
2010-2011 MSBA High School Mock Trial Case & Competition



Managed by
the Citizenship Law Related Education Program
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In cooperation with the
Maryland Judicial Conference Public Awareness Committee,
Executive Committee on Law Related Education,
& Maryland State Department of Education

Important Contacts for the Mock Trial Competition

During LOCAL CIRCUIT COMPETITIONS, your first point of contact is your LOCAL COORDINATOR.

Call your local coordinator regarding your local competition schedule.

Your second point of contact is the State Mock Trial Director:

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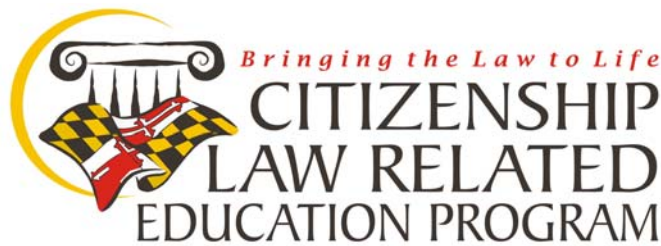
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November 9, 2010

Dear Mock Trial Participant:

Welcome to the 2010-2011 Maryland State Bar Association Statewide High School Mock Trial Competition. This is the 28th year for Mock Trial – over 48,000 students have participated in this competition since its inception. We are pleased that you are joining in this exciting learning experience.

This year's case explores issues of teen driving, underage alcohol use, and negligence. Sadly, the leading cause of death in older teens is automobile accidents. Every spring, proms and graduations are marred by tragic accidents involving teens. We hope that, as you participate in this year's competition, you will take the message of safe driving to heart.

Our four primary objectives for the MSBA Mock Trial competition are:

- To further understand and appreciate the rule of law, court procedures, and the legal system;
- To increase proficiency in basic life skills such as listening, speaking, reading, and critical thinking;
- To promote better communication and cooperation between the school system, the legal profession, and the community at large;
- To heighten enthusiasm for academic studies as well as career consciousness for law-related professions.

Mock Trial works best when everyone competes fairly and honestly. Your goal should be to learn – not to win. Mock Trial provides opportunities to learn – through case preparation with your attorney advisor, teacher coach, and teammates, the competition with other schools, and various interpretations and perspectives of our law and legal system.

It is vital for you to remember that Mock Trial parallels the real world in terms of proceedings, interpretations, and decisions in the courtroom and by the Bench. Decisions will not always go your way and you will not always prevail. If you observe and remember this, you will enjoy the competition and succeed regardless of your win-loss record.

We ask that you read carefully through the rules, guidelines and score sheet included in this casebook. We wish you a very successful year and a rewarding learning experience.

Sincerely,

Honorable Diane O. Leasure
Diane O. Leasure
Chair, Executive Committee

Ellery M. "Rick" Miller, Jr.
Ellery M. "Rick" Miller, Jr.
Executive Director, CLREP

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**2010-2011
MSBA HIGH SCHOOL MOCK TRIAL COMPETITION**

PART I: ORGANIZATIONAL RULES

1. **Forfeits are prohibited.** As a registered team, you agree to attend all scheduled competitions. If a team does not have an adequate number of students (i.e. due to illness, athletics, or other conflicts), it is still expected to attend and participate in the competition. In these instances, a team will “borrow” students from the opposing team. While this is treated as an automatic win for the opposition, both teams still gain the practice experience. Further, it maintains the integrity of the competition and is respectful of the Court, Presiding Judge, attorneys and the other team that has prepared and traveled to the competition. If this occurs, coaches should make every effort to notify the local coordinator AND the other coach in advance of the competition. When an opposing team does not have enough students to assist the other team, students may depict two or more of the roles (i.e. they may depict 2 witnesses or play the part of 2 attorneys).
2. Student attorneys are expected to keep their presentations limited to specific time guidelines. It is the presiding judge’s sole discretion as to how or if the time guidelines will be implemented during each competition. Teams should NOT object if they perceive a violation of these *guidelines*.
 - Opening statements/closing arguments – 5 minutes each;
 - Direct examination – 7 minutes per witness;
 - Voir Dire, if necessary – 2 minutes per expert witness (in addition to the time permitted for direct and cross examination)
 - Cross-examination – 5 minutes per witness;
 - Re-Direct and Re-Cross Examination – 3 minutes and a maximum of 3 questions per witness.
3. Local competitions must consist of enough matches that each participating high school presents both sides of the Mock Trial case at least once.
4. A team must be comprised of no fewer than eight (8) but a maximum of twelve (12) student members from the same high school, with the exception of high schools with a Maryland State Department of Education inter-scholastic athletics designation of Class 2A or Class 1A, which may combine with any other schools in the LEA in those classifications to field a team. Two “alternate” students are permitted during the local competition only. If a team advances beyond the local competition, an official roster must be submitted not exceeding 12 students.
5. A team may use its members to play different roles in different competitions. (See Part II: Hints on Preparing for the Competition). For any single competition, all teams are to consist of three (3) attorneys and three (3) witnesses, for a total of six (6) different students. For any single competition, a student may depict one role only of either witness OR attorney. (Note: In Circuits 1 and 2, where teams typically participate in two competitions per evening – once as prosecution and once as defense – students may change roles for the second competition.)
6. Any high school which fields more than one team (Team A and Team B, for example) may NEVER allow, under any circumstances, students from Team A to compete for Team B or vice-versa. If a high school fields two or more teams, each team must have a different teacher coach and a different attorney coach than the other team. Additionally, if a high school has multiple teams, then those teams MUST compete against one another in local (circuit) competition.
7. A.) Areas of competition coincide with the eight Judicial Circuits of Maryland. Each circuit must have a minimum of four (4) teams. However, in order to provide the opportunity for as many teams to participate as possible, if a circuit has two (2) or three (3) teams, they may compete in a “Round

Robin” to determine who will represent the circuit in the circuit playoff. The runner-up team from another circuit would be selected to compete based upon their winning record and average points scored during local competition rounds. This team would compete with the circuit representative in a playoff prior to the Regional Competition. When a circuit has only one registered team, CLREP may designate another circuit in which this team may compete.

B.) OR, under the discretion of a circuit coordinator and CLREP, if a circuit so chooses, it may combine with the “un-official” circuit to increase the number of opportunities to compete. In this case, a “circuit opening” arises and will be filled by the following method. To create the most equity, a sequential rotation of circuits will occur. If willing, the second place team from the specified circuit will advance to the regional competitions to fill the opening. If that team is unable to advance, the opportunity will move to the next circuit, and so on, until the opening is filled. In the event that all circuits are officially comprised of a minimum of four teams, the designated circuit will remain the next in-line to advance in future years.

2010-2011	Circuit 7	2014-2015	Circuit 3
2011-2012	Circuit 8	2015-2016	Circuit 4
2012-2013	Circuit 1	2016-2017	Circuit 5
2013-2014	Circuit 2	2017-2018	Circuit 6

8. Each competing circuit must declare one team as Circuit Champion by holding local competitions based on the official Mock Trial Guide and rules. That representative will compete against another Circuit Champion in a single elimination competition on April 5 or 6, 2011.
9. The dates for the Regionals, the Semi-Finals, and the Finals will be set and notice given to all known participating high schools by Tuesday, November 19, 2010. Changes may occur due to conflicts in judicial schedules.
10. District Court judges, Circuit Court judges, and attorneys may preside and render decisions for all matches. If possible, a judge from the Court of Appeals or Court of Special Appeals will preside and render a decision in the Finals.
11. Any team that is declared a Regional Representative must agree to participate on the dates set for the remainder of the competition. Failure to do so will result in their elimination from the competition and the first runner-up in that circuit will then be the Regional Representative under the stipulations.
12. Winners in any single round should be prepared to switch sides in the case for the next round. Circuit Coordinators will prepare and inform teams of the local circuit schedule.
13. CLREP encourages Teacher Coaches of competing teams to exchange information regarding the names and gender of their witnesses at least 1 day prior to any given round. The teacher coach for the plaintiff/prosecution should assume responsibility for informing the defense teacher coach. A physical identification of all team members must be made in the courtroom immediately preceding the trial.
14. Members of a school team entered in the competition – including Teacher Coaches, back-up witnesses, attorneys, and others directly associated with the team’s preparation – are NOT to attend the enactments of ANY possible future opponent in the contest.
15. All teams are to work with their attorney coach in preparing their cases. It is suggested that they meet with their Attorney Advisor at least twice prior to the beginning of the competition. For some

suggestions regarding the Attorney Advisor's role in helping a team prepare for the tournament, see PART II: Hints on Preparing for Mock Trial and Appendix A.

16. **THERE IS NO APPEAL TO A JUDGE'S DECISION IN A CASE.** CLREP retains the right to declare a mistrial when there has been gross transgression of the organizational rules and/or egregious attempt to undermine the intent and integrity of the Mock Trial Competition. **Upon the coaches' review of, and signature on the score sheet, THE OUTCOME IS FINAL.**
17. There shall be **NO** coaching of any kind during the enactment of a mock trial: i.e. student attorneys may not coach their witnesses during the other team's cross examination; teacher and attorney coaches may not coach team members during any part of the competition; members of the audience, including members of the team who are not participating that particular day, may not coach team members who are competing; and team members must have their cell phones and all other electronic devices turned off during competition as texting may be construed as coaching. Teacher and Attorney Coaches **MAY NOT** sit directly behind their team during competition as any movements or conversations may be construed as coaching.
18. It is specifically prohibited before and during trial to notify the judge of students' ages, grades, school name or length of time the team has competed.
19. The student attorney who directly examines a witness is the only attorney who may raise objections when that same witness is being cross-examined. The student attorney who raises objections on direct examination must be the same attorney who then cross-examines that same witness. This same principle applies if a student attorney calls for a bench conference; i.e., it must be the attorney currently addressing the Court. The student attorney who handles the opening statement may not perform the closing argument.
20. Judging and scoring at the Regional, Semi-Final and Statewide Final Competitions are distinct from judging and scoring in some local competitions. As in a real trial, the judge will preside, hear objections and motions, instruct counsel, and determine which team prevailed based on the merits of the law. Two attorneys will independently score team performance at the trial, using the score sheet from the official Mock Trial Guide. At the conclusion of the trial and while in chambers, the judge will award the tie point without informing the attorney scorers. The Tie Point will only be added into the final score only in the case of a tie. The attorneys will meet and work out any differences in scoring so that the two attorneys present one score sheet to the judge, and eventually, the two teams. The judge retains the right to overrule any score on the score sheet. Both teams shall receive a copy of this score sheet, signed by the judge. Teams will **not** have access to the original, independent score sheets of the attorneys.
21. **Evidentiary materials that have been modified for use during trial (e.g., enlarged), must be made available during the trial for the opposing team's use. During witness identification exchanges, please alert the other team if you plan to use modified materials.**

PART II: HINTS ON PREPARING FOR A MOCK TRIAL COMPETITION

The following tips were developed by long-time Mock Trial Coaches.

1. Every student, teacher and attorney participating in a team's preparation should read the entire set of materials (case and guide) and discuss the information, procedures and rules used in the mock trial competition. Students: you are ultimately responsible for all of this once Court is in session.

2. Examine and discuss the facts of the case, witness testimony and the points for each side. Record key information as discussion proceeds so that it can be referred to in the future.
3. Witness' credibility is very important to a team's presentation of the case. Witnesses: move into your roles and attempt to think as the person you are portraying. Read over your affidavits many times and have other members of your team ask you questions about the facts until you know them.
4. Student attorneys: you should have primary responsibility for deciding what possible questions should be asked of each witness on direct and cross-examination. Questions for each witness should be written down and/or recorded. Write out key points for your opening statements and closing arguments before trial; then, incorporate additional points that arose during the competition for inclusion in your closing argument to highlight the important developments that occurred during the trial. Concise, summary, pertinent statements which reflect the trial that the judge just heard are the most compelling and effective. Be prepared for interruptions by judges who like to question you, especially during closing arguments.
5. The best teams generally have student attorneys prepare their own questions, with the Teacher and Attorney Coaches giving the team continual feedback and assistance. Based on these practice sessions, student attorneys should continue revising questions and witnesses should continue studying their affidavits.
6. As you approach your first round of competition, you should conduct at least one complete trial as a dress rehearsal. All formalities should be followed and notes should be taken by everyone. Evaluate the team's presentation together. Try to schedule this session when your Attorney Coach can attend.
7. **Some of the most important skills for team members to learn are:**
 - Deciding which points will prove your side of the case and developing the strategy for proving those points.
 - Stating clearly what you intend to prove in an opening statement and then arguing effectively in your closing that the facts and evidence presented have proven your case.
 - Following the formality of court; e.g., standing up when the judge enters or whenever you address the Bench, and appropriately addressing the judge as "Your Honor," etcetera.
 - Phrasing direct examination questions that are not leading (carefully review the rules of evidence and watch for this type of questioning in practice sessions).
 - Refraining from asking so many questions on cross-examination that well-made points are lost. When a witness has been contradicted or otherwise discredited, learn to limit additional questions, as they often lessen the impact of previously made points.
 - Thinking quickly on your feet when a witness gives you an unexpected answer, an attorney asks unexpected questions, or a judge throws questions at you.
 - Recognizing objectionable questions and answers, offering those objections quickly and providing the appropriate basis for the objection.
 - Paying attention to all facets of the trial, not just the parts that directly affect your presentation. All information heard is influential! Learn to listen and incorporate information so that your presentation, whether as a witness or an attorney, is the most effective it can be.

- The Mock Trial should be as enjoyable as it is educational. When winning becomes your primary motivation, the entire competition is diminished. **Coaches and students should prepare AT LEAST as much for losing as they do for winning/advancing.** Each member of the team—student or coach—is personally responsible for his/her behavior prior to, during, and at the close of the trial. There are schools and individuals across the state that are no longer welcome to participate based on previous behavior.

Part III: Trial Procedures

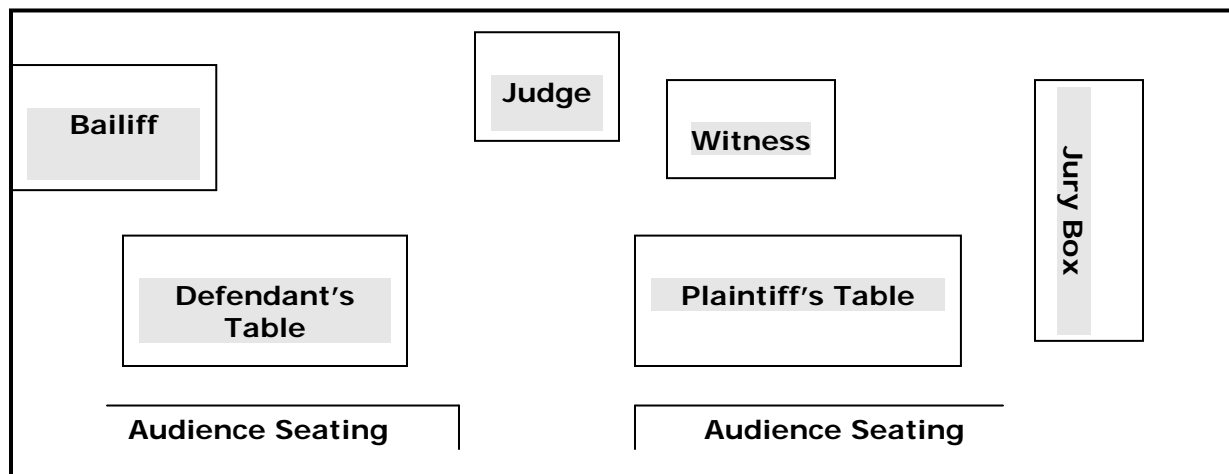
Before participating in a mock trial, it is important to be familiar with the physical setting of the courtroom, as well as with the events that generally take place during the competition and the order in which they occur. This section outlines the usual steps in a “bench” trial—that is, without a jury.

1. The Opening of the Court

- Either the clerk of the Court or the judge will call the Court to order.
- When the judge enters, all participants should remain standing until the judge is seated.
- The case will be announced; i.e., “The Court will now hear the case of _____ v. _____.”
- The judge will then ask the attorneys for each side if they are ready.

2. Opening Statements (5 minutes maximum)

- Prosecution (criminal case)/ Plaintiff (civil case)
After introducing oneself and one’s colleagues to the judge, the prosecutor or plaintiff’s attorney summarizes the evidence for the Court which will be presented to prove the case. The Prosecution/ Plaintiff statement should include a description of the facts and circumstances surrounding the case, as well as a brief summary of the key facts that each witness will reveal during testimony. The Opening Statement should avoid too much information. It should also avoid argument, as the statement is specifically to provide facts of the case from the client’s perspective.
- Defense (criminal or civil case)
After introducing oneself and one’s colleagues to the judge, the defendant’s attorney summarizes the evidence for the Court which will be presented to rebut the case (or deny the validity of the case) which the plaintiff has made. It includes facts that tend to weaken the opposition’s case, as well as key facts that each witness will reveal during testimony. It should avoid repetition of facts that are not in dispute, as well as strong points of the plaintiff/ prosecution’s case. As with the Plaintiff’s statement, Defense should avoid argument at this time.



3. Direct Examination by the Plaintiff/Prosecutor (7 minutes plus 2 minutes for Voir Dire)

The prosecutor/ plaintiff's attorney conducts direct examination (questioning) of each of its own witnesses. At this time, testimony and other evidence to prove the prosecution's/plaintiff's case will be presented. The purpose of direct examination is to allow the witness to relate the facts to support the prosecution/plaintiff claim and meet the required burden. It also allows counsel for each side to establish the credibility of each of their witnesses. (If opposing counsel chooses to voir dire a witness, 2 minutes are permitted, in addition to the 7 minutes allowed for direct examination.)

General Suggestions:

- Ask open-ended questions, rather than those that draw a "yes" or "no" response. Questions that begin with "who," "what," "where," "when," and "how" or "explain..." and "describe..." are helpful during direct examination.
- Questions should be clear and concise, and should help guide your witness through direct examination. Witnesses should not narrate too long, as it will likely draw an objection from opposing counsel.
- Do not ask questions that "suggest" a specific answer or response.

4. Cross-Examination by the Defendant's Attorneys (5 minutes)

After the attorney for the prosecution/plaintiff has completed the questioning of a witness, the judge then allows the defense attorney to cross-examine the witness. The cross-examiner seeks to clarify or cast doubt upon the testimony of the opposing witness. Inconsistency in stories, bias, and other damaging facts may be pointed out to the judge through cross-examination. (If an attorney chooses to voir dire a witness, 2 minutes are permitted, in addition to the 5 minutes allowed for cross examination. These 2 minutes are typically allotted during the witness' direct examination.)

General Suggestions:

- Use narrow, leading questions that "suggest" an answer to the witness. Ask questions that require "yes" or "no" responses.
 - In general, it is never a good idea to ask questions to which you do not know the answer - unexpected responses can be costly and may leave you unprepared and off-guard.
 - Never ask "why." You do not want to give a well-prepared witness an opportunity to expand upon a response.
 - Avoid questions that begin with "Isn't it a fact that...", as it allows an opportunistic witness an opportunity to discredit *you*.
5. Direct Examination by the Defendant's Attorneys (7 minutes plus 2 minutes for Voir Dire)
Direct examination of each defense witness follows the same pattern as above which describes the process for prosecution's witness. (See #3 above for suggestions.)
6. Cross-Examination by the Prosecution/ Plaintiff (5 minutes)
Cross-examination of each defense witness follows the same pattern as above for cross-examination by the defense. (See #4 above for suggestions.)
7. Re-Direct Examination by the Plaintiff/ Prosecution (3 minutes and/or 3 questions)
The Plaintiff's/Prosecution's attorney may conduct re-direct examination of the witness to clarify any testimony that was cast in doubt or impeached during cross-examination. (Maximum of three minutes or three questions.)
8. Re-Cross Examination by the Defense Attorneys (3 minutes and/or 3 questions)
The defense attorneys may re-cross examine the opposing witness to impeach previous testimony. (Maximum of three minutes or three questions.)

9. Voir Dire Examination by Either the Plaintiff/ Prosecution or the Defense Attorneys (2 minutes)

Voir Dire is the process of asking questions to determine the competence of an alleged expert witness. Before giving any expert opinion, the witness must be qualified by the court as an expert witness. The court must first determine whether or not the witness is qualified by knowledge, skills, experience, training or education to give the anticipated opinion. After the attorney who called the witness questions him/her about his/her qualifications to give the opinion, and before the court qualifies the witness as an expert witness, the opposing counsel shall (if he/she chooses to do so) have the opportunity to conduct a brief cross-examination (called "voir dire") of the witness' qualifications.

10. Closing Arguments (Attorneys) (5 minutes)

For the purposes of the Mock Trial Competition, the first closing argument at all trials shall be that of the Defense.

a. Defense

A closing argument is a review of the evidence presented. Counsel for the defense reviews the evidence as presented, indicates how the evidence does not substantiate the elements of a charge or claim, stresses the facts and law favorable to the defense, and asks for a finding of not guilty (or not at fault) for the defense.

b. Prosecution/ Plaintiff

The closing argument for the prosecution/ plaintiff reviews the evidence presented. The prosecution's/ plaintiff's closing argument should indicate how the evidence has satisfied the elements of a charge, point out the law applicable to the case, and ask for a finding of guilt, or fault on the part of the defense. Because the burden of proof rests with the prosecution/ plaintiff, this side has the final word.

11. The Judge's Role and Decision

The judge is the person who presides over the trial to ensure that the parties' rights are protected and that the attorneys follow the rules of evidence and trial procedure. In mock trials, the judge also has the function of determining the facts of the case and rendering a judgment, just as in actual bench trials.

