Circuit Court for Worcester County
Case No. C-23-CV-22-000022

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1103

September Term, 2023

TODD E. BURBAGE

v.

CHRISTOPHER ZAYKOSKI, ET AL.

Wells, C.J.,
Leahy,
Tang,

JJ.

Opinion by Wells, C.J.

Filed: April 16, 2024

*This is an unreported opinion. It may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This appeal arises from a civil tort suit appellant Todd Burbage ("Burbage") filed against Trooper Christopher Zaykoski and Corporal Eric Lenz, among others, appellees here. The basis of the suit was Burbage's claim that the troopers did not have probable cause to pull him over and, ultimately, arrest him for driving while impaired by alcohol, in addition to other charges. A jury found in favor of the troopers on all counts. Burbage then timely filed this appeal and presents three questions for our review, which we have slightly rephrased as follows:[1]

1. Did the circuit court err when it allowed Burbage's refusal to submit to the field sobriety tests into evidence to support probable cause?

2. Did the circuit court err when it excluded Burbage's video and photographic evidence of other vehicles driving on the same highway but at times and dates different from when Burbage was stopped?

3. Did the circuit court err when it denied Burbage's motion for partial summary judgment regarding the issue of probable cause?

[1] Burbage's verbatim questions are:

1. Should Burbage's refusal to submit to a field sobriety test before being arrested have been excluded from evidence and not presented to or considered by the jury in making its probable cause decision?

2. Should Burbage have been permitted to introduce into evidence the video and pictures of numerous vehicles committing the same lane line infraction on Route 611 that the arresting trooper contended Burbage did and constituted an indicium of his driving while impaired by alcohol?

3. Did the denial of Burbage's motion for partial summary judgment on the issue of Defendants' lack of probable cause for a DUI arrest based on uncontested facts constitute an error of law?

For the reasons we will explain, Burbage's argument regarding the admission of evidence concerning his refusal to perform field sobriety tests was not preserved for our review. As for the other two issues, we find no error; therefore, we affirm the circuit court on all three issues.

FACTUAL AND PROCEDURAL BACKGROUND

The following information comes from testimony adduced at the civil trial. On February 20, 2021, Burbage left a business meeting at the Aloft Hotel, where, by his admission, he consumed one- and one-half vodka tonics and left the hotel. After leaving the hotel, Burbage ate at a restaurant, ordering a single beer with dinner. Around 8:00 p.m., Burbage started his drive home, traveling southbound on Route 611 in Worcester County, an unilluminated, two-lane road. Because of this, Burbage said he activated his high-beam headlights to avoid any wildlife that might stray onto the highway.

Trooper Zaykoski ("Tpr. Zaykoski") was driving northbound on Route 611 when he drove past Burbage, and, according to Tpr. Zaykoski's testimony, Burbage failed to dim his high beam headlights. Because failing to dim one's high beams is a citable action, Tpr. Zaykoski made a U-turn and began following Burbage. While following Burbage, Tpr. Zaykoski witnessed Burbage drive on the center line, abruptly overcorrect, drive on the shoulder divider line, and then return to the proper lane of travel. Tpr. Zaykoski then activated his emergency lights and initiated a traffic stop.

Tpr. Zaykoski approached Burbage's vehicle and began speaking with him. Tpr. Zaykoski testified he immediately noticed the odor of alcohol emanating from Burbage's

person. At the time, Burbage was wearing a COVID-19 mask. Nonetheless, Tpr. Zaykoski observed Burbage's eyes were bloodshot, and he had a "thousand-yard stare." Tpr. Zaykoski requested Burbage's driver's license and vehicle registration, and, according to the trooper, Burbage fumbled with the papers in his glove box and then "shoved" them toward Tpr. Zaykoski.

While examining the documents, Tpr. Zaykoski asked Burbage if he had been drinking alcohol that evening. According to Tpr. Zaykoski, Burbage denied drinking any alcohol. Burbage testified that he was perplexed as to why he had been stopped, hence, he explained, the "thousand-yard stare" the trooper observed.

