidence for a reasonable jury to find that she was sexually harassed in a hostile work environment at Scollon Productions. A divided panel of judges for the Fourth Circuit held that Scollon Productions was entitled to judgment as a matter of law because the sexually charged environment that existed was not directed at Ocheltree because of her sex. Judge Williams, writing for the majority, reasoned that because the sexual conversations, the sexual jokes, the commentary on the sexual habits of co-workers, and the use of sexually tinged profanity existed before Ocheltree's employment at Scollon Productions these innuendos were not directed at Ocheltree because of her sex. Additionally, the court found that there were only a handful of actual incidents directed at Ocheltree and therefore the "severe or pervasive" requirement for a sexual harassment claim was not satisfied. The Fourth Circuit then vacated the

65. Ocheltree I, 308 F.3d at 355.
66. Id.
67. Ocheltree II, 335 F.3d at 330.
68. Id.
69. Ocheltree I, 308 F.3d at 355. Section 1981 limits the amount of punitive damages to $50,000 for employers who have more than 14 but fewer than 101 employees for at least 20 calendar weeks of the current or preceding year. 42 U.S.C. § 1981a(b)(3)(a) (2000).
70. Ocheltree II, 335 F.3d at 330.
71. Ocheltree I, 308 F.3d at 355.
72. Id.
73. Id. at 359.
74. Judge Niemeyer joined Judge Williams in the majority. Id. at 353.
75. Id. at 358-59.
76. Id. at 359-60.
2. **Legal Background.**—Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on gender. Initially, however, women who attempted to recover damages for sexual harassment in the workplace were unsuccessful because Title VII did not provide employer liability for sexual harassment as a matter of law. In 1980, the EEOC established guidelines that created a cause of action for sexual harassment in the workplace. The guidelines also make employers responsible for sexual harassment in the workplace. The first time the Supreme Court examined the issue of sexual harassment based on the 1980 EEOC regulations was in *Meritor Savings Bank v. Vinson* in 1986. In *Meritor*, the Court articulated two types of actionable sexual harassment claims: *quid pro quo* claims and hostile

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77. *Ocheltree II*, 335 F.3d at 327.
78. 42 U.S.C. § 2000e-2(a) (2000); see supra note 2 (quoting the relevant language of the statute).
79. See, e.g., Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975) (finding that Title VII did not cover sexual advances by another employee, even a supervising employee, if those acts had no relation to the nature of the work); see also infra note 91 (noting examples of trial courts' denials of recovery to sexual harassment claimants).
81. 29 C.F.R. § 1604.11. The regulation provides that:

> Harassment on the basis of sex is a violation of section 703 of title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment ....

> ** * **

> An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.

*Id.* § 1604.11(a), (e).
82. 477 U.S. at 57-58.
83. The *Meritor* Court defined *quid pro quo* claims as sexual harassment where employment benefits or detriments are conditioned on submission to sexual acts or favors. *Id.* at 65.
work environment claims. In 1993, the Supreme Court narrowed the distinction between quid pro quo claims and hostile work environment claims in *Harris v. Forklift Systems, Inc.* Harris established the criteria for determining if a work environment was hostile. Since *Harris*, the Court has continued to narrow the distinction between quid pro quo claims and hostile work environment claims. Using the Supreme Court's direction in *Harris*, the Fourth Circuit established the necessary requirements for a prima facie case for a hostile work environment in *Spicer v. Virginia Department of Corrections.* Lastly, in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the Supreme Court created a standard by which employers can be held vicariously liable in sexual harassment claims, as well as the affirmative defenses available to the employer in such cases.

*a. Title VII.*—Title VII of the Civil Rights Act of 1964 provides that employers are prohibited "to fail or refuse to hire or to discharge . . . or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." The statutory language does not contain any information as to whether sexual harassment is considered a prohibited form of sexual discrimination. Following the passage of Title VII, most trial courts denied claimants recovery against employers for sexual harassment claims.

*b. EEOC Regulations.*—In 1980, the EEOC promulgated regulations for sexual harassment claims that established criteria for de-
terminating whether behavior constitutes sexual harassment.92 These regulations were the first guidance issued for courts in evaluating sexual harassment claims under Title VII.93 The regulations describe workplace conduct actionable under Title VII as:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.94

The EEOC's 1980 regulations added greater specificity and substance to the concept of sexual harassment.95 Prior to these regulations, most trial courts denied sexual harassment claims.96 The regulations created a cause of action against employers under Title VII.97 They are the foundation for the American legal system's jurisprudence on sexual harassment claims.98

c. The Supreme Court's Jurisprudence.—In Meritor Savings Bank, FSB v. Vinson, the Supreme Court addressed the EEOC's sexual harassment guidelines for the first time.99 Upholding the regulations, the Court created two types of actionable sexual harassment claims, quid pro quo and hostile work environment.100 When first defined in Mer-

94. 29 C.F.R. § 1604.11(a).
95. See id. (specifying that harassment can take the form of unwanted sexual advances, requests for sexual favors, and a catch all category of conduct of a sexual nature that is a term of the individual's employment or interferes with the individual's employment).
96. See supra note 91 (citing sexual harassment claims where the trial courts found no cause of action under Title VII).
97. See 29 C.F.R. § 1604.11(b)-(e) (explaining circumstances under which an employer may be liable for sexual harassment).
98. See Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 755 (1998) (discussing the creation of supervisor liability created by the guidelines); Faragher v. City of Boca Raton, 524 U.S. 775, 806 (1998) (discussing the adoption of the guidelines, which charged employers with taking steps necessary to prevent sexual harassment); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22-23 (1993) (discussing the possible questions left unanswered by the guidelines).
100. Id. at 65-66.
itor, the terms had a narrow construction and limited meaning.\textsuperscript{101} The Court defined \textit{quid pro quo} claims as sexual harassment where the employer's actions are linked to the grant or denial of an economic \textit{quid pro quo}.\textsuperscript{102} To establish a \textit{quid pro quo} sexual harassment claim, the Court reasoned that the harassment must result in a tangible detriment to the subordinate employee.\textsuperscript{103} \textit{Quid pro quo} claims created vicarious liability for the supervisor's actions.\textsuperscript{104}