PART IV: SIMPLIFIED RULES OF EVIDENCE AND PROCEDURE

In American trials, elaborate rules are used to regulate the admission of proof (i.e., oral or physical evidence). These rules are designed to ensure that both parties receive a fair hearing and to exclude any evidence deemed irrelevant, incompetent, untrustworthy or unduly prejudicial. If it appears that a rule of evidence is being violated, an attorney may raise an objection to the judge. The judge then decides whether the rule has been violated and whether the evidence must be excluded from the record of the trial. In the absence of a properly made objection, however, the evidence will probably be allowed by the judge. **The burden is on the attorneys to know the rules, to be able to use them to present the best possible case, and to limit the actions of opposing counsel and their witnesses.**

Formal rules of evidence are quite complicated and differ depending on the court where the trial occurs. For purposes of this Mock Trial Competition, the rules of evidence have been modified and simplified. Not all judges will interpret the rules of evidence or procedure the same way, and you must be prepared to point out the specific rule (quoting it, if necessary) and to argue persuasively for the interpretation and application of the rule you think proper. No matter which way the judge rules, attorneys should accept the ruling with grace and courtesy!

1. SCOPE

RULE 101: SCOPE. These rules govern all proceedings in the mock trial competition. The only rules of evidence in the competition are those included in these rules.

RULE 102: OBJECTIONS. An objection which is not contained in these rules shall not be considered by the Court. However, if counsel responding to the objection does not point out to the judge the application of this rule, the Court may exercise its discretion in considering such objections.

2. RELEVANCY

RULE 201: RELEVANCY. Only relevant testimony and evidence – that which helps the trier of fact decide the issues of the case – may be presented. However, if the relevant evidence is unfairly prejudicial, confuses the issues, or is a waste of time, it may be excluded by the Court. This may include testimony, pieces of evidence, and demonstrations that have no direct bearing on the issues of the case and have nothing to do with making the issues clearer.

Example:

Relevant: “Hayden, how many beers did you drink the night of the accident, June 26, 2010, while your parents were at the hospital?”

Irrelevant: “Hayden, would you describe your parents as heavy drinkers?”

Objections to Irrelevant Questions/Testimony:

“Objection. This testimony is unduly prejudicial.”

“I object, Your Honor. This testimony is irrelevant to the facts of the case.”

RULE 202: CHARACTER. Evidence about the character of a party or witness (other than his or her character for truthfulness or untruthfulness) may not be introduced unless the person’s character is an issue in the case.

Objection:

“Objection. Evidence of the witness’ character is not proper given the facts of the case.”

3. WITNESS EXAMINATION

A. DIRECT EXAMINATION (attorney calls and questions witness)

RULE 301: FORM OF QUESTION. Witnesses should be asked direct questions and may not be asked leading questions on direct examination. Direct questions are phrased to evoke a set of facts from the witnesses. A leading question is one that suggests to the witness the answer desired by the examiner -- typically a “yes” or “no” answer.

Example of a Direct Question:

Q: “Sergeant McCrystal, when you arrived at the scene of the accident, what did you find?”

Example of a Leading Question:

Q: "Sergeant McCrystal, when you arrived at the scene you found Sam Spangler to be terribly injured, did you not?"

Narration: While the purpose of direct examination is to get the witness to tell a story, the questions must ask for specific information. The questions must not be so broad that the witness is allowed to wander or narrate an entire story. Narrative questions are objectionable.

Example of Narrative Question:

Q: "Dr. Chapman, please tell us everything that happened when you arrived at the Spanglers' house."

Objection:

"Objection. Question seeks a narration."

At times, a direct question may be appropriate, but the witness' answer may go beyond the facts for which the question was asked. Such answers are subject to objection on the grounds of narration.

Objections:

"Objection: Counsel is leading the witness."

"Objection. Witness is being narrative."

"Objection: Question asks for a narration."

- RULE 302: SCOPE OF WITNESS EXAMINATION. Direct examination may cover all facts relevant to the case of which the witness has first-hand knowledge. Any factual areas examined on direct examination may be subject to cross-examination.
- RULE 303: REFRESHING RECOLLECTION. If a witness is unable to recall a statement made in an affidavit, the attorney on direct may show that portion of the affidavit that will help the witness to remember.

B. CROSS EXAMINATION (questioning the other side's witness)

- RULE 304: FORM OF QUESTION. An attorney may ask leading questions when cross-examining the opponent's witnesses. Questions that tend to evoke a narrative answer should be avoided in most instances.
- RULE 305: SCOPE OF WITNESS EXAMINATION. Attorneys may only ask questions that relate to matters brought out by the other side on direct examination or to matters relating to the credibility of the witness. This includes facts and statements made by the witness for the opposing party. Note that many judges allow a broad interpretation of this rule.

Example:

If, on direct examination, a witness is not questioned about a given topic, and the opposing attorney attempts to ask a question about this topic on cross examination.

Objection:

"Objection. Counsel is asking the witness about matters which did not arise during direct examination."

RULE 306: IMPEACHMENT. On cross-examination, the attorney may impeach a witness (show that a witness should not be believed) by (1) asking questions about prior conduct that makes the witness' credibility (truth-telling ability) doubtful, or (2) asking questions about previous contradictory statements. These kinds of questions can only be asked when the cross-examining attorney has information that indicates that the conduct actually happened.

C. RE-DIRECT EXAMINATION

RULE 307: LIMIT ON QUESTIONS. After cross-examination, up to three (3), but no more than three (3), questions may be asked by the direct examining attorney, and such questions are limited to matters raised by the attorney on cross-examination. (The presiding judge has considerable discretion in deciding how to limit the scope of the re-direct.)

NOTE:

If the credibility or the reputation for truthfulness of the witness has been attacked on cross-examination, the attorney whose witness has been damaged may wish to ask several more questions. These questions should be limited to the damage the attorney thinks has been done and should be phrased so as to try to "save" the witness' truth-telling image in the eyes of the court. Re-direct examination is limited to issues raised by the attorney on cross-examination. Please note that at times it may be more appropriate NOT to engage in re-direct examination.

D. RE-CROSS EXAMINATION

RULE 308: LIMIT ON QUESTIONS. Three (3) additional questions, but no more than three (3), may be asked by the cross-examining attorney, and such questions are limited to matters on re-direct examination and should avoid repetition. (The presiding judge has considerable discretion in deciding how to limit the scope of the re-cross.) Like re-direct examination, at times it may be more appropriate not to engage in re-cross examination.

Objection:

"Objection. Counsel is asking the witness about matters that did not come up on re-direct examination."

4. HEARSAY

A. THE RULE

RULE 401: HEARSAY. Hearsay is a statement made outside of the courtroom. Statements made outside of the courtroom are usually not allowed as evidence if they are offered in court to show that the statements are true. The most common hearsay problem occurs when a witness is asked to repeat what another person stated to him or her. **For the purposes of the Mock Trial Competition, if a document is stipulated, you may not raise a hearsay objection to it.**

Example: "Ms. Lechter, you did not have any reason to believe that Hayden was drunk, did you?"

Tyne Lechter testifies, "Hayden said that she only drank one beer before we got back, so no, she was not drunk."

Objection: "Objection. The statement is hearsay, Your Honor."

Possible Response to the Objection: “Your Honor, the testimony is not offered to prove the truth of the matter asserted, but only to show....”

B. EXCEPTIONS

- RULE 402: ADMISSION AGAINST INTEREST. A judge may admit hearsay evidence if it was said by a party in the case and contains evidence which goes against the party’s side.
- RULE 403: STATE OF MIND. A judge may admit hearsay evidence if a person’s state of mind is an important part of the case and the hearsay consists of evidence of what someone said which described that particular person’s state of mind.
- RULE 404: BUSINESS RECORDS. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time by or from information transmitted by a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of the information or the method of circumstances of preparation indicate lack of trustworthiness, shall be admissible. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and callings of every kind, whether or not conducted for profit.
- RULE 405: EXCITED UTTERANCE. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

5. OPINION AND EXPERT TESTIMONY

- RULE 501: OPINION TESTIMONY BY NON-EXPERTS. Witnesses who are not testifying as experts may give opinions which are based on what they saw or heard and are helpful in explaining their story. A witness may NOT testify to any matter of which the witness has no personal knowledge, nor may a witness give an opinion about how the case should be decided.

Example:

“Hayden, you said that you only drank one or two beers. Could your BAC level have been that high if that was all you drank?”

Objection:

“Objection. The witness has no personal knowledge that would enable him/her to answer this question/ make this statement.”

Objection:

“Objection. The question asks the witness to give a conclusion that goes to the finding of the Court.”

- RULE 502: OPINION TESTIMONY BY EXPERTS. Only persons qualified as experts may give opinions on questions that require special knowledge or qualifications. An expert may be called as a witness to render an opinion based on professional experience. An expert must be qualified by the attorney for the party for whom the expert is testifying. This means that before the expert witness can be asked

for expert opinion, the questioning attorney must bring out the expert's qualifications, education and/or experience.

Example: (Prior to being qualified as an expert) "Sergeant McCrystal, given the reading from the Breathalyzer test, what would Hayden Lechter's BAC been at the time of the accident?"

Objection: "Objection. Counsel is asking the witness to give an expert opinion for which the witness has not been qualified."

RULE 503: VOIR DIRE. ("To speak the truth.") After an attorney who has called a witness questions him/her about his/her qualifications, and before the court qualifies the witness as an expert, the opposing counsel shall have the opportunity, if he/she chooses, to conduct voir dire. After the voir dire examination has been conducted, the cross-examining attorney should advise the court as to whether there are any objections to the witness being qualified as an expert witness and/or whether there are any objections to the witness' expertise to give the specific opinion the opposing counsel is trying to elicit from this witness.

Example:

(after questioning by an attorney to create a foundation for his/her witness to be qualified by the Court as an expert witness): "At this time, your Honor, I request that the Court accept and qualify the witness as an expert in the field of"

Objection:

"Your Honor, we would like permission to voir dire the witness."

6. PHYSICAL EVIDENCE

RULE 601: INTRODUCTION OF PHYSICAL EVIDENCE. Physical evidence may be introduced if it is relevant to the case. Physical evidence will not be admitted into evidence until it has been identified and shown to be authentic or its identification and/or authenticity has been stipulated. That a document is "authentic" means only that it is what it appears to be, not that the statements in the document are necessarily true.

Physical evidence need only be introduced once. The proper procedure to use when introducing a physical object or document for identification and/or use as evidence is (for example):

- a. Show the exhibit to opposing counsel.
- b. Show the exhibit and have it marked by the clerk/judge. "Your Honor, please have this marked as Plaintiff's Exhibit 1 for identification."
- c. Ask the witness to identify the exhibit. "I now hand you what is marked Plaintiff's Exhibit 1. Would you identify it, please?"
- d. Ask the witness about the exhibit, establishing its relevancy.
- e. Offer the exhibit into evidence. "Your Honor, we offer Plaintiff's Exhibit 1 into evidence at this time."
- f. The Judge will ask opposing counsel whether there is any objection, rule on the objection if there is one, and admit or not admit the exhibit into evidence.
- g. If the exhibit is a document, hand it to the clerk/judge.

NOTE: After an affidavit has been marked for identification, a witness may be asked questions about it without its introduction into evidence.

7. INVENTION OF FACTS (Special Rules for the Mock Trial Competition)

RULE 701: DIRECT EXAMINATION. On direct examination, the witness is limited to the facts provided in the casebook. If a witness testifies in contradiction of a fact given in the witness' statement, opposing counsel should impeach the witness' testimony during cross-examination. If the witness goes beyond the facts given, such that they directly conflict with the stipulated facts or witness affidavits, a bench conference may be requested by opposing counsel, at which time the counsel may object to invention of facts. (It should be noted that the granting of a bench conference is a discretionary decision of the judge. A request for a bench conference might not be granted.)

Example: During Direct Examination

Q: "Dr. Chapman, would you please describe to the Court the results of your examination of Hayden Lechter?"

A. Dr. Chapman testifies, "Hayden's eyes, coloring, and speech were entirely normal, and I did not notice any smell of alcohol on Hayden's breath."

Objection:

"Objection, your honor, the witness is creating facts which are not in the record."

During Cross-Examination

Objection:

"Objection. The witness is inventing facts that directly contradict case material."

Objection to be made at a bench conference:

"Your Honor, the witness is creating facts which are not in the record."

"Your Honor, the witness is intentionally creating facts which could materially alter the outcome of the case."

RULE 702: CROSS-EXAMINATION. Questions on cross-examination should not seek to elicit information that is not contained in the fact pattern. If on cross-examination a witness is asked a question, the answer to which is not contained in the witness' statements of the direct examination, the witness may respond with any answer which does not materially alter the outcome of the trial. An answer which is contrary to the witness' affidavit may be impeached by the cross-examining attorney. If the witness invents facts material to the case, a bench conference may be called and, if granted, an objection made to the invention of facts.

Objection:

"Objection. The witness' answer is inventing facts which materially alter the case."

8. SPECULATION

RULE 801: Speculation by a witness, upon which the court may not base verdict, is the art of theorizing about a matter as to which evidence is not sufficient for certain knowledge. Speculation as to what possibly could have happened is of little probative value. Some leeway is allowed for the witness to use their own words, and greater freedom is allowed with expert witnesses.

Example: Direct Examination by the Prosecution

Q: "Alexis, please tell us about your involvement in MADD."

A: Alexis Spangler testifies, "My spouse and I have been very involved with MADD for a number of years. Because of that I know a lot about the effects of alcohol and I know that from how high Hayden's BAC was at the time of the accident, the Lechters *must* have known that Hayden was drunk when they handed over the keys."

Objection:

"Objection. Inadmissible speculation on behalf of the witness. I move that the second portion of this statement, beginning with 'Because of that...' be stricken from the record."

9. PROCEDURE RULES

- RULE 901: PROCEDURES FOR OBJECTIONS. An attorney may object anytime the opposing attorney has violated the Rules of Evidence.
NOTE: The attorney who is objecting should stand up and do so at the time of the violation. When an objection is made, the judge will usually ask the reason for it. Then the judge will turn to the attorney who asked the question and that attorney will usually have a chance to explain why the objection should not be accepted ("sustained") by the judge. The judge will then decide whether to discard a question or answer because it has violated a rule of evidence ("objection sustained"), or whether to allow a question or answer to remain on the trial record ("objection overruled").
- RULE 902: MOTIONS TO DISMISS. Motions for dismissal at the end of the prosecution's case are NOT permitted.
- RULE 903: CLOSING ARGUMENTS. Closing arguments must be based on the evidence and testimony presented during the trial. Offering new information at this point is prohibited.

**IN THE CIRCUIT COURT FOR THE STATE OF MARYLAND
IN AND FOR QUEEN ANNE'S COUNTY**

SPANGLER ET AL,
PLAINTIFFS,

v.

LECHTER ET AL,
DEFENDANTS.

STATEMENT OF STIPULATED FACTS

Seventeen-year-old Hayden Lechter, a graduate of Queen Anne's High School in Centreville, Maryland, and one of the best lacrosse players ever to come out of that school, hosted a graduation party on June 26, 2010, at the family's home at 112 McDonald Drive in Centreville. Hayden had asked for permission to host the party. Since Hayden had done very well in school, was responsible and mature, Hayden's parents consented.

Approximately forty-five people attended the party, most of whom were teammates from lacrosse and friends who had graduated. People began arriving at the Lechters' home around 4:00pm. Mr. and Mrs. Lechter had given strict instructions that there was to be no alcohol brought to, or consumed at, the party. Hayden was informed about a recent news story concerning parents who were found criminally and civilly responsible for allowing a keg party to be held in their home by their teenager. Hayden's parents stated that no alcohol was to be served and anyone bringing alcoholic beverages of any kind was to leave the party immediately. Hayden was told that the pool and cabana area, which included a fully stocked bar, was off-limits to everyone. The pool and cabana are surrounded by a fence and locked. No one, under any circumstances, was to be allowed inside. Hayden understood and promised that everyone would stay out of the area. Hayden was also informed that both parents would be home to supervise the party.

At approximately 6:30pm, the Lechters received a telephone call informing them that Mrs. Lechter's sister, Lizzy, had been seriously injured in an automobile accident, and had been admitted to Queen Anne's Hospital in Chestertown. The Lechters informed Hayden that they would be going to the hospital to check on Mrs. Lechter's sister, but that that they would be back as soon as possible. They again made it clear that no one was to have, or consume alcohol, and that no one was permitted in the gated pool and cabana.

The Lechters left for the hospital at 6:45pm. Upon learning that Mrs. Lechter's sister was in stable but guarded condition and suffered from a lacerated spleen, they contacted their close friend and child's pediatrician, Dr. Kelly Chapman, to request clarification on Lizzy's condition. They also expressed concern about getting home quickly because of the party. Dr. Chapman agreed to meet them at their house so they could discuss the sister's condition. This would provide an opportunity for Dr. Chapman to contact the hospital to obtain more information about the sister's condition.

At approximately 10:00pm, the Lechters and Dr. Chapman arrived at the Lechters' home. Upon entering the backyard, they saw the cabana and pool gate unlocked and open. Kids were swimming in the pool and underage attendees were drinking beer. The Lechters ended the party immediately and demanded that everyone leave, after making sure that everyone had a parent or other responsible driver to take

them home. As people were leaving, Hayden asked to borrow the family car to drive Jordan Bundy home. Jordan lived about two miles away. When questioned about drinking, Hayden admitted to having some beer, but was vague on the amount. As the Lechters did not perceive any signs of impairment or influence of alcohol, they permitted Hayden to drive Jordan home, but gave implicit instructions to return home immediately. Dr. Chapman was standing with the Lechters when they granted permission to Hayden.

After receiving a phone call from Hayden's friend, Ashton Spangler, explaining that the party at the Lechters had ended because of underage drinking, Alexis Spangler drove to the Lechter home to pick up Ashton. As Alexis arrived, Hayden was pulling out of the driveway. Both waved at each other. Alexis had known the Lechters for years; both of their children were on the lacrosse team and were close friends. Alexis noted that there were a number of teenagers waiting outside for rides, many of whom looked wet. Tyne Lechter, Hayden's parent, saw Alexis and apologized for the inconvenience of having to pick up Ashton, explaining that the kids disobeyed their clear instructions, and were drinking and swimming. Ashton apologized to Tyne Lechter and said "things just got out of hand." Alexis said a quick goodbye knowing that their youngest child, Sam, who had just finished babysitting, would be arriving home to an empty house.

At about the same time that Hayden was preparing to take Jordan home, fourteen-year-olds Sam Spangler and Dakota Miller were leaving a babysitting job at 360 West Elm Street and walking back to Sam's house. Sam had called home before leaving the babysitting job to say that they were leaving to walk home. As the two began to walk, a severe thunderstorm hit the area with torrential rains, lightning, and forty mile-per-hour winds. The two began to run home as fast as they could.

At roughly 10:30pm, Sam and Dakota neared the intersection of Chestnut and Spruce Streets, which features a four-way stop and a marked crosswalk area. They slowed to look for oncoming cars, then proceeded to run diagonally toward the center of the intersection. As they neared the middle of the intersection, the pair saw a car speeding toward them. They immediately ran in the opposite direction from the approaching car, toward the far crosswalk. As they reached the crosswalk, the car, driven by Hayden, was still heading straight for them.

Dakota tried to push Sam out of the way, but slipped on the wet crosswalk. Unable to get out of the way fast enough, Dakota's right leg was struck by the car. Hit head on, Sam was thrown through the air and came to rest on the side of the road, in a state of semi-consciousness. Dakota Miller lay immobile in the crosswalk about fifteen feet from Sam. Hayden and Jordan were extremely shaken, but apparently uninjured. At approximately 10:38pm, Sgt. Andy McCrystal arrived on the scene, followed shortly thereafter by paramedics and additional police officers.

Alexis and Ashton Spangler were on their way home when they recognized the Lechters' car near the intersection. They saw Dakota being lifted into an ambulance, and realized then that something horrible had occurred.

Sam and Dakota were taken by ambulance to Queen Anne's Hospital. Hayden and Jordan were taken by another ambulance to the hospital to be examined as well.

After Hayden was examined by the hospital's attending physician, Sgt. McCrystal questioned Hayden about the details of the accident. The sergeant asked if Hayden had been drinking, how fast they had been driving, and from which direction the two pedestrians had come. Hayden told the officer that they were coming from a graduation party at Hayden's home and that they could not have been going more than twenty-five miles per hour because of the severe weather conditions. Hayden attributed the accident to poor visibility.

Based on the circumstances surrounding the accident and Hayden’s responses during questioning, Sgt. McCrystal invoked the Implied Consent Law (ICL) and ordered Hayden to submit to a Breathalyzer test. In Maryland, the ICL requires motorists to submit to a chemical test for alcohol/drug impairment if the accident results in the death of, or life threatening injury to, another person and the officer has reasonable grounds to believe that the driver is impaired. Failure to submit to the test may result in suspension of the motorist’s driving privileges.

The test registered a blood alcohol content (BAC) of .04%, approximately one hour and fifteen minutes after the accident. Sgt. Andy McCrystal, highly experienced in evaluating blood alcohol content using relevant charts, graphs, and calculations, determined that Hayden had metabolized some of the alcohol during the seventy-five minute period between the time of the accident and the time the Breathalyzer was administered. Hayden was Mirandized and taken to the station for booking. As a result of the information and evidence gathered during questioning at the scene of the accident, in the hospital, and from the Breathalyzer test, Hayden was placed under arrest and charged with Driving Under the Influence and Negligent Driving.

Sam Spangler suffered multiple internal injuries and lapsed into a coma immediately following the accident. Sam has remained in a comatose state and has not yet made any noticeable recovery. Doctors have informed Sam’s parents that it is virtually impossible to predict what the future holds for their child. Dakota Miller suffered a fractured tibia and fibula, but has since recovered.

On behalf of their child Sam, the Spanglers are suing Hayden Lechter, and Hayden’s parents – Tyne and Sandy - for negligence, which resulted in the injury of their child. The suit seeks damages in the amount of six million dollars for Sam’s future medical care, injuries suffered, and pain and suffering.

Stipulations

1. The numbers provided for the BAC level of Hayden Lechter CANNOT be challenged as inaccurate or incorrectly figured in any way.
2. Sergeant Andy McCrystal is qualified as an expert with respect to determining BAC levels and in reading a BAC level chart.
3. Determination of criminal charges against Hayden Lechter are pending, but for the purposes of this mock trial, Hayden cannot invoke Fifth and/or Fourteenth Amendment privileges.
4. Irrespective of Hayden Lechter’s gender in court, Hayden’s gender has no bearing on the stipulated BAC levels.
5. Hayden Lechter’s sex, race, eye and hair color are intentionally left blank on the police report. However, for the purposes of this mock trial the information shall be considered to match the physical characteristics of the witness identified as Hayden Lechter. Regardless of Hayden’s appearance in court, Hayden’s height and weight, as described in the police report, cannot be challenged.
6. The police report, including the map of the accident scene, is eligible for use as evidence at trial, following proper procedure for identification and submission
7. The map of the accident scene is an accurate representation of the accident.

