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## RESCUING MARYLAND TORT LAW: A TRIBUTE TO JUDGE SALLY ADKINS

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This is an unconventional tribute. I have never worked closely with Judge Sally Adkins. Indeed, if my memory is correct, my contact with her has been limited to a couple of personal conversations, separated by approximately a quarter-century, and three telephone conversations, two of which focused on her selection of judicial clerks. However, during the past five years, when teaching Torts and related courses at the University of Maryland Carey School of Law, I frequently praised her work. My students read her opinions; opinions that stand out among Maryland torts jurisprudence because they uniquely echo and respond to changes in tort law that swept most of the remainder of American jurisdictions between 1965 and 1985 but had previously been ignored by the Maryland courts.

Not even a torts professor like me could have “foreseen” that Judge Adkins would emerge as my personal judicial heroine. Her pre-bench legal practice in Salisbury, Maryland, rarely involved tort matters. As expected, her opinions in torts cases while a member of the Court of Special Appeals of Maryland were often fact-specific and faithfully applied the law of precedents from the Court of Appeals of Maryland.<sup>1</sup> Even in her early years on the Court of Appeals, her opinions in torts cases<sup>2</sup> gave little hint of the groundbreaking decisions that would follow.

### I. MARYLAND TORT LAW: LEGAL HISTORY IN PRESENT TIME

However surprising it may be that Judge Adkins would author several of the most important Maryland tort opinions in recent decades, the structure of the ex-ante tort law that Judge Adkins began to transform was even more shocking. It is commonly—and mistakenly—assumed that predominantly Democratic and liberal leaning states such as Maryland would have tort law

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1. *See, e.g.*, *Lapides v. Trabbic*, 134 Md. App. 51, 758 A.2d 1114 (2000); *Piper v. Layman*, 125 Md. App. 745, 726 A.2d 887 (1999).

2. *See, e.g.*, *Prince George’s Cty. v. Longtin*, 419 Md. 450, 19 A.3d 859 (2011); *Houghton v. Forrest*, 412 Md. 578, 989 A.2d 223 (2010).

that favors plaintiffs and the ability of plaintiffs' counsel to have their cases heard and decided by juries.<sup>3</sup>

The reality of Maryland tort law is different. A study that sociologist Dr. Brian Jones and I published in 2016 found that tort doctrines in Maryland were among the most restrictive in enabling plaintiffs' counsel to have their cases decided by juries, ranking Maryland behind only Virginia and slightly ahead of Alabama among the seventeen states we studied.<sup>4</sup> Other jurisdictions experienced dramatic pro-plaintiff changes in personal injury law between the mid-1960s and the mid-1980s, but Maryland remained an isolated outlier.<sup>5</sup> The anachronistic characteristics of Maryland tort law are pervasive.<sup>6</sup> Perhaps most notorious is the Court of Appeals's continuing recognition of contributory negligence as a total bar to recovery, a doctrine rejected by forty-five other states.<sup>7</sup> Other aberrant and harsh features of Maryland tort law abound. For example, the Court of Appeals rejects the attractive nuisance doctrine and any other amelioration of the harsh doctrine that a child trespasser is owed only a duty to avoid willful, wanton, or reckless conduct on the part of the landowner.<sup>8</sup>

At the close of the twentieth century, two of the Court of Appeals's positions most out-of-line with those of almost all other jurisdictions involved the fundamental issue of how duty is determined in a tort case and the doctrine of negligence per se. First and most notably, Maryland law made it far easier for judges to keep cases from being heard by a jury by deciding as a matter of law that the defendant owed no duty to the plaintiff than did virtually any other state, with the possible exception of Virginia.<sup>9</sup> Second, Maryland courts rejected the doctrine of negligence per se,<sup>10</sup> adopted in a "strong majority" of all states,<sup>11</sup> that provided that when a defendant violated a specific statutory obligation designed to protect a class of people among whom

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3. See generally Donald G. Gifford & Brian Jones, *Keeping Cases from Black Juries: An Empirical Analysis of How Race, Income Inequality, and Regional History Affect Tort Law*, 73 WASH. & LEE L. REV. 557 (2016).

4. *Id.* app. A at 635–36.

5. *Id.* at 560–61.

6. *Id.* at 563–64; see also Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701, 701–02 (2014).

7. See generally *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 69 A.3d 1149 (2013); Gifford & Robinette, *supra* note 6.

8. *E.g.*, *Osterman v. Peters*, 260 Md. 313, 317–18, 272 A.2d 21, 23–24 (1971) (declining to adopt the doctrine of attractive nuisance to hold the landowners liable when a four-year-old boy fell into a neighbor's swimming pool and drowned).

9. See Gifford & Jones, *supra* note 3, at 615 tbl.1.

10. See, *e.g.*, *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 126, 90 A.3d 464, 479 (2014).

11. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 14, cmt. c (AM. LAW INST. 2010) (stating that only "[a]bout a dozen states conclude that violation of a statute is only some evidence of negligence").

the injured plaintiff was a member from the type of harm that the plaintiff suffered, the defendant's statutory violation established, either as a matter of law or as a presumption, that the defendant had breached a duty of reasonable care owed to the plaintiff.<sup>12</sup>

Why would Maryland, a progressive state, adopt substantive tort principles making it more difficult for plaintiffs to have their cases heard by the jury? During the past twenty-seven years, as a dean and professor of torts at the law school, I listened as defense insurance attorneys and business leaders told me of the importance of finding ways "to keep cases from Baltimore juries." In my study with Dr. Jones, we found that the prevalence of torts doctrines that keep plaintiffs' cases from being heard by juries is correlated with two factors: (1) the percentage of black jurors in the largest urban areas of a state and (2) a state's history as part of the slaveholding South during the antebellum era.<sup>13</sup> Based on the common perception, at least among defense attorneys and business leaders, that urban juries engaged in wealth redistribution, we also tested whether there was a correlation between the degree to which a state's substantive tort law kept cases from juries and the degree of income inequality within that state's largest cities, but we found no such correlation.<sup>14</sup> In other words, keeping cases from Bronx (and Baltimore) juries<sup>15</sup> results from race, not poverty.

In any event, as late as 2013, Maryland's tort law retained many of the same anti-plaintiff, anti-jury doctrines that the overwhelming majority of other jurisdictions discarded between the mid-1960s and the mid-1980s. Then, Judge Adkins assumed a leadership role in bringing Maryland tort law closer to prevailing national norms.

