Circuit Court for Baltimore County
Case No. C-03-JV-22-000785

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1389

September Term, 2023

IN RE: A.R.

Graeff,
Nazarian,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: May 14, 2024

In October 2022, the Baltimore County Department of Social Services (the "Department" or "DSS") filed a juvenile petition alleging that nine-year-old A.R.[1] was a child in need of assistance ("CINA") because of the condition of her Mother's, N.W.'s, home. According to the petition, A was placed with her father ("Father") under a safety plan. Ultimately, after contested adjudication hearings that finished in August 2023, the court concluded that Mother was unfit but that A was not a CINA because Father was able and willing to provide proper care. The court transferred full custody of A to Father and terminated its jurisdiction. On appeal, Mother argues we should reverse the juvenile court's custody transfer for two reasons: (1) the juvenile court lacked subject matter jurisdiction because the Department never alleged sufficiently that A was a CINA, and (2) the juvenile court made clearly erroneous factual findings and otherwise abused its discretion when it transferred full custody of A to Father. We affirm.

I. BACKGROUND

Mother had primary legal and physical custody of nine-year-old A and her thirteen-year-old sibling, J.P. On September 8, 2022, DSS received a report after police responded to a call from Mother "due to a verbal disturbance" between Mother and J when officers observed that Mother's home was in an unsafe, unsanitary condition. At the time, Mother blamed J for "intentionally dirtying up the home because he was jealous of his sister, [A]."

[1] To respect and protect the privacy of the child in this matter, we refer to the child, her parents, and half-sibling by initials. We mean no disrespect.

The Department followed up with Mother and, after repeated attempts to verify that Mother cleaned up the home, the Department filed the initial CINA petition in this case, and a separate petition with respect to J on October 31, 2022. The Department alleged generally that A was a CINA[2] due to unsanitary conditions in Mother's home. The petition stated that A already had been "safety planned"[3] to Father on September 19, 2022, before the Department filed the petition after A disclosed "that she did not like living in [Mother]'s home due to conditions of the home." The petition referenced the fact that Mother had "a long history of involvement with the Department" for "different children in her care." The

[2]A "CINA" case refers to proceedings brought pursuant to Maryland Code (1974, 2006 Repl. Vol., 2008 Supp.), Title 3, Subtitle 8 of the Courts and Judicial Proceedings Article ("CJ") for the protection of children "coming within the provisions of [the] subtitle[.]" CJ § 3–802(a)(1). Under CJ § 3-801(f) a CINA or "Child in need of assistance" means "a child who requires court intervention because: (1) The child has been abused, has been neglected, has a developmental disability, or has a mental disorder; and (2) The child's parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and the child's needs."

[3] A "safety plan" can be used by the Department "as one method of '*any appropriate* services in the best interest of the child' when assessing the welfare of the child" and "are only approved for low risk, alternative response cases." *In re J.R.*, 246 Md. App. 707, 737 (2020) (*citing* Md. Code (1984, 2018 Repl. Vol.), § 5-706(n), (s)(11) of the Family Law Article ("FL")). The Department has "far-reaching authority" to use alternative responses and the legislature gave the Department broad deference to determine what is an "appropriate service[]." *Id.* at 738 (*citing* FL § 5-706(s)(11)(i)).

Mother had agreed that A could visit Father for the weekend so that Mother could clean the home, then agreed to extend that visit under a safety plan until September 23rd. J remained in the home because he was "14 years old and he was unwilling to go."

Department asked that A be placed in shelter care pending an adjudicatory hearing. There were otherwise no allegations as to Father.

In November 2022, Mother had resumed custody of A,[4] and in January 2023, she agreed to a court order controlling her conduct (the "OCC"). The OCC required her to comply with certain directives, including a directive to maintain safe and sanitary housing and to ensure that A was present and on time for school. The court continued the matter for adjudication. But on February 14, 2023, the Department filed an amended petition requesting shelter care again, alleging that Mother had violated the OCC. DSS alleged that Mother's home again (as of February 10, 2023) was in an unsafe condition and that A had a significant number of unexcused absences at school attributable to Mother, and the petition requested that A be placed in shelter care pending the adjudicatory hearing. This petition also made no allegations against Father; in fact, A had been returned to Father's care on February 9th. The same day, the juvenile court found that the OCC had been violated and granted the Department's shelter care request.