<u>Witnesses for the Plaintiff</u>	<u>Witnesses for the Defense</u>
ALEXIS SPANGLER Parent of Sam Spangler	DR. KELLY CHAPMAN, Friend of Lechters and Spanglers
DAKOTA MILLER Friend of Sam Spangler	TYNE LECHTER Parent of Hayden Lechter
SERGEANT ANDY MCCRYSTAL Officer for the Centreville Police Department	HAYDEN LECHTER Driver of automobile

Witness for the Plaintiff

Alexis Spangler

My name is Alexis Spangler. I reside at 413 Spruce Street in Centreville, Maryland. I have lived at this address for twenty years. I am the parent of Sam Spangler, who will be a ninth grader at Queen Anne's High School. After serving as an army medic, I became a Registered Nurse and now serve on a medical-surgical floor at Queen Anne's Hospital. My spouse and I are both active members of Mothers Against Drunk Driving (MADD) and Sam plans to become a member of the high school's chapter of Students Against Drunk Driving (SADD).

On the evening of Saturday, June 26, 2010, Sam and a friend, Dakota Miller, were babysitting from 5:00 to 10:00pm at the Bachmans' home who live over on Elm Street. As has been our practice since Sam started babysitting, Sam calls us before leaving the Bachmans'. That night Sam called around 10:15pm to let us know that they were walking home. I was just leaving to pick up Ashton, our oldest child, who had been attending a graduation party. I let Sam know that we would probably get home at about the same time. When I left the house to go to the Lechters, it looked like a storm was approaching. As I pulled into the Lechters' driveway, Hayden was pulling out and waved to me. I waved back and noticed another person, sitting slumped over, in the passenger seat. I saw boys and girls standing around waiting for their rides, sitting with their heads in their laps, looking very unhappy. A few of the kids looked as if they had been swimming.

Tyne Lechter came over to my car and apologized for my having to pick up Ashton. Tyne told me that the kids disobeyed the rules they had been given, and had been drinking beer from the cabana and swimming in the pool. Tyne explained that they left the party for a couple of hours to go to the hospital because a family member had been injured. We have known the Lechters for years. Our families are very close. Ashton apologized to Tyne and said "things just got out of hand." I said a quick goodbye because I did not want Sam arriving to an empty house. Plus, it had started thundering and raining.

The rain appeared as though it were coming down sideways and the lightning was terrific. At one point, soon after we left the Lechters' house, I pulled over because I couldn't see beyond the hood of the car. As we approached the intersection of Chestnut and Spruce, lightning lit up everything. I saw the Lechters' car on the other side of the intersection as well as Dakota Miller, who had been with Sam, being stretchered into one of the ambulances. I knew something horrible had occurred. I drove through the intersection and pulled over to the police officer and asked who had been injured. The officer asked for my name and reason for the inquiry. I explained that my child, Sam, and Dakota were supposed to be walking this way to get home. I was shaking even before I was told that Sam had been hurt. I followed the police car to the hospital.

Sam was severely injured in the accident, suffering multiple internal injuries, internal bleeding, and a terrible concussion from the impact of the collision and landing on asphalt. The internal injuries were treated and stabilized. However, Sam lapsed into a coma after the accident and the doctors do not know if Sam will recover. At best, we know it will be a long road ahead of us. At worst, we may have already lost our child.

I can't believe that this has happened to Sam. We have seen other families who have been devastated by the needless death of a loved one because of their own, or someone else's, drunk driving. That's why I became involved in MADD - I thought that I could help people realize how dangerous the improper use of alcohol can be and how much damage it has caused. I can't put into words how terribly angry it makes me that my own child has been hurt because of drinking and driving.

To compound the pain, there was a front-page story the day before graduation about other unfortunate kids who were killed or injured as a result of alcohol being consumed at graduation parties across the nation.

I know how difficult it is to be the parent of a teenager. In some ways, I can sympathize with Hayden's parents. I think they did try to keep alcohol out of the party. But it was their decision to leave the party and it was their child who let everyone into the pool and cabana bar. It was their thoughtless decision to let Hayden drive after learning everyone, including Hayden, had been drinking.

I let Ashton attend the party because I was told the Lechters would be there to chaperone and that no alcoholic beverages would be tolerated. Had I known differently, I would never have given permission; and in fact, friends or not, I would have felt obliged to inform the authorities. When I dropped Ashton off at the party, there must have been forty teens already there. The Lechters assured me that there would be "no booze" at this graduation party. I recall thanking them.

When I arrived later to pick up Ashton, my heart sank to learn that the party had ended because of underage drinking. When I learned about Lizzy's car accident I felt terrible for them, but I don't understand why both Tyne and Sandy needed to go to the hospital. They could've called us as back-up chaperones. How could they leave so many teenagers unsupervised in their home? It is unacceptable.

If so many of the kids had to get rides from their parents, how could the Lechters possibly think their own child, who had already deliberately disobeyed them and had admitted to drinking, was in any condition to drive a friend home?

My own child is now fighting for life because of the Lechters' failure to properly supervise their child and the party they hosted. It has been months since we have heard our child's voice. We may never hear it again. The Lechters should be held responsible. I do not know what will happen to Sam, but something good has to come out of this tragedy. Parents and kids must learn that there is a very steep price to be paid when you mix alcohol and automobiles—it's no longer just the innocent victim who's going to get stuck with the tab. The Lechters should not have left the kids unsupervised. More importantly, they should have never allowed Hayden to drive their car knowing Hayden had been drinking. It's as simple as that.

Alexis Spangler

Alexis Spangler

Witness for the Plaintiff

Dakota Miller

My name is Dakota Miller. I reside at 418 Spruce Street in Centreville, Maryland. I am fourteen years old. I am a freshman at Queen Anne's High School. I have known Sam Spangler for three years, and we have been doing babysitting jobs to earn extra money for about six months prior to the accident.

On the evening of June 26th, I had taken a babysitting job with Sam at 360 West Elm Street. We were supposed to babysit four kids from 5:00 to 10:00pm. Sam's parents ask Sam to call before leaving to come home. So, Sam called them around 10:15pm, and we left right away to walk home.

There had been thunder and lightning in the area for several minutes. As we left the house, it began to rain. The wind was blowing so hard it was bending the trees. Even though we were both wearing summer jackets and jeans, we knew we were going to get soaked to the bone. We decided to make a run for it. We were both on the track team and our season had ended a couple of weeks before the accident. We were wearing the green and gold windbreakers we got for being on the team. I was running with my head down to keep the wind and rain out of my face. I think Sam was doing the same thing.

As we approached the intersection of Chestnut and Spruce streets, I looked around quickly for on-coming cars. I didn't see any. Since that intersection is a four-way stop, we ran diagonally across it, because the storm was getting worse. We were about halfway across Chestnut when this car seemed to come out of nowhere. I hadn't seen headlights or heard it coming until the car was almost at the intersection— then I realized it wasn't going to stop at the sign. Sam and I must have seen the car at the same time because we both turned to our right and began running away from the car and toward the sidewalk. We made it to the crosswalk, but the car never stopped. I tried to push Sam out of the way, but I slipped and my legs went out from under me and I fell in the middle of the crosswalk. I saw the car hit Sam. I watched as Sam was thrown into the air and landed fifteen feet away on the side of the road. I tried to get up, but I couldn't move my leg.

Everything happened so fast. One minute the car wasn't there; the next it was. The car had to be going pretty fast - definitely more than the speed limit; and in any case, it never stopped like it was supposed to. Chestnut and Spruce are small neighborhood streets, and I'm pretty sure that the speed limit is twenty or twenty-five miles per hour. Everyone who lives here knows that it is a four-way stop. It's been there as long as I can remember.

The police arrived on the scene pretty quickly, but the paramedics took a little longer. It was really confusing because of the pain in my leg, seeing Sam not moving, and all the rain and thunder. I remember thinking that Sam was hurt much worse than I was.

This whole accident is unbelievable. I never thought something like this could happen to me or someone I know. Sam and I were doing what we were supposed to do, and this car comes out of nowhere and runs us down. You always hear people say that life can change in the blink of an eye. I never believed it till now.

Dakota Miller

Dakota Miller

Witness for the Plaintiff
Sergeant Andy McCrystal

My name is Andy McCrystal. I am 30 years old. I am a sergeant with the Centreville Police Department, where I have been an active duty police officer for ten years. I have been a sergeant for the last three years. I was born and raised in Centreville, Maryland. I have a BA in Criminology and Criminal Justice from the University of Maryland at College Park.

On June 26, 2010, I received a radio call from the dispatcher at 22:32 hours. There had been an anonymous report of a motor vehicle accident involving two pedestrians, which allegedly occurred at the intersection of Chestnut and Spruce Streets. Because there had already been two other accidents during the storm that night, I was the closest patrol car to the scene and responded to the call. Due to the poor weather conditions that evening, I was slightly delayed in arriving at the scene. It took me about six minutes to respond. Normally, from where I was when I received the call, it would have taken no more than three minutes to arrive at the scene. I arrived at approximately 22:38.

When I arrived on the scene, there was the normal confusion you find at an accident. I observed two pedestrians lying in the road. One was lying on the side of the road and appeared to be unconscious, but was moaning softly; the other was lying in the crosswalk and was conscious and obviously in a lot of pain. The involved vehicle was east of the intersection of Chestnut and Spruce, just past the crosswalk heading east on Chestnut Street. I immediately attended to the more serious of the two victims. I checked to see if the young person who appeared unconscious had a pulse and was still breathing. The second victim was conscious and in a lot of pain from a serious leg injury. I asked for the child's name and was told it was Dakota Miller. Dakota told me that the other victim's name was Sam Spangler and that they had been running home from a babysitting job. I did not move either victim, for fear of causing further injuries. I then went to check on the driver of the car. The driver of the automobile and the passenger in the car seemed to be extremely shaken up, but uninjured. I recognized the driver of the car as Hayden Lechter, the star midfielder on the high school lacrosse team. By this time the paramedics had arrived.

After the EMS crew began tending to Sam and Dakota, and I had placed road flares at the accident site, I began to question those in the vehicle. I learned that Jordan Bundy was the passenger in the vehicle and was asleep when the accident occurred and had not seen or heard anything. I then spoke to the driver, Hayden Lechter, about the details of the accident. Hayden was fully conscious but appeared disoriented and upset. Hayden's face looked pale, and although Hayden's eyes were not bloodshot, the pupils were quite dilated. Hayden was very quiet. My questions seemed to perplex Hayden, but that could easily be attributed to shock from the accident. When Hayden did speak, it seemed slow and halting, like the kid was concentrating on saying just the right thing. I did detect what can only be described as the faint odor of stale beer on Hayden's breath, but no alcoholic beverages were evident in the vehicle.

Sam and Dakota were rushed to the hospital immediately. Soon after the paramedics examined Hayden and the passenger, Jordan, they were also taken to the hospital. After being checked in at the hospital, it took about twenty minutes for Hayden to be examined and released. I took Hayden aside to ask some additional questions about the accident. I asked Hayden how the accident occurred. Hayden said, "The weather was terrible; it was an awful thunderstorm with torrential rain. We couldn't have been going faster than twenty-five miles per hour, if that."

When I asked if Hayden had been drinking that evening, Hayden replied, "Yes, but just a little - like a few sips." Hayden told me they had been coming from a graduation party. Based on the circumstances of the accident and the admission of alcohol consumption, I asked Hayden to submit to a Breathalyzer test. Hayden consented after I stated that refusing to do so could result in an automatic suspension of a driver's license. The test registered a blood alcohol content (BAC) of .04%, seventy-five minutes after the

accident, which had occurred at approximately 22:30. I used the general figures for the BAC regression and extrapolated that Hayden's BAC at the time of the accident was approximately .055%. Hayden was Mirandized and placed under arrest for Driving Under the Influence (DUI) and for Negligent Driving.

Andy McCrystal

Andy McCrystal, Sgt.

Witness for the Defendant

Dr. Kelly Chapman

My name is Kelly Chapman. I am a pediatrician by profession and I am friends of both the Lechter and Spangler families. I was their children's physician. I am married and we live at 215 Penny Lane in Centreville, Maryland. I am forty-six years of age.

On June 26, 2010, I received a telephone call from Tyne Lechter. I was told that Mrs. Lechter's sister had been seriously injured in an automobile accident and had been admitted to Queen Anne's Hospital in Chestertown. Although resting and stable, she was suffering from a lacerated spleen that might require a splenectomy. The Lechters were quite upset, and I told them that I would make some calls to find out more information. As they were also in a hurry to get back to their home because of Hayden's graduation party, I agreed to meet them there. They only lived about ten minutes away. I have medical privileges at Queen Anne's Hospital, so I requested information from her chart. I wanted to reassure the Lechters that Lizzy could live a normal life, even after a splenectomy.

When I pulled up to the Lechters' home, I saw dozens of kids. The Lechters were speaking to Hayden, and from what I could tell, they didn't look happy. I continued walking to the back and saw kids climbing out of the pool and throwing cups and beer cans into the trash. I overheard Tyne telling Hayden, "We trusted you and you promised us no one would go into the pool area or get into the cabana bar. How did this happen?" I heard Tyne repeating "You promised, you promised, how could you, how could you?" Tyne ended the party immediately, and instructed the kids to call their parents for rides. To say that the Lechters were outraged would be an understatement.

I saw Hayden, who appeared sober at the time. Hayden was speaking with Jordan Bundy about the drinking and swimming, which apparently started as soon as the Lechters left for the hospital. From the looks of the number of cups and beer cans on the ground, I imagined it must have been going on for a while. I was standing with the Lechters when they asked how much beer Hayden had consumed. Hayden admitted to drinking, but was adamant that it was only a very little bit. In fact, I believe Hayden said, "I doubt it was even a whole beer." Hayden did not exhibit any of the typical signs of intoxication, but I was still concerned when Hayden asked to drive Jordan home. Hayden's eyes, coloring and speech seemed normal. Of course, people react differently to alcohol, and by no means did I conduct a thorough examination. Hayden was speaking slowly and quietly, which I attributed to the verbal thrashing from Tyne. I was a little surprised that the Lechters let Hayden drive Jordan home. I wouldn't have done the same if Hayden were my child, but I'm not here to judge.

The whole thing is just so horrific. I have taken care of all those children at one time or another. The Spanglers and Lechters are both friends of ours. I do not want to get in the middle of friends, but I feel an obligation to report the facts as I saw them.

Kelly Chapman

Kelly Chapman, M.D.

Witness for the Defendant

Tyne Lechter

My name is Tyne Lechter. I reside at 112 McDonald Drive in Centreville, Maryland. I am forty-six years of age, and married with one child. I have been employed as the Assistant Manager at CNB Bank in Centreville. I was born and raised here.

In mid June, Hayden came to us and asked if we could host a graduation party for the lacrosse team and other friends. Hayden had played lacrosse all through high school and had won many athletic awards. We consented to having the party at the house. We have always trusted Hayden and felt comfortable hosting the party.

We talked with Hayden about a recent news story involving parents who were found criminally and civilly responsible for allowing their teenager to host a keg party. We made it clear that there would be no alcohol at this party, and that if anyone tried to bring it in, they would be asked to leave. Hayden was also told that the pool and cabana area, which included a bar stocked with liquor and beer, was off-limits to everyone. The pool has a fence surrounding its perimeter, and we keep the gate to it locked. Hayden promised to abide by the rules we had set. We also let Hayden know that we would be home to supervise the party.

Approximately forty-five people attended, most of whom were teammates from lacrosse and friends from their graduating class. People began arriving around 4:00pm. We made it clear to everyone that there was to be no alcohol consumed at the party. It appeared that everyone was having a great time. Hayden's friends were all courteous and well-behaved and, although there was rough play outside, it was certainly under control.

At about 6:30pm -- just after we had finished serving the last of the burgers and dogs from the grill and everyone was sitting around eating -- we received a telephone call informing us that a family member had been seriously injured in an automobile accident. She had been admitted to Queen Anne's Hospital in Chestertown. I informed Hayden that we would be going to the hospital to check on Aunt Lizzy and that we would be back as soon as possible. I reiterated our rules about no alcohol or swimming. We had no reason to distrust Hayden.

We left for the hospital at 6:45pm. When we learned that Lizzy had stabilized, I called our close friend, Dr. Kelly Chapman, who had also been Hayden's pediatrician. I told Dr. Chapman what had happened and asked for an explanation of what we should expect for Lizzy. I also expressed concern about getting back to our home because of the graduation party. Dr. Chapman said that there would be no problem in meeting us at our home where we could discuss the situation. Dr. Chapman told me that it would provide an opportunity to contact the hospital to get more information about Lizzy's condition.

We arrived home at about 10:00 pm; not long after, Dr. Chapman pulled up. When we walked around back, we saw that the gate to the cabana and pool area was unlocked and ajar. Kids were in the pool and many of them were drinking beer. I ended the party immediately and demanded that everyone leave as soon as they had a parent or sober driver to take them home. We were furious with Hayden. I let Hayden know just how disappointed and angry we were and how our trust had been completely broken. Hayden apologized over and over to us and then walked around asking if anyone needed help finding a ride home. A little while later, Hayden asked to borrow our car to take Jordan Bundy home. Jordan lived about two miles away and did not have a ride.

I asked if Hayden had also been drinking and, if so, how much. Hayden admitted to having some beer but was adamant that it was a very small amount. Although I was disappointed, I believed Hayden was being truthful. Dr. Chapman, who was standing right there, did not say anything to the contrary when I

gave Hayden permission to drive. So I handed over the keys to the car. I have seen people who were drunk or buzzed, including workers on the job, and feel like I can tell when someone has had too much to drink. Hayden looked perfectly fine and spoke normally. I instructed Hayden to take Jordan home and then come back immediately. Just as Hayden was leaving, I saw Alexis Spangler pull up to get Ashton. I apologized to Alexis for having to pick up Ashton, but explained that the kids had deliberately disobeyed the instructions they had been given, and had been swimming and drinking. Ashton apologized to me before getting in the car and said "things just got out of hand." The Spanglers said goodbye and I watched them drive off.

At about 11:15pm - long past the time that Hayden should have been home - I was wavering between anger and worry, when we received a telephone call from the Queen Anne's Hospital. Hayden had been in an accident and had been taken to the hospital. When we arrived, we learned that Hayden was not injured, but had been placed under arrest. This is a kid who has never been in serious trouble - at home or school.

We believe we acted responsibly. Hayden did not seem intoxicated or under the influence at all, so we let Hayden borrow the car to drive a friend home. We had been insistent that this be an alcohol-free celebration. We were there for a good portion of the party. We felt that Lizzy's accident was an emergency and necessitated both of us being there for her. When we got home and saw that the kids were drinking and swimming, we ended the party immediately.

While what Hayden did during the party was wrong, I do not believe Hayden was suffering any ill effects from the beer upon leaving the house. That night, a bad storm came through the area. I read in the paper the next day that there were several other storm-related car accidents within a few minutes of each other. My child had an accident, and two kids were seriously hurt because of it. That is an incredible burden to bear, and our hearts weigh heavy every day thinking about it. Hayden is not the same person since that night, and I imagine the Spanglers and Millers feel much the same way. There were so many variables that factored into that accident, and while we understand that the Spanglers want justice for their child, there were too many aspects out of our control to place the blame on our family.

Tyne Lechter

Tyne Lechter

Witness for the Defendant

Hayden Lechter

My name is Hayden Lechter. I live at 112 McDonald Drive with my parents. I am seventeen years old and I recently graduated from Queen Anne's High School where I played lacrosse. I have lived in Centreville all my life.

Shortly before graduation, I asked my parents about the possibility of having a graduation party at our home. At first my folks were concerned about having a lot of kids at the house. They were worried that some of the kids might get a little wild with school finished and summer coming. I told them that I always respected our house and their rules, and that I would not take any chances with our home. They told me that it would be all right to hold the party, provided that I understood that the pool area and cabana were to be off-limits and that the gate to the area would stay locked. I know they were concerned about liability in case someone drowned or got into the bar that was in the cabana. They also made it clear that no alcohol would be allowed and anyone arriving with them would be told to leave, no matter who it might be. I assured them that no one would go in the pool or cabana area and no one would be drinking.

We held the party on June 26, 2010. I invited about forty-five kids. They were mostly from the high school's boys' and girls' lacrosse teams. We were all having a great time eating and playing around when, at around 6:30pm, my parents got a call informing them that my Aunt Lizzy had been seriously hurt in a car accident and was taken to the hospital. My parents told me that they were going to go to the hospital to check on her and that they would be back shortly. They again reminded me that the pool and cabana area were off-limits, and no alcohol was permitted.

I knew it was wrong and that I had promised my folks we wouldn't get into the pool and bar, but my friends were giving me a hard time and really laying it on thick. I gave in and unlocked the gate. A number of kids got in the pool. I was making sure no one got too rough and didn't notice several of my teammates go into the cabana bar. Before I realized it, they were handing out beer. At first, I tried to stop them, but I didn't have much luck. Then a couple of friends told me to loosen up, so I took a few sips from one of their beers. I don't really know how much I had all told, because I kept putting my can down and someone would hand me a new one. But I was not drunk, not even close. My parents came back around 10:00pm and when they saw what was going on, they were fuming. They demanded that everyone get out of the pool, throw their drinks out, and leave. The party was over.

Everyone was calling home or trying to figure out how they were going to get home, and my mom and dad were really laying into me. I have never seen them so angry and upset. I knew I had blown it, but it was the first time I did anything like that and I was going to clean it up. My friend, Jordan Bundy, called home and no one picked up, so I offered to borrow my parents' car. I didn't think I was affected at all by the beer I drank. I had been running around the whole time and I had just eaten a hamburger and a hotdog. I told my folks that I needed to give Jordan a ride home and asked them for the car keys. They asked me what I had to drink and I said that I only had a few sips throughout the evening. They told me to drop Jordan off and get back immediately.