## II. JUDGE ADKINS: THE EVOLUTION OF DUTY UNDER MARYLAND LAW

### A. *The Power of Dissent: Warr v. JMGM Group, LLC*

At times, the opinions that are most important are dissenting opinions. Such was the case when Judge Adkins wrote the dissenting opinion in *Warr v. JMGM Group, LLC*,<sup>16</sup> the Court of Appeals 2013 decision finding that a tavern did not owe a duty of care to a child killed in an auto accident after the tavern had served its patron, Mr. Eaton, at least twenty-one drinks, many of

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12. See generally *Osborne v. McMasters*, 41 N.W. 543 (Minn. 1889); *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920).

13. Gifford & Jones, *supra* note 3, at 565.

14. *Id.* at 590.

15. In his novel, *The Bonfire of the Vanities*, Tom Wolfe characterized any jury in Bronx County, New York as a "vehicle for redistributing wealth." TOM WOLFE, *THE BONFIRE OF THE VANITIES* 406 (Picador 2008) (1987).

16. 433 Md. 170, 70 A.3d 347 (2013).

them after Eaton was visibly intoxicated.<sup>17</sup> Subsequently, Eaton drove in excess of 90 mph and caused a collision killing a child and injuring other family members.<sup>18</sup> Judge Adkins attacked the court's failure to accept dram shop liability<sup>19</sup> as poor social policy<sup>20</sup> and as a decision totally out of line with judicial decisions in at least forty-one other states.<sup>21</sup> My analysis and comments here, however, focus on what Judge Adkins described as the "violence [done] to the tort of negligence which will have far ranging consequences, well beyond the issue of dram shop liability."<sup>22</sup>

Judge Adkins's dissenting opinion is essentially a tutorial in how the law in Maryland governing duty is dramatically at odds with the law in virtually all other jurisdictions<sup>23</sup> and as expressed in the *Restatement (Third) of Torts*.<sup>24</sup> The majority holds that the defendant-tavern did not owe a duty of care to the plaintiffs and purports to justify its opinion by an analysis of various provisions of the *Restatement (Second) of Torts*.<sup>25</sup> In her dissent, Judge Adkins eviscerates the majority's reasoning.<sup>26</sup>

The plaintiffs in *Warr* alleged that the defendant's employees continued to serve Mr. Eaton alcoholic beverages after he was visibly intoxicated and in doing so, violated both a criminal statute and a duty owed to the plaintiffs to "not furnish alcohol to intoxicated persons," which caused their injuries.<sup>27</sup> The majority states that whether there is a duty "is generally determined by examining a number of factors, to include:"

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered the injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing

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17. *Id.* at 199–200, 70 A.3d at 365 (Adkins, J., dissenting).

18. *Id.*

19. *See id.* at 202, 70 A.3d at 366 (majority opinion) (defining "dram shop liability" as "[c]ivil liability of a commercial seller of alcoholic beverages for personal injury caused by an intoxicated customer" (quoting BLACK'S LAW DICTIONARY 568 (9th ed. 2009))).

20. *Id.* at 204, 230–33, 70 A.3d at 367, 383–85 (Adkins, J., dissenting).

21. *Id.* at 244 n.33, 70 A.3d at 391 n.33.

22. *Id.* at 253, 70 A.3d at 396; *see also* Katherine O'Konski, Note, *Warr v. JMGM Group: Maryland Dram Shops Escape Duty to Foreseeable Victims of Drunk Driving*, 73 MD. L. REV. 1206 (2014). This note contains an excellent student analysis of the *Warr* decision; I am proud to acknowledge that I was one of the faculty members who assisted Ms. O'Konski in the development of her thesis. *Id.*

23. O'Konski, *supra* note 22, at 1210 ("Although Maryland declined to adopt dram shop liability in the 1980s, many other states recognized that taverns owed a duty to protect others from foreseeable injury at the hands of their intoxicated patrons.").

24. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 (AM. LAW INST. 2010); *see also infra* notes 36–49.

25. *Warr*, 433 Md. at 184, 190–95, 70 A.3d at 355, 359–62.

26. *See id.* at 253, 70 A.3d at 396 (Adkins, J., dissenting).

27. *Id.* at 174, 70 A.3d at 349 (majority opinion).

future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost and prevalence of insurance for the risk involved.<sup>28</sup>

Additionally, the majority writes that where the injury is more directly caused by a third-party (Eaton), the original tortfeasor (the tavern) owes “no duty to an injured person for harm caused by a third party” unless the tortfeasor either has control over the actions of the third party or has a special relationship with the victim.<sup>29</sup>

Judge Adkins carefully and convincingly explains how the majority misunderstands the law of duty as applied in the *Restatements*, the beginning text for the majority’s analysis. She notes that the rules that apply to whether the defendant owes a duty of care begin with whether a defendant is engaged in affirmative conduct or whether a defendant is merely being unreasonable by not coming to the aid of a stranger whose peril the defendant did not create.<sup>30</sup> Judge Adkins is exceedingly careful in making it clear that the real distinction is whether the defendant’s “conduct . . . results in greater risk to another than the other would have faced absent the conduct” and that “[t]his ‘greater risk’ includes ‘risk by exposing another to the improper conduct of third parties.’”<sup>31</sup>

As Judge Adkins explicitly states in a bolded heading in her opinion, titled “Majority Applies Wrong Standard,”<sup>32</sup> the majority’s holding rests on the statement within Section 315 of the *Restatement (Second) of Torts* which essentially provides “that—absent a special relationship—an individual has no duty to prevent a third person from causing harm to another.”<sup>33</sup> However, as Judge Adkins notes, “Section 315 is found within the ‘Duties of Affirmative Action’ topic of the Second Restatement.”<sup>34</sup> It does not apply at all when a defendant is acting affirmatively—or, more precisely, when the defendant’s conduct increases the risk to the plaintiff, including increasing the risk caused by third parties.<sup>35</sup> In other words, when the tavern’s employees served alcohol to the visibly intoxicated Eaton, Section 315 does not apply at all. Perhaps we can blame it all on a computerized legal research error. Using one

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28. *Id.* at 182, 70 A.3d at 354 (quoting *Ashburn v. Anne Arundel Cty.*, 306 Md. 617, 627, 510 A.2d 1078, 1083 (1986)).

29. *Id.* at 189, 70 A.3d at 358.

30. *Id.* at 205–06, 210, 70 A.3d at 368, 371 (Adkins, J., dissenting).

31. *Id.* at 207, 70 A.3d at 369 (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 cmt. o (AM. LAW INST. 2010)).

32. *Id.* at 208, 70 A.3d at 370.

33. *Id.* at 209, 70 A.3d at 370 (citing RESTATEMENT (SECOND) OF TORTS § 315 (AM. LAW INST. 1965)).

34. *Id.* at 209, 70 A.3d at 371.

35. *Id.* at 210, 70 A.3d at 371.

of the electronic legal research services such as Westlaw or LEXIS, the judge or her law clerk evidently took Section 315 entirely out of context and applied it to a situation in which the defendant's employee, the bartender, was already acting affirmatively.