The second circumstance the Court recognized as creating a sexual harassment claim is when a co-worker's actions create a hostile work environment for the employee.\textsuperscript{105} In a hostile work environment, the co-worker's conduct unreasonably interferes with the individual's work performance or creates "an intimidating, hostile, or offensive working environment."\textsuperscript{106} Employer liability in \textit{quid pro quo} claims is distinct from employer liability in a hostile work environment claim.\textsuperscript{107} To sustain a cause of action against an employer in a hostile work environment claim, the Court noted that the employee must demonstrate that the conduct was severe or pervasive enough so as "to alter the conditions of [the victim's] employment and create an abusive working environment."\textsuperscript{108} In \textit{Meritor}, the Supreme Court declined to rule on the issue of imputed employer liability in hostile work environment claims and encouraged the courts to look at agency principles in determining employer liability.\textsuperscript{109}

d. Hostile Work Environment Claims.—The EEOC regulations provided that in a hostile work environment, Title VII barred conduct that would seriously affect a reasonable person's psychological well-being.\textsuperscript{110} The regulations, however, did not provide specific information on what would constitute a serious effect on a reasonable person's psychological well-being. The lack of specificity permitted a split to develop in the circuits as to what constituted an effect on a person's

\textsuperscript{101} Id.; see also \textit{Burlington Indus.}, 524 U.S. at 752-53 (discussing the evolution of the application of \textit{quid pro quo} claims and hostile work environment claims and stating that in \textit{Meritor} "the terms served a specific and limited purpose").
\textsuperscript{102} \textit{Meritor}, 477 U.S. at 65.
\textsuperscript{103} Id. at 76 (Marshall, J., concurring).
\textsuperscript{104} See id. (Marshall, J., concurring) ("[E]very Court of Appeals has held that sexual harassment by supervisory personnel is automatically imputed to the employer when the harassment results in tangible job detriment to the subordinate employee.").
\textsuperscript{105} Id. at 65-67.
\textsuperscript{106} Id. at 65.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 67.
\textsuperscript{109} Id. at 72.
psychological well-being, ranging from merely offensive behavior to tangible psychological injury.\(^{111}\)

In 1993, the Supreme Court held in *Harris* that it was unnecessary for an employee to demonstrate that she suffered psychological harm to find that the employer violated Title VII.\(^{112}\) The Court found that the applicable standard for a Title VII violation was only that the environment be reasonably perceived as hostile.\(^{113}\) Moreover, the standard for a Title VII claim is not contingent upon whether the employee's work has been impaired, but upon whether working conditions have been discriminatorily altered.\(^{114}\) *Harris* also established criteria for determining if a work environment was hostile.\(^{115}\) The Court held that a hostile work environment could be determined only by examining the totality of the circumstances.\(^{116}\) These circumstances may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."\(^{117}\) Based on these criteria, the Court determined that employers will be held liable if the plaintiff demonstrates a "severe or pervasive" standard of a hostile work environment.\(^{118}\)

**e. Relationship Between Fourth Circuit Cases and Supreme Court Cases.**—Using the Supreme Court's decision in *Harris* as a foundation, the Fourth Circuit established the necessary requirements to create a prima facie case for a hostile work environment claim in *Spicer v. Virginia Department of Corrections*.\(^{119}\) The Fourth Circuit held that an employee must meet four criteria to establish the prima facie case for a hostile work environment claim.\(^{120}\) First, the employee must prove that the conduct was unwelcome.\(^{121}\) Second, the employee must

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111. *Compare* Vance v. S. Bell Tel. & Tel. Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (requiring serious effect on psychological well-being), and Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (same), and Downes v. FAA, 775 F.2d 288, 292 (Fed. Cir. 1985) (same), *with* Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting the requirement that a plaintiff's psychological well-being be seriously affected and instead requiring the harasser's conduct to be sufficiently severe).
112. 510 U.S. at 22.
113. *Id.*
114. *Id.* at 25 (Scalia, J., concurring).
115. *Id.* at 23.
116. *Id.*
117. *Id.*
118. *See* *id.* at 21.
119. 66 F.3d 705, 710 (4th Cir. 1995).
120. *Id.*
121. *Id.*
demonstrate that the conduct was engaged in because of the sex of the employee.\textsuperscript{122} Third, the employee must show that the conduct was sufficiently severe or pervasive to alter the employee's conditions of employment and to create an abusive work environment.\textsuperscript{123} Fourth, the employee must establish that the conduct was imputable on some factual basis to the employer.\textsuperscript{124}

The Supreme Court added further clarity to the "because of sex" requirement in \textit{Oncale v. Sundowner Offshore Services, Inc.}\textsuperscript{125} The Supreme Court specifically ruled that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII.\textsuperscript{126} In addressing the issue of same-sex sexual harassment, the Court provided greater clarity on what a plaintiff must demonstrate to satisfy the "because of sex" requirement. In holding same-sex claims actionable, the Court stated that harassing conduct need not be motivated by sexual desire; rather, the harasser need only be motivated by the general hostility to the presence of women in the workplace.\textsuperscript{127} The Court held that Title VII does not prohibit verbal or physical harassment in the workplace, but only "discrimination because of sex."\textsuperscript{128} The Court concluded that a claimant must demonstrate the conduct at issue does not merely imply sexual connotations, but that the conduct actually constituted discrimination because of sex.\textsuperscript{129}