Subsequently, Tpr. Zaykoski requested Burbage exit the vehicle, but before doing so, Burbage attempted to set up his cellphone to record the interaction. Despite being given time to do so, Burbage failed to set up the phone on his dashboard. Once outside the vehicle, Tpr. Zaykoski testified he could smell alcohol coming from Burbage, so he requested Burbage complete the field sobriety tests.[2] Burbage refused, stating he had not been

[2] According to the National Highway Safety Administration:

> STANDARDIZED FIELD SOBRIETY TESTs (SFTFs): There are three NHTSA/IACP-approved SFSTs, namely Horizontal Gaze Nystagmus (HGN), Walk and Turn (WAT), and One Leg Stand (OLS). Based on a series of controlled laboratory and field studies, scientifically validated clues of impairment have been identified for each of these three tests. They are the only NHTSA/IACP-approved Standardized Field Sobriety Tests for which validated clues have been identified for DWI investigations.

drinking alcohol, nor did he think he was swaying or having issues with balance. Further, Burbage said at the time, and later testified, he did not trust the tests or how they were administered or interpreted. Tpr. Zaykoski asked Burbage to complete the tests several times, and Burbage refused each request, even after Tpr. Zaykoski told Burbage the next step was an arrest. Burbage still refused. Consequently, Tpr. Zaykoski arrested Burbage charging him with Driving Under the Influence (DUI) and placed him in handcuffs. At trial, Tpr. Zaykoski acknowledged that a refusal to consent to a field sobriety test could not by itself be used as a basis for probable cause to make a DUI arrest.

According to Tpr. Zaykoski, Burbage was moving his hands during the handcuffing process, which resulted in the handcuffs not being "double-locked" as Maryland State Police training requires. Shortly thereafter, Corporal Eric Lenz ("Cpl. Lenz") arrived on the scene as backup. Upon arrival, Cpl. Lenz noticed Burbage's handcuffs were not properly fastened, he was being uncooperative, and his eyes were "severely bloodshot." Cpl. Lenz told Burbage he was under arrest, to which Burbage responded, "No, I'm not."[3] Cpl. Lenz then asked Burbage to stop interlacing his fingers so he could double lock the

NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, SFST DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING PARTICIPANT MANUAL (2023), https://www.nhtsa.gov/sites/nhtsa.gov/files/2023-03/15911-SFST_Participant_Manual_2023-tag.pdf [perma: https://perma.cc/N5BV-X9D4].

These are the three field sobriety tests used by the Maryland State Police.

[3] According to Burbage's opening brief, he was not denying his arrest in the general sense, rather he was denying that he was being lawfully arrested for driving under the influence.

handcuffs. Burbage did not do so, therefore, Cpl. Lenz attempted to manipulate Burbage's hands to release his grip. In doing all of this, Burbage told the trooper that he had hurt his hand. Burbage claims the troopers were "annoyed by [his] attitude" and were unnecessarily rough with him.

Thereafter, Worchester County Sheriff Deputy Jason Burns and Maryland Department of Natural Resources Officer John Bunting arrived on scene. Both Deputy Burns and Officer Bunting testified they smelled the odor of alcohol on Burbage. Cpl. Lenz contacted the barracks in Berlin, Maryland and called an ambulance to treat Burbage's injury to his hand. The ambulance arrived and transported Burbage to Atlantic General Hospital.

Medical personnel who treated Burbage, including EMT Gary Parnell and Dr. Matthew Stensland, an emergency room physician, testified that by the time Burbage arrived at the hospital, neither smelled the odor of alcohol on Burbage's person, saw that he had bloodshot eyes, nor noticed any other signs of apparent alcohol impairment. A medical examination revealed that Burbage's fifth metacarpal finger was fractured. After having his finger treated, Burbage was transported to the Berlin barracks for processing. Trooper Jeffrey Hoffmeister drove the transport vehicle and, later, testified he smelled alcohol coming from Burbage. Upon arrival at the barracks, Burbage was brought to Duty Sargent Colin Sweitzer who testified he did not smell alcohol on Burbage, observe that he bloodshot eyes, or identify any outward signs of alcohol impairment.

At the barracks, Burbage was given an opportunity to take an intoximeter[4] test, but he declined to do so. Burbage was processed and ultimately charged with resisting arrest, driving while impaired by alcohol, driving while under the influence of alcohol, reckless driving, negligent driving, failure to drive right of center, failure to obey designed lane directions, using a vehicle lamp projecting glaring and dazzling light, and driver failure to avoid projecting glaring light within 500-feet of approaching vehicle.