As egregious and sloppy as the majority's error in applying the concept of special relationship to a situation in which it is not relevant, the majority's analysis also differs more fundamentally from the law of duty as expressed in the *Restatements* and the overwhelming percentage of jurisdictions.<sup>36</sup> At least since Judge Cardozo's iconic opinion in *MacPherson v. Buick Motor Co.*,<sup>37</sup> and perhaps even before then,<sup>38</sup> virtually all other jurisdictions have held that a defendant owes a duty of care to anyone whom it could foresee might be injured by its negligence.<sup>39</sup> In contrast, the majority opinion in *Warr* recites a list of factors from *Tarasoff v. Regents of University of California*,<sup>40</sup> that it asserts must be examined in every case to determine whether a duty is owed by the defendant.<sup>41</sup> This interpretation of the California Supreme Court's analysis of duty in *Tarasoff* is entirely mistaken. In *Tarasoff*, the court quotes with approval the classic language of *Heaven v. Pender*,<sup>42</sup> providing essentially that when a defendant's conduct foreseeably results in harm to others, a duty exists.<sup>43</sup> The *Tarasoff* court then goes on to state, "We depart from 'this fundamental principle' only upon the 'balancing of a number of considerations,'"<sup>44</sup> the same factors identified earlier in this Section<sup>45</sup> that the *Warr* majority indicated should be considered in deciding whether a duty exists in the first place under Maryland law.<sup>46</sup> Similarly, Section 7 of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*, after stating that "[a]n actor ordinarily has a duty to exercise reasonable care

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36. *Id.* at 243, 70 A.3d at 391.

37. 111 N.E. 1050 (N.Y. 1916).

38. *See, e.g., Heaven v. Pender*, 11 QBD 503 (1883) (stating "whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger").

39. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 (AM. LAW INST. 2010) (going even further and recognizing that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm;" in other words, the actor need not foresee the risk).

40. 551 P.2d 334 (Cal. 1976).

41. *Warr*, 433 Md. at 182, 70 A.3d at 354; *see supra* note 13 and accompanying text.

42. 11 QBD 503 (1883).

43. *Tarasoff*, 551 P.2d at 342 (quoting *Heaven*, 11 QBD at 509); *see supra* note 22 and accompanying text.

44. *Tarasoff*, 551 P.2d at 334.

45. *See supra* note 28 and accompanying text.

46. *Warr*, 433 Md. at 182, 70 A.3d at 354 (quoting *Ashburn v. Anne Arundel Cty.*, 306 Md. 617, 627, 510 A.2d 1078, 1083 (1986)).

when the actor's conduct creates a risk of physical harm," goes on to make the same point as the court in *Tarasoff*: "In *exceptional* cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification."<sup>47</sup>

Despite the Maryland Court of Appeals's continued reference and reliance on the *Tarasoff* factors, the difference between how the court uses the factors and how the California Supreme Court and the *Restatement* employ them is profound. In the vast bulk of other American jurisdictions, foreseeability alone creates the duty when the defendant is acting affirmatively (or, as Judge Adkins would correct me, "increasing the risk" through its conduct).<sup>48</sup> In Maryland, the Court of Appeals states that the court must examine these same *Tarasoff* factors to determine whether a duty is owed in the first place.<sup>49</sup> When it comes to duty, in Maryland, the presumption is flipped. Why? This virtually unique formulation of duty analysis gives Maryland trial courts the opportunity to keep cases from "Baltimore" juries.

Judge Adkins dissenting opinion in *Warr* is the first Court of Appeals opinion in recent years, and perhaps much longer, that seriously examines some of the differences between how duty is determined under Maryland law and under the law that operates in the overwhelming percentage of other jurisdictions. Her analysis was in a losing effort, but it set the stage for important Court of Appeals decisions to come—notably *May v. Air & Liquid Systems Corp.*<sup>50</sup> and, especially, *Kiriakos v. Phillips*.<sup>51</sup>

#### *B. Pushing the Envelope of Duty: Imposing Liability on a Manufacturer that Did Not Produce the Product*

In the two years following *Warr*, Judge Adkins wrote for a majority of the Court of Appeals in two opinions that probably extend duty farther than any other decisions issued by the court in recent decades. At the same time, the doctrinal articulation of duty under Maryland law moved, but only incrementally, toward the test of duty employed in most other jurisdictions.

In *May v. Air & Liquid Systems Corp.*, the plaintiff's decedent ("May") died of mesothelioma, a particularly virulent form of cancer almost always resulting from exposure to asbestos.<sup>52</sup> His wife sued the defendant, the manufacturer of steam pumps installed in naval vessels that contained asbestos

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47. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7 (AM. LAW INST. 2010) (emphasis added).

48. *Warr*, 433 Md. at 185, 70 A.3d at 356.

49. See *supra* note 28 and accompanying text.

50. 446 Md. 1, 129 A.3d 984 (2015); see *infra* Section I.B.

51. 448 Md. 440, 139 A.3d 1006 (2016); see *infra* Section I.C.

52. *May*, 446 Md. at 7, 129 A.3d at 987.

gaskets and packing.<sup>53</sup> The defendant's instruction manual lacked any warning "regarding the danger of inhaling asbestos dust or directions to wear protective gear."<sup>54</sup> However, May was not exposed to asbestos gaskets and packing that the defendant had incorporated into the product it sold. Instead, May's exposure had been to replacement gaskets and packing, produced by other manufacturers, that were later installed in the pumps originally manufactured by the defendant.<sup>55</sup> During the years when May inhaled the asbestos fibers from the gaskets and packing materials, the only insulating material available that could withstand the high temperatures present in the pumps contained asbestos.<sup>56</sup>

When the plaintiff sued the defendant, the manufacturer of the original pump, under both negligence and strict liability failure to warn claims, the defendant quite understandably argued that it owed no duty to the plaintiff's decedent because it had not manufactured the asbestos gaskets and packing that caused his harm.<sup>57</sup> Judge Adkins analyzed the duty issue using the same six factors that the court had described in *Warr*.<sup>58</sup> Now, however, Judge Adkins, while acknowledging that "foreseeability alone is not sufficient to establish a duty,"<sup>59</sup> stated clearly that "the principal determinant of duty is foreseeability."<sup>60</sup>

Admittedly, the case in which this advance occurred is the type of case that draws the wrath of commentators from the defense side who argue, particularly on the strict liability claim, that a manufacturer is being held liable for a product it did not produce.<sup>61</sup> Arguably, being held liable on the strict

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53. *Id.* at 5–7, 129 A.3d at 986–87.

54. *Id.* at 6, 129 A.3d at 987.

55. *Id.* at 6–7, 9–10, 129 A.3d at 986–87, 989.