Because the Supreme Court had not yet addressed the issue of employer liability for its employees' actions in hostile work environment claims in 1996, the Fourth Circuit established its own jurisprudence on the issue. In \textit{Andrade v. Mayfair Management, Inc.},\textsuperscript{130} the Fourth Circuit held that the employee's claims against the company were not valid because the supervisor, who had made sexually explicit remarks, was not of a sufficient management level to hold the employer liable for the supervisor's actions.\textsuperscript{131} The court created the standard that the employer is held liable only if the employer was aware of the sexual harassment, or should have been aware of it and failed to take prompt remedial action.\textsuperscript{132}

\begin{itemize}
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Id.
  \item \textsuperscript{125} 523 U.S. 75 (1998).
  \item \textsuperscript{126} Id. at 79-80.
  \item \textsuperscript{127} Id. at 80.
  \item \textsuperscript{128} Id. at 81.
  \item \textsuperscript{129} Id.
  \item \textsuperscript{130} 88 F.3d 258 (4th Cir. 1996).
  \item \textsuperscript{131} Id. at 262.
  \item \textsuperscript{132} Id.
\end{itemize}
Following Andrade, the Supreme Court addressed the issue of employer liability in 1998 in Faragher v. City of Boca Raton and Burlington Industries, Inc. v. Ellerth. In these cases, the Court narrowed the distinction between quid pro quo claims and hostile work environment claims with regard to employer liability. The Court found that the rule subjecting employers to vicarious liability in quid pro quo claims created an incentive for plaintiffs to attempt to fit their claims into the definition of quid pro quo in order to create employer liability and, thus, allowed plaintiffs to recover damages against their employer. The holdings in Faragher and Burlington Industries created a standard by which employers could be held vicariously liable for their employees' actions whether the plaintiff made a quid pro quo claim or a hostile work environment claim.

In both cases, the Court held that an employer is vicariously liable for an employee's claim for a hostile work environment when a supervisor with immediate, or successively higher authority over the employee, created the environment. The Court further determined that the burden then shifts to the employer, who may avoid liability by establishing one of the following affirmative defenses: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise." The Supreme Court thus narrowed the distinction between quid pro quo claims and hostile work environment claims by creating employer liability regardless of the type of claim asserted by the employee.

f. Punitive Damages.—Punitive damages are awarded to punish malicious conduct or to make an example to deter potential future wrongdoers from engaging in similar harm. When Title VII was originally enacted, the statute did not provide for compensatory or punitive damages. Subsequently, Congress enacted the Civil Rights

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135. See id. at 753-54; Faragher, 524 U.S. at 807.
136. Burlington Indus., 524 U.S. at 753 (finding that "[t]he rule encouraged Title VII plaintiffs to state their claims as quid pro quo claims, which in turn put expansive pressure on the definition").
137. Id. at 765; Faragher, 524 U.S. at 790, 809.
139. Burlington Indus., 524 U.S. at 765; Faragher, 524 U.S. at 809.
Act of 1991, which made compensatory and punitive damages available in Title VII cases, but provided a cap for liability based on the number of employees.\textsuperscript{142} Despite the enactment of this provision, punitive damages have been difficult to obtain.\textsuperscript{143} In \textit{Kolstad v. American Dental Ass'n}, the Supreme Court addressed punitive damages awards under Title VII for the first time.\textsuperscript{144} Upholding the statute, the Court defined the circumstances in which punitive damages may be awarded under Title VII.\textsuperscript{145} The Court held that, when an employer demonstrates malice or reckless indifference towards an employee's federally protected rights, that employer may be held liable for punitive damages.\textsuperscript{146} Additionally, the Court stated that where the employer had made good faith efforts to comply with Title VII, the employer may not be vicariously liable for the discrimination of its managerial agents.\textsuperscript{147} The Court reasoned that because the primary objective of Title VII was to avoid harm, providing punitive damage protection to employers who make a good-faith effort to prevent discrimination accomplished Title VII's objectives.\textsuperscript{148}

In \textit{Harris v. L & L Wings, Inc.}, the Fourth Circuit provided further clarity on the requirements for punitive damages—specifically in a Title VII claim based on sexual harassment.\textsuperscript{149} In \textit{L & L Wings}, the court upheld the district court's decision awarding $150,000 in punitive damages to each plaintiff because they met the heightened showing of the culpable state of mind of the employer in a claim for

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\item \textsuperscript{142} 42 U.S.C. § 1981a(b)(3) (2000); see supra note 69 (discussing the statutory cap for an employer the size of Scollon Productions).
\item \textsuperscript{143} \textit{Kolstad}, 527 U.S. at 533 (recognizing a split among circuits as to the circumstances warranting punitive damages).
\item \textsuperscript{144} \textit{Id.} The Supreme Court first considered the Civil Rights Act of 1991 in \textit{Landgraf v. USI Film Productions}, 511 U.S. 244 (1994). In \textit{Landgraf}, the Court upheld the lower court's decision denying punitive damages. \textit{Id.} at 286. However, the Court did not consider the substance of the punitive damages claim; rather, the Court held that because the Civil Rights Act of 1991 became law while Landgraf's appeal was pending, the Court found no clear evidence of congressional intent that would demonstrate the statute was intended to be applied retroactively. \textit{Id.}
\item \textsuperscript{145} \textit{Kolstad}, 527 U.S. at 534-35.
\item \textsuperscript{146} \textit{Id.} at 534. The Court went on to say that intentional discrimination does not create an automatic cause of action for punitive damages. \textit{Id.} at 536-37. The Court stated that there may be instances where "the employer may simply be unaware of the relevant federal prohibition. There will be cases, moreover, in which the employer discriminates with the distinct belief that its discrimination is lawful." \textit{Id.} at 537. However, the Court did not state that ignorance was enough. The Court stated that punitive damages may be granted where the employer knows that, or shows reckless disregard for the matter of whether, its conduct was prohibited by statute. \textit{Id.}
\item \textsuperscript{147} \textit{Id.} at 544.
\item \textsuperscript{148} \textit{Id.} at 545-46.
\item \textsuperscript{149} 132 F.3d 978, 982-83 (4th Cir. 1997).
\end{itemize}
The court relied on three types of evidence to determine that the employer had the requisite level of malice or reckless indifference to support a finding of punitive damages: "1) evidence of the employer’s attitude towards sexual harassment; 2) direct statements by the employer about plaintiffs’ rights or complaints; and 3) egregiousness of the conduct at issue."  