As I was pulling out of the driveway, I saw the Spangler car pulling in to pick up Ashton. I waved, but I did not see who was driving. Jordan lived only two miles from my house. As we drove, it started to rain heavily. A big thunderstorm was hitting the area, with lots of lightning and thunder. I was driving pretty slow, being careful, when suddenly I saw two kids run right in front of me. I couldn't stop fast enough—the road was just too wet. The accident just could not have been avoided. It was only after I got out of the car that I even realized it was an intersection. I had been looking ahead, through the windshield, but couldn't see anything out the side windows. I never saw the stop sign. I could barely see the road in front of me, much less a stop sign or people running across the road.

As soon as I saw the kids, I slammed on the brakes. I've never had such a sick feeling come over me so fast in my life. I felt woozy, my palms were sweaty, and I just lost it. I could not help crying. I couldn't believe this had happened. I felt even worse when I got out of my car and saw the two people who had run in front of me lying on the road. I felt like everything was going in slow-motion. None of this could be real. It still feels that way.

I feel terrible about the accident. But it was just an accident. It was nighttime, with heavy rain and winds. It wasn't the beer that caused me to hit those kids; it was that horrible storm. I just didn't see them, but they didn't see me either before they crossed the street. That tells you how bad the storm was. If I could change anything about that night, I would take away the storm. Even without the beer, that storm would have broken up my party and I would have been taking Jordan home. And, I still wouldn't have been able to see those two.

I am sorry for them. I am sorry for their families. I am sorry for my parents. They didn't do anything wrong, but the little bit of beer I drank might cost them big time. The thing is - I don't think the accident was caused by anyone's wrongdoing. Sometimes things just HAPPEN and there is nothing you can do to make any of it better.

Hayden Lechter

Hayden Lechter

(Included for informational purposes only.)

MARYLAND CODE

CRIMINAL LAW

TITLE 10. CRIMES AGAINST PUBLIC HEALTH, CONDUCT, AND SENSIBILITIES

Subtitle 1. Crimes Against Public Health and Safety

PART II. Alcoholic Beverages Violations.

§ 10-114. Underage possession

An individual under the age of 21 years may not possess or have under the individual's charge or control an alcoholic beverage unless the individual is a bona fide employee of the license holder as defined in Article 2B, § 1-102 of the Code and the alcoholic beverage is in the possession or under the charge or control of the individual in the course of the individual's employment and during regular working hours.

§ 10-116. Obtaining for underage consumption

An individual may not obtain an alcoholic beverage from any person licensed to sell alcoholic beverages for consumption by another who the individual obtaining the beverage knows is under the age of 21 years.

§ 10-117. Furnishing for or allowing underage consumption

(a) Except as provided in subsection (c) of this section, a person may not furnish an alcoholic beverage to an individual if:

- (1) The person furnishing the alcoholic beverage knows that the individual is under the age of 21 years; and
- (2) The alcoholic beverage is furnished for the purpose of consumption by the individual under the age of 21 years.

(b) Except as provided in subsection (c) of this section, an adult may not knowingly and willfully allow an individual under the age of 21 years actually to possess or consume an alcoholic beverage at a residence, or within the curtilage of a residence that the adult owns or leases and in which the adult resides.

(c) (1) the prohibition set forth in subsection (a) of this section does not apply if the person furnishing the alcoholic beverage and the individual to whom the alcoholic beverage is furnished:

- (i) are members of the same immediate family, and the alcoholic beverage is furnished and consumed in a private residence or within the curtilage of the residence; or
- (ii) are participants in a religious ceremony.

(2) The prohibition set forth in subsection (b) of this section does not apply if the adult allowing the possession or consumption of the alcoholic beverage and the individual under the age of 21 years who possesses or consumes the alcoholic beverage:

- (i) are members of the same immediate family, and the alcoholic beverage is possessed and consumed in a private residence, or within the curtilage of the residence, of the adult; or
- (ii) are participants in a religious ceremony.

§ 10-121. Penalties for violation of § 10-116 or § 10-117

(a) *Applicability.* - This section does not apply to a person who:

- (1) was acting in the capacity of a licensee, or an employee of a licensee, under Article 2B of the Code; and
- (2) has committed a violation of and is subject to the penalties under Article 2B, § 12-108 of the Code.

(b) *Penalties.* - An adult who violates § 10-116 or § 10-117 of this subtitle is guilty of a misdemeanor and on conviction is subject to:

- (1) a fine not exceeding \$2,500 for a first offense; or
 - (2) a fine not exceeding \$5,000 for a second or subsequent offense.
- 2009, ch. 499.]

COURTS AND JUDICIAL PROCEEDINGS

TITLE 10. EVIDENCE

Subtitle 3. Motor Vehicle Laws

§ 10-307. Chemical test for alcohol, drug or controlled dangerous substance content - Results of analysis and presumptions.

(a) *In general.* -

(1) In any criminal, juvenile, or civil proceeding in which a person is alleged to have committed an act that would constitute a violation of Title 2, Subtitle 5, § 2-209, or § 3-211 of the Criminal Law Article, or with driving or attempting to drive a vehicle in violation of § 16-113, § 16-813, or § 21-902 of the Transportation Article, the amount of alcohol in the person's breath or blood shown by analysis as provided in this subtitle is admissible in evidence and has the effect set forth in subsections (b) through (g) of this section.

(2) Alcohol concentration as used in this section shall be measured by:

- (i) Grams of alcohol per 100 milliliters of blood; or
- (ii) Grams of alcohol per 210 liters of breath.

(4) If the amount of alcohol in the person's blood shown by analysis as provided in this subtitle is measured by milligrams of alcohol per deciliters of blood or milligrams of alcohol per 100 milliliters of blood, a court or an administrative law judge, as the case may be, shall convert the measurement into grams of alcohol per 100 milliliters of blood by dividing the measurement by 1000.

(b) If at the time of testing a person has an alcohol concentration of 0.05 or less, as determined by an analysis of the person's blood or breath, it shall be presumed that the person was not under the influence of alcohol and that the person was not driving while impaired by alcohol.

(c) If at the time of testing a person has an alcohol concentration of more than 0.05 but less than 0.07, as determined by an analysis of the person's blood or breath, this fact may not give rise to any presumption that the person was or was not under the influence of alcohol or that the person was or was not driving while impaired by alcohol, but this fact may be considered with other competent evidence in determining whether the person was or was not driving while under the influence of alcohol or driving while impaired by alcohol.

(d) If at the time of testing a person has an alcohol concentration of at least 0.07 but less than 0.08, as determined by an analysis of the person's blood or breath, it shall be prima facie evidence that the person was driving while impaired by alcohol.

(e) If at the time of testing a person has an alcohol concentration of 0.02 or more, as determined by an analysis of the person's blood or breath, it shall be prima facie evidence that the person was driving with alcohol in the person's blood.

(f) If at the time of testing a person has an alcohol concentration of 0.02 or more, as determined by an analysis of the person's blood or breath, it shall be prima facie evidence that the person was driving in violation of an alcohol restriction under § 16-113 of the Transportation Article.

(g) If at the time of testing a person has an alcohol concentration of 0.08 or more, as determined by an analysis of the person's blood or breath, the person shall be considered under the influence of alcohol per se as defined in § 11-174.1 of the Transportation Article.

TRANSPORTATION

TITLE 16. VEHICLE LAWS - DRIVERS' LICENSES

Subtitle 2. Cancellation, Refusal, Suspension, or Revocation

§ 16-205.1. Suspension or disqualification for refusal to submit to chemical tests for intoxication.

(c) *Circumstances under which chemical tests required; administration; liability.-*

(1) If a person is involved in a motor vehicle accident that results in the death of, or a life threatening injury to, another person and the person is detained by a police officer who has reasonable grounds to believe that the person has been driving or attempting to drive while under the influence of alcohol, while impaired by alcohol, while so far impaired by any drug, any combination of drugs, or a combination of one or more drugs and alcohol that the person could not drive a vehicle safely, while impaired by a controlled dangerous substance, or in violation of § 16-813 of this title, the person shall be required to submit, as directed by the officer, to a test of:

(i) The person's breath to determine alcohol concentration;

(ii) One specimen of the person's blood, to determine alcohol concentration or to determine the drug or controlled dangerous substance content of the person's blood; or

(iii) Both the person's breath under item (i) of this paragraph and one specimen of the person's blood under item (ii) of this paragraph.

TITLE 21. VEHICLE LAWS - RULES OF THE ROAD

Subtitle 5. Pedestrians' Rights and Rules

§ 21-502. Pedestrians' right-of-way in crosswalks

(a) (1) this subsection does not apply where:

(i) A pedestrian tunnel or overhead pedestrian crossing is provided, as described in § 21-503(b) of this subtitle; or

(ii) A traffic control signal is in operation.

(2) The driver of a vehicle shall come to a stop when a pedestrian crossing the roadway in a crosswalk is:

(i) On the half of the roadway on which the vehicle is traveling; or

(ii) Approaching from an adjacent lane on the other half of the roadway.

(b) A pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to yield.

(c) If, at a marked crosswalk or at an unmarked crosswalk at an intersection, a vehicle is stopped to let a pedestrian cross the roadway, the driver of any other vehicle approaching from the rear may not overtake and pass the stopped vehicle.

§ 21-503. Crossing at other than crosswalks

(a) If a pedestrian crosses a roadway at any point other than in a marked crosswalk or in an unmarked crosswalk at an intersection, the pedestrian shall yield the right-of-way to any vehicle approaching on the roadway.

(b) If a pedestrian crosses a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing is provided, the pedestrian shall yield the right-of-way to any vehicle approaching on the roadway.

(c) Between adjacent intersections at which a traffic control signal is in operation, a pedestrian may cross a roadway only in a marked crosswalk.

(d) A pedestrian may not cross a roadway intersection diagonally unless authorized by a traffic control device for crossing movements. If authorized to cross diagonally, a pedestrian may cross only in accordance with the traffic control device.

Subtitle 9. Reckless, Negligent, or Impaired Driving; Fleeing or Eluding Police

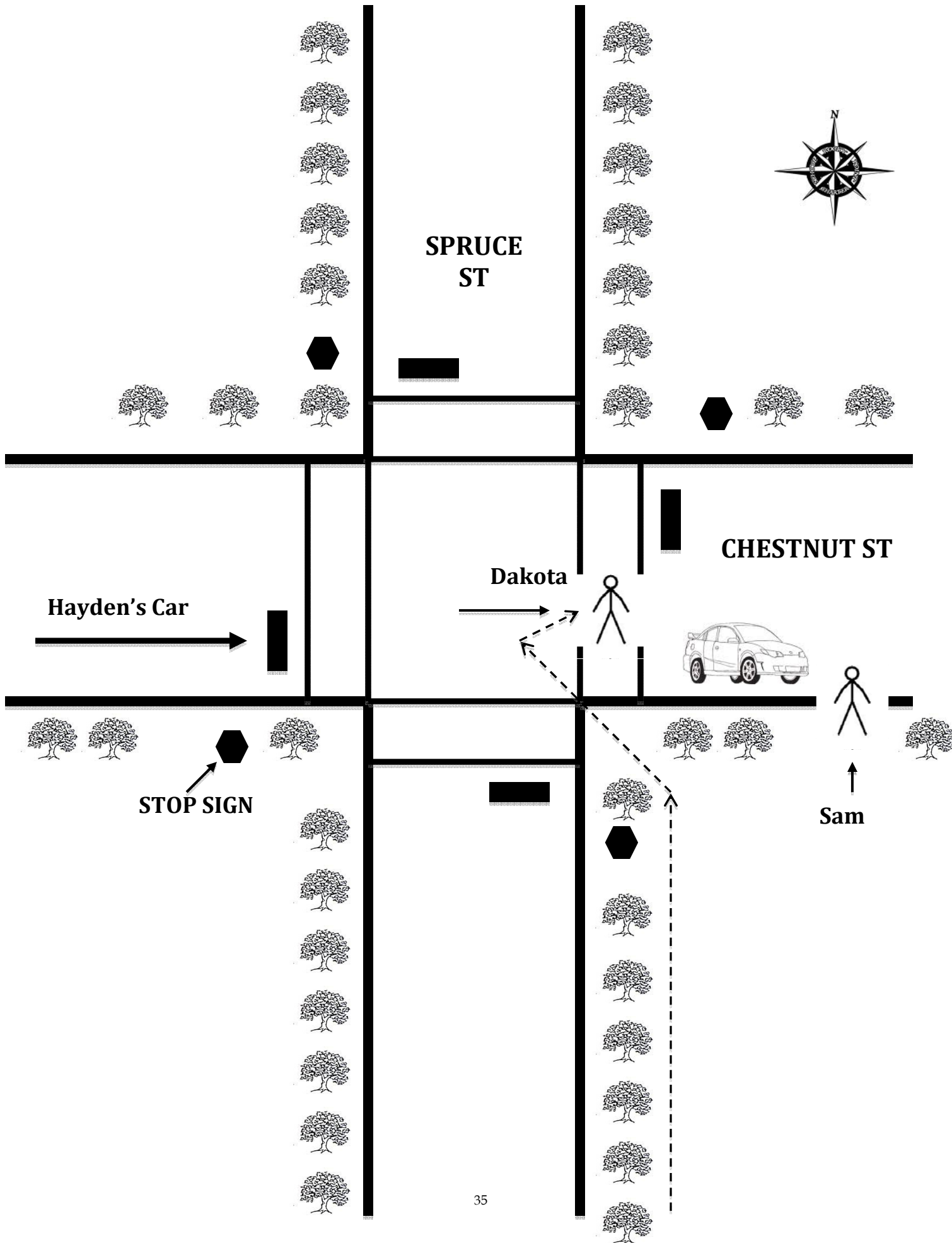
§ 21-901.1. Reckless and negligent driving

- (a) A person is guilty of reckless driving if he drives a motor vehicle:
- (1) In wanton or willful disregard for the safety of persons or property; or
 - (2) In a manner that indicates a wanton or willful disregard for the safety of persons or property.
- (b) A person is guilty of negligent driving if he drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.

§ 21-902. Aggressive driving

- (a) (1) a person may not drive or attempt to drive any vehicle while under the influence of alcohol.
(2) A person may not drive or attempt to drive any vehicle while the person is under the influence of alcohol per se.
(3) A person may not violate paragraph (1) or (2) of this subsection while transporting a minor.
- (b) (1) a person may not drive or attempt to drive any vehicle while impaired by alcohol.
(2) A person may not violate paragraph (1) of this subsection while transporting a minor.
- (c) (1) A person may not drive or attempt to drive any vehicle while he is so far impaired by any drug, any combination of drugs, or a combination of one or more drugs and alcohol that he cannot drive a vehicle safely.
(2) It is not a defense to any charge of violating this subsection that the person charged is or was entitled under the laws of this State to use the drug, combination of drugs, or combination of one or more drugs and alcohol, unless the person was unaware that the drug or combination would make the person incapable of safely driving a vehicle.
(3) A person may not violate paragraph (1) or (2) of this subsection while transporting a minor.
- (d) (1) A person may not drive or attempt to drive any vehicle while the person is impaired by any controlled dangerous substance, as that term is defined in § 5-101 of the Criminal Law Article, if the person is not entitled to use the controlled dangerous substance under the laws of this State.
(2) A person may not violate paragraph (1) of this subsection while transporting a minor.
- (e) For purposes of the application of subsequent offender penalties under § 27-101 of this article, a conviction for a crime committed in another state or federal jurisdiction that, if committed in this State, would constitute a violation of subsection (a), (b), (c), or (d) of this section shall be considered a violation of subsection (a), (b), (c), or (d) of this section.

ARRESTING OFFICER CODE			RECORD OF ARREST				ARREST NUMBER	
M00120109			QUEEN ANNE'S COUNTY OF MARYLAND				04-0036	
POLICE DEPARTMENT FORM 83/11 USE CAPITALS EXCEPT FOR SIGNATURES			1. NAME (LAST, FIRST, MIDDLE)		AGE	2. COMPLAINT NO.		
			<i>LECHTER HAYDEN LEE</i>		<i>17</i>	<i>01556</i>		
18. CAR <i>65</i>	19. POST <i>CENTREVILLE</i>	20. REPORTING OFFICER <i>MCCRYSAL, A.</i>	3. ADDRESS			4. CUSTODY NO.		
			<i>112 MCDONALD DRIVE</i>			<i>334BC006</i>		
21. TAKEN INTO CUSTODY (LOCATION & TIME)			<i>QUEEN ANNE'S HOSPITAL 22:45</i>			5. RES PHONE <i>410-555-1987</i>		
22. LOCATION OF INCIDENT <i>CHESTNUT AND SPRUCE STS</i>		23. SOBRIETY ___Yes <input checked="" type="checkbox"/> No	6. SCHOOL <i>N/A</i>		GRADE <i>N/A</i>			
24. DATE <i>JUNE 26, 2010</i>	TIME <i>22:30</i>	25. NARCOTIC ___Yes <input checked="" type="checkbox"/> No	7. ALIAS OR NICKNAME <i>N/A</i>	8. SOCIAL SEC. NO <i>878-99-6990</i>		9. PLACE OF BIRTH <i>CHESTERTOWN, MD</i>		
26. VEHICLE INVOLVED: Make/Model License State <i>2009 HONDA ACCORD DRT3995 MD</i>			10. EMPLOYED <i>STUDENT</i>		BUSINESS PHONE <i>N/A</i>		11. INDENT. NO. <i>N/A</i>	
27. OFFICER IN CASE <i>MCCRYSAL, ANDY</i>		SEQ. NO. DIST. OR UNIT <i>CENTREVILLE</i>	12. INCIDENT (EXPLAIN) <i>DUI/ NEGLIGENT DRIVING</i>		13. COMP. FILED ___Yes <input checked="" type="checkbox"/> No		14. DATE OF CUSTODY <i>JUNE 26, 2010</i>	
Race: Height: <i>5'7"</i> Weight: <i>140</i> Eyes: Hair:		15. JUDGE <i>TBD</i>		TRIAL DATE <i>TBD</i>	16. DISPOSITION <i>PENDING</i>		17. WARRANT NO. <i>N/A</i>	
28. COMPLAINANT <i>N/A</i>			ADDRESS <i>N/A</i>	CITY	ZIP	RES. PH <i>N/A</i>	BUS. PH <i>N/A</i>	
29. REPORTING PERSON <i>N/A</i>			ADDRESS	CITY	ZIP	RES. PH	BUS. PH	
30. ACCOMPLICE <i>N/A</i>			ADDRESS	CITY	ZIP	PH NO.	CUSTODY NO.	
31. HOW TRANSPORTED <i>CRUISER</i>		32. CAR NO. <i>65</i>	33. SEARCHED BY <i>MCCRYSAL</i>		SEQ. NO.	34. NATURE OF INJURY <i>SHAKEN UP</i>		
						35. HOSPITALIZED <i>NO</i>		
36. NARRATIVE On June 26, 2010 at 22:32 I was dispatched to the corner of Chestnut and Spruce for an accident. When I arrived at the scene I saw two pedestrians, one lying in the crosswalk moaning with a leg injury and the other lying unconscious, but breathing on the side of the road. I did not move the injured. the driver and passenger of the car involved appeared to be shaken up. The car was stopped just after the crosswalk heading east on Chestnut. EMS personnel arrived and assisted the two pedestrians. I learned that Dakota Miller was the leg injury victim and that the unconscious one was Sam Spangler. I questioned the driver and passenger about the accident. A Jordan Bundy was the passenger and was asleep at the time. The driver, Hayden Lechter, appeared disoriented and the pupils of both eyes were dilated although not bloodshot. Hayden was quiet and attempted to answer my questions but seemed perplexed by most. Hayden's speech was slow and deliberate, but halting. I did detect the faint odor of stale beer on Hayden's breath, but no containers were evident in the vehicle. The EMS wanted to take both Hayden and Jordan to the hospital for observation. They were taken to the hospital by ambulance. After Hayden was examined and released after 20 minutes, I again questioned Hayden. I asked how the accident occurred and was told that "the weather conditions were terrible, it was raining hard, very windy with lightning and thunder so I could not have be going faster than 25 mph." I asked if they had been drinking and Hayden stated, "I only had one beer and that was over two hours ago." Based on the accident and the admission that alcohol was consumed I asked Hayden to submit to a breathalyzer test and Hayden consented. The test registered a BAC of .04, seventy-five minutes after the accident at 22:45. I used the general figures for the BAC regression and extrapolated that the subject's BAC at the time of the accident was approximately .055. I therefore placed the subject under arrest for DUI, negligent driving, and underage possession. The subject was handcuffed, Mirandized, and taken to the station.								
IMPORTANT NOTICE FROM THE CIRCUIT COURT OF QUEEN ANNE'S COUNTY, DIVISION FOR CRIMINAL								
You will receive a summons if a complaint is filed with the QUEEN ANNE'S COUNTY Circuit Court. You are required to notify the Court Clerk's Office, 100 Court House Square, Centreville, MD 21617, 410-555- 7591 of any change of address for you. Failure to obey a Court summons or give notification of change of address will result in re-arrest and a proceeding against you for Contempt of Court.								
I acknowledge receipt of this notice: <u>Hayden Lechter</u>						Date: <u>June 26, 2010</u>		



"BAC Comparison Over Time" Chart*

Any "average elimination" charts are simply that---for the average person. Your rate could well be SLOWER, meaning that your BAC level would be higher than shown here, at a given time. The purpose of this comparison chart is to demonstrate why SLOWING down consumption can be very beneficial to most drinkers, especially those who have larger body size, especially the average male drinker (versus average female of the same weight). See "[Male/Female Differences](#)".