56. *Id.* at 6, 129 A.3d at 986.

57. *Id.* at 11, 129 A.3d at 989–90.

58. *See supra* note 28 and accompanying text.

59. *May*, 446 Md. at 12, 129 A.3d at 990.

60. *Id.* at 18, 129 A.3d at 994. The opinion, written by Judge Adkins, also holds that the manufacturer can be held liable on a strict liability basis. *Id.* at 26, 28–29, 129 A.3d at 989–1000. *See infra* notes 61–62 and accompanying text. In an opinion written by Justice Kavanaugh and joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan, the United States Supreme Court recently reached a similar conclusion in a case with facts virtually identical to those in *May*. *See Air & Liquid Sys. Corp. v. DeVries*, 139 S. Ct. 986, 991 (2019) ("In the maritime tort context, a product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.").

61. *See* PHIL GOLDBERG, PROGRESSIVE POLICY INST., SHOWDOWN IN ALABAMA: LITIGATORS VS. INNOVATORS 1 (2015), [https://www.progressivepolicy.org/wp-content/uploads/2015/09/2015.09-Goldberg\\_Showdown-in-Alabama-Litigators-vs-Innovators.pdf](https://www.progressivepolicy.org/wp-content/uploads/2015/09/2015.09-Goldberg_Showdown-in-Alabama-Litigators-vs-Innovators.pdf) ("Every once in a while, personal injury lawyers come up with new ways to sue that can be real head scratchers. . . . This happened last year in Alabama, where the Alabama Supreme Court held that a company can be subject to liability, not for its own products, but for products entirely made and sold by



products liability claim can be justified on the grounds that the manufacturer sold the original pump without warning of the dangers of inhaling asbestos fibers resulting from the presence of asbestos gaskets and packing materials inherently necessary for the product to function.<sup>62</sup>

The questionable holding on strict liability should not obscure the importance or the soundness of Judge Adkins's conclusion that a duty exists under the negligence claim. Her ability to gain the votes for her majority opinion of five of the seven members of the court<sup>63</sup> is surprising given that her dissent in *Warr* was joined by only two other judges.<sup>64</sup> More important, foreseeability was now the “principal”—if not the only—factor determining liability.<sup>65</sup>

*C. Take II of the Liability of Providers of Alcohol: Kiriakos v. Phillips*

After the Court of Appeals rejected dram shop liability in *Warr*, few observers would have predicted that the court would accept social host liability only three years later. More jurisdictions accept dram shop liability than do social host liability.<sup>66</sup> Restaurants and bars train their bartenders and servers as to how to detect underage patrons or signs that a customer has had too much to drink; individuals hosting parties in their own homes rarely if ever undergo such training.<sup>67</sup> Commercial establishments are able to distribute the losses resulting from liability judgments for damages resulting from traffic accidents caused by their underage or visibly intoxicated patrons, through either insurance or incrementally increasing prices for the serving of

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its competitors.” (referring to *Wyeth, Inc. v. Weeks*, 159 So. 3d 649, 673–74 (Ala. 2014) (allowing the plaintiff to recover against a brand-name pharmaceutical manufacturer even though the drugs that harmed him were generic drugs produced by a different manufacturer))).

62. *May*, 446 Md. at 28–29, 129 A.3d at 1000.

63. Judge Adkins's opinion was joined by Chief Judge Barbera, Judge Greene, Judge McDonald, and Judge Harrell. Judge Battaglia and Judge Watts dissented. *See id.* at 30, 129 A.3d at 1001 (Watts, J., dissenting).

64. Judge Harrell and Judge McDonald joined Judge Adkins's dissent. *See Warr v. JMGM Grp., LLC*, 433 Md. 170, 199, 70 A.3d 347, 365 (2013) (Adkins, J., dissenting).

65. *See May*, 446 Md. at 18, 129 A.3d at 994.

66. Thirty-one states impose social host liability in civil suits following injuries or damages caused by underage drinkers. Heather Morton, *Social Host Liability for Underage Drinking Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (Mar. 27, 2014), <http://www.ncsl.org/research/financial-services-and-commerce/social-host-liability-for-underage-drinking-statutes.aspx>. Forty states impose liability for dram shops. Krystyna D. Gancoss, Note, “*I’m Not a Regular Mom . . . I’m a Cool Mom*”: *An Argument for Broader Civil Social Host Liability in Connecticut*, 35 QUINNIPIAC L. REV. 351, 365 (2017).

67. *Cf. MD. CODE ANN., AL. BEV. § 4-505* (West 2016) (requiring an owner of a restaurant or bar licensed to serve alcoholic beverages, or their employee, to attend state-approved program on alcohol awareness, including “effective methods to . . . determine whether a customer is under the legal drinking age . . . [and] stop service before a customer becomes intoxicated”).

alcoholic beverages, in ways that often are not available to those who serve alcohol to their social guests in their homes and apartments.

Despite all this, in *Kiriakos v. Phillips*, the Court of Appeals, in an opinion written by Judge Adkins, unanimously imposed social host liability in two companion cases.<sup>68</sup> The court distinguished *Kiriakos* from *Warr* in two ways. First, the Maryland statute involved in *Kiriakos* makes it illegal for a defendant to allow a guest, whom he knows is underage, to drink alcoholic beverages on his property.<sup>69</sup> Judge Adkins characterizes “[t]his prohibition . . . as a bright line.”<sup>70</sup> In contrast, the statute in *Warr* made it illegal for a tavern to serve alcoholic beverages “to an adult who was ‘visibly intoxicated.’”<sup>71</sup> The judge concluded that “[t]he point at which a patron becomes ‘visibly intoxicated’ is a point about which reasonable minds could differ.”<sup>72</sup> Perhaps this contrast is superficially plausible. Yet, how realistic is it to expect that a social host will check the IDs of dozens of partygoers in their late teens or early twenties? Is implementing such a requirement for social hosts really more feasible than expecting properly trained employees of bars and restaurants to be able to determine if a patron is visibly intoxicated?

The second way in which Judge Adkins’s opinion distinguishes *Warr* is by stressing repeatedly that the Maryland legislature had evinced a special concern for the vulnerability of underage drinkers by passing the criminal statute making it illegal to serve alcoholic beverages to those under twenty-one years of age.<sup>73</sup> The court’s opinion repeatedly states that when the legislature enacted the statute prohibiting the serving of alcoholic beverages to those under twenty-one years of age, it had expressed a policy of showing special solicitude for minors, recognizing both their inability to make mature decisions and their vulnerability to the effects of alcohol.<sup>74</sup>

Judge Adkins’s distinguishing of *Warr* demonstrates her persuasive and diplomatic efforts to gain the votes necessary for a unanimous decision, including that of Judge Battaglia who wrote the court’s opinion in *Warr*. In objective terms, however, the attempt to distinguish the two cases is not

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68. *Kiriakos v. Phillips*, 448 Md. 440, 139 A.3d 1006 (2016).