In evaluating the first element, evidence of the employer’s attitude towards sexual harassment, the court placed great weight on the existence of a sexual harassment policy and the employer’s implementation of such a policy. The court discussed the importance its sister circuits had placed on a written sexual harassment policy. The court noted that in some circuits, the existence of a written policy had operated as an absolute bar to the recovery of punitive damages. The court cited Splunge v. Shoney’s Inc., which held that the defendant’s failure to post a sexual harassment policy that communicated to employees how to contact management regarding sexual harassment complaints barred the company’s affirmative defense that it was not on notice of the sexual harassment. The L & L Wings court stated that although the absence of a sexual harassment policy alone could not establish liability for punitive damages, the absence of such a policy coupled with the employer’s failure to address the harassment when employees complained, was sufficient to meet the first element for punitive damages.

The court then examined the second element, direct statements by the employer about plaintiffs’ rights or complaints in evaluating the propriety of punitive damages. The court found a direct statement by the corporation’s president, that a sexual harassment policy is “a ridiculous thing,” constituted a disavowal of responsibility under Title VII. Finally, the court examined the evidence presented to

150. Id. at 983-85.
151. Id. at 983. The court went onto say that the defendant’s “failure to implement any sexual harassment or grievance policy and its utter failure to respond to repeated complaints of pervasive sexual harassment do little to bolster its challenge to the punitive award.” Id. The court further explained that absence of a sexual harassment policy alone will not establish liability, but “the institution of a written sexual harassment policy goes a long way towards dispelling any claim about the employer’s ‘reckless’ or ‘malicious’ state of mind.” Id. at 984.
152. Id. at 983-84.
153. Id. at 983.
154. 97 F.3d 488 (11th Cir. 1996).
155. Id. at 491.
156. L & L Wings, 132 F.3d at 983-84.
157. Id. at 984.
158. Id.
the jury and found the actual nature of the harassment was sufficiently egregious to support an award of punitive damages.\textsuperscript{159} In *L & L Wings*, the employees were harassed daily with vulgarities, crude remarks, and, often, physical groping.\textsuperscript{160} The court found that the harassment was crude, persistent, and demeaning.\textsuperscript{161} The court held that based on the lack of a sexual harassment policy, the statements by the company president, and the egregious nature of the conduct, the harassment was sufficient to sustain a jury finding of punitive damages.\textsuperscript{162}

3. \textit{The Court's Reasoning}.—In *Ocheltree II*, the United States Court of Appeals for the Fourth Circuit held that a reasonable jury could find that a sexually charged environment that existed before Ocheltree's employment was a hostile work environment under Title VII.\textsuperscript{163} In a 10-2 decision,\textsuperscript{164} the court, sitting en banc, affirmed the decision of the district court, finding that Ocheltree had met the requirements for a hostile work environment claim.\textsuperscript{165} The en banc court concluded that a reasonable jury could find the harassing behavior was directed at Ocheltree because of her sex and the behavior was sufficiently severe or pervasive to satisfy that requirement for a hostile work environment claim under Title VII.\textsuperscript{166} However, the court reversed the district court's award of punitive damages, finding that no reasonable jury could award punitive damages based on the level of knowledge required of the employer under the Civil Rights Act of 1991.\textsuperscript{167}

The court, following its decision in *Spicer*, stated that to establish a sexual harassment claim based on a hostile work environment, the plaintiff must prove that (1) the conduct was unwelcome; (2) it was based on the sex of the plaintiff; (3) it was sufficiently severe or pervasive to alter the plaintiff's conditions of employment and to create an abusive work environment; and (4) it was imputable on some factual

\begin{itemize}
\item \textsuperscript{159} *Id.*
\item \textsuperscript{160} *Id.*
\item \textsuperscript{161} *Id.*
\item \textsuperscript{162} *Id.* at 984-85.
\item \textsuperscript{163} *Ocheltree II*, 335 F.3d at 327, 331-33.
\item \textsuperscript{164} Chief Judge Wilkins, and Judges Wilkinson, Luttig, Motz, Traxler, King, Gregory, and Shedd joined Judge Michael in the majority. *Id.* at 327. Judge Niemeyer wrote a separate opinion concurring in judgment. *Id.* Judge Widener joined Judge Williams in his opinion dissenting in part and concurring in the judgment in part. *Id.*
\item \textsuperscript{165} *Id.* at 327.
\item \textsuperscript{166} *Id.* at 331-33.
\item \textsuperscript{167} *Id.* at 335-36; \textit{see also} 42 U.S.C. § 1981a(b)(1) (2000) (stating that a plaintiff is entitled to damages if the employer engages in the discrimination "with malice or with reckless indifference to [the plaintiff's] federally protected rights").
\end{itemize}
basis to the employer. Scollon Productions did not contest the first requirement, but it argued that the evidence was insufficient to satisfy the second, third, and fourth elements. The majority concluded that Ocheltree satisfied each of the remaining elements and found Scollon Productions liable for the Title VII claim. However, the court reversed the punitive damage award. The court stated that although Scollon Productions had knowledge of the sexual harassment sufficient to satisfy the fourth prong of a hostile work environment claim, it did not have the knowledge required to warrant punitive damages.

Examining the second element for a hostile work environment claim, that the harassment took place “because of sex,” the court found the behavior was directed at Ocheltree because of her sex despite the existence of a sexually charged environment at Scollon Productions prior to Ocheltree’s employment. Relying on Oncale, the court stated that the “because of sex” prong is satisfied when a female is harassed with sexually derogatory terms that make it clear that the harasser’s motive is based on the presence of women in the workplace. The court emphasized that even though the environment had existed before Ocheltree’s employment, and much of the sexualized commentary and sex-laden conduct could be witnessed by anyone present, the behavior was still directed at Ocheltree because of her sex. The court reasoned that the men behaved as they did to make Ocheltree uncomfortable and provoke a reaction from her as a woman. The court stated that, although Scollon Productions may have exposed the male employees to the same environment, there was no evidence the conduct was aimed at them in order to solicit an embarrassed or humiliated reaction, as was the case with Ocheltree. Consequently, the court concluded that a reasonable jury could find that Ocheltree satisfied the second element for a hostile work environment claim.