	# of Drinks Consumed [in 1 hour]					One drink is equal to a jigger (1¼ oz. oz.) of 80-proof liquor, 12 oz. of beer, or 4 oz. of table wine.
	1	2	3	4	5	
Body Weight Pounds						Average Drinker's Elimination is 0.015% per hour
100	.038	.075	.113	.150	.188	
120	.031	.063	.094	.125	.156	
140	.027	.054	.080	.107	.134	A BAC of ≥ 0.080 legally intoxicated in MOST states). And, ≤ 0.050 is considered NOT impaired in most.
160	.023	.047	.070	.094	.117	
180	.021	.042	.063	.083	.104	
200	.019	.038	.056	.075	.094	

	# of Drinks Consumed [in 2 hours]					One drink is equal to a jigger (1¼ oz. oz.) of 80-proof liquor, 12 oz. of beer, or 4 oz. of table wine.
	1	2	3	4	5	
Body Weight Pounds						Average Drinker's Elimination is 0.015% per hour
100	.023	.060	.098	.135	.171	
120	.016	.048	.079	.110	.141	
140	.012	.039	.065	.092	.119	A BAC of ≥ 0.080 legally intoxicated in MOST states). And, ≤ 0.050 is considered NOT impaired in most.
160	.008	.032	.055	.079	.102	
180	.006	.027	.048	.068	.089	
200	.004	.023	.041	.060	.079	

* DrunkDrivingDefense.com

Headnote: *Preston Carter v. Senate Masonry, Inc.*, No. 334, September Term, 2002.

NEGLIGENCE - CONTRIBUTORY NEGLIGENCE - LAST CLEAR CHANCE DOCTRINE -

The last clear chance doctrine could be applied to an accident on a construction site that involved a forklift operator and a commercial plumber. The plumber was injured in the accident and sued the employer of the forklift operator. The evidence at trial showed that both the plumber and the forklift operator were negligent, but there was also evidence from which the jury could surmise that the forklift operator had the final opportunity to avoid the accident. That is, a jury could have concluded that, given the sequence of events detailed in testimony, as well as the forklift operator's superior knowledge of the impending danger, he had the superior ability to avert the accident.

Because there was evidence supporting the jury's verdict, the trial court should not have disturbed it by granting judgment notwithstanding the verdict in favor of the forklift operator's employer. This Court reinstates the jury verdict.

REPORTED
IN THE
COURT OF SPECIAL APPEALS OF MARYLAND
EN BANC

No. 334
September Term, 2002

PRESTON CARTER
V.
SENATE MASONRY, INCORPORATED

Murphy, C.J.,
Davis,
Hollander,
Eyler, James R.,
Sonner,
Kenney,
Eyler, Deborah S.,
Adkins,
Krauser,
Barbera,
Sharer,
JJ.

Opinion by Sonner, J.
Concurring Opinion by Krauser, J., which
Murphy, C.J., joins
Dissenting Opinion by Eyler, James R., J.,
which Davis, J., Kenney, J., and Eyler,
Deborah S., J., joins

Filed: April 6, 2004

This appeal concerns the legal doctrine of “last clear chance.” Preston Carter accused an employee of Senate Masonry, Incorporated (“Senate”) of negligently harming him at a construction site. A jury in the Circuit Court for Prince George’s County accepted that accusation, but found Carter negligent as well. Nonetheless, it awarded Carter damages, with the apparent belief that the Senate employee had the last clear chance to avoid the injury, and his failure to do so warranted compensation for Carter. The trial court disagreed and granted Senate’s post-trial motion for judgment notwithstanding the jury’s verdict (“JNOV”). We disagree with the trial court and reinstate the jury’s verdict.

I.

It is critical to note at the outset that we present the facts in the light most favorable to Preston Carter, because he prevailed at trial and lost below on the JNOV. See *Wholey v. Sears Roebuck*, 370 Md. 38, 46, 803 A.2d 482 (2002). That also means that, in our analysis, we will reverse the grant of the JNOV if there is any evidence from which the jury could have reached the conclusion that it reached. *Houston v. Safeway Stores, Inc.*, 346 Md. 503, 521, 697 A.2d 851 (1997). The circuit court must respect these same guiding principles when it receives a motion for JNOV. See *I.O.A. Leasing Corp. v. Merle Thomas Corp.*, 260 Md. 243, 248-50, 272 A.2d 1 (1971).

The evidence at this trial consisted of three primary witnesses: two fact witnesses presented by Carter and an expert witness presented by Senate. Carter is a commercial plumber with twenty years’ experience. He testified that on August 15, 1997, he was working in Columbia, Maryland, at the construction site for a new Safeway supermarket. While installing some rudimentary plumbing, Carter walked over to the nearby scaffolding to locate certain pipe fittings. He noticed a forklift that was situated about a hundred feet away from him. The forklift operator delivered a cube of cinder block to the scaffold.

As he knelt on the ground searching for the parts, he perceived the forklift move in behind him, coming as close as six to ten feet from him, and then stop in front of the scaffolding. The operator of the forklift then maneuvered the machine to place a pan of mortar upon the cube of cinder blocks that had just been delivered to the scaffold. His action caused several of the blocks to fall, striking Carter in the head, neck, shoulder, and back. It was Carter’s testimony that he would have been clearly visible to the forklift operator all the time that he knelt near the scaffold.

Hervan Montiel, the Senate employee who operated the forklift, testified as plaintiff’s witness and recounted the series of events as follows:

I remember the day of the accident. My tractor was parked. I tried to move the arm of the tractor towards the scaffold. And on my right side a person was coming by, and since he didn’t stop, I stopped the arm of my tractor. He went underneath and he went to my left side. I waited for him to go

away at least some eight or ten feet. And when he was no longer in front of me I continued with my concentration with the job that I was doing. I remember that when I put the box of the mix on one side then when I was taking out the forks I heard that someone screamed or yelled. ¹And I saw what happened, the man was on the ground. And that's all I remember.[1]

Montiel stated further that he did not use a pallet on the morning of the accident, which he knew might lead to the forks of the forklift breaking the cube of cinder blocks, upon which he placed the pan of mortar.

Both Carter and Montiel denied having said anything to one another as they proceeded with their respective tasks. Carter explained, “[W]hen you’re working construction you don’t think to ask a guy to stop laying brick while you look for fittings.” He did not believe his actions were unsafe. Montiel acknowledged that he thought the placement of the block on the scaffold created a dangerous situation. Senate put forth the testimony of Stephen Fournier, an expert in civil engineering, who investigated “the circumstances” of Carter’s injuries “to determine if anybody associated with the work acted in an unsafe or inappropriate manner.” The exclusive source of his eyewitness information was Senate employees. Fournier testified that Carter put “himself in a position of danger,” but also that Montiel increased the risk of injury by operating the forklift without a pallet. He was equivocal in his opinion as to whether Montiel had a duty to warn Carter of danger. Fournier stated that, if Montiel knew Carter was in a position of danger, he had a duty to warn; but, then, in response to questions posed by Senate’s counsel, he remarked that Montiel “acted reasonably” in continuing with his work, without communicating with Carter.

At the close of the evidence, Senate moved for judgment upon the assertions that Carter acted negligently, but Montiel did not. Carter responded that Montiel breached a duty to warn and a duty to stop the forklift operation once he saw Carter kneeling by the scaffold. He raised the specter of the last clear chance doctrine. The circuit court reserved ruling on the motion, stating, “[T]here are facts that would sustain a finding of negligence and facts that would find there was no contributory negligence.” The judge also noted his uncertainty as to whether the last clear chance doctrine applied. Accordingly, the court denied Carter’s motion for judgment, which he premised on the last clear chance doctrine.

Preparing the case for deliberation, the court instructed the jury on negligence, contributory negligence, and as follows:

The plaintiff has alleged that the Defendant had the last clear chance to avoid the injuries sustained by the Plaintiff. Before you can determine the issue of last clear chance you must first determine that the Defendant was

¹ As the trial court noted, Carter and Montiel differed in their description of the sequence of events. Carter said that the forklift began its operation once he had already stopped near the scaffold. According to Montiel, however, he began the operation, stopped to let Carter pass, then continued his work.

negligent, second that the Plaintiff was contributorily negligent, and third, that the Defendant had a fresh opportunity of which the Defendant was aware to avoid the injury.

The jury returned a verdict in favor of Carter, finding that Senate was negligent through the actions of Montiel, Carter was contributorily negligent, and Senate had the last clear chance to avoid the accident. It awarded Carter about \$66,000.00 in economic damages and \$150,000.00 in non-economic damages.

Senate then moved for JNOV, with the principal assertion that Carter and Montiel committed their respective negligence simultaneously, so Senate could not be held to have squandered the final opportunity to avoid the accident. Also, Senate argued that Montiel did not have “superior knowledge” over Carter as to the risk at hand.

Carter rebutted both those assertions. He attributed greater knowledge to Montiel, who surveyed the scene from the height of the forklift cab and who worked with cinder blocks on a regular basis. Moreover, Carter chronicled the events as follows: (1) Carter negligently stooped near the scaffold; (2) Montiel negligently failed to warn him to leave the area; and (3) Montiel negligently continued with the forklift operation. With this sequence of events, Montiel was the final bearer of the accident and injury.

The trial judge engaged counsel in lengthy discussions about the facts of the case and the plethora of cases on point, but he was confident that, no matter how he ruled, the case would be appealed. Ultimately, the court granted Senate’s JNOV, without much explanation.

II.

Both Senate and Carter concede, for purposes of this appeal, that there were sufficient facts from which the jury could find that each of them acted negligently. That leaves them debating only whether Montiel could have avoided the accident – whether he held the last clear chance to transform the unfortunate hit to a near miss.

As this Court explained in *Burdette v. Rockville Crane Rental, Inc.*, 130 Md. App. 193, 216, 745 A.2d 457 (2000):

[T]he doctrine of last clear chance permits a contributorily negligent plaintiff to recover damages from a negligent defendant if each of the following elements is satisfied: (i) the defendant is negligent; (ii) the plaintiff is contributorily negligent; and (iii) the plaintiff makes “a showing of something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence.”

The theory behind the doctrine is that “if the defendant has the last clear opportunity to avoid the harm, the plaintiff’s negligence is not a ‘proximate cause’ of the result.” *Id.* at 215 (quoting W. Prosser, *Law of Torts* §66 (4th ed. 1971)).

“A fresh opportunity” is the operative phrase, for the doctrine will apply only if “the acts of the respective parties [were] sequential and not concurrent.” *Id.* at 216. In other words, the defendant must have had a chance to avoid the injury after plaintiff’s negligent action was put in motion. *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 637-38, 495 A.2d 838 (1985). The doctrine “assumes” that, after the primary negligence of the plaintiff and defendant, “the defendant could, and the plaintiff could not, by the use of the means available avert the accident.” *United Rys. Co. v. Sherwood Bros.*, 161 Md. 304, 310, 157 A. 280 (1931). In this way, the defendant should have recognized and responded to the plaintiff’s position of “helpless peril.” *Baltimore & O.R. Co. v. Leasure*, 193 Md. 523, 534 (1949).

Our research revealed more than four dozen reported Maryland cases discussing the last clear chance doctrine. Its history in our State law dates back to 1868. *See Burdette*, 130 Md. App. At 215-16 (tracing the doctrine’s roots to English common law); *Ritter v. Portera*, 59 Md. App. 65, 70-72, 481 A.2d 239 (1984) (same); *see also N. Cent. Ry. Co. v. State*, 29 Md. 420, 436 (1868) (first reference of the doctrine in Maryland law). The doctrine is more often described than applied because of the requirement that plaintiffs show a new act of negligence following their own actions.

In *Sears v. Baltimore and Ohio Railroad Co.*, 219 Md. 118, 148 A.2d 366 (1959), for example, the Court of Appeals declined to extend the doctrine to a plaintiff/appellant whose truck collided with a train as it crossed a set of tracks. The Court wrote:

[T]here was no evidence sufficient to go to the jury in the present case to support a finding that, assuming the appellant's negligence, there was a time after such negligence when the appellee could have averted the accident and the appellant could not. Both the train and the truck were moving at the time of the impact, and it is clear that if the appellee was negligent, its negligence was concurrent and not sequential. We have said that in order for the rule to be applicable "[s]omething new, or independent, must be shown, which gave the defendant a fresh opportunity to avert the consequences of his original negligence and the plaintiff's contributory negligence." Even though the operator of the appellee's locomotive saw the appellant's truck standing or moving slowly at a point close to the tracks, he had the right to assume that the appellant would stop before he reached the track upon which the train was proceeding. The appellant did not present any evidence to support an inference that the appellee had a "fresh opportunity" to avert the consequences of his own contributory negligence in driving onto the tracks.

Id. at 125-26 (citations omitted).

Likewise, in *Quinn v. Glackin*, 31 Md. App. 247, 355 A.2d 523 (1976), this Court did not see a last clear chance in an accident between a girl on a bicycle and a motorist. The adult, Mr. Glackin, saw the child heading for the street from her driveway when he was about 100 feet away from the driveway. He applied his brakes when he was about thirty feet away from her. The injured child, Marie Quinn, conceded her own negligence, but sought refuge in Mr. Glackin's failure to see her sooner and his failure to warn her of the impending danger by blowing the horn. In her view, after she headed for the street, "there was then still time for [Mr. Glackin] to avoid the accident." *Id.* at 251.

This Court disagreed:

If the evidence in this case was sufficient to show any negligence at all on Mr. Glackin's part, and it is unnecessary to decide whether it was, then it was original negligence which continued, and concurred with the admitted negligence of Marie Quinn to cause her injury.

There could be no fresh opportunity available to Mr. Glackin to avoid the consequences of Marie Quinn's negligence until she did something negligent. Her approach down the driveway was not negligent, and did not then place her in a position of peril. Her lawful approach could not constitute notice to Mr. Glackin that she would fail to yield the right of way to him. A motorist on the favored highway has the right to assume that the unfavored driver will yield the right of way.

Marie Quinn's negligence - her failure to yield the right of way to a motorist on the favored highway - was followed almost instantaneously by the accident. The trial judge correctly ruled that there was no evidence to show that Mr. Glackin had a last clear chance to avoid the accident.

Id. at 254-55. Thus, we rejected plaintiff's attempt to split Mr. Glackin's negligence into separate acts of negligent warning and negligent doing.

In contrast, the premier example of the last clear chance doctrine at work is *Ritter v. Portera*, 59 Md. App. 65, 474 A.2d 556 (1984), which involved a group of young people and a moving car. One of the teenagers perched on the hood of the car, and, as the driver sped up and drove away, she fell off the car, grabbed hold of the bumper, and was dragged at least twenty feet. Clearly, the driver was negligent in inviting people to sit on the hood of his car, but the injured person was also negligent in accepting the invitation. For the trial court, the contributory negligence barred the teenager's claim against the driver.

This Court reversed, however, reasoning that the injured teenager was not a "proximate cause of the accident." Instead, the driver "could have, and indeed should have, refused to move the vehicle while [the teenager] was so situate[d]." *Id.* at 72. Because the driver's negligence was so clearly sequential to whatever negligence preceded it, the injured teenager was entitled to pursue a claim for recovery. *See also Payne v.*

Healey, 139 Md. 86 (1921) (invoking the last clear chance doctrine to allow evidence to go to a jury that showed that train operators were responsible for a collision between an automobile and a semaphore).

III.

Carter faces the same hurdle as the plaintiffs in the cases discussed above. He cannot recover if the facts show only that he and Montiel both acted unreasonably, which would create only a concurrent negligence. Rather, Carter must show that the jury could have read the facts to mean that Montiel was negligent, Carter was negligent, and then Montiel had a new opportunity to change the course of events.

We conclude that the facts could have been read to show the sequential course of events that Carter needs to defeat the grant of JNOV. The jury could have found from the testimony that Montiel negligently first placed the cube of cinder blocks on the forklift without using a pallet and placed them on the scaffold, possibly breaking some; that later, with the pan of mortar on the forklift, he saw Carter kneeling by the scaffold in harm's way and failed to warn him of the danger; and that, following a pause in his operations, he negligently proceeded to place the mortar on the scaffold, causing the cinder blocks to fall. There are various points along this continuum of negligent conduct where the jury might have interjected Carter's negligence, but the bottom line is that the jury could have concluded that Montiel held the final opportunity to avoid the accident.

Beyond the doctrinal phrases of "last clear chance," "fresh opportunity," and "helpless peril," the jury could have found from the evidence in this case an account of two men acting dangerously on a construction site, but with one man having superior knowledge of the impending danger, as well as the superior ability, the last clear chance, to avert it. Montiel was not like the train conductor in *Sears*, who could only watch the truck impede on the railroad tracks, or the driver in *Quinn*, who had no real opportunity to avoid hitting the child rushing at him. Montiel controlled the final force that brought about this accident – the forklift. Like the young driver in *Ritter*, Montiel had a "fresh opportunity" to avoid the accident. He could have refused to move his vehicle as long as Carter remained in danger. Because the jury could have lawfully found in favor of Carter, the circuit court should have respected its decision, and we now reinstate that verdict.

**JUDGMENT OF THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY REVERSED,
WITH INSTRUCTIONS TO REINSTATE THE
JURY'S VERDICT.**

APPELLEE TO PAY COSTS.

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND
EN BANC

No. 334
September Term, 2002

PRESTON CARTER
v.
SENATE MASONRY, INC.

Murphy, C.J.,
Davis,
Hollander,
Eyler, James R.,
Sonner,
Kenney,
Eyler, Deborah S.,
Adkins,
Krauser,
Barbera,
Sharer,
JJ.

Concurring Opinion by Krauser, J.,
which Murphy, C.J., joins
Filed:

I concur in the result reached by the majority but I regret that this Court did not take the opportunity presented by this case to modify Maryland's last clear chance rule and rid it of an odious doctrinal accretion: the requirement that the plaintiff must first prove that the defendant was negligent before the defendant had the last clear chance to avoid injuring the plaintiff.² It is an "accretion" because it was not part of the last clear chance rule when that rule was first promulgated. It is "odious" because regardless of how helpless the plaintiff, how perilous his predicament, and how blameworthy the defendant's conduct, the plaintiff cannot recover unless he or she can first show a preliminary act of negligence by the defendant.

² Maryland's last clear chance rule requires the following elements to be satisfied before a plaintiff can recover: "(i) the defendant is negligent; (ii) the plaintiff is contributorily negligent; and (iii) the plaintiff makes 'a showing of something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence.'" *Burdette v. Rockville Crane Rental, Inc.*, 130 Md. App. 193, 216 (2000) (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 638 (1985)).

This factitious requirement has no intellectual genealogy. It owes its perpetuation to the reflexive application of precedent, not to the reflective application of policy. Indeed it serves no discernible public policy, though it undermines a few, as it exculpates the tortfeasor, no matter how egregious his negligence, while inculcating the tort victim, no matter how slight his fault. This criticism, some will no doubt point out, is also applicable to the doctrine of contributory negligence itself. That may be, but in last clear chance cases this criticism is more telling. For, in sharp contrast to a typical negligence tortfeasor, a last clear chance tortfeasor knows, before acting, who his likely victim is, the probable consequences of his actions, and the helpless state of his victim. Consequently, last clear chance cases often involve an element of callous indifference and sheer recklessness that is missing in ordinary negligence cases.

What is more, this requirement was not an element of the last clear chance rule as that rule was originally conceived. The last clear chance rule was first articulated in *Davies v. Mann*, 10 M. & W. 546, 152 Eng. Rep. 588 (Ex. 1842), cited in Charles A. Keigwin, *Cases on Torts* 276-77 (3rd ed. 1929). In that case, the plaintiff left his “fettered” donkey on a public highway. It was then run over by the defendant’s wagon when he ignored the donkey’s peril. But the facts of *Davies* are best summed up by the case itself:

The plaintiff fettered the fore feet of a donkey and turned the beast into a public road to graze. The defendant’s wagon came down the road at what a witness called a smartish pace and on a slight descent ran down the donkey, which was unable to get out of the way and soon afterwards died from the injuries caused by the collision.

Id. (footnote omitted).

Concluding that the defendant was liable for the plaintiff’s loss despite the plaintiff’s negligence in leaving a “fettered” donkey on a public road, the *Davies* court declared:

[A]lthough there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant’s negligence, he is entitled to recover; if by ordinary care he might have avoided them, he is the author of his own wrong. . . . All that is perfectly correct; for, although the ass may have been wrongfully there, still the defendant was bound to go along the road at such pace as would be likely to prevent mischief. Were this not so, a man might justify driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road.

Id.

In finding the defendant negligent, the court did not consider whether the defendant had committed a preliminary act of negligence but only whether he had the last clear chance to avoid the accident. Unfortunately, the lesson of this seminal case has been obscured by the adoption of a wholly gratuitous requirement that bears not at all on the question: Did the defendant have the last clear opportunity to avoid the accident but chose not to, knowing the plaintiff’s helpless and perilous position?

We are but one of a few states that still adheres to the doctrine of contributory negligence, a doctrine that most other states have found too harsh and pitiless to apply. The last clear chance rule was formulated to reduce, in some small measure, the severity of that doctrine. But, in adopting that rule, we have needlessly limited its application by pointlessly requiring a deserving plaintiff to jump through an additional hoop to have any hope of recovery.

Had we seized the opportunity to recast the last clear chance rule so that it comported with its original formulation, we would not be alone. We would be joining at least one other contributory negligence state, North Carolina. Guided by *Davies v. Mann*, the Supreme Court of North Carolina in *Vernon v. Crist*, 231 S.E.2d 591 (N.C. 1977) declared:

If defendant had the last clear chance to avoid injury to the plaintiff and failed to exercise it, then his negligence, and not the contributory negligence of the plaintiff, is the proximate cause of the injury. This interpretation of the doctrine is in keeping with the theory behind the original English 'Fettered Ass Case,' *Davies v. Mann*, 10 M. & W. 547, 152 Eng. Rep. 588. 'The only negligence of the defendant may have occurred after he discovered the perilous position of the plaintiff. Such 'original negligence' of the defendant is sufficient to bring the doctrine of the last clear chance into play if the other elements of that doctrine are proved.' *Exum v. Boyles*, [158 S.E.2d 845, 853 (N.C. 1968)].
Id. at 596.

The North Carolina court stressed:

For the doctrine to apply it must appear 'that after the plaintiff had, by his own negligence, gotten into a position of helpless peril (or into a position of peril to which he was inadvertent), the defendant discovered the plaintiff's helpless peril (or inadvertence), or, being under a duty to do so, should have, and, thereafter, the defendant, having the means and the time to avoid the injury, negligently failed to do so.' [*Exum*, 158 S.E.2d at 853].