In June 2023, the Department filed a second amended CINA petition that requested that custody and guardianship of A be transferred to Father. After contested adjudication and disposition hearings in June and August 2023, the court sustained the amended petition's findings, transferred full custody of A to Father under CJ § 3-819(e), and ordered that Mother's visitation with A would be decided "[a]s between [the] parties."

[4] A was returned to Mother's care after a social worker verified that the home had been "clear of the debris."

The social worker's testimony regarding the home's condition in February 2023 painted a problematic scene:

> Subsequently after the OCC, I went on a home visit February 8th. When I came into the house, the house was very deplorable. I observed an extremely overpowering smell, and insects were flying all over the house. There were piles of trash bags outside the front porch, and the floor was very sticky and it was wet. . . . The corners of the baseboard and walls were lined up with a lot of black mice droppings in the house.
>
> The ceiling in the living room was caving in with mold on it, and there was water leakage coming out from the ceiling. They actually had a bucket or pan collecting the dirty water that was coming from the ceiling. The kitchen sink and stove were filled with dirty dishes, and the fridge and the walls were smeared with food all over the kitchen. During that visit I told [Mother], "This is very unsafe for [A] and [J] to be in the house," but I told her I'm going to give her the opportunity to clean the house . . . .

When the social worker returned a few days later, the home "was in the same condition . . . ." The Department also offered school records showing that A had missed twenty-five days of school between November 2nd and February 9th while in her Mother's care.

The juvenile court made detailed factual findings in its ruling:

> The Court finds [the social worker] testified credibly that there were approximately twelve attempts to schedule an appointment with the mother or to schedule a visit with the mother to be able to see the condition of the home, and that was not able to be completed, and for those reasons the Department created a safety plan.
>
> There were concerns not only of the condition of the home, the Court finds, but of missing school by the children, and the Court so finds because of that and seeing such things when the Department did have access to the home such as water damage, the Court found that when the safety plan was completed, there

> was still debris, there was still feces that was located, and still trash within the home.
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> The Court finds that due to that between September and November, there were concerns of [A] remaining in the home. The Court finds it's been proven to this Court that prior to this incident, there were three different cases in which Child Protective Services or the Department of Social Services were involved, including dating back to 2018.
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> . . . [A]t that time the child's Father for [A] was a resource that was used by the Department, and there had been periods of time throughout this pending litigation and shelter Father has been acting in a custodial role.

The court found proven the allegation that A had missed "at least 25 days" of school attributable to Mother and discussed the "potential harm in the home" from her brother, J. The court found substantiated all the paragraphs in the petition. As to Father, the court found that he hadn't contributed to the allegations in the petition:

> The Court so finds that the father for [A] has not been alleged of any being an actor in any of the Petitions that would in any way indicate that he has contributed to or participated in either failing to send the child to school or the conditions that the child was living in for [A]. In fact, Father has been proven to this Court has attempted to advise or encourage Mother based upon his concerns that he had with the condition of the home and the condition of [A] when she would visit with him. The Court so finds that he has helped the child attend school and the father has not contributed to the conditions of either the home or of the child that were present in Mother's home.

Mother timely appealed. Additional facts will be discussed as necessary below.

II. DISCUSSION

Mother raises two issues for our review, which we have condensed and reworded:[5] *first*, whether the Department invoked the juvenile court's subject matter jurisdiction properly, and *second*, whether the court abused its discretion by transferring custody to Father. DSS and Father both urge us to uphold the transfer of custody. We find no reversible error and affirm.