69. See MD. CODE ANN., CRIM. LAW § 10-117 (West 2016).

70. *Kiriakos*, 448 Md. at 491, 139 A.3d at 1036.

71. *Id.* (quoting *Warr v. JMGM Grp., LLC*, 443 Md. 170, 195, 70 A.3d 347, 362 (2013)).

72. *Id.* at 491, 139 A.3d at 1036.

73. CRIM. LAW § 10-117; *Kiriakos*, 448 Md. at 459–60, 139 A.3d at 1019.

74. *E.g.*, *Kiriakos*, 448 Md. at 460, 139 A.3d at 1018 (“CR § 10-117(b) identifies a specific class that the General Assembly sought to protect: underage people exposed to alcohol. The text of the statute makes clear to us the General Assembly’s concern for this specific class.”); *id.* at 475, 139 A.3d at 1027 (“[W]e also identify a legislative recognition that minors . . . have a reduced ability to handle alcohol.”); *id.* at 477, 139 A.3d at 1029 (“[T]he General Assembly’s determination that underage persons have a diminished ability to handle alcohol . . . .”); *id.* at 488, 139 A.3d at 1035 (“Considering the legislative recognition in Maryland that underage people have a diminished ability to handle alcohol and may expose themselves and others to harm . . . .”).

wholly convincing, as I suspect Judge Adkins, who, of course, dissented in *Warr*, realized. First, just as minors are unable to make mature decisions about the consumption of alcohol, so are those who are already visibly intoxicated. Second, the opinion attributes to the legislature a special solicitude for minors. These statements blur the distinction between the intoxicated driver and the victim of the accident. Ironically, the decedent in *Warr*<sup>75</sup> was a child, and the decedent in *Kiriakos* was an adult.<sup>76</sup>

Presumably, the tavern that serves an underaged patron should be just as liable as the social host in *Kiriakos*. How long can *Warr* survive as precedent if a tavern is held liable for serving an alcoholic beverage to a twenty-year old with a realistic-looking fake ID but is not held liable for serving more than twenty alcoholic beverages to someone “visibly intoxicated,” as the defendant’s tavern did for Eaton in *Kiriakos*?

Yes, the issues in the two cases are modestly different. However, what really matters for the development of the common law of negligence in Maryland is how Judge Adkins in *Kiriakos* assumed leadership of the court on the issue of duty. I will be brief in addressing the duty issue in *Dankos v. Stapf*,<sup>77</sup> the first of the two companion cases considered in the *Kiriakos* opinion. In that case, the defendant Linda Stapf allowed seventeen-year old Steven Dankos to drink alcoholic beverages at her home.<sup>78</sup> Dankos left Stapf’s home early the next morning, riding in the bed of a pickup truck driven by another intoxicated partygoer who was twenty-two years of age.<sup>79</sup> When the driver crashed the truck, Dankos was killed. His mother sued Stapf, among others.<sup>80</sup>

Judge Adkins’s opinion in the *Dankos* case applies the “Statute or Ordinance rule,” described and analyzed in the next Part,<sup>81</sup> to find that Stapf owed Dankos a duty of care under the Maryland criminal statute making it illegal for adults to enable someone less than twenty-years of age to consume alcoholic beverages.<sup>82</sup> She concludes that the statute’s legislative history shows a legislative purpose to protect “underage non-drivers who are provided alcohol” as well as those who become intoxicated and drive.<sup>83</sup> She further finds that a jury could find that the statutory violation was a proximate

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75. *Warr*, 433 Md. at 200, 70 A.3d at 365 (Adkins, J., dissenting).

76. *Kiriakos*, 448 Md. at 452–53, 139 A.3d at 1014.

77. *Davis v. Stapf*, 224 Md. App. 393, 120 A.3d 890, cert. granted sub nom. *Dankos v. Stapf*, 445 Md. 4, 122 A.3d 974 (2015).

78. *Id.* at 451–52, 139 A.3d at 1012–13.

79. *Id.*

80. *Id.*

81. See *infra* Part III.

82. *Kiriakos v. Phillips*, 448 Md. 440, 462–64, 139 A.3d 1006, 1014–16, 1020 (2016).

83. *Id.* at 464, 139 A.3d at 1020.

cause of Dankos's death because "Steven's 'degree of intoxication' inhibited his ability to make a reasonable decision about how to leave the party."<sup>84</sup>

Judge Adkins's handling of the case of *Kiriakos* is of far greater interest to the development of duty in negligence cases under Maryland law.<sup>85</sup> In that case, eighteen-year-old Shetmiyah Robinson struck Manal Kiriakos, who was walking her dogs, causing her severe injuries.<sup>86</sup> The previous evening, the defendant Brandon Phillips served Robinson alcoholic drinks. The statute or ordinance rule does not provide the means of establishing duty because Kiriakos, an adult and presumably sober pedestrian, is not a part of the class designed to be protected by the statute. Instead, Judge Adkins finds that Phillips owed Kiriakos a duty under the common law of negligence by analogizing to the tort of negligent entrustment.<sup>87</sup> She reasons that providing alcoholic beverages to an underage minor is analogous to providing someone whom a defendant knows or should know to be incompetent to handle an automobile or a similar dangerous instrumentality because of his youth or incompetence.<sup>88</sup>

Judge Adkins then confirms that Phillips owes Kiriakos a duty by applying the traditional Maryland test using the seven policy factors previously identified.<sup>89</sup> She again highlights that "foreseeability is perhaps 'most important' among these factors," but cautions that "it alone does not justify the imposition of a duty."<sup>90</sup> By finding a duty, of course, Judge Adkins reaches a result at least in tension and arguably directly at odds with the holding in *Warr*.<sup>91</sup>

The importance of Judge Adkins's opinions in *May* and *Kiriakos* is that she repeatedly stresses the "primacy" of foreseeability as a determinant of duty. Maryland's unusual handling of duty, employing a multifactorial test, which if employed without any indication as to which factor is most important or at least some indication has to how the factors should be weighted in a court's analysis, is a virtual invitation for a trial court judge to decide the case backwards; that is, to decide whether or not a duty exists based on intu-

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84. *Id.*, 139 A.3d at 1021.

85. *Id.* at 452–54, 475–94, 139 A.3d at 1013–15, 1027–38.

86. *Id.* at 452–53, 139 A.3d at 1014.

87. In her dissent in *Warr*, Judge Adkins provided plaintiff's counsel with a roadmap showing how to argue that providing alcoholic beverages to someone visibly intoxicated, or here a minor, was analogous to negligent entrustment. *Warr v. JMGM Grp., LLC*, 433 Md. 170, 224–25, 70 A.3d 347, 379–80 (2013) (Adkins, J., dissenting).