168. Ocheltree II, 335 F.3d at 331 (citing Spicer v. Va. Dep’t of Corrs., 66 F.3d 705, 710 (4th Cir. 1995)).
169. Id.
170. Id. at 335.
171. Id. at 336.
172. Id. at 335-36.
173. Id. at 331-33.
174. Id. at 331-32 (citing Oncale v. Sundower Offshore Serv., Inc., 523 U.S. 75, 80 (1998)).
175. Id. at 332.
176. Id.
177. Id.
178. Id. at 332-33.
Examining the third element, the majority found that the incidents Ocheltree complained of were severe or pervasive enough to constitute harassment for the purpose of a hostile work environment claim. The majority reasoned that taken together, the mannequin incidents, the vulgar song, the pictures, as well as the general environment of sexual banter satisfied the severe or pervasive requirement. The court stressed that the sexual banter did not just exist as impartial sexual comments; rather, the sexual discussions constantly painted women in a "sexually subservient and demeaning light." Thus the court found Ocheltree met the third prong for a hostile work environment claim.

For the fourth element of a hostile work environment claim, that the harassment was in some way imputable to the employer, the court found that a reasonable person could find that Scollon Productions, although it may have lacked actual knowledge, did have constructive knowledge of the harassment as defined in Spicer. The majority determined that knowledge of harassment could be imputed to an employer if a reasonable person would have known about the harassment and "an employer may be charged with constructive knowledge of co-worker harassment when it fails to provide reasonable procedures for victims to register complaints." The court used the Spicer standard to determine Scollon Productions's level of constructive knowledge. In determining the culpability of Scollon Productions, the court found it debatable whether Scollon Productions even had a sexual harassment policy, as the term sexual harassment did not appear in their employee manual. The court implied that management may

179. Id. at 333.
180. Id.
181. Id.
182. Id.
183. Id. at 333-35; see Spicer v. Va. Dep't of Corrs., 66 F.3d 705, 710 (4th Cir. 1995) (discussing the burden on the employer to demonstrate that it provided reasonable procedures for employees to make management aware of sexually harassing behavior in the workplace).
184. Ocheltree II, 335 F.3d at 334.
185. Id. The majority pointed out that nothing in the handbook, nor any company documentation, ever contained the term "sexual harassment policy." Id. Scollon Productions relied on a section in the employee handbook labeled "Talking" that stated verbal abuse was not acceptable and was grounds for termination. Id. It also relied on a section entitled "Open Door Policy," which stated that an employee with a complaint or problem should first try to resolve it with their immediate supervisor, and that Locklear or Scollon were available throughout the day to resolve complaints not settled by supervisors. Id. The court found such a complaint procedure was ill equipped to ensure upper management is made aware of such behavior as the victim would have to make a second complaint to the company's top officials. Id. at 334-35.
have in fact taken steps to avoid actual knowledge of the sexual harassment that went on at Scollon Productions, stating that "[a]n employer cannot avoid Title VII liability for coworker harassment by adopting a 'see no evil, hear no evil strategy.'"186 The court took note of the attempts Ocheltree made to talk with Locklear and Scollon and the evidence that these attempts were constantly frustrated.187 Applying these facts to the standard articulated in Spicer, the court found it was reasonable for a jury to find Scollon Productions should have known about the harassment and, therefore, charged it with constructive knowledge.188

The court, however, did not find Scollon Productions possessed the requisite level of knowledge to support liability for punitive damages.189 The court determined that an employer is liable for punitive damages if the employer knew, either directly or by imputation, that they were acting in violation of federal law.190 Applying this standard, the court found no evidence Scollon Productions knew, or should have known, that it was acting in violation of Ocheltree's federally protected rights and therefore set aside the punitive damage award.191

Whereas the majority held that Ocheltree introduced sufficient evidence to establish a prima facie case for a hostile work environment claim under Title VII, Judge Williams's dissent substantially differed in its characterization of the facts.192 The dissent argued that the majority's conclusion rested on too wide a conception of the "because of sex" requirement."193 The dissent argued that a reasonable jury could neither identify Ocheltree's claims as satisfying the "because of sex" element nor as being sufficiently severe or pervasive enough to amount to a hostile work environment.194

The dissent reasoned that Ocheltree could not demonstrate that the harassment was because of her sex and therefore concluded that she did not satisfy the second element of her hostile work environ-

186. Id. at 334.
187. Id. at 335. The court noted that despite the "open door policy," Ocheltree attempted to talk to Locklear and Scollon on numerous occasions with the intent of reporting the harassment. Id. She was repeatedly told by Scollon that he had no time to talk to her and that she should discuss her problem with Locklear, who was equally unavailable. Id.
188. Id.
189. Id. at 336.
190. Id.
191. Id.
192. Id. at 337-44 (Williams, J., dissenting).
193. Id. at 337 (Williams, J., dissenting).
194. Id. (Williams, J., dissenting).
The dissent relied on Oncale, stating that Title VII claims were not intended to cover "all verbal or physical harassment in the workplace; it is directed only at discrimination because of sex." The dissent stated that only three of the incidents were directed at Ocheltree, characterizing her claims as conduct that "occurred in group settings as part of the male workers' daily bantering with one another." Judge Williams characterized the type of offensive behavior that occurred, including the profanity, the dirty jokes, and the discussions of sexual exploits of the employees, as part of the work environment, and, as such, concluded that it was not gender-related. The dissent reasoned that because the behavior was equally offensive to men and women alike, the behavior was not directed at Ocheltree because of her sex. Moreover, Judge Williams concluded that because the behavior did not begin or change with Ocheltree's employment, the behavior was not directed specifically at her. Consequently, the dissent found that Ocheltree did not satisfy the second element of the prima facie case for a hostile work environment claim.