Almost a year after his arrest, on January 26, 2022, Burbage filed a civil suit against the Maryland State Police Department, Cpl. Lenz and Tpr. Zaykoski, and the State, claiming battery, false arrest and imprisonment, malicious prosecution, unconstitutional search and seizure, negligent supervision and retention, and unlawful search and seizure and fabrication of evidence. After the civil suit was filed, the State proposed a plea agreement where it would nolle pros all other motor vehicle charges if Burbage pleaded guilty to the headlight violation. Burbage agreed. When the criminal case was called,

[4] "In Maryland, breath tests are administered using the Intoximeter EC/IR II. EC stands for electro-chemical, and IR means infrared. These represent two different ways to measure ethanol in the blood. The infrared method accomplishes this by relying on the absorption of infrared light by alcohol in the sample chamber. The electro-chemical method, also called the fuel cell method, converts ethanol and oxygen into acetic acid and water. The process creates an electrical current proportional to the concentration of alcohol in the blood, which can then be measured. The police officer who administers a breath test using the Intoximeter is required to be trained and certified in the operation of the device. In addition, the machines themselves must be regularly certified and tested to ensure they are functioning properly." *What is the Intoximeter?,* FRIZWOODS CRIM. DEF.(Jan. 7, 2022, 3:10 PM), https://frizwoods.com/blog/intox-ec-ir-ii [perma: https://perma.cc/VBQ3-BE45].

Burbage pleaded guilty to the single citation, and the court found him not guilty on the remaining charges. Burbage's civil claims went forward.

Before trial on Burbage's civil lawsuit, the defendants moved *in limine* to exclude videotape and photographic evidence of vehicles driving on Route 611. Burbage hoped to present this evidence to show that other cars often drive over the center line and shoulder on that stretch of roadway. Additionally, the defendants moved for summary judgment and moved to bifurcate the claims, both of which Burbage opposed. Burbage also filed his own motion *in limine* to exclude evidence about his refusal to take the field sobriety tests, and he moved for partial summary judgment. After a hearing on April 27, 2023, the court denied all motions except the defendants' motion *in limine*, thus excluding the videotape and photographic evidence of other vehicles driving on Route 611.

The case moved forward to trial. As we will discuss later, the defendants presented evidence that Burbage refused to submit to the field sobriety. Burbage did not object to the introduction of the evidence at any stage during trial. Burbage even questioned Tpr. Zaykoski about his refusal to take the field sobriety tests.

After a four-day trial, a jury returned a verdict in favor of the defendants on all counts. Burbage moved for a new trial which the court denied after a hearing. Then, Burbage timely filed this appeal.

We will provide additional facts in our analysis when necessary.

DISCUSSION

I. The Issue Regarding Evidence of Burbage's Refusal to Complete the Field Sobriety Test Was Not Preserved for Review.

As a preliminary matter, we note that pursuant to the Supreme Court of Maryland's interpretation of Maryland Rule 4–323(a), "[a]n objection to the admission of evidence shall be made at the time the evidence is offered or as soon thereafter as the grounds for objection become apparent. Otherwise, the objection is waived." *Klauenberg v. State*, 355 Md. 528, 539 (1999). A party may also "request a continuing objection to the entire line of questioning." *Fone v. State*, 233 Md. App. 88, 113 (2017) ("[A]t the close of the motion *in limine*, the appellant could have requested a continuing objection but did not."). Regarding the contemporaneous objection rule and its applicability to circumstances involving motions *in limine*, the Maryland Supreme Court has explained:

> When the evidence, the admissibility of which has been contested previously in a motion *in limine,* is offered at trial, a contemporaneous objection generally must be made pursuant to Maryland Rule 4–323(a) in order for that issue of admissibility to be preserved for the purpose of appeal.