Id.

And finally, this wholly unwarranted obstacle to recovery has led our courts to stretch and strain to find acts of preliminary negligence by the defendant, where none exist, but where the injuries of the hapless plaintiff are great and the conduct of the defendant particularly censurable. The creativity displayed by these courts in trying to squeeze a square peg into a round hole has been impressive (and, in my view, laudatory) but I hope at some later date will become entirely unnecessary.

REPORTED
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No. 334

PRESTON CARTER

v.

SENATE MASONRY, INC.

Murphy, C.J.,
Davis,
Hollander,
Eyler, James R.,
Sonner,
Kenney,
Eyler, Deborah S.,
Adkins,
Krauser,
Barbera,
Sharer,
JJ.

Dissenting Opinion by Eyler, James R., J.,
which Davis, J., Kenney, J., and Eyler,
Deborah S., J., join

Filed:

I respectfully dissent. To help create a mental picture of the scene, to understand the negligent acts of the parties, I shall begin with some general background information.

The following description is derived from appellant's testimony. The incident occurred on the construction site for a building which, when finished, would house a Safeway store. As is typical in that situation, the work of subcontractors was coordinated, and more than one subcontractor worked on the site at the same time.

During the time period leading up to the day of the incident, appellant's employer, a plumbing subcontractor, was on the site, and appellee, a masonry subcontractor, was on the site. It is unknown whether other subcontractors were also working on the site. At that time, the building was in its early stages of construction. Concrete footers had been poured, defining the footprint of the building. Cinder blocks had been laid on the footers to grade height at some or all of the wall locations. Appellee had erected a three level scaffold from one corner of the building to another corner of the building for the purpose of laying cinder blocks to build a wall to its desired height. Appellant's employer, including appellant, had finished approximately 50 per cent of the initial, pre-building shell, plumbing work which consisted of trenching, laying pipes, and backfilling to cover the pipes. The pipes were to serve as water supply and drain lines. The ends of the lines at various locations were "stubbed," meaning that they extended above ground level,

to eventually be connected to the internal plumbing of the building, after the pouring of a concrete slab and the erection of the building shell and installation of internal plumbing.

According to appellant, on the day of the incident, he was working in a trench laying pipe approximately 30 to 40 feet from where appellee's employees were constructing a block wall. The scaffolding was three levels high, but the wall was in its early stages and the masons were working off, or slightly below,³ the first level of the scaffolding, which was 5 to 7 feet in height. Appellant walked to an area near the scaffolding to look for pipe fittings in bins left in that area.

Appellant testified that he saw the forklift in question as it entered the building footprint. He explained that he knew the forklift would deliver materials to the scaffolding for the masons and he knew the path the forklift would take. He knew this because the forklift had to take the same path each time in order to maneuver between the stubbed pipes and other obstructions within the footprint. Appellant testified that he went to the bins and kneeled, approximately 5 to 6 feet from the scaffolding. While there, he knew that the forklift had moved to its destination, approximately 8 to 10 feet behind him, and was unloading its materials. Appellant also knew that blocks were on the scaffolding and that masons were working from the scaffolding. According to appellant, there were no obstructions between him and the forklift operator and, therefore, nothing to prevent either one from seeing the other.

Appellant had worked as a plumber for 24 years, mostly commercial plumbing, similar to the job that he was working on at the time of the incident. He stated that it was typical for plumbers and masons to work on a construction site at the same time. Appellant testified that, on construction jobs, a worker typically does not ask another subcontractor's employee to stop work in order for the worker to get something because each worker is responsible for not putting himself or herself in a dangerous position. He did not think he had put himself in a position of danger, however, because he had been around scaffolds on many occasions and had never seen whole blocks fall. He acknowledged the potential for danger and that pieces of block frequently would fall while masons were working. Appellant did not see what struck him prior to impact. He did not know what caused the blocks to fall.

Hervin Montiel, the forklift operator, testified to the following. He approached the scaffolding with a mortar pan full of mortar to be placed on the first level of the scaffolding. He stopped, approximately 12 feet from the scaffolding, at the location from which he planned to move the boom to which the forks were attached to place the pan. While stopped, he noticed a man walk by, underneath the boom. He waited until

³ It is clear that cinder blocks and other materials used by the masons were located on the first level. There was testimony that there were "hangers" on the scaffold, lower than the level holding the materials, so that workers could stand on the hangers while laying the blocks. It is unclear where the workers were standing at the time of the incident.

the man was 8 to 10 feet away. At that point, he ceased watching the man, concentrated on placing the mortar pan, and did so. After he set the mortar pan on the scaffolding, he heard someone yell. Montiel did not see appellant being struck. When he saw appellant lying on the ground after being hit, appellant was 10 inches from the edge of a hanger which extended approximately two feet from the scaffolding. Montiel did not testify as to how far appellant was from the forklift.

Some of the questions Montiel was asked concerned the situation as it existed on the day of the incident; others were general questions, about the usual performance of his work. With respect to the specifics of the day of the incident, Montiel testified that he did not see any broken blocks on the scaffolding. Also, he did not see any blocks fall. Speaking generally, he acknowledged that, when blocks are placed on scaffolding by a forklift, particularly without a pallet, blocks sometimes break. The blocks on the scaffolding in question on the day of the incident were placed there without a pallet, by inserting the forks through the holes in the bottom layer of blocks to be moved.

Montiel acknowledged it was possible that broken blocks were on the scaffold. Again speaking generally, he stated that, when a mortar pan is placed on scaffolding, the scaffolding may vibrate, sometimes causing blocks to fall. He also acknowledged that the possibility of blocks falling would be greater if there were broken blocks on the bottom of the stack of blocks. Montiel testified that, after the man walked by, he continued with his work. He did not think the man, appellant, was in a place of danger.

Stephen Fournier, a professional engineer, testified as an expert witness on behalf of appellee.⁴ On direct examination, Fournier described the situation as it existed leading up to the incident as “normal.” He acknowledged that placing a mortar pan on scaffolding could cause material to fall, including blocks. Speaking generally in terms of what constituted good practice, and not the specifics as they existed at the time, he opined that appellant violated good construction practice by placing himself in an area where there was a potential hazard of falling material.

On cross-examination, Fournier was asked several hypothetical questions. In essence, Fournier testified that, assuming: (1) there were broken blocks on the scaffolding; (2) that they were on the bottom of the stack of blocks; and (3) that placing the mortar pan caused vibration, it would create an unstable condition. This possibility would be foreseeable by an experienced worker, including Montiel. Further assuming that Montiel knew appellant’s location and knew that it was a position of danger, then Montiel had a duty to warn appellant and to not proceed with his work.

⁴ To understand why Fournier was asked various hypothetical questions, it is helpful to point out that no one saw a block fall and hit appellant, nor did anyone offer direct evidence why blocks fell.

On redirect examination, Fournier testified that, if Montiel did not know there were broken blocks on the scaffolding and he believed appellant was at least 5 feet from the scaffolding, he could continue with his work. If Montiel subjectively believed that appellant was in a position of danger, Montiel should have stopped until appellant left the position of danger.

The above constitutes the testimony relevant to the issue before us. The jury found that appellee was negligent, appellant was negligent, and that the act of negligence of each was a proximate cause of the incident. The only question before this Court is whether the last clear chance doctrine was applicable on these facts.

In order for last clear chance to apply under Maryland law, there must first have been acts of negligence by both the plaintiff and the defendant, each proximately causing the incident in question. If a defendant is primarily negligent, and a plaintiff is contributorily negligent, the plaintiff's action is barred.

That bar does not exist if the defendant committed an act of negligence different from that which resulted in a finding of primary negligence at a point in time after the plaintiff has been contributorily negligent, and the new act of negligence can be said to supersede the plaintiff's act of contributory negligence. Thus, for last clear chance to apply, we have the well settled requirement, acknowledged by the majority, that a defendant must have committed sequential acts of negligence. Burdette v. Rockville Crane Rental, Inc., 130 Md. App. 193, 216 (2000). The first act gives rise to primary negligence. The second act must occur at a time when the plaintiff can not avoid the accident. See Kassama v. Magat, 368 Md. 113, 133 (2002) (quoting MPJI section 19:12 (2d ed 1984)). This is sometimes referred to as the plaintiff being in a position of helpless peril while the defendant has a fresh opportunity to avoid the accident. Id.

In this case, appellant's negligence theory rested on a single negligent act: that Montiel placed the mortar pan on the scaffolding, without warning appellee, when he knew or should have known that there were broken blocks on the scaffolding, thus creating an unstable condition, which resulted in a block or blocks falling on appellant. Appellee's contributory negligence against appellant also rested on a single act of negligence: that he placed himself in a position that he knew or should have known was dangerous and remained there with knowledge of the forklift's operation. Obviously, the jury found that appellant should have known that he placed himself in a dangerous position and that Montiel should have known the same.

The relevant point is that, while both parties were negligent, the negligent acts were concurrent. The only act of Montiel's negligence was placing the mortar pan on the scaffolding, when he knew or should have known that it might cause blocks to fall, and that appellant was in a zone of danger.

On appeal, appellant does not argue to the contrary. Indeed, he could not make a contrary argument because no evidence of any other act of negligence was presented. Specifically, the majority's theory that Montiel may have committed a preliminary separate act of negligence in placing the blocks on the scaffolding, without using a pallet, has not been argued by appellant. The reason for that is clear: it has no support in the record. In fact, the only evidence on that point was that placing the blocks, without a pallet, was normal. A jury finding to the contrary, had it been made, would have been based on pure speculation. At trial, the sole point of the evidence that there was or might have been broken blocks on the bottom of the stack of blocks was to show instability in the stack and to show foreseeability of an accident when the mortar pan was placed on the scaffolding. The majority's theory as to what might have been the evidence, findings, and argument is not this case.⁵

What appellant does argue on appeal is that the jury could have found that Montiel's failure to warn was a negligent act separate from his conduct of placing the mortar pan on the scaffold. Certainly, a failure to warn could, depending on the facts, constitute a negligent act separate from another negligent act, but here the negligent act was the conduct in placing the mortar pan while not giving a warning. The warning was not separable from the conduct. A warning would not have sufficed had Montiel continued with his conduct. Montiel should not have proceeded with his work until appellant left the area. It was his conduct that was the negligent act proximately causing damages.

Moreover, even if the failure to warn and placement of the mortar pan could be viewed as two acts, they were contemporaneous acts that continued up to the time of injury and were concurrent with the negligent act of appellant, which also continued up to the time of injury. The evidence indicates that Montiel did not have actual knowledge that broken blocks were on the scaffolding. Montiel thought that he was proceeding safely. He did not subjectively believe that appellant was in danger or that appellant was in a position from which he could not have readily removed himself. Appellant did not subjectively believe that he had placed himself in a position of actual danger; if he had, he could have removed himself. He had actual knowledge of the forklift's operation. Both parties admitted almost the same awareness of the objective facts, one difference being that Montiel did not acknowledge that he knew appellant's location just prior to the incident while appellant acknowledged that he knew Montiel's location.

In summary, both parties had the same objective knowledge and the same subjective beliefs. Appellant could have taken himself out of a position of danger at any time. Contrary to the statement in the majority opinion, appellant acknowledged greater awareness of the objective facts than did Montiel. Specifically, as

⁵ Even if there had been a scintilla of evidence that Montiel negligently placed the blocks on the scaffolding prior to appellant's arrival in the area, the result would be the same. Neither party believed appellant was in peril. Appellant was not helpless and could have removed himself at any time prior to the injury. Montiel had no fresh opportunity to avoid the accident.

mentioned above, appellant acknowledged that he knew the location of the forklift and that it was unloading, while Montiel did not acknowledge that he knew the location of appellant. Each party committed a continuing act of negligence during the same period of time.

Montiel, like the defendants in Sears and Quinn, discussed in the majority's opinion, assumed that appellant had moved on and was not in a position of danger. Unlike Ritter, relied on by the majority, a case in which the defendant knew the plaintiff was sitting on the hood of the defendant's car when the defendant moved forward, Montiel did not know appellant was in a position of danger. Montiel should have known. See Benton v. Henry, 241 Md. 32(1965)(plaintiff negligently jumped on an ice cream truck's running board; defendant operator of truck negligently failed to detect plaintiff's presence but did not commit a new act of negligence by operating the truck with the plaintiff on the running board). A continuing act of negligence is not a new sequential act. See Myers v. Estate of Alessi, 80 Md. App. 124, 128-29(1989)(continued failure to diagnose a disease is not a new act of negligence).

I would affirm the judgment.

HEADNOTE:

NATIONWIDE MUTUAL INSURANCE CO. V. GAIL ANDERSON, INDIVIDUALLY, ETC., NO. 2055, SEPTEMBER, TERM, 2003.

LAST CLEAR CHANCE DOCTRINE; ELEMENTS OF THE DOCTRINE ARE PRIMARY AND CONTRIBUTORY NEGLIGENCE OF THE PARTIES, A SHOWING, BY THE PLAINTIFF, OF SOMETHING NEW AND SEQUENTIAL WHICH AFFORDS THE DEFENDANT A FRESH OPPORTUNITY (OF WHICH THE DEFENDANT FAILS TO AVAIL HIMSELF OR HERSELF) TO AVERT THE CONSEQUENCE OF HIS ORIGINAL NEGLIGENCE; LOWER COURT ERRED IN INSTRUCTING JURY ON LAST CLEAR CHANCE AND DENYING DEFENDANT'S MOTION JNOV IN CASE IN WHICH ESTATE OF 16-YEAR-OLD UNLICENSED, INTOXICATED DRIVER, SUED THE 29-YEAR-OLD DEFENDANT/PASSENGER ON THE THEORY THAT HE HAD THE LAST CLEAR CHANCE TO PREVENT THE MINOR FROM STRIKING THE FRONT OF ANOTHER CAR, CAUSING VEHICLE IN WHICH THEY WERE RIDING TO FLIP OVER AND COMING TO REST ON ITS ROOF, KILLING THE 16-YEAR-OLD DRIVER; BECAUSE NEGLIGENCE OF THE PARTIES WAS CONCURRENT AND THERE WAS NO FRESH OPPORTUNITY ON THE PART OF DEFENDANT TO AVOID THE DANGER AND BECAUSE PARTY IN HELPLESS PERIL AND PARTY IN POSITION TO AVOID DANGER BY REASON OF BEING IN CONTROL OF THE DANGEROUS INSTRUMENTALITY WERE THE SAME PERSON, LAST CLEAR CHANCE DOCTRINE WAS INAPPLICABLE TO THE INSTANT CASE.

REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2055

September Term, 2003

NATIONWIDE MUTUAL INSURANCE COMPANY

v.

GAIL ANDERSON, INDIVIDUALLY, ETC.

Davis,
Eyler, Deborah S.,
Adkins,
JJ.

Opinion by Davis, J.

Filed: December 23, 2004

On June 10, 2002, appellee Gail Anderson¹ filed a Complaint as personal representative of her deceased daughter's estate against Renardo and Sean Clyburn and appellant Nationwide Mutual Insurance Company (Nationwide)² in the Circuit Court for Prince George's County. A settlement was reached between appellant and Renardo and Sean Clyburn; the Clyburns were subsequently dismissed from the action on October 10, 2002. The matter proceeded to trial on July 8, 2003 and, on July 9, 2003, the jury returned a verdict in favor of appellee and awarded appellee \$155,000 in damages. On appellant's motion, and with appellee's consent, the award was reduced to \$80,000. On July 11, 2003, appellant filed a Motion for Judgment Notwithstanding Verdict, which was denied by the trial judge (Clarke, J.). Appellant timely filed an appeal on October 29, 2003.

Appellant presents one question for our review, which we re-phrase as follows:

Did the trial court err in denying appellant's
Motion for Judgment Notwithstanding Verdict?

We answer the question in the affirmative and, accordingly, reverse the judgment of the circuit court.

FACTUAL BACKGROUND

At the time of the events at issue, appellee, a police officer for the District of Columbia Police Department, lived with her four children in Landover, Prince George's County, Maryland. At approximately 6:30 p.m. on March 25, 2000, appellee's sixteen-year-old daughter, Shereka Jones, asked appellee for permission to go skating with her friend, Tamarah Willingham, who was also sixteen years old. After getting appellee's approval, Jones left the house. While appellee was under the impression that Jones was going to walk over to Willingham's house, Jones, instead, got into a white Cadillac Eldorado (Cadillac) driven by an individual who referred to himself as Sean Clyburn. It was later determined that the individual driving the Cadillac was actually Sean's brother, Renardo Clyburn³, who was twenty-nine years old at the time. Clyburn, Jones, and another passenger named Louis then picked up Willingham at her house in Landover. Willingham testified that she had never met or seen Jones with Clyburn prior to that day. While the initial plan was for Jones and Willingham to go roller-skating, instead the group proceeded to

¹ Appellee, in her capacity as the personal representative of her deceased daughter's estate, and the Decedent will hereinafter be referred to interchangeably as appellee.

² Nationwide is a party to this appeal because appellee, Gail Anderson, the mother of the Decedent, Shereka Jones, was insured by the defendant, nationwide Mutual Insurance Company. Defendant Renardo Clyburn's insurer paid the limit of \$20,000 on its policy and Nationwide paid Anderson after a jury returned a verdict against Nationwide, which had exhausted Anderson's limit on her uninsured motorist policy.

³ Sean Clyburn, Renardo's brother, was the registered owner of the Cadillac. For the purposes of this opinion, any reference to "Clyburn" will refer to Renardo, unless otherwise indicated.

a movie theater in Tyson's Corner, Virginia. On the way to Virginia, Clyburn stopped at a liquor store in Washington, D.C. and bought two cans of beer. According to Willingham's testimony, Jones drank both cans of beer. The group arrived in Tyson's Corner, watched a movie, and then, proceeded back to Maryland. After dropping off Louis at his home, Clyburn, Jones, and Willingham drove to Willingham's house. Their respite at Willingham's house was brief and, from there, the three drove to Jimmy's, a liquor store in Landover. According to Willingham's testimony, Clyburn purchased "some brown liquor" and some alcoholic "fruit coolers" for Willingham and Jones. All three occupants of the vehicle began drinking in the parking lot of the liquor store. According to Willingham's testimony, not only did she and Jones drink the "fruit coolers," but she witnessed Jones and Clyburn drinking the "brown liquor," as well.

As the vehicle was still parked in the lot outside of the liquor store, Jones asked Clyburn if she could drive the Cadillac and Clyburn obliged. The undisputed evidence in the record shows that, at the time of the alleged events, Jones did not have her license and had not otherwise received any driver training prior to that point. Nonetheless, Jones drove the Cadillac, with Clyburn in the passenger seat and Willingham in the rear seat, from the liquor store into Washington D.C. From there, Jones drove the group to an apartment complex in Temple Hills, where Clyburn's attempt to locate a friend who lived in the complex was unsuccessful. After Clyburn returned to the vehicle, Willingham requested to be driven home. As Jones drove the Cadillac out of the parking lot of the apartment complex, she struck a parked car. Willingham testified that Clyburn instructed Jones "to keep going." Upon arriving at Willingham's house in Landover, Jones and Willingham exited the vehicle. Willingham testified that she expected Jones to stay the night at her house. Clyburn, however, asked Jones to "come with him." Jones got back into the Cadillac with Clyburn and left Willingham at her house.

At trial, Darrell Bumbray testified that, in the early morning hours of March 26, 2000, he, his friend, Ryan Ifill, and another passenger were driving back from a club in Washington D.C. in Ifill's Nissan Stanza (Nissan). According to his testimony, they were traveling southbound on Branch Avenue and stopped at an intersection in front of a mall in Marlow Heights. Next to the Nissan was another vehicle and behind that vehicle was the Cadillac being driven by Jones. The group in the Nissan made visual contact with Jones as the cars were still stopped at the stoplight. Bumbray testified that, when the stoplight turned green,

[t]he Acura and [our Nissan], we both had took off and we are just driving and we got by the Chevrolet dealership down the street from where the light was and I saw a car coming up real fast in the rearview mirror and when [Jones] was beside us [she] put the middle finger [sic],

it was with the left hand, and was driving with the right hand and she couldn't control [the Cadillac] going around the bend and the rear of the [Cadillac] smacked the front of us and we both started sliding to the side.

The Nissan slid sideways into a culvert on the shoulder of Branch Avenue. None of the passengers in the Nissan was injured. According to Bumbray's testimony, after the Nissan came to a stop, he, Ifill, and the other passenger exited the vehicle and approached the Cadillac, which had come to a stop farther down on Branch Avenue. Bumbray stated that the Cadillac had flipped over and was resting on its roof. Clyburn emerged from the vehicle out of the driver's side door from the passenger side. According to Bumbray, once he was out of the Cadillac, Clyburn exclaimed, "That bitch can't drive." Bumbray and his companions initially noticed that Jones was no longer in the vehicle. They found her in a ditch just a few feet in front of the Cadillac, not moving and bleeding profusely. Jones was later pronounced dead at the scene.

The Reconstruction/Report of Investigation (Report) completed by Corporal Teresa Watson of the Prince George's County Police Department, which was admitted into evidence at trial, postulated that, at approximately 2:42 a.m. on the night in question, the Cadillac, driven by Jones, crossed over from the right lane to the left lane, where the Nissan was driving. The Cadillac struck the right front fender of the Nissan, which caused the Nissan to slide sideways and into a culvert off of the shoulder of Branch Avenue. After the initial collision, the Cadillac, the Report suggests, "began to rotate counter clockwise and onto its side. [The Cadillac] slid on its side along the roadway edge for approximately 200 feet and came to rest on its roof. The driver of [the Cadillac] was thrown from the vehicle just prior to the vehicle's rest." At trial, Officer Watson concluded that, at the time of the accident, Jones was sixteen years of age, did not possess a driver's license, had a blood/alcohol content of .17, and was not using a seat belt. After taking measurements of the skid marks, the grade of the roadway, and the level of friction of the asphalt on Branch Avenue, she calculated that, at a minimum, the Nissan was traveling seventy-three miles-per-hour and the Cadillac was traveling eighty-seven miles-per-hour. The uncontroverted evidence in the record indicates that the maximum speed limit on that portion of Branch Avenue was fifty miles-per-hour.