88. *Kiriakos*, 448 Md. at 452–53, 139 A.3d at 1014.

89. *Id.* at 486–92, 139 A.3d at 1033–37; *see supra* note 28 and accompanying text.

90. *Kiriakos*, 448 Md. at 486, 139 A.3d at 1034.

91. *See supra* Section I.A.

itive judgment or political biases and then apply the articulated factors to justify whatever result is reached. Judge Adkins's focus on the primacy of foreseeability is a significant step in avoiding this.

Maryland's multifactorial test for duty also exacerbates the risk that trial court and appellate court judges, particularly those who may be skeptical of Baltimore or other urban juries, will inappropriately find "no duty" as a means to keep cases from the jury. For example, in *Georgia Pacific, LLC v. Farrar*,<sup>92</sup> the Court of Appeals held that the defendant that had manufactured a joint compound containing asbestos owed no duty of care to the plaintiff, the granddaughter of a worker exposed to the defendant's asbestos-containing product, who regularly shook out and laundered his asbestos-laden work clothes.<sup>93</sup> The court's decision rested largely on two factors. First, the court found that the risks of secondary exposure to asbestos by those in the workers' homes was not foreseeable to the defendant, even in the face of the trial court jury's verdict for the plaintiff and the Court of Special Appeals's finding that the risks were foreseeable to the defendant.<sup>94</sup> The Court of Appeals acknowledged that its own dubious factual finding was predicated not only on testimony in the trial record, but also by the court's consideration of the facts in cases it had decided in the past and findings by courts in other jurisdictions.<sup>95</sup> In making this finding of fact, the court arguably invaded the province of the jury. Second, the Court of Appeals concluded that it was not feasible for the defendant to warn victims of secondary exposure.<sup>96</sup> Again, the court assumed responsibility for determining whether the defendant breached a duty of care; that is, was the burden of precaution greater than the probability of harm multiplied by the gravity of the resulting harm?<sup>97</sup> A comment to the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* explicitly admonishes courts not to use the rubric of *duty* to keep cases from the jury, even in cases where a trial court might appropriately find that reasonable jurors could not find that a defendant breached a duty of care and, therefore, it would be appropriate for the court to issue judgment for the defendant as a matter of law.<sup>98</sup>

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92. 432 Md. 523, 69 A.3d 1028 (2013).

93. *Id.* at 526, 69 A.3d at 1030–31.

94. *Id.* at 530, 69 A.3d at 1032–33.

95. *Id.* at 535–39, 69 A.3d at 1036–39.

96. *Id.* at 531–32, 69 A.3d at 1033–34.

97. *See generally* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947) (articulating Judge Learned Hand's formula of whether the burden of precaution is less than the probability of the harm occurring multiplied by the gravity of the injury that may be caused as a test of negligence).

98. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7, cmt. i (AM. LAW INST. 2010).

Judge Adkins has guided the Court of Appeals in a direction where foreseeability is the primary determinant of liability. Now it is up to the court to finish the journey and adopt an approach to duty that is consistent with that in place in most other jurisdictions and in the *Restatements*: If a defendant acts negligently and can foresee that harm to others will occur as a result of its negligence, a duty of care is owed, at least to the class of people within the “range of apprehension”<sup>99</sup> who might be foreseeably harmed. When a defendant is acting affirmatively, the other six factors used by Maryland courts in recent decades to determine the existence of a duty should be limited to a more carefully defined role. Their use should be restricted to determining whether “[i]n exceptional cases . . . a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification” “when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases.”<sup>100</sup>

### III. THE STATUTE OR ORDINANCE RULE—NEGLIGENCE PER SE BY ANY OTHER NAME

Changes in the law in a common law system where judges derive their authority to decide cases from the legitimacy of past precedents under the doctrine of stare decisis<sup>101</sup> is difficult. Despite this, the most famous and important tort opinions of all time are those where judges purport to be following precedent and yet, somehow, once the effects of the opinion are realized, it becomes clear that the common law has been turned upside down. The classic example, of course, is Judge Benjamin Cardozo’s opinion in *MacPherson v. Buick Motor Company*,<sup>102</sup> in which the plaintiff was injured by a defective wheel, a component part of an automobile allegedly negligently inspected by the defendant Buick Motor Company that assembled the car, but purchased by the plaintiff from an independent dealer.<sup>103</sup> The law at the time was clear: a defendant who provided a product that subsequently injured a plaintiff owed no duty of care to the plaintiff unless privity, a direct contractual relationship, existed between the defendant and the plaintiff.<sup>104</sup> New York courts had created exceptions to this harsh rule for products that were “*imminently dangerous to life*,” such as falsely labelled poisons, explosives,

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99. *Palsgraf v. Long Island Ry. Co.*, 162 N.E. 99, 100–01 (N.Y. 1928).

100. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 7(b) (AM. LAW INST. 2010).

101. See Gifford & Robinette, *supra* note 6, at 711–12; see also Gifford & Jones, *supra* note 3, at 712–16.

102. 111 N.E. 1050 (N.Y. 1916).

103. *Id.* at 1051.

104. *Id.* at 1052–52.

and deadly weapons when they were negligently constructed or labeled.<sup>105</sup> Judge Cardozo purported to follow these precedents when he held that *if any product* is “reasonably certain to place life and limb in peril when negligently made,” then the product is imminently dangerous and, therefore, privity is not required.<sup>106</sup> Judge Cardozo had replaced a requirement of privity to establish duty with a test of foreseeability. Obviously, if a plaintiff has been injured and is suing for personal injury, it is easy to argue that the product is imminently dangerous.

Judge Adkins employs the same sort of principled reasoning in *Blackburn Limited Partnership v. Paul*.<sup>107</sup> A toddler had drowned, causing severe anoxic brain injury, in a pool after apparently gaining access through a gate that was faulty and failed to comply with a county ordinance and state regulations.<sup>108</sup> Plaintiff’s counsel initial evaluation of the chances for success in the ensuing litigation could not have been optimistic. In a case with remarkably similar facts a generation earlier, *Osterman v. Peters*,<sup>109</sup> the Court of Appeals held that, because Maryland was one of only two states that continued to reject the attractive nuisance doctrine<sup>110</sup> or a similar provision under the *Restatement (Second) of Torts*<sup>111</sup> each of which provide that a child trespasser is owed a duty of reasonable care under some circumstances, the landowner owed no duty to a trespassing child “except to abstain from willful or wanton misconduct or entrapment.”<sup>112</sup> Even if, somehow, a duty could be established, plaintiff’s counsel could not rely on the doctrine of negligence *per se* to prove that the defendant was negligent and had violated a standard of care because Maryland rejected the doctrine of negligence *per se*; in Maryland, a violation of a statute, ordinance, or regulation was only “mere[] evidence” of negligence.<sup>113</sup>

Notwithstanding that a literal, mechanical application of well-established precedents seemed to suggest that the Court of Appeals could not hold

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105. *See id.* at 1052 (emphasis added) (discussing *Thomas v. Winchester*, 6 N.Y. 397 (1852)).