Reed v. State, 353 Md. 628, 638 (1999); *see also Klauenberg*, 355 Md. at 539 ("[W]hen a motion *in limine* to exclude evidence is denied, the issue of the admissibility of the evidence that was the subject of the motion is not preserved for appellate review unless a contemporaneous objection is made at the time the evidence is later introduced at trial."). The rare "exception to the general rule for a contemporaneous objection is when it is apparent that any further ruling would be unfavorable, *i.e.*, an objection would be futile." *Wright v. State*, 247 Md. App. 216, 228 (2020), *aff'd*,474 Md. 467 (2021).

To determine whether an objection is futile, we consider the "temporal proximity" to when the motion *in limine* was made. In *Watson v. State*, 311 Md. 370 (1988), the circuit court judge reiterated his ruling on the motion *in limine* to exclude prior convictions immediately before the State cross-examined Watson, during which the State elicited testimony about Watson's prior convictions. *Id.* at 376 n.1. Watson, however, did not renew his objection when this testimony was elicited. *Id.* The circuit court concluded that "requiring Watson to make yet another objection only a short time after the court's ruling to admit the evidence would be to exalt form over substance." *Id.* The court, therefore, held that Watson's argument was preserved despite the lack of a contemporaneous objection, which the Maryland Supreme Court affirmed. *Id.*; *see also Clemons v. State*, 392 Md. 339, 363 (2006) (holding that requiring the party to "restate his objection minutes after he originally" motioned is unnecessary).

Notably, however, this Court recognized that the exception established in *Watson* "is a narrow one and applies only when the prior ruling by the court . . . is in close proximity to the point where the offending evidence was introduced." *Jamsa v. State*, 248 Md. App. 285, 310 (2020) The temporal proximity must be very close, and therefore, substantial time cannot have passed between the motion *in limine* or challenged evidence and the time the evidence is admitted. *See e.g., Jamsa*, 248 Md. App. at 285 (the motion was made immediately before witness gave the challenged testimony); *Norton v. State*, 217 Md. App. 388 (2014) (the challenged testimony was only separated by the brief testimony of one witness); *Dyce v. State*, 85 Md. App. 193 (1990) (the motion and challenged

testimony elicited on cross-examination was only separated by the direct examination of that witness).

This case does not fall within the "temporal proximity" required under *Watson*. Prior to trial, Burbage filed a motion *in limine* to exclude the evidence regarding his refusal to complete the field sobriety tests. On April 27, 2023, roughly three weeks before trial, the circuit court held a hearing to address the motions *in limine* from both parties. At the hearing, the circuit court denied Burbage's motion to exclude the field sobriety tests evidence.

That hearing was the last attempt Burbage made to exclude the evidence. In his opening brief, Burbage mentions that the appellees utilized the field sobriety test evidence at trial to prove consciousness of guilt. However, the record shows there were no contemporaneous objections during the appellees' opening or closing statements, and there were no objections during any testimony regarding the refusal to complete the field sobriety tests. Burbage's counsel, as part of his case, even elicited testimony from Tpr. Zaykoski about the field sobriety tests after calling him as an adverse witness. Three weeks is not within the zone of temporal closeness that this Court or the Supreme Court has accepted under *Watson*; there was ample opportunity for Burbage to contemporaneously object at trial. Because this was a challenge to the admissibility of evidence, *Reed* and *Klauenberg* control, thus, a contemporaneous objection was required. We, therefore, conclude that Burbage failed to preserve this issue regarding the admission of evidence relating to his refusal to complete the field sobriety tests.

II. The Trial Court Did Not Err in Excluding the Video and Photographic Evidence of Route 611.

Again, preliminarily, for the sake of clarity and consistency, we must address the issue of preservation. The pre-trial hearing on April 27, 2023 was the last time the court addressed excluding Burbage's video and photographic evidence of how other cars were driving on Route 611. Contrary to what we held regarding the field sobriety tests, in this instance, where the court granted a motion *in limine* and excluded the introduction of evidence, a separate analysis is required.

The Supreme Court in *Reed* explained that "[w]hen motions *in limine* to exclude evidence are granted, normally no further objection is required to preserve the issue for appellate review." 353 Md. at 638; *see also Prout v. State*, 311 Md. 348, 356 (1988) *superseded by rule on other grounds,* Md. Rule 1-502, *as recognized by Beales v. State*, 329 Md. 263 (1993) ("[W]hen a trial judge, in response to a motion *in limine,* makes a ruling to exclude evidence that is clearly intended to be the final word on the matter, and that will not be affected by the manner in which the evidence unfolds at trial, and the proponent of the evidence makes a contemporaneous objection [*i.e.,* at the time of the action by the trial court on the motion *in limine*], his objection ordinarily is preserved under Rule 4–322(c)."); *Simmons v. State*, 313 Md. 33, 37-38 (1988).