In its analysis of the third element, the dissent found that the incidents Ocheltree complained of were not severe or pervasive enough to constitute harassment. The dissent reasoned that only three of the incidents were directed at Ocheltree because of her sex; therefore, the dissent only applied the severe or pervasive test to those three incidents. The dissent relied on its prior finding in Oncale that isolated incidents of harassment generally do not meet the necessary level of severity to constitute an actionable Title VII claim. Additionally, because the dissent examined only three incidents of harassment, the dissent found that the types of incidents Ocheltree

195. Id. (Williams, J., dissenting).
196. Id. at 338 (Williams, J., dissenting) (internal quotation marks omitted).
197. Id. at 339 (Williams, J., dissenting). The dissent characterized only the "come to me" song, the simulated oral sex on the mannequin, and the body piercing as incidents of sexual harassment directed at Ocheltree. Id. (Williams, J., dissenting).
198. Id. at 340 (Williams, J., dissenting).
199. Id. at 339-40 (Williams, J., dissenting).
200. Id. at 339 (Williams, J., dissenting). The dissent noted that of the other eleven employees at Scollon Productions, all of whom were male, three of the men testified that they were offended by the atmosphere at Scollon Productions and also complained about it. Id. (Williams, J., dissenting).
201. Id. at 341 (Williams, J., dissenting).
202. Id. (Williams, J., dissenting).
203. Id. at 343 (Williams, J., dissenting).
204. Id. (Williams, J., dissenting); see supra note 197 (listing the three incidents the dissent characterized as those directed at Ocheltree because of her sex).
205. Ocheltree II, 335 F.3d at 343 (Williams, J., dissenting).
complained of were isolated and scattered over the course of a year and a half and therefore did not support a claim under Title VII.206

4. Analysis.—In Ocheltree II, the United States Court of Appeals for the Fourth Circuit found that Ocheltree established a prima facie case for a hostile work environment claim under Title VII because the alleged conduct was directed at her because of her sex and was sufficiently severe or pervasive, even though the conduct was present in the workplace prior to Ocheltree's employment.207 In reaching its decision, the majority followed the Supreme Court's direction in Harris, which requires an examination of the totality of the circumstances to determine the merit of a hostile work environment claim.208 Additionally, the court reinforced the EEOC regulations that echo the Harris approach, as the court's decision encourages employers to correct sexually harassing environments.209 However, the court's decision was inconsistent insofar as it found that Scollon Productions had the requisite knowledge to be held accountable for its employees' harassing behavior toward Ocheltree, but not the requisite knowledge to be held liable for punitive damages under the Civil Rights Act of 1991.210

a. Following the Supreme Court's Directive in Harris.—By examining the major incidents of harassment against the backdrop of a sexually charged environment in Ocheltree II, the Fourth Circuit followed the Supreme Court's directive in Harris to consider a hostile work environment claim based on the totality of the circumstances.211 In Ocheltree II, the majority analyzed the mannequin incident, the vulgar song, the pictures, as well as the numerous vulgar discussions of sex and graphic descriptions of crude sex acts to find the incidents of harassment were sufficiently severe or pervasive enough to constitute

206. Id. (Williams, J., dissenting).
207. Id. at 327.
208. Id. at 333; see infra notes 211-220 and accompanying text.
209. See 29 C.F.R. § 1604.11(b) (2004) (“In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.”); see also infra notes 221-249 and accompanying text.
210. See infra notes 232-248 and accompanying text (discussing the court's failure to consider the factors set forth in Harris v. L & L Wings, Inc., 132 F.3d 978, 983 (4th Cir. 1997), in reversing the punitive damage award).
211. Ocheltree II, 335 F.3d at 333; Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993). The Court listed several factors for courts to use to determine whether a workplace is hostile: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." See id.
a hostile work environment. The court specifically stated that "we consider all of the circumstances" in determining if the harassment was sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and create a hostile work environment. In contrast, the dissent analyzed only three incidents of possible harassment, discounting all other incidents and the environment in which the incidents took place. The dissent reasoned that because only three instances could possibly meet the first "because of sex" element of a hostile work environment claim, the severity of only these instances should be analyzed. Under the dissent's approach, an offender who subjected victims to harassment on a daily basis with constant inappropriate behavior would likely not be found in violation of Title VII because he would be part of the environment and the behavior would not be directed at the employee because of the employee's sex. Logically, an offender whose incidents of harassment were fewer and more isolated would be more likely to be found in violation of Title VII because, under the dissent's approach, he would no longer be part of the general environment and therefore his behavior would be directed at the employee because of sex.

The majority properly recognized that by using the very factors the Harris Court articulated—frequency, severity, physical threats, and whether the harassment affects the employee's work performance—courts can evaluate all of the evidence and still have the ability to filter out trivial claims. The majority's recognition illustrates the inapplicability of the dissent's fear of ordinary workplace teasing and gender-related jokes becoming actionable under Title VII. As the Supreme Court has articulated, such conduct does not rise to the level of sexual harassment. Moreover, the court in Ocheltree II correctly followed precedent by applying the totality of the circumstances standard announced by the Supreme Court in Harris, when it found that a reasonable jury could find that, taken together, the incidents of harassment

212. See Ocheltree II, 335 F.3d at 333.
213. Id. (emphasis added).
214. Id. at 339-40 (Williams, J., dissenting).
215. Id. (Williams, J., dissenting).
216. See id. (Williams, J., dissenting) (stating that the behavior the majority relies on does not meet the because of sex requirement because all the employees, not just the females, were subject to the same vulgarities as part of the regular environment).
217. See id. (Williams, J., dissenting).
218. Id. at 333.
219. See Faragher v. City of Boca Raton, 524 U.S. 775, 778 (1998) (stating that the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing are not actionable Title VII claims).
as well as the sexually charged atmosphere of the production shop constitute a harassing environment.  

b. Furthering the Purpose of the EEOC Regulations.—In addition to following the Supreme Court's precedent in *Harris*, the Fourth Circuit's holding in *Ocheltree II* also reaffirms the purpose of Title VII, thereby creating an incentive for employers to take the remedial action that Title VII encourages. The EEOC was created to enforce the Civil Rights Act of 1964, which prohibits discrimination based on sex.  