106. *Id.* at 1053.

107. 438 Md. 100, 90 A.3d 464 (2014). For a remarkably astute and well-researched analysis of *Blackburn*, see Monica Basche, Note, *Blackburn Limited Partnership v. Paul: The Birth of Maryland’s Statute or Ordinance Rule and Its Ill-Defined “Targeted Class” Requirement*, 74 MD. L. REV. 621 (2015). I am proud to acknowledge that Ms. Basche was once my student and research assistant. Following graduation, Ms. Basche clerked for Judge Adkins.

108. *Blackburn*, 438 Md. at 104–05, 90 A.3d at 466.

109. 260 Md. 313, 272 A.2d 21 (1971).

110. *Id.* at 315, 272 A.2d at 22.

111. RESTATEMENT (SECOND) OF TORTS § 339 (AM. LAW INST. 1977).

112. *Osterman*, 260 Md. at 314, 272 A.2d at 22; *see also* *Herring v. Christensen*, 252 Md. 240, 249 A.2d 718 (1969).

113. *See* *Absolon v. Dollahite*, 376 Md. 547, 553–54, 831 A.2d 6, 9–10 (2003) (“[T]he long established general rule in Maryland [is] that the violation of a statutory duty is only evidence of negligence, but does not establish negligence *per se*.”).

that the plaintiffs in *Blackburn* would be able to recover, Judge Adkins, writing for a unanimous court, did just that. Like Judge Cardozo, she did not confront the court's past decisions rejecting negligence per se frontally, as the California Supreme Court of the 1960s or 1970s might have done.<sup>114</sup> Perhaps reflecting the extremely cautious and conservative view "[t]hat judges can and do make new law on subjects not covered by previous decisions; but that judges cannot unmake old law, cannot even change an existing rule of 'judge-made' law,"<sup>115</sup> Judge Adkins did not adopt the doctrine of negligence per se followed in most jurisdictions,<sup>116</sup> but instead labelled a new rule, the "statute or ordinance"<sup>117</sup> rule, created from scraps and hints from earlier Court of Appeals decisions.<sup>118</sup> The significance of the *Blackburn* opinion is two-fold. First, it establishes that a duty of care is owed to members of the specific class intended to be protected by the statute or ordinance.<sup>119</sup> For example, a duty other than merely refraining from willful and reckless misconduct is owed to the child trespasser in the first place because the ordinance was designed to protect children from the type of harm that befell the toddler. Second, the defendant's violation of the standard expressed in the ordinance establishes a prima facie case of negligence.<sup>120</sup>

As sometimes happens, the significance of *Blackburn* is obscured by the idiosyncratic ways in which Maryland courts define legal terms. The Court of Appeals has stated that "proof of a statutory violation, plaintiff's membership in the class of people designed to be protected by the statute, and causation, amount to *prima facie* evidence of negligence, not negligence *per se*."<sup>121</sup> However, a sizeable minority of jurisdictions that purport to follow the doctrine of negligence per se regard it not as a doctrine establishing negligence as a matter of law, but as a doctrine establishing a rebuttable presumption of

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114. *E.g.*, *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

115. Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 344, 366 (1914). Professor Smith, writing during the time when legal formalism was the prevailing judicial doctrine, preferred another view of the judicial role: "That judges can and do make new law; and also can and do unmake old law; *i.e.*, law previously laid down by themselves or by their judicial predecessors." *Id.*

116. *Blackburn Ltd. P'ship v. Paul*, 438 Md. 100, 126, 90 A.3d 464, 479 (2014); *see also supra* note 11.

117. *Blackburn*, 438 Md. at 111–17, 90 A.3d at 470–74; *see also* *Polakoff v. Turner*, 385 Md. 467, 476, 869 A.2d 837, 843 (2005); *Brooks v. Lewin Realty III, Inc.*, 378 Md. 70, 79, 835 A.2d 616, 621 (2003).

118. *See Brooks*, 378 Md. at 79, 835 A.2d at 621; *Flaccomio v. Eysink*, 129 Md. 367, 380, 100 A. 510, 515 (1916).

119. *Blackburn*, 438 Md. at 126–28, 90 A.3d at 479–80.

120. *Id.* at 128, 90 A.3d at 480.

121. *Polakoff*, 385 Md. at 478, 869 A.2d at 844; *see also Brooks*, 378 Md. at 78–81, 84–85, 85 n.5, 89, 835 A.2d at 620–25, 625 n.5, 627. *See generally Blackburn*, 438 Md. at 100, 90 A.3d at 464.



negligence.<sup>122</sup> At least after *Blackburn*, the Court of Appeals has adopted what a number of other jurisdictions regard as negligence per se even if that court continues to claim that it rejects the doctrine.<sup>123</sup>

Further, the court uses the term “prima facie” evidence of negligence differently than it is used elsewhere. In *Brooks v. Lewin Realty III, Inc.*,<sup>124</sup> a case that Judge Adkins relies on in *Blackburn*, the court constantly flips back and forth between saying that the statutory violation was “evidence of negligence” and saying it was “prima facie evidence of negligence.”<sup>125</sup> In *Blackburn*, Judge Adkins quotes from an earlier case, *Allen v. Dackman*,<sup>126</sup> and appears to equate “prima facie evidence” with “sufficient evidence to warrant the court in submitting the case to the jury on the question of . . . negligence.”<sup>127</sup> Prima facie evidence of negligence is more than evidence that should be submitted to the jury; it is evidence that is sufficient unless rebutted to allow a court to direct a verdict in favor of the plaintiff on the issue of breach of duty.<sup>128</sup> In any event, Judge Adkins’s consistent use of the term “prima facie evidence” in her articulation of the Statute or Ordinance Rule moves beyond the Court of Appeals’s prior intermingling of that term with the unadorned use of the term “evidence.” As stated previously, once Judge Adkins describes the statute or ordinance rule as establishing a prima facie case of negligence, in effect, Maryland’s statute or ordinance rule looks remarkably like the negligence per se doctrine followed by many other jurisdictions.