At the conclusion of all of the evidence at trial, appellant's counsel orally made a motion for judgment, upon which the trial judge reserved ruling. Appellant's trial counsel additionally objected to the trial judge instructing the jury on, *inter alia*, the doctrine of last clear chance. The trial judge overruled the objection and, subsequently, instructed the jury on the doctrine. The jury returned a special verdict in appellee's favor, finding that Clyburn was negligent, Jones was contributorily negligent, and that

Clyburn had the last clear chance to avoid the accident. The appellant filed a Motion for Judgment Notwithstanding Verdict (Motion). On October 20, 2003, appellant's Motion was denied. This appeal followed.

LEGAL ANALYSIS

Appellant's sole assignment of error on this appeal, as set forth in its brief, is:

Plaintiff never presented evidence of Clyburn's consequential negligence, instead arguing again and again his primary negligence. There must be two acts of negligence, interrupted by the plaintiff's negligence, in order for the [last clear chance] doctrine to apply. A review of the uncontested facts in the motor vehicle accident report and trial transcript indicate Jones was negligent. Moreover, her negligence was the final negligent act and concurrent with her death.

For Jones to recover under the doctrine of last clear chance, she needed to demonstrate that her negligence had ceased and that Clyburn had an opportunity to avoid his original negligence and Jones' contributory negligence. No such evidence was presented by Jones.

Adverting to the facts that Clyburn had provided the sixteen-year-old driver with the keys to the car, permitted her to proceed to drive the vehicle, and was in the passenger seat within reach of the ignition and steering column, appellee argues that "[t]he last clear chance to avoid this accident presented itself to defendant Clyburn when an intoxicated and un-licensed sixteen year old Shereka Jones exited his vehicle, intending to spend the night with her girlfriend. Unfortunately, Mr. Clyburn failed to avail himself of this opportunity and called Ms. Jones back to his vehicle and put her behind the wheel, sealing her tragic fate.

That act, in and of itself, was enough to warrant giving the requested jury instruction on last clear chance, and to support a jury finding in favor of appellee." In count one of the complaint, specifically paragraph 24, citing Jones's inexperience and intoxicated condition, appellee alleged negligent entrustment.⁴ The sum total of appellant's argument is that the trial judge erroneously instructed the jury on the doctrine of last clear chance because it is undisputed that Jones's contributory negligence occurred concurrently with Clyburn's primary negligence. Clyburn, appellee avers, had a fresh opportunity to prevent the injury to Jones from the time Jones re-entered the Cadillac after Willingham departed to the moment the accident occurred on Branch Avenue.

⁴ When asked, during oral argument, before the panel of this court, appellee conceded that the gravamen of counsel's position was the decedent's status as a minor and that, had Jones been an adult, his argument would be severely undermined.

I

Maryland Rule 2-532(a) provides that, “[i]n a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion.” In the event that a trial court “reserves ruling on a motion for judgment made at the close of all the evidence, that motion becomes a motion for judgment notwithstanding the verdict if the verdict is against the moving party. . . .” Md. Rule 2-532(b). In essence, a motion for judgment notwithstanding verdict (JNOV) “tests the legal sufficiency of the evidence.” *Impala Platinum Ltd. v. Impala Sales (U.S.A.), Inc.*, 283 Md. 296, 326 (1978). Our goal when reviewing the trial judge’s denial of appellant’s Motion is to “determine whether the record contains legally relevant and competent evidence, however slight, from which a jury rationally could have found in appellee’s favor.” *Southern Management Corp. v. Taha*, 137 Md. App. 697, 714 (2001), *rev’d on other grounds*, 367 Md. 564 (2002). We are required to view the evidence in a light most favorable to the prevailing party and “assume the truth of all evidence and inferences as may naturally and legitimately be deduced therefrom. . . .” *Houston v. Safeway Stores, Inc.*, 346 Md. 503, 521 (1997)(quoting *Smith v. Bernfeld*, 226 Md. 400, 405 (1961)). The denial of a motion for JNOV is in error, however, “[i]f the evidence . . . does not rise above speculation, hypothesis, and conjecture, and does not lead to the jury’s conclusion with reasonable certainty. . . .” *Jacobs v. Flynn*, 131 Md. App. 342, 353 (2000). Additionally, we may reverse the trial court’s judgment if the denial of appellant’s Motion was “legally flawed.” *Taha*, 137 Md. App. at 714.

II

The doctrine of last clear chance has been applied in this State for over 130 years and has remained relatively unchanged during that time. See *Ritter v. Portera*, 59 Md. App. 65, 70 (1984)(discussing *The N. Cent. Ry. Co. v. Maryland, ex rel. Adeline Price*, 29 Md. 420 (1868)). Essentially, the last clear chance doctrine is a plaintiff’s defense to a defendant’s allegation that the plaintiff was contributorily negligent. See *State, ex rel. Kolish v. Wash., Baltimore & Annapolis Elec. R.R. Co.*, 149 Md. 443, 457 (1926).

In the recent case of *Carter v. Senate Masonry, Inc.*, 156 Md. App. 162, 168-169, 846 A.2d 50,54 (2004), we reviewed the elements requisite to an invocation of the doctrine of last clear chance:

As this Court explained in *Burdette v. Rockville Crane Rental, Inc.*, 130 Md. App. 193, 216, 745 A.2d 457 (2000):

[T]he doctrine of last clear chance permits a contributorily negligent plaintiff to recover damages from a negligent defendant if each of the following elements is satisfied: (i) the defendant is negligent; (ii) the plaintiff is contributorily negligent; and (iii) the plaintiff makes “a showing of something new or sequential, which affords the defendant a

fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence.”

The theory behind the doctrine is that “if the defendant has the last clear opportunity to avoid the harm, the plaintiff’s negligence is not a ‘proximate cause’ of the result.” *Id.* at 215, 745 A.2d 457 (quoting W. Prosser, *Law of Torts* § 66 (4th ed. 1971)).

“A fresh opportunity” is the operative phrase, for the doctrine will apply only if “the acts of the respective parties [were] sequential and not concurrent.” *Id.* at 216, 745 A.2d 457. In other words, the defendant must have had a chance to avoid the injury after plaintiff’s negligent action was put in motion. *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 637-38, 495 A.2d 838 (1985). The doctrine “assumes” that, after the primary negligence of the plaintiff and defendant, “the defendant could, and the plaintiff could not, by the use of the means available avert the accident.” *United Rys. & Elec. Co. v. Sherwood Bros.*, 161 Md. 304, 310, 157 A. 280 (1931). In this way, the defendant should have recognized and responded to the plaintiff’s position of “helpless peril.” *Baltimore & O.R. Co. v. Leasure*, 193 Md. 523, 534, 69 A.2d 248 (1949).

Our research revealed more than four dozen reported Maryland cases discussing the last clear chance doctrine. Its history in our State law dates back to 1868. *See Burdette*, 130 Md. App. at 215-16, 745 A.2d 457 (tracing the doctrine’s roots to English common law); *Ritter v. Portera*, 59 Md. App. 65, 70-72, 474 A.2d 556 (1984) (same); *see also N. Cent. Ry. Co. v. State*, 29 Md. 420, 436 (1868) (first reference of the doctrine in Maryland law). The doctrine is more often described than applied because of the requirement that plaintiffs show a new act of negligence following their own actions.

The Court of Appeals has previously explained:

Knowledge, therefore, on the part of the person causing the injury superior to that of the injured person is the ultimate basis of the doctrine, and it follows that time is an essential element thereof, because the doctrine is not applicable unless the defendant discovered the plaintiff’s peril in time, by the exercise of ordinary care, to have avoided the accident.

Kolish, 149 Md. at 457. Thus, in order for the doctrine of last clear chance to apply, “the acts of the respective parties must be sequential and not concurrent.” *Burdette*, 130 Md. App. at 216. In other words, last clear chance “is only applicable when the defendant’s negligence in not avoiding the consequences of the plaintiff’s negligence is the *last* negligent act; and, cannot be invoked when plaintiff’s own act is the final negligence act, or is *concurrent* with defendant’s negligence.” *Meldrum v. Kellam Distrib. Co.*, 211 Md. 504, 512 (1957). The courts of this State have explicated that the doctrine “does not mean that defendant’s primary negligence, without more[,] may serve again to charge him [or her] with a last clear chance.” *Id.* It follows that, for a plaintiff to successfully raise the doctrine of last clear chance, evidence must be presented to show “something new or independent, which affords the defendant a fresh opportunity” to avoid the harm that ultimately occurred. *Cohen v. Rubin*, 55 Md. App. 83, 92 (1983)(citing *MacKenzie v. Reese*, 235 Md. 381 (1964)).

III

On appeal, appellant concedes Clyburn's negligence. While appellee does not concede Jones's negligence, it is beyond cavil that Jones, as an unlicensed driver operating a motor vehicle under the influence of alcohol, was contributorily negligent as a matter of law. Consequently, the only question is whether there was evidence creating a jury question as to whether Clyburn had a last clear chance to avoid the accident that ultimately claimed Jones's life. Appellee argues that, when Clyburn, Jones, and Willingham returned to Willingham's house, Clyburn had a fresh opportunity to prevent the accident by allowing Jones to return with Willingham to her house instead of calling her back into the car. We reject this argument because, at the time all three individuals were at Willingham's home, Jones was no longer driving the vehicle and, as a result, there were no negligent acts being committed by either Jones or Clyburn. In the absence of any negligence committed by Jones or Clyburn at the time, there necessarily cannot be a last clear chance.

Once Jones re-entered the Cadillac upon Clyburn's request, a new set of negligent acts commenced. As for Clyburn's actual or constructive knowledge of whether Jones possessed a driver's license, the evidence in the record is not entirely clear. For the purposes of our analysis, we shall view the evidence in a light most favorable to appellee, the prevailing party, and assume that Clyburn had, at the very least, constructive knowledge that Jones was not authorized by the State to operate a motor vehicle on public roads. The fact that Clyburn was aware that Jones had consumed alcoholic beverages is adequately supported by the evidence. Thus, Clyburn's primary act of negligence was allowing Jones, an intoxicated unlicensed person, to drive his vehicle from Willingham's house.

Jones, according to the record, was certainly aware she was not legally authorized to be behind the wheel of a car. Viewing the evidence in appellee's favor, we believe that a reasonable sixteen year old person would also be aware that consuming alcohol would seriously impair one's ability to drive a motor vehicle. Jones was contributorily negligent by driving the Cadillac with knowledge that she did not have a driver's license and that she had previously consumed alcoholic beverages.

Appellee contends that from the time Clyburn and Jones left Willingham's house with Jones driving the Cadillac, up until the moment of the accident, Clyburn had a fresh opportunity to gain control of the vehicle, either by physical force or psychological influence. This argument exposes the most salient flaw in appellee's argument. The last clear chance doctrine contemplates two or more parties who are both negligent, but one is in helpless peril unable to avoid the imminent danger. The doctrine imposes liability on the party who is aware of the danger and is in control of the instrumentality and thus in a position to

avoid the impending danger. A plaintiff may avail himself or herself of the last clear chance doctrine if the defendant is in a position to act with reasonable care on the fresh opportunity to prevent the likely consequences.

In the instant case, Jones was in control of the instrumentality that imperiled her life and the lives of her passengers and anyone else traveling on the night in question. Jones, however, was not the party in *helpless* peril because she was the only person in a position to prevent the tragic accident. Although it is conceded by all that Clyburn was negligent in allowing Jones to drive the Cadillac, the record is devoid of any evidence that Clyburn committed a negligent act subsequent to Jones's negligence and additional to his earlier negligent acts. In other words, Clyburn, as the passenger, was not in control of the vehicle and was therefore not in a position to avoid the danger. When the Cadillac crossed over from the right lane and into the left lane and struck the Nissan, Jones, as the driver of the Cadillac, had committed the final negligent act.⁵ In the absence of any evidence of a new and independent opportunity available to Clyburn once the events that led to Jones's death were set in motion by her actions, the last clear chance doctrine is inapplicable to the instant facts.

IV

Anticipating that her reliance on the last clear chance doctrine required appellee to demonstrate that "the defendant must have had a chance to avoid the injury after plaintiff's negligent action was put into motion," *Lipscomb v. Potomac Edison Co., supra*, appellee, in positing that Clyburn exercised control over Jones, asseverates, "A jury could reasonably infer that defendant Clyburn was the person in control and the proverbial 'captain of the ship' by virtue of his ownership of the vehicle, the age difference between Mr. Clyburn and Ms. Jones, and her intoxicated condition." In an attempt to establish that Clyburn had an opportunity to avoid the injury, appellee, as we have previously discussed, argues that the steering wheel and the ignition of the Cadillac were within Clyburn's reach. Appellee's reliance on Clyburn's possessory interest in the vehicle, the disparity in age, and Jones's intoxicated state, is an attempt to overcome the facts that it was Jones who appellee contends was in helpless peril, despite the fact that she was in control of the vehicle, and it was Jones's negligence that was the direct and proximate cause of the injury. No new or independent opportunity for Clyburn to prevent the accident presented itself subsequent to Jones's negligence. Notwithstanding, appellee argues that Clyburn had a fresh opportunity to avoid the injury by reason of his control over Jones.

⁵ At oral argument, appellee's counsel conceded that the relevant time frame began when Jones was driving the Cadillac just before the collision, and did not include the events leading up to that point.

As noted, *supra*, appellee's counsel conceded, at oral argument, that his case would be substantially weakened if Jones had been an adult. Counsel's hypothesis that the fresh opportunity to avoid the injury was based on Clyburn's control over Jones, however, is misplaced because the case was tried and submitted to the jury on the theory of last clear chance. In proceeding in that manner, the parties and the court presumed - and indeed no one even at this juncture disputes - that both Clyburn and Jones were negligent. If appellee's theory of the case rested on negligent entrustment or some variation of that principle, appellee would have been required to maintain that there was no negligence on the part of Jones and that, throughout the evening, her actions were, essentially, directed and controlled by Clyburn. Having proceeded on a theory that presupposed Jones's negligence, appellee cannot now rely on lack of capacity on the part of the sixteen-year-old driver to bolster her theory of last clear chance.

In sum, the accident that took Jones's life was the direct result of her negligence. The circumstances of this case, while tragic, simply do not comport with the requisite elements of the doctrine of last clear chance. Clyburn's original and primary negligent conduct continued unabated from the point in time when he permitted Jones to drive his Cadillac to the fatal accident. There was, however, no fresh opportunity subsequent to Jones's contributory negligence which constituted a "last" chance to avert the impending danger. Moreover, the doctrine of last clear chance is not implicated when the party in control of the instrumentality that causes the injury is the "helpless" party the doctrine is designed to protect.

We hold that the trial court erred in instructing the jury on the doctrine of last clear chance and in denying appellant's Motion for JNOV. Pursuant to Md. Rule 2-532(f)(2), we reverse the trial court's denial of appellant's Motion JNOV and direct that the trial court enter judgment in favor of appellant.

**JUDGMENT OF THE CIRCUIT COURT
FOR PRINCE GEORGE'S COUNTY
REVERSED; CASE REMANDED FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION.**

COSTS TO BE PAID BY APPELLEE.

REPORTED
IN THE COURT OF APPEALS OF MARYLAND

No. 45

September Term, 2008

VALERIE WOOLDRIDGE, ET AL.

v.

LINDA D. PRICE, ET AL.

Eyler, Debroah S.,
Woodward,
Sharer, J. Frederick (Ret'd, Specially Assigned),
JJ.

Opinion by Eyler, Deborah S., J.

Filed: March 5, 2009

Robert H. Wooldridge, Jr. (the “decendent”) was killed when the skateboard he was riding was struck by a car in which Richard Price and Linda Price, the appellees, were traveling. In the Circuit Court for Montgomery County, Valerie Wooldridge, the decedent’s surviving wife and personal representative of his estate, the appellant, brought a wrongful death and survival action on behalf of herself, their minor children, and the decedent’s parents. After discovery was undertaken, the Prices moved for summary judgment. The court granted the motion in a memorandum opinion and order.

Mrs. Wooldridge noted this appeal, presenting three questions for review, which we have reordered and slightly rephrased:

- I. Was the circuit court legally correct when it ruled that the decedent was not a pedestrian, that a skateboard is a vehicle, that the boulevard rule applies as a matter of law, and that the decedent was contributorily negligent as a matter of law?

- II. Was the circuit court legally correct when it ruled that the doctrine of last clear chance does not apply to the facts in this case, viewed most favorably to the appellant, as a matter of law?
- III. Was the circuit court legally correct when it ruled that Mrs. Price was entitled to summary judgment because any dispute over whether she was driving at the time of the accident was not material to the issue of liability?

For the reasons that follow, we shall affirm the circuit court's grant of summary judgment.

FACTS AND PROCEEDINGS

The accident in this case happened on July 15, 2006. The decedent was 44 years old and was living with his wife and children in a single family residence at 10526 Sweetbriar Parkway, in Silver Spring. The decedent's in-laws (Mrs. Wooldridge's parents) lived across the street at 10545 Sweetbriar Parkway. Jennifer Raymond, Mrs. Wooldridge's sister, lived next door to the decedent.

The Prices lived in a single family residence at 1801 Kimberly Road, in the same neighborhood. Indeed, Kimberly Road begins where Sweetbriar Parkway ends.

The accident happened on Sweetbriar Parkway at approximately 12:49pm. The weather was clear and sunny with temperatures in the 80's, the road was dry, and the traffic was light. It was a Saturday. The Prices were on their way to Henderson Hall Marine Barrack to do some shopping and have lunch. Both Mr. and Mrs. Price were 57 years old.

The decedent was on the driveway of his in-laws' house, across the street from his own house. The driveways of the two houses are directly across the street from each other. The decedent had been riding his skateboard down one driveway, across the road, and up the other driveway.

The Prices were proceeding south on Sweetbriar Parkway, at 15 miles per hour, which was less than the posted speed limit of 25 miles per hour. The accident happened when the decedent, on his skateboard, traveled from his in-laws' driveway into the street, apparently to cross over to his own driveway. The decedent was heading in a westerly direction, meaning that he was approaching the Prices' car from the left, driver's side. The Prices' vehicle struck the decedent in the middle of Sweetbriar Parkway. The decedent ended up underneath the Prices' car, behind the front wheels. He died from the injuries sustained in the accident. The only people present who witnessed the accident were the Prices and the decedent.

According to the Prices, when the accident happened, Mr. Price was driving their car (a 2001 Volvo) and Mrs. Price was sitting in the front passenger seat. She was looking down into her purse and for that reason did not see what happened. Mr. Price saw the decedent come out of the driveway at a rapid speed and in a crouched position and fall down in front of the Prices' car. Mr. Price immediately applied his brakes and tried to turn the car to the right, to no avail.

According to Mrs. Wooldridge, upon hearing the sound of the crash, Jennifer Raymond (her sister), and Jaclyn Leimbach (their mother) ran to the scene, arriving within seconds. Ms. Raymond would testify that she noticed that Mrs. Price was holding car keys in her hand and that she saw Mrs. Price get out of the driver's side of the car, walk around to the back of the car, and lean on the rear driver's side of the car with her head in her hands. Mrs. Leimbach would testify that she saw Mr. Price sitting in the front passenger seat of the car and that she saw Mrs. Price walking around the driver's side of the car to the trunk, which she leaned on.

The Montgomery County Police Department investigated the accident and prepared a written report. Mrs. Wooldridge hired Gregory Manning, an accident reconstructionist, who prepared a report about the accident and its cause.

Mrs. Wooldridge filed suit, alleging that her husband's death was the result of negligence on the part of the Prices. Discovery ensued. On December 20, 2007, the Prices filed a motion for summary judgment, which was supported by a memorandum of law and interrogatory answers by each of them. Mrs. Wooldridge filed an opposition to the motion, supported by affidavits by Ms. Raymond, Mrs. Leimbach, and Mr. Manning. The Manning affidavit attached his report of September 11, 2007. The Prices filed a reply of memorandum of law to which they attached the "State of Maryland Motor Vehicle Accident Report" and excerpts from Mr. Manning's deposition.

The court held a hearing on the summary judgment motion on February 5, 2008. Thereafter, on February 8, 2008, it issued a memorandum opinion and order granting summary judgment because: 1) the boulevard rule provision of the Transportation Article governed the accident; 2) under that rule, the decedent was contributorily negligent as a matter of law; 3) if Mrs. Wooldridge were able to generate evidence of negligence on the part of the Prices, her claims nevertheless would be barred by contributory negligence because, as a matter of law, the doctrine of last clear chance did not apply; and 4) whether Mr. Price or Mrs. Price was driving the car at the time of the accident was not a material fact, and therefore the parties' apparent dispute over that fact did not preclude the grant of summary judgment. The order was entered on February 13, 2008.

Mrs. Wooldridge filed a timely notice of appeal. We shall include additional information as necessary to our discussion of the issues.

STANDARD OF REVIEW

As this Court recently explained, the standard of review for the grant of summary judgment is as follows:

We review a circuit court's decision to grant summary judgment *de novo*. *Crickenberger v. Hyundai Motor America*, 404 Md. 37, 45, 944, A.2d 1136 (2008). Our review is two-fold. First, we determine whether there was or was not a genuine dispute of material fact on the summary judgment record. *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294, 936 A.2d 343 (2007). A material fact is a fact that, if found one way or the other, will affect the outcome of the case. *Miller v. Bay City Property Owners Ass'n*, 393 Md. 620, 631, 903 A.2d 938 (2006). Second, if there is no genuine dispute of material fact, we determine whether the party that obtained summary judgment was entitled to judgment in its favor, as a matter of law. *Crickenberger, supra*, 404 Md. At 45, 944 A.2d 1136.

Zitterbart v. Am. Suzuki Motor Corp., 182 Md. App. 495, 501-02, *cert. denied*, 406 Md. 581 (2008).

DISCUSSION

Mrs. Wooldridge's three questions presented really are three arguments as to why, in her view, the circuit court erred in granting summary judgment in favor of the Prices.

I.