Here, the video evidence was the subject of one of the appellees' motions *in limine*, which were addressed at the April 27 hearing. The circuit court granted the appellees' motion excluding Burbage's evidence. This exclusion was "clearly intended [to be the] final word on the matter," preserving Burbage's argument for our review.

A. Parties' Contentions

Burbage contends he should have been permitted to introduce video and photographic evidence regarding vehicles committing allegedly the same lane infractions he did on Route 611. Specifically, Burbage argues the appellees' emphasis on his weaving on Route 611 to indicate probable cause to arrest for driving while impaired by alcohol opened the door for him to provide counter-evidence, which would include showing other drivers regularly committing similar lane infractions on Route 611. Burbage contends that with this evidence, he was going to cross-examine the troopers about other drivers' infractions compared to his to show the weaving was not a sign of impairment. Burbage contends these intentions to bolster his case against the troopers were relevant and probative.

The appellees contend the circuit court properly excluded the evidence because it was irrelevant to the events involving Burbage. They argue the roadway videoed and photographed was not the same location where Tpr. Zaykoski witnessed Burbage's road-lane infractions, and none of the vehicles recorded committed the same infractions Tpr. Zaykoski observed. Moreover, the appellees further emphasized that even if the drivers in the video committed the same lane infractions, that does not negate what Tpr. Zaykoski observed Burbage doing. Finally, the appellees concluded that if Burbage's argument, that showing other drivers committing infractions absolved him of his own, was successful, Maryland traffic laws would be ineffective.

B. Standard of Review

Our standard of review on the admissibility of evidence depends on whether the "ruling under review was based on a discretionary weighing of relevance in relation to other factors or on a pure conclusion of law." *Parker v. State,* 408 Md. 428, 437 (2009) (quoting *J.L. Matthews, Inc. v. Md.–Nat'l Capital Park & Planning Comm'n*, 368 Md. 71, 92 (2002)). Generally, "whether a particular item of evidence should be admitted or excluded is committed to the considerable and sound discretion of the trial court" and reviewed under an abuse of discretion standard. *Perry v. Asphalt & Concrete Servs., Inc;* 447 Md. 31, 48 (2016) (internal citations omitted). Although trial judges have wide discretion "in weighing relevancy in light of unfairness or efficiency considerations, trial judges do not have discretion to admit irrelevant evidence." *State v. Simms*, 420 Md. 705, 724 (2011). In some instances, appellate courts conduct a two-step analysis. "During the first consideration, we test for legal error," *Id.* at 725*,* which is "whether the evidence is legally relevant, a conclusion of law which we review *de novo." Smith v. State*, 218 Md. App. 689, 704 (2014) (internal citations omitted). "While the second consideration requires review of the trial judge's discretionary weighing and is thus tested for abuse of that discretion." *Simms*, 420 Md. at 725; *see also Merzbacher v. State* 346 Md. 391, 404-05 (1997) ("In reviewing a motion in limine, we are generally loath to reverse a trial court unless the evidence was plainly improperly admitted or excluded under law, or there is a clear showing of an abuse of discretion.").

C. Analysis

Under the Maryland Rules of Evidence, "all relevant evidence is admissible." Md. Rule 5-402. Rule 5-401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Moreover, "the relevancy determination is not made in isolation[;]" rather, we look at the evidence "in conjunction with all other relevant evidence." *Snyder v. State*, 361 Md. 580, 592 (2000). In our review, "we must consider first, whether the evidence is legally relevant, and, if relevant, then whether the evidence is inadmissible because its probative value is outweighed by the danger of unfair prejudice, or other countervailing concerns as outlined in Maryland Rule 5-403." *Simms*, 420 Md. at 725; *see also Consol. Waste Indus., Inc. v. Standard Equip. Co*., 421 Md. 210, 220 (2011) ("The danger associated with the misuse of evidence tends to outweigh substantially any probative value where other evidence, tending to prove the same, may be attained through less prejudicial means."). Unfair prejudice includes "confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* at 728 (quoting Md. Rule. 5-403).