Through its regulations, the EEOC encourages employers to take voluntary steps that are necessary and appropriate to eliminate hostile work environments. In *Ocheltree II*, the majority's holding directs employers to take remedial action to correct sexual harassment in the workplace.

The dissent suggests that so long as the environment existed before the aggrieved employee began working for the employer, the sexual harassment could not have been directed at the employee because of her gender. Under the dissent's view, an employer would be insulated from suits so long as the hostile work environment existed prior to the employee's tenure. As a result, under the dissent's view an employer would be deterred from taking remedial action to correct a hostile work environment because taking such actions would expose an employer to liability if an employee later files a hostile work environment claim.

The majority reasoned to the contrary, finding that regardless of when the hostile atmosphere began relative to an employee's tenure, a reasonable jury could find that the behavior was directed at Ocheltree because of her sex, thus encouraging employers to take remedial action against instances of sexual harassment. Although the atmos-

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220. *Ocheltree II*, 335 F.2d at 333.
222. *See Faragher*, 524 U.S. at 806 (“As long ago as 1980, the EEOC, charged with the enforcement of Title VII, 42 U.S.C. § 2000e-4, adopted regulations advising employers to take all steps necessary to prevent sexual harassment from occurring, such as . . . informing employees of their right to raise and how to raise the issue of harassment.” (internal quotation marks omitted)).
223. *Ocheltree II*, 335 F.3d at 332.
224. *Id.* at 341 (Williams, J., dissenting). The dissent cites the testimony of Ocheltree's co-worker, Zouras, who stated that the same conversations went on before Ocheltree came to work at Scollon Productions as after she arrived. *Id.* (Williams, J., dissenting). The dissent concluded that the behavior could not have been motivated by her sex. *Id.* (Williams, J., dissenting).
225. *See id.* (Williams, J., dissenting).
226. *Id.* at 332.
phere existed prior to her employment,\textsuperscript{227} the court pointed to the specific conduct of the offending employees, finding that "[m]uch of the conduct, a jury could find, was particularly offensive to women and was intended to provoke Ocheltree's reaction as a woman."\textsuperscript{228} The majority's reasoning follows the Supreme Court's directive in 	extit{Oncale}, holding that harassing conduct need not be motivated by sexual desire, but could be motivated by general hostility towards women in the workplace.\textsuperscript{229} Even though much of the atmosphere existed prior to her employment, engaging in such behavior to solicit a reaction from Ocheltree as a woman satisfies the "because of sex" prong. The court reasoned that, although the general atmosphere may have existed prior to Ocheltree's employment, the harassment was of such a nature that it was particularly offensive to women, and therefore to Ocheltree, as the only woman in the shop.\textsuperscript{230} Under the court's reasoning, had Scollon Productions corrected harassing behavior prior to Ocheltree's employment, it could have avoided liability.\textsuperscript{231} Thus, the court's decision furthered the aims of the EEOC regulations and Title VII by creating an incentive for employers to avoid liability by utilizing remedial measures to correct and eliminate sexual harassment in the workplace.

c. The Inconsistency in Vacating the Punitive Damages Award.—In setting aside the jury award for punitive damages in 	extit{Ocheltree II}, the court was inconsistent in its finding that Scollon Productions had the requisite level of knowledge to find liability for compensatory damages, but not for punitive damages. Although the Supreme Court has held that intentional discrimination alone does not create an auto-

\textsuperscript{227} There is conflicting evidence as to the nature of the atmosphere prior to Ocheltree's employment. Ocheltree described the atmosphere as "fun" and "friendly" when her employment first began, but stated that in the course of the first year the sexual conduct of the men began to occur with increasing frequency. \textit{Id.} at 328. However, the dissent points to testimony of Ocheltree's co-worker who stated the atmosphere was the same before her employment and maintained the same level of sexual charge after Ocheltree began her employment. \textit{See supra} note 224 (noting testimony of Ocheltree's co-worker, Zouras). Regardless of the level of elevation, if any, in sexual remarks and conduct in the workplace after Ocheltree's employment, neither side claims that the workplace was harassment free prior to her employment.
\textsuperscript{228} \textit{Id.} at 332.
\textsuperscript{230} \textit{Ocheltree II}, 335 F.2d at 332. The majority pointed to such incidents as the degrading song the men sang—"[c]ome to me, oh baby come to me, your breath smells like come to me," concluding that its words were particularly aimed at a woman. \textit{Id.}
\textsuperscript{231} \textit{Id.} at 335.
matic cause of action for punitive damages, the *Ocheltree II* court failed to recognize that just as Scollon Productions had the requisite knowledge for liability for sexual harassment, Scollon Productions also had the requisite knowledge to support a finding for punitive damages. Had the court applied the test articulated in *L & L Wings* to the facts underlying its finding of sexual harassment, the court likely would have found Scollon Productions liable for punitive damages.

In *Ocheltree II*, the court imputed liability to the employer for sexual harassment because Scollon Productions failed to provide an adequate procedure to report sexual harassment. The court found that Scollon Productions should have known about the harassment but did not because of its own failure to provide adequate avenues for employees to register complaints. The court, however, did not address this lack of a sexual harassment policy in its punitive damages analysis. The court merely stated that "we find no evidence that would allow a jury to find that Scollon Productions knew, either directly or by imputation, that it might have been acting in violation of Ocheltree’s federally protected rights." In failing to apply the test articulated in *L & L Wings*, the court failed to adequately examine the issue of punitive damages in *Ocheltree II*.