One other aspect of *Blackburn* is particularly noteworthy. In articulating the requirements of the Statute or Ordinance Rule, Judge Adkins is careful to make it clear that “a plaintiff must show . . . [a] violation of a statute or ordinance designed to protect a specific class of persons which includes the

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122. *E.g.*, *Zeni v. Anderson*, 243 N.W.2d 270, 277–78 (Mich. 1976) (stating that “while it has been said that violation of this statute constitutes negligence per se, . . . such presumption may be overcome”); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYS. & EMOT. HARM § 14, cmt. c (AM. LAW INST. 2010) (“Some states say that the violation of a statute creates a rebuttable presumption of negligence, or prima facie proof of negligence. Since this Restatement allows negligence per se to be rebutted by an adequate showing of excuse (see § 15), the position taken by these states is close to or congruent with this Restatement’s position.” (citations omitted)).

123. *Absolon v. Dollahite*, 376 Md. 547, 555, 831 A.2d 6, 11 (2003); *Blackburn*, 438 Md. at 126, 90 A.3d at 479.

124. 378 Md. 70, 835 A.2d 616 (2003).

125. *Id.* at 79, 835 A.2d at 621.

126. 413 Md. 132, 991 A.2d 1216 (2010).

127. *Blackburn*, 438 Md. at 128, 90 A.3d at 480 (quoting *Allen*, 413 Md. at 144, 991 A.3d at 1223).

128. *See, e.g.*, *O’Donnell v. Elgin, J. & E. Ry. Co.*, 338 U.S. 384, 390 (1949) (explaining that “‘prima facie’ or ‘presumptive’ evidence of negligence” is evidence “which defendant must meet or overcome”).

plaintiff.”<sup>129</sup> One suspects that the reason for this was to gain the votes of her Court of Appeals colleagues who were concerned in *Warr*<sup>130</sup> that holding the tavern liable for anyone on Maryland’s highways injured or killed by an intoxicated patron from the tavern would create indeterminate liability.<sup>131</sup> Judge Adkins went to extraordinary lengths in *Blackburn* to find evidence of such specific statutory purpose because in previous opinions, the Court of Appeals had refused to apply the reasoning now consolidated in the Statute or Ordinance Rule in cases in which an ordinance “was passed for the benefit of the public.”<sup>132</sup> The plaintiff in *Blackburn* alleged violations of both Maryland regulations and the Montgomery County Code.<sup>133</sup> The applicable Maryland regulation explicitly stated that its purpose was to “protect and promote the public health and safety of individuals at public spas and pools in Maryland” including “recreational pools.”<sup>134</sup> Thus, the regulation itself defines the class protected by the regulation no more specifically than “the public . . . safety of individuals” who might be protected by dram shop statutes.<sup>135</sup> However, Judge Adkins found that one of the relevant Maryland regulations “incorporates by reference the ‘American National Standard for Residential Inground Swimming Pools,’” regulations drafted by a swimming pool industry trade group.<sup>136</sup> Appendix E to those industry regulations begins with a Preamble that states that “[p]rotecting young children from accidental drownings and near-drownings in all aquatic environments . . . is a primary concern.”<sup>137</sup> From this Preamble to an Appendix of industry regulations incorporated by reference in a Maryland regulation, Judge Adkins finds the “specific class”<sup>138</sup> that she asserts is protected by the Maryland regulation. Let me be clear. I am not being critical of the Judge. This contorted analysis was evidently what it took to get her colleagues onboard. A great judge must be a brilliant negotiator, as well as someone gifted in analysis and writing and able to look beyond the often-parochial perspectives of the hometown crowd. At the same time, *Blackburn* suggests that attorneys and judges in

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129. *Blackburn*, 438 Md. at 112, 90 A.3d at 471 (quoting *Brooks*, 378 Md. at 79, 835 A.2d at 621).

130. *Warr v. JMGM Grp., LLC*, 433 Md. 170, 188–94, 70 A.3d 347, 358–61 (2013) (expressing concern repeatedly about duties owed to “an indeterminate class of people, known or unknown” (quoting *Gourdine v. Crews*, 405 Md. 722, 750, 955 A.2d 769, 786 (2008))).

131. *Id.* at 188–89, 70 A.3d at 358.

132. *Blackburn*, 438 Md. at 113, 90 A.3d at 472 (quoting *State v. Longeley*, 161 Md. 563, 569, 158 A. 6, 8 (1932)).

133. *Id.* at 105, 90 A.3d at 467.

134. *Id.* at 118, 90 A.3d at 474 (quoting MD. CODE REGS. 10.17.01.01 (2010)).

135. *Cf. id.*

136. *Id.* at 122, 90 A.3d at 477 (discussing MD. CODE REGS. 10.17.01.04D).

137. *Id.* at 122–23, 90 A.3d at 477 (emphasis omitted) (quoting MD. CODE REGS. 10.17.01.04D app. E at 37).

138. *Id.* at 125, 90 A.3d at 479.

the future have wide berth in seeking an express statement of statutory purpose to benefit a specific class.

#### IV. CONCLUSION

Judge Adkins was not the first Court of Appeals judge to espouse an understanding of tort law less parochial and backward than what that court has often stood for. Judge Glenn Harrell's incredibly powerful dissent in *Coleman v. Soccer Ass'n of Columbia*,<sup>139</sup> the contributory negligence decision, particularly comes to mind.<sup>140</sup>

Nor hopefully will she be the last Court of Appeals judge to move Maryland's tort law in the direction of widely adopted and better-reasoned national norms. What Judge Adkins did, in the few years during which she focused on tort law, was to make a dent in what was largely a monolithically backward body of torts jurisprudence.

The importance of Judge Adkins's torts jurisprudence is yet to be decided. Perhaps especially in these polarized times, the future of Maryland tort law should not be a partisan issue. When I attend nationwide conferences of tort scholars, I am often asked, "Does Maryland still have contributory negligence?" When I respond "yes," leading scholars—whether progressive or conservative (admittedly, there are not many of those in legal education)—are shocked. In contrast to the Court of Appeals, the supreme courts of conservative, predominately Republican states like Kansas, South Carolina, and

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139. 432 Md. 679, 69 A.3d 1149 (2013).

140. *Id.* at 695–738, 69 A.3d at 1158–84 (Harrell, J., dissenting).

Texas, often issue opinions that reflect the mainstream legal values articulated in the various iterations of the *Restatement (Third) of Torts*.<sup>141</sup> Maryland is long overdue to throw out antiquated tort doctrines that probably were quite intentionally designed to keep cases out of the hands of Baltimore juries.

Judge Adkins has shown the way. She has earned her retirement. It is up to the rest of us to pick up the torch she lit.

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141. See, e.g., *Jones v. Hansen*, 867 P.2d 303, 318 (Kan. 1994) (abolishing the trichotomy of the status of land visitors, that is, invitees, licensees, or trespassers, to determine the standard of care owed by a land possessor); *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991) (adopting comparative negligence in South Carolina); *El Chico Corp. v. Poole*, 732 S.W.2d 306, 314–15 (Tex. 1987) (adopting dram shop liability in Texas).