Burbage wanted to use this evidence to show that he was not impaired on the night in question and, therefore, was not weaving on the highway, contrary to what Tpr. Zaykoski claimed. But the video evidence of what other drivers were doing on Route 611 was not relevant because their actions had no bearing on Burbage's actions the night he was

stopped. Moreover, there was no foundation for what Burbage claimed the videos showed: how he was driving on a particular stretch of highway on a particular night. For instance, there was conflicting evidence about whether the drivers were on the same part of the highway where Tpr. Zaykoski initiated the traffic stop. Further, there was conflicting evidence that the drivers in the video were committing similar lane infractions as Burbage was supposed to have done. Burbage could only assert that he would testify the highway area was the same.

Additionally, Burbage failed to articulate how the video wasn't unduly suggestive. There was no evidence or a proffer that the other drivers were themselves impaired, using a cellphone, or distracted by other means. Burbage's counsel argued that the jury was entitled to view the stretch of highway where he was stopped. The circuit court agreed, and so do we. A photograph or video of that portion of the highway might have been relevant. But what is not relevant is how other individuals drove on that section of the highway at any given time of day. What other drivers might have done at some other time and under different conditions does not tend to show that Burbage did not commit the lane infractions the trooper said he observed. Consequently, we conclude the court did not abuse its discretion in excluding this evidence on relevancy grounds. It is well-settled that we will not disturb unless "the court act[ed] without reference to any guiding principles, and the ruling under consideration is 'clearly against the logic and effect of facts and inferences before the court." *Beyond Sys., Inc. v. Realtime Gaming Holding Co., LLC*, 388 Md. 1, 28 (2005) (citations omitted); *see also Brown v. Daniel Realty Co.*, 409 Md. 565, 601 (2009)

("An abuse of discretion lies where no reasonable person would share the view taken by the trial judge."). Therefore, we affirm.

III. The Circuit Court Did Not Err in Denying Burbage's Motion for Partial Summary Judgment on the Probable Cause Issue.

A. Parties' Contentions

Burbage contends that the circuit court erred in denying his motion for partial summary judgment. Specifically, he argues that for the purposes of summary judgment, he will accept the facts as the appellees presented them, so there was no dispute of material fact. According to Burbage, the circuit court was, therefore, required to decide the motion as a matter of law. Lastly, Burbage contends that because there were no disputed material facts, the issue of probable cause is purely an issue of law, which we should review *de novo.* Consequently, Burbage claims the court erred because there was no probable cause for a DUI arrest, and without disputed material facts, he was entitled to judgment as a matter of law.

The appellees argue the denial of a pre-trial motion for summary judgment is reviewed for abuse of discretion, emphasizing that probable cause is a mixed issue of law and fact. Additionally, they contend there were disputed material facts, but even if there were not, the court properly denied the partial motion for summary judgment because, as a matter of law, the troopers had probable cause to arrest Burbage under the totality of the circumstances.

B. Standard of Review

Maryland Rule 2-501 states that, in reviewing a pre-trial motion for summary judgment, the court "shall enter judgment in favor of or against the moving party if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Md. Rule 2-501(f). The denial of a motion for summary judgment "should be reviewed for abuse of discretion." *Hous. Auth. of Balt. City v. Woodland*, 438 Md. 415, 426 (2014) (citing *Metro.Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25 (1980)). "Although, ordinarily, when there is no dispute of material fact, a trial court does not have any discretionary power when granting summary judgment it does, nonetheless, exercise discretion when affirmatively denying a motion for summary judgment or denying summary judgment in favor of a full hearing on the merits." *Dashiell v. Meeks*, 396 Md. 149, 164 (2006); *see also Woodland*, 438 Md. at 426 ("When presented with a pretrial motion for summary judgment, a court has discretion to affirmatively . . . deny . . . a summary judgment request in favor of a full hearing on the merits. . . . This discretion exists even though the technical requirements for the entry of such a judgment have been met.") (internal citations omitted); *see also Mathis v. Hargrove*, 166 Md. App. 286, 306 (2005) ("This principle holds true even where, as appellant claims here, there are no disputes as to a material fact."); *Foy v. Prudential Ins. Co. of Am.*316 Md. 418, 424 (1989) ("[N]o party is entitled to a summary judgment as a matter of law. It is within the discretion of the judge hearing the motion, if he finds no uncontroverted material facts, to grant summary judgment or to require a trial