The *Ocheltree II* court recognized that in *Kolstad*, the Supreme Court required that an employer act with malice or reckless indifference toward the employee’s federally protected rights to warrant an award of punitive damages under Title VII. However, the *Ocheltree II* court failed to acknowledge that the Fourth Circuit specified the criteria for determining what constituted malice or reckless indifference in a Title VII action for punitive damages in *L & L Wings*. In *L & L Wings*, the court stated that to determine an employer’s malice or reckless indifference, three sources of evidence should be considered: (1) evidence of the employer’s attitude toward sexual harassment; (2) direct statements by the employer about the employee’s rights or complaints; and (3) egregiousness of the conduct at issue.
The Ocheltree II court ignored L & L Wings, and did not examine, or even refer to, these elements in determining whether punitive damages were warranted.\textsuperscript{241} The court's punitive damages decision in Ocheltree II was inconsistent with the L & L Wings court's analysis of the first element for determining malice or reckless indifference. In evaluating the evidence of the employer's attitude toward sexual harassment, the L & L Wings court found that the absence of a written policy, coupled with the company's failure to respond to repeated complaints, was sufficient evidence to show that the employer's attitude toward sexual harassment satisfied the requisite malice or reckless indifference for a punitive damages claim.\textsuperscript{242} Although the majority in Ocheltree II found it debatable as to whether Scollon Productions had a sexual harassment policy, and if it did, it was utterly deficient in its implementation,\textsuperscript{243} the court neglected to consider the fact that the policy Scollon Productions implemented is not consistent with the types of policies implemented in good faith that courts have sought to reward on the basis of preventive measures in its punitive damages analysis.\textsuperscript{244} In addition, the court's punitive damage analysis made no mention of Ocheltree's repeated complaints to her shop supervisor and numerous attempts to talk to the company president and vice-president that were all ignored.\textsuperscript{245} Furthermore, the Ocheltree II court failed to recognize that the lack of a sexual harassment policy and Ocheltree's ignored complaints illustrate Scollon Production's reckless indifference toward sexual harassment in the workplace.

In addition, the court in Ocheltree II failed to consider the possibility that a reasonable jury could have found Bill Scollon’s statements regarding why he turned Ocheltree away despite her repeated attempts to talk with him about the harassing atmosphere—“he believed whatever she wanted to talk about was not important”—to constitute direct statements illustrating the direct disavowed responsibility for Title VII, in satisfying the second L & L Wings element of recklessness.\textsuperscript{246} Finally, under L & L Wings, the Ocheltree II court should have examined the egregiousness of the conduct at issue. The Ocheltree II court failed to recognize that in L & L Wings punitive dam-

\textsuperscript{241} See Ocheltree II, 335 F.3d at 335-36.
\textsuperscript{242} L & L Wings, 132 F.3d at 983-84.
\textsuperscript{243} Ocheltree II, 335 F.3d at 334-35.
\textsuperscript{244} Id. at 335-36.
\textsuperscript{245} Id.
\textsuperscript{246} Id. at 330.
\textsuperscript{247} Id.; see L & L Wings, 132 F.3d at 984 (finding the employer's statement "it's a ridiculous thing" in response to why the employer did not have a sexual harassment policy was sufficient to demonstrate the employer's disavowal of responsibility toward his employees).
ages were warranted based on similar harassment as that suffered by Ocheltree: vulgar comments, graphic pictures, and boasts of sexual prowess.\footnote{\textit{Ocheltree II}, 335 F.3d at 335-36; \textit{see L & L Wings}, 132 F.3d at 980-81. In \textit{L & L Wings}, employee's treatment was slightly different in that they were also subject to physical groping by their employer as well; however, despite this added form of harassment, a reasonable jury could have found this similar atmosphere, even without the physical conduct, rose to the level sufficient to award punitive damages. \textit{See id}.} It is likely that, had the court examined the facts in \textit{Ocheltree II} using the three-part test articulated in \textit{L & L Wings}, the court would have found enough evidence to support a reasonable jury's finding of punitive damages based on the similar circumstances present in \textit{Ocheltree II}. The court's vacatur of the punitive damages award is inconsistent with its finding of liability for compensatory damages.

5. \textit{Conclusion}.—In \textit{Ocheltree v. Scollon Productions, Inc.}, the United States Court of Appeals for the Fourth Circuit correctly found an employee may satisfy the "because of sex" requirement for a hostile work environment claim under Title VII of the Civil Rights Act of 1964, even though the work environment about which the employee complained had existed prior to her employment.\footnote{\textit{Id.} at 333; \textit{Harris v. Forklift Sys., Inc.}, 510 U.S. 17, 23 (1993); \textit{see supra} notes 211-220 and accompanying text.} The court properly examined the incidents of alleged harassment as well as the context in which they occurred, in line with the Supreme Court's directive in \textit{Harris} to consider the totality of the circumstances in determining whether a work environment is hostile.\footnote{\textit{See supra} note 222 (discussing the EEOC's encouragement to employers through adopted regulations to take steps to prevent sexual harassment); \textit{see also supra} notes 221-237 and accompanying text (discussing how the \textit{Ocheltree II} court's decision furthers the purpose of the EEOC Regulations).} The court's decision provides an incentive for employers to improve hostile work environments, and as such is consistent with the spirit of the Equal Employment Opportunity Commission's regulations.\footnote{42 U.S.C. § 1981 (2000).} However, the court's examination of the punitive damages issue is incomplete. The court did not charge Scollon Productions with the knowledge that the conduct was prohibited by statute, and thus concluded that the company was not liable for punitive damages under the Civil Rights Act of 1991.\footnote{In doing so, the court failed to examine the factors articu-}
lated by the court in *L & L Wings* for determining punitive damage liability in sexual harassment cases.253

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253. See *Ocheltree II*, 335 F.2d at 335-36; Harris v. L & L Wings, Inc., 132 F.3d 978, 983 (4th Cir. 1997); see also *supra* notes 239-248 (criticizing the *Ocheltree II* court for failing to consider the *L & L Wings* elements of recklessness in its punitive damages discussion).