Duty of Care/ Application of Boulevard Rule

Mrs. Wooldridge's first argument is that a skateboard is not a "vehicle," within the meaning of the "rules of the road," as set forth in Md. Code (1977, 2006 Repl. Vol.), sections 21-101 et. seq. of the Transportation Article ("TR"), and therefore the "boulevard rule," one such rule of the road, did not apply. And, even if the boulevard rule did apply, the decedent was not contributorily negligent as a matter of law, and the circuit court's ruling to the contrary was in error. Not surprisingly, the Prices argue the opposite.

The portion of the boulevard rule in question here appears in TR section 21-404, which provides, in relevant part:

- (a) *Entering highway from other than a highway – Duty to stop.* – The driver of a vehicle about to enter or cross a highway from a private road or driveway or from any other place that is not a highway shall stop.
- (b) *Same – Yielding right-of-way.* – The driver of a vehicle about to enter or cross a highway from a private road or driveway or from any other place that is not a highway shall yield the right-of-way to any other vehicle approaching on the highway.

In the vernacular of the Maryland boulevard rule cases, the driver with the duty to stop and yield the right-of-way is the “unfavored driver” and the driver with the right of way is the “favored driver.” See, e.g., *Wash. Metro. Area Transit Auth. V. Seymour*, 387 Md. 217 (2005); *Dennard v. Green*, 355 Md. 305 (1994); *Dean v. Redmiles*, 280 Md. 137 (1977).

In determining whether the conduct of a person on a skateboard entering a road such as Sweetbriar Parkway from a driveway is controlled by the boulevard rule, we must consider the definitions of pertinent terms, as set forth in the Transportation Article. A “highway” is “the entire width between the boundary lines of any way or thoroughfare of which any part is used by the public for vehicular travel, whether or not the way or thoroughfare has been dedicated to the public or accepted by any proper authority.” TR § 11-127. A “driver” is “any individual who drives a vehicle.” TR § 11-115. To “drive” is “to drive, operate, move, or be in actual physical control of a vehicle.” TR § 11-114. A “vehicle” is (with an exception not applicable here) “any device in, on, or by which any individual or property might be transported or towed on a highway.” TR § 11-176 (a)(1). It includes a “low-speed vehicle.” TR § 11-176(b).¹

Sweetbriar Parkway meets the definition of a “highway” in TR section 11-127. The decedent was entering that highway from a driveway. Therefore, if the decedent was a “driver” and the skateboard he was riding was a “vehicle,” his duty of care was governed by TR section 21-404, i.e. he was required to stop at the end of the driveway and, before entering the road, yield the right of way to the Prices’ car. Because “drive” includes moving or being in physical control of a vehicle, the decedent was driving the skateboard if his skateboard was a “vehicle.” In other words, the world of drivers is not limited to those who are driving cars, trucks, or other devices commonly known as vehicles; it includes those who are moving or in physical control of any device that meets the definition of “vehicle.”

The question then is whether a skateboard is a device on which a person is or “might be transported.” TR § 11-176(a)(1). Two cases decided quite some time ago, but interpreting the same statutory language, offer guidance on this point. In *Moon v. Weeks*, 25 Md. App. 322, 333 (1975), this Court held that a sled is a “‘vehicle’ when a person is transported upon it upon a highway.” A few months later, in *Richards v. Goff*, 26 Md. App. 344 (1975), we likewise held that a bicycle is a vehicle. These decisions rested upon the plain language of the statutory definition of “vehicle” as quoted above (with only minor changes to the definition over the years).

¹ The exception is for “an electric personal assistive mobility device as defined in TR § 21-101(j).” TR § 11-176(b). It is not disputed that the skateboard the decedent was riding at the time of the accident was not such a device.

Mrs. Wooldridge points out that courts in two of our sister states have held that devices such as skateboards are not vehicles, and argues that we should follow suit. These cases are distinguishable. In *State v. Smith* (184 Or. Ct. App. 118 (200)), the Oregon Court of Appeals held that a skateboard a person was riding on a sidewalk was not a vehicle. That state's statutory definition of "vehicle" is roughly the same as Maryland's definition of that term. However, Oregon exempts from the "vehicle" category devices propelled exclusively by human power. The court held that a skateboard is covered by that exemption, and therefore is not a vehicle. It is clear that the holding would have differed if the exemption did not exist; and in Maryland, no such exemption exists. In *Schallenberger v. Rudd*, 244 Kan. 230 (1989), the court held that that state's rules of the road allow bicycles to be driven on sidewalks, and therefore require drivers to yield to bicycle riders in crosswalks. The case is inapposite as it does not involve transportation by bicycle or any other self-propelled device upon a highway and it concerns riding in crosswalks, which is not at issue here.

Accordingly, we agree with the circuit court that, as a matter of law, the skateboard the decedent was riding in this case was a "vehicle," and therefore he was an unfavored driver under the boulevard rule. It is undisputed that the decedent rode the skateboard to the end of his in-laws' driveway and entered Sweetbriar Parkway without stopping, in violation of TR section 21-404(a); and that he entered Sweetbriar Parkway without yielding the right of way to the Prices, who were the favored drivers, in violation of TR section 21-404(b).

Mrs. Wooldridge argues, however, that, because the evidence to be adduced at trial would show that the decedent fell off the skateboard in front of the Prices' car, then at the time he was struck he was a pedestrian, not a skateboard driver. There is no merit in this argument. Whether the decedent complied with the duty of care created by the boulevard rule must be determined based upon his conduct when he arrived at the end of his in-laws' driveway and entered the street. At that point, he was riding the skateboard and was not a pedestrian, which the Transportation Article defines as "an individual afoot." TR § 11-145. Indeed, under any interpretation of the facts, the decedent was never afoot, and therefore was not a pedestrian. We note that in *Moon, supra*, we observed that a child who was getting off her sled when she was hit by a car was not a pedestrian. *Moon, supra*, 25 Md. App. At 333 n.10.

Clearly, by violating the boulevard rule, the decedent engaged in conduct that did not comport with his duty of care, and therefore was contributorily negligent as a matter of law. See *Richards v. Goff, supra*, 26 Md. App. 344.

II.

Last Clear Chance Doctrine

In Maryland, contributory negligence on the part of a plaintiff completely bars recovery against a negligent defendant. See *May v. Giant Food, Inc.*, 122 Md. App. 364, 375 (1988); *Richards, supra*, 26 Md. App. 344. In survival actions and wrongful death actions, contributory negligence of the decedent is a bar to recovery against a negligent defendant. See *Smith v. Gross*, 319 Md. 138, 144 (1990); *Dehn v. Edgcombe*, 152 Md. App. 657, 694 – 97 (2003), *aff'd* 384 Md. 606 (2005). Thus, in the case at bar, even if Mrs. Wooldridge could adduce some evidence of negligence on the part of the Prices, her claims against them would be barred.

In some contributory negligence situations, however, the doctrine of last clear chance can apply to allow recovery.

[T]he doctrine of last clear chance permits a contributorily negligent plaintiff to recover damages from a negligent defendant if each of the following elements is satisfied: (i) the defendant is negligent; (ii) the plaintiff is contributorily negligent; and (iii) the plaintiff makes a “showing of something new or sequential, which affords the defendant a fresh opportunity (of which he fails to avail himself) to avert the consequences of his original negligence.”

Burdette v. Rockville Crane Rental, Inc., 130 Md. App. 193, 216 (2004) (quoting *Liscombe v. Potomac Edison Co.*, 303 Md. 619, 638 (1985)). “The theory behind the doctrine is that ‘if the defendant has the last clear opportunity to avoid the harm, the plaintiff’s negligence is not a “proximate cause” of the result.’” *Id.* At 215 (quoting W. PROSSER, LAW OF TORTS, § 66 (4th ed. 1971)).

“A fresh opportunity” is the operative phrase, for the doctrine will apply only if “the acts of the respective parties [were] sequential and not concurrent.” *Id.* At 216. In other words, the defendant must have had a chance to avoid the injury after plaintiff’s negligent action was put in motion. The doctrine “assumes” that, after the primary negligence of the plaintiff and defendant, “the defendant could, and the plaintiff could not, by the use of the means available avert the accident.” *United Rys. & Elec. Co. v. Sherwood Bros.*, 161 Md. 304, 310 (1931). In this way, the defendant should have recognized and responded to the plaintiff’s position of “helpless peril.” *Baltimore & O.R. Co. v. Leasure*, 193 Md. 523, 534 (1949).

Carter v. Senate Masonry, Inc., 156 Md. App. 162, 168-69 (2004) (some citations omitted).

The Maryland last clear chance case that is most like the case at bar is *Quinn v. Glackin*, 31 Md. App. 247 (1976). There, when a 12-year-old girl rode her bicycle down her driveway and into the street, she was hit by a car and sustained serious injuries. The child’s parents brought suit for negligence on her behalf

against the driver. The child had no memory of the accident and could not testify about what had happened. The driver testified that he first saw the child 9 or 10 feet from the edge of the road, right before the impact. In affirming the grant of a directed verdict, we stated:

If the evidence in this case was sufficient to show any negligence at all on [the driver's] part...then it was original negligence which continued, and concurred with the admitted negligence of [the child] to cause her injury.

There could be no fresh opportunity available to [the driver] to avoid the consequences of [the child's] negligence until she did something negligent. Her approach down the driveway was not negligent, and did not then place her in a position of peril. Her lawful approach could not constitute notice to [the driver] that she would fail to yield the right of way to him. A motorist on the favored highway has the right to assume that the unfavored driver will yield the right of way.

[The child's] negligence – her failure to yield the right of way to a motorist on the favored highway – was followed almost instantaneously by the accident. The trial judge correctly ruled that there was no evidence to show that [the driver] had a last clear chance to avoid the accident.

Id. At 254 (citation omitted).

So, too, in this case, all of the forecasted evidence, including Mr. Manning's affidavit and report, had the impact happening almost instantaneously after the decedent negligently failed to yield the right of way at the edge of the driveway. Indeed, the opinion Mr. Manning offered as to negligence on the part of the Prices was that, notwithstanding that the driveway in question was lined by bushes and plants, the driver of the Price vehicle should have been able to see (peripherally) the decedent intermittently, between the shrubs, as he rode down the driveway, and therefore should have brought the vehicle to a stop, thus avoiding impact. Even if these facts could show negligence by the Prices (for, as this Court explained in *Quinn, supra*, the unfavored driver is not negligent until he fails to yield the right of way, and not before), they cannot show that the decedent was in a position of helpless peril with the Prices having a fresh opportunity to exercise due care to avoid striking him. Any negligence on the part of the Prices was one brief but continuing event that, combined with the decedent's own negligence, caused this tragic accident. As a matter of law, the doctrine of last clear chance has no application on these facts.

III.

Driver's Identity

Finally, Mrs. Wooldridge argues that the circuit court should not have granted summary judgment because there was a genuine dispute of material fact as to the identity of the driver when the accident occurred. The Prices would testify that Mr. Price was driving. Mrs.

Wooldridge's sister and mother would testify to facts they observed immediately after the accident that could give rise to a reasonable inference that Mrs. Price was the driver.

The circuit court explained that this dispute of fact, even if genuine, is not material, and therefore does not preclude the grant of summary judgment. We agree. A fact is "material" for summary judgment purposes if its determination one way or the other will have an effect on the outcome of the case. *Miller v. Bay City Property Owners Ass'n*, 393 Md. 620, 631 (2006) (quoting *United Serv. Auto Ass'n v. Riley*, 393 Md. 55, 67 (2006)); *Fearnow v. Chesapeake & Potomac Tel. Co. of Md.*, 104 Md. App. 1, 49 (1995) (quoting *King v. Bankerd*, 303 Md. 98, 111 (1985)), *rev'd on other grounds*, 342 Md. 363 (1996). Here, as a matter of law, the decedent was contributorily negligent and the doctrine of last clear chance does not apply. Regardless of which of the Prices were driving, Mrs. Wooldridge's wrongful death and survival claims are barred. Therefore, whether Mr. Price was driving or Mrs. Price was driving is not a factual finding that will make a difference in the outcome of the case. As the identity of the driver is not a material fact, the court was free to grant summary judgment even though the fact was in dispute.

**JUDGEMENT AFFIRMED. COSTS TO BE PAID
BY THE APPELLANT.**

Appendix A: Guidelines for Attorney Coaches

Please also refer to Appendix B: Guidelines for Judges.

I. Approaches to Student Coaching

A. Initial Sessions

The first session with a student team should be devoted to the following tasks:

- Answering questions that students may have concerning general trial practices;
- Discussing court etiquette
- Explaining the reasons for the sequence of events/procedures found in a trial;
- Listening to the students' approach to the assigned case; and
- Discussing general strategies as well as raising key questions regarding the enactment.

B. Subsequent Sessions

Subsequent sessions should center on the development of proper questioning techniques by the student attorneys and sound testimony by the witnesses. Here, an attorney can best serve as a constructive observer and critical teacher—listening, suggesting, and demonstrating techniques to the team.

Students develop a better understanding of the case and learn more from the experience if the attorney coaches **do not** figure out the angles, fill in the gaps, and determine trial strategy for the team.

Coaching, guiding, and asking questions of the students is far more beneficial than telling them how to proceed.

If the competition is to realize its full potential, it is crucial that you help discourage a “win-at-all-costs” attitude among your team members. Please coach your team on proper decorum when a case, or decisions throughout the case, are not decided in their favor.

It is extremely important that students are coached on and understand the “human” element of judging and how that fits into the nature of our judicial process. Part of your focus should rest upon the fact that law is not black and white, and that individuals will interpret the law differently. Similarly, as in the real world, court proceedings will vary in relation to the presiding judge; accordingly, scores, interpretations, and outcomes will vary. What is permitted in one courtroom may not be permitted in another; what is successful in one case, may not be successful in another.

After twenty successful years, it has been shown time and time again that the best teams are those that view defeats as opportunities to learn. Debriefing with team members after wins and losses helps everyone to improve their skills and increase their understanding of the law.

II. Time Commitment

There is no pre-determined amount of time that attorney coaches are expected to spend coaching their teams. Some attorneys are available for one to two sessions per month, and others are available on a daily or weekly basis. Attorneys who have caseloads which do not permit them to coach in the afternoons have worked with teams on weekday evenings or weekends.

While most teams work with one attorney coach throughout the competition season, there are a handful of teams which have opted for a “team” of attorney coaches, so that the time commitment of each attorney is decreased.

Appendix B: Guidelines for Competition Judges

I. Procedures for Scoring Competitions

Rankings are determined by both wins and points. Therefore, it is essential that the presiding judge carefully rate each team on all elements listed on the Performance Rating Sheet.

A. Special Point

Always award the Special Point immediately after the close of the trial, and before adding the scores. This point will be used only in the event of a tie.

B. Decorum

Please be sure to score each team's overall performance in decorum in the space provided on the rating sheet.

C. Announcing Your Decision

1. After awarding, tallying and double-checking the rest of the scores, your first announcement to the teams should focus on the general student performance, decorum, and legal understanding that you just witnessed.
2. Your second announcement should be which team prevailed, based on the merits of the case.
3. Your last announcement should declare who prevailed based on student performance (the score).

II. Time Limitations

Students have been asked to limit their presentations to the timeframes listed below. It is particularly helpful for teams to know in advance how you will handle the time guidelines. Some judges prefer to give a warning, for instance, when there is one minute left; others expect students to be mindful of the time on their own. Still others prefer not to watch the time at all, though this has, at times, led to lengthy competitions. Students should not base an objection on the time. This is left to your discretion as the presiding judge. Competitions should last approximately 1 ½ to 2 hours.

Opening/Closing Statements	5 minutes each
Direct Examination	7 minutes/witness
Cross-Examination	5 minutes/witness
Voir Dire, as part of cross-examination	2 minutes per expert witness (in addition to the 5 minutes permitted for the cross-examination)
Re-Direct and Re-Cross Examination	3 minutes or a maximum of 3 questions

III. Mock Trial Simplified Rules of Evidence

The rules of evidence governing trial practice have been modified and simplified for the purposes of mock trial competitions. They are to govern proceedings. Other more complex rules are NOT to be raised during the trial enactment.

Attorneys and witnesses may neither contradict the Statement of Facts or Affidavits, nor introduce any evidence that is not included in this packet of materials. As with any perceived violation of a rule of evidence, students should object or request a bench conference.

IV. Trial Procedures

A. Motions to Dismiss

The purpose of the competition is to hear both sides; therefore, motions to dismiss, etcetera, are not allowed. There shall be no sequestration of witnesses at any time during the trial. If such a motion is made, the motion MUST be denied.

B. Opening/ Closing Arguments

Competition procedures permit only one opening statement and one closing argument for each team. In Mock Trial Competition, the Defense Team will always make the first closing argument, followed by the Prosecution/Plaintiff. There is no rebuttal in Mock Trial.

C. Direct and Cross Examinations

Each attorney (three for each side) must engage in the direct examination of one witness and the cross-examination of another.

Mock Trial Performance Score Sheet

Schools: _____ vs. _____
Plaintiff/Prosecution Defense

1=Fair 2=Satisfactory 3=Good 4=Very Good 5=Excellent

Please note that you are asked to give each attorney a composite score for their overall presentation: direct and re-direct or cross and re-cross. If re-direct or re-cross is NOT used, the attorney should NOT be penalized for not using this technique if there was nothing to be gained by using re-direct or re-cross.

****Please do not use fractions in scoring.****

		Prosecution/ Plaintiff	Defense
Opening Statements			
<u>PLAINTIFF/PROSECUTION</u> First Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>PLAINTIFF/PROSECUTION</u> Second Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>PLAINTIFF/PROSECUTION</u> Third Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>DEFENSE</u> First Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>DEFENSE</u> Second Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
<u>DEFENSE</u> Third Witness	Direct & Re-Direct Examination by Attorney		
	Cross & Re-Cross Examination by Attorney		
	Witness Performance		
Closing Arguments			
Decorum/ Use of Objections: Students were courteous, observed courtroom etiquette, spoke clearly, demonstrated professionalism, and utilized objections appropriately.			
TOTAL			
Tie Point (Before totaling score sheet, please award one point to the team you think gave the best overall performance. <u>This point will be used ONLY in a tie.</u>)			
TOTAL WITH TIE POINT (provide this score only in a tie)			

I have checked the scores and tallies, and by my signature, certify they are correct:

Presiding Judge: _____ Date: _____

Teacher Coach, Defense: _____ Teacher Coach, Plaintiff: _____

**Maryland State Bar Association
2010-2011
Statewide High School Mock Trial Competition**

Registration Deadline.....	Friday, November 5, 2010
Mock Trial Case Distributed to Registered Teams.....	Tuesday, November 9, 2010
Circuit Competitions (1st Level of Competition).....	January 10 – March 24, 2011
CIRCUIT CHAMPIONS MUST BE DECLARED BY THURSDAY, MARCH 24, 2011.	
Regional Competitions (2nd Level of Competition)..... (The eight Circuit Champions compete in single eliminations.)	Tuesday, April 5 and Weds., April 6, 2011
Semi-Final Competitions: Anne Arundel Circuit Court, 4pm.....	Thursday, April 14, 2011
State Championship: Maryland Court of Appeals, Annapolis, 10am*...	Friday, April 15, 2011
LIVE WEBCAST - http://www.mdcourts.gov/coappeals/webcast.html	

**Note: All competition dates are final.
A change by the Chief Judge of the State of Maryland is the only exception.**

Organizing Local Competitions

The Citizenship Law-Related Education Program will:

- provide Mock Trial Guides and rules for each State competition;
- disseminate information to each circuit;
- provide technical assistance to Circuit Coordinators;
- provide all registered participants who compete for the season with a certificate of participation;
- assist in recruitment of schools;
- act as a liaison in finding legal professionals to assist teams;
- develop press releases, beginning at the Regional Level of Competition.

The role of the Bar Association is:

- to advocate involvement of local attorneys in preparing teams and hearing trials;
- to provide support to schools;
- to assist the Circuit Coordinator.

The role of the Circuit Coordinator is:

- to make decisions/ mediate at the local level when problems or questions arise;
- to establish the circuit competition calendar;
- to arrange for courtrooms, judges, and attorneys for local competitions;
- to inform and attempt to recruit all schools in the circuit;
- to work with the local Bar Associations to set court dates, recruit attorney advisors, and establish local guidelines;
- to arrange general training sessions if necessary.

The role of the individual school/teacher coach is:

- to DEMONSTRATE that winning is secondary to learning;
- to coach and mentor students about the “real-world” aspect of judging in competitions;
- to teach sportsmanship, team etiquette and courtroom decorum;
- to recruit students for the team;
- to arrange training sessions and scrimmages;
- to arrange transportation to competitions
- to supervise the team during practices and competitions;
- to work with partners to recruit attorney advisors;
- to ensure that the team arrives at all scheduled mock trial competitions.

Mock Trial State Champions

2009-2010 Severna Park High School Anne Arundel County	1995-1996 Towson High School Baltimore County
2008-2009 Allegany High School Allegany County	1994-1995 Pikesville High School Baltimore County
2007-2008 Severna Park High School Anne Arundel County	1993-1994 Richard Montgomery High School Montgomery County
2006-2007 Severn School Anne Arundel County	1992-1993 Elizabeth Seton High School Prince George's County
2005 - 2006 Severna Park High School Anne Arundel County	1991-1992 Oxon Hill High School Prince George's County
2004-2005 Richard Montgomery High School Montgomery County	1990-1991 Westmar High School Allegany County
2003-2004 The Park School Baltimore County	1989-1990 Bishop Walsh High School Allegany County
2002-2003 Elizabeth Seton High School Prince George's County	1988-1989 Lake Clifton/Eastern High School Baltimore City
2001-2002 Towson High School Baltimore County	1987-1988 Pikesville High School Baltimore County
2000-2001 DeMatha Catholic High School Prince George's County	1986-1987 Thomas S. Wootton High School Montgomery County
1999-2000 Broadneck High School Anne Arundel County	1985-1986 Old Mill High School Anne Arundel County
1998-1999 Towson High School Baltimore County	1984-1985 High Point High School Prince George's County
1997-1998 Pikesville High School Baltimore County	1983-1984 Worcester County Team
1996-1997 Suitland High School Prince George's County	