on the merits. It is not reversible error for him to deny the motion and require a trial."). The Maryland Supreme Court emphasized that "an appellate court should be loath indeed to overturn . . . a final judgment on the merits entered in favor of the party resisting the summary judgment." *Basiliko*, 288 Md. at 29.

But this Court has held where "a motion for summary judgment is based upon a pure issue of law" and material facts are not in dispute, we need not extend the discretion set forth in *Basiliko* and *Woodland*. *Presbyterian Univ. Hosp. v. Wilson*, 99 Md. App. 305, 313 (1994), *aff'd*, 337 Md. 541 (1995). In such a case, we apply a *de novo* standard of review, and determine whether the "trial court was legally correct." *Sheets v. Brethren Mut. Ins. Co.,* 342 Md. 634, 638 (1996); *see also Shader v. Hampton Imp. Ass'n, Inc.*, 217 Md. App. 581, 605 (2014), *aff'd,* 443 Md. 148 (2015).

C. Analysis

During the April 27, 2023 motions hearing, Burbage argued there were no material facts in dispute, and he was entitled to judgment as a matter of law.[5] However, the appellees

[5] Burbage's argument, that by accepting the arresting troopers' version of events, he should prevail on summary judgment, seems nonsensical. Accepting the arresting troopers' version of events does not show the absence of probable cause, but the opposite. The arresting troopers' testimony was consistent: Burbage failed to dim his high beam headlights for on-coming traffic and drove erratically. That information, if accepted as fact, provided Tpr. Zaykoski with reasonable suspicion to pull Burbage over. Once in physical contact with Burbage, both arresting troopers testified that he smelled of alcohol and was disoriented, despite his assertion that he had not been drinking at all that night. Tpr. Zaykoski noted that it took Burbage some time to find his license and registration. And the trooper testified Burbage could not set up his phone to record the interaction with the trooper even after being given several minutes to do so. Further, both troopers testified Burbage had bloodshot eyes and a far-away gaze ("thousand-yard stare"). Finally,

claimed there was a dispute of material fact, which was evident in the arguments over probable cause, as Burbage consistently disputed whether Tpr. Zaykoski had probable cause to arrest him for driving while allegedly impaired by alcohol.

We agree with the appellees. Several facts were disputed on the probable cause issue. *First*, it was disputed whether Tpr. Zaykoski could smell the odor of alcohol coming from Burbage's mouth when Burbage was wearing a COVID-19 mask at the time of the stop. Further, Burbage testified that the wind was blowing during the stop. He argued the blowing wind made it even more difficult for the trooper to have smelled alcohol on his breath while wearing a mask. On this point, the hospital staff said they smelled no alcohol on Burbage's person when they saw him later that night. Finally, on a related point, there was a factual dispute about who was telling the truth about whether Burbage's eyes were bloodshot: the arresting officers or the hospital staff and Sargent Sweitzer.

Second, there was a factual dispute over whether Burbage crossed the roadway's lines because of some engineering anomaly on that stretch of the highway or because he was impaired by alcohol. *Third*, there was the overall factual dispute about how one should weigh all this information under a totality of the circumstances analysis to determine

Burbage's failure to submit to the field sobriety tests for no reason other than his supposed distrust of the tests, could reasonably infer consciousness of guilt. Taking those facts in the light most favorable to the troopers, a trier of fact could reasonably find the troopers had probable cause to arrest Burbage for driving while impaired by alcohol. If we were to look at all the testimony from the witnesses, as we explain here, there was conflicting testimony on a material fact, namely, whether Burbage was operating a motor vehicle while impaired by alcohol, thus defeating summary judgment.

whether the troopers had probable cause to arrest Burbage. This last point alone would have been enough for the court, in the exercise of its discretion, to deny the motion for partial summary judgment. However, even if we assume, for the sake of argument, that there was no dispute of material fact, our review would still be for an abuse of discretion. We explain.

Maryland courts have consistently held that a court has discretion to deny a motion for summary judgment, even if the facts are uncontroverted. *See Woodland*, *Mathis, &* *Foy*, previously cited *supra.* The only scenarios where we have departed from this standard are when the issues resolved at the summary judgment stage were purely questions of law. The controlling precedent includes *Presbyterian Univ. Hosp.*, previously cited *supra*.

There, the circuit court granted a motion for summary judgment, on the specific issue of lack of personal jurisdiction. *Presbyterian Univ. Hosp.*, 99 Md. App. at 314. This Court overturned the circuit court, reasoning "the motion for summary judgment [was] in reality nothing more than an extension of, or supplement to, the appellant's (mandatory) motion to dismiss for lack of personal jurisdiction filed in these proceedings pursuant to Md. Rule 2–322(a)." *Id.* And whether the court had personal jurisdiction is purely a question of law. *Id.*

In *Shader*, this Court held that it would have been within the trial court's discretion to defer ruling on the motion for summary judgment, but the motion for summary judgment raised the legal doctrine of collateral estoppel. 217 Md. App. at 605. Consequently, this Court determined that "whether this doctrine should be applied is ultimately a question of

law for the court. Therefore, we examine *de novo* the court's legal determination of whether collateral estoppel should apply based on the court's sustainable findings of fact." *Id.*

Neither case is analogous to the issue of probable cause. Probable cause, under Maryland law, is not purely an issue of law. The Supreme Court of Maryland determined that "[t]he probable cause determination is neither entirely a factual determination nor a question of law; rather, it is a mixed question of fact and law." *Longshore*, 399 Md. at 521.

Burbage also cites to *Maryland Casualty. Co. v. Blackstone International Ltd.*, 442 Md. 685 (2015), *Sheets v. Brethren Mutual. Insurance. Co.* 342 Md. 634, 638 (1996), and *Baltimore County. v. Wesley Chapel Bluemount Association*, 128 Md. App. 180 (1999) to support his assertion that we should review *de novo* for legal correctness. However, these cases are not applicable to this case. All three cases Burbage cites involve circumstances where the trial court decided on summary judgment, and the subsequent appeal immediately followed. Significantly, as is the case here, none of those cases went to a trier of fact to determine the outcome. *In Maryland Casualty. Co*., the court granted summary judgment, and both this Court and the Supreme Court reviewed a granting of summary judgment, not a denial. 442 Md. at 693-94. A similar situation occurred in *Sheets*, where the Supreme Court was reviewing an immediate appeal following a *granting* of a motion for summary judgment. 342 Md. at 637 (emphasis added). Lastly, in *Wesley Chapel Bluemount Association*, we dealt with an administrative board being denied summary judgment on two issues, for which the circuit court remanded the case back to the board

for further proceedings. 128 Md. App at 183. The appeal subsequently followed; therefore, a trier of fact never concluded the case on the merits. *Id.*

Under the circumstances here, if we were to reverse the circuit court's denial of the partial motion for summary judgment, as Burbage urges us, that would be tantamount to reversing the jury's decision, which we are unwilling to do. We see no reason to depart from the holding and rationale of *Woodland* and *Basiliko;* as the Court explained in *Basiliko*, "to turn the tables in this manner would be nothing short of substituting a known unjust result for a known just one," and we are not compelled to do so. 288 Md. at 28-29. Similarly, we see no injustice in the result in this case. The denial of the motion for summary judgment did not preclude Burbage from arguing his case on the merits, nor was he prevented from submitting the evidence offered in support of his motion to the jury. Burbage's motion "presented factual issues, rather than pure questions of law, properly submitted to a trier of fact—in this instance, a jury—for determination." *Mathis*, 166 Md. App. at 306. The circuit court heard arguments on both sides and made a discretionary determination. This determination was not "well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *State v. Robertson*, 463 Md. 342, 365. (2019) Therefore, we hold that the court was within its discretion and did not otherwise err.

THE JUDGMENT OF THE CIRCUIT COURT FOR WORCESTER COUNTY IS AFFIRMED. APPELLANT TO PAY THE COSTS.