[5] Mother phrased the Questions Presented as follows:

1. Did the juvenile court lack subject matter jurisdiction to proceed in this matter considering neither the Department nor any other party *ever* alleged that A.R. was a CINA, and as a result, should the final judgment be vacated with directions to the lower court to dismiss the petition?
2. Did the court err when it failed to adopt CINA petition amendments proposed by mother?
3. Did the court err when it transferred custody of A.R. to father under CJP § 3-819(e) before dismissing the case?
    A. Did the sustained findings and evidence fail to establish that A.R. was a CINA as to mother, and in particular, that mother was presently unable or unwilling to care for A.R.?
    B. Did the evidence fail to establish that a full custody transfer was in A.R.'s best interests?

The Department listed its Question Presented as, "Did the juvenile court properly act within its broad discretion by placing A.R. in Father's custody before dismissing the CINA petition?"

Father phrased his Questions Presented as:

1. Did the juvenile court have subject matter jurisdiction over A.R. as an alleged CINA?
2. Did the juvenile court have the authority to transfer custody of A.R. to father, the non-offending parent, under CJP § 3-819(e) and to close the CINA case?

We review CINA proceedings using three inter-related standards:

> In CINA cases, factual findings by the juvenile court are reviewed for clear error. An erroneous legal determination by the juvenile court will require further proceedings in the trial court unless the error is deemed to be harmless. The final conclusion of the juvenile court, when based on proper factual findings and correct legal principles, will stand unless the decision is a clear abuse of discretion.

In re Ashley S., 431 Md. 678, 704 (2013) (*citing In re Yve S.*, 373 Md. 551, 586 (2003)). We give "the greatest respect" to the juvenile court's opportunity to view and assess the witnesses' testimony. *In re Adoption/Guardianship of Amber R.*, 417 Md. 701, 719 (2011). We also bear in mind the "fundamental liberty interest of natural parents in the care, custody, and management of their child . . . ." *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

A. The Juvenile Court Had Subject Matter Jurisdiction.

Mother's *first* contention is that the juvenile court lacked subject matter jurisdiction because, "for a child to be an alleged CINA, DSS must raise allegations against *both* parents." Notwithstanding the Department's allegation all along that "[A] is a Child In Need of Assistance," and making no allegations as to Father, Mother asserts that "no party ever sufficiently alleged that A.R. was a CINA" because "DSS affirmatively reported that [F]ather had been safely caring for A.R. for over a month and [Father] had already taken steps in family law court to obtain greater custodial access to her." She contends that the case "always was—and should have remained—a purely family law court matter, where [F]ather had already initiated proceedings." The Department and Father both take the

position that Mother has failed to overcome the presumption that subject matter jurisdiction exists in this case and we agree.

Maryland courts have interpreted Title 3, Subtitle 8 of the Courts and Judicial Proceedings Article broadly to confer jurisdiction in juvenile cases. That is because "the circuit court sitting as the Juvenile Court in a CINA proceeding is a court of general jurisdiction, and the presumption in favor of subject matter jurisdiction applies." *In re John F.*, 169 Md. App. 171, 183 (2006). A CINA petition must, among other things, "'allege that a child is in need of assistance and . . . set forth in clear and simple language the facts supporting that allegation.'" *In re M.H.*, 252 Md. App. 29, 43 (2021) (*quoting* CJ § 3-811(a)(1)); Md. Rule 11-205(e)(4). Any deficiencies in the petition are balanced "against the overall purpose of the CINA statute," *In re M.H.*, 252 Md. App. at 48, which is "to provide for the care, protection, safety, and mental and physical development of any child coming within the provisions" of the Act. CJ § 3-802(a)(1). And of course, the best interest of the child is always the overarching consideration. *See In re Blessen H.*, 392 Md. 684, 694 (2006) ("the best interest of the child may take precedence over the parent's liberty interest" in a custody dispute and "in cases where abuse or neglect is evidenced, particularly in a CINA case, the court's role is necessarily more pro-active" (cleaned up)).

Mother argues that *In re John F.*'s presumption of jurisdiction shouldn't apply because "the *John F.* Court specifically highlighted that the CINA petition allegations [in that case] were replete with factual representations" that jurisdiction was appropriate. But although the Court considered in *In re John F.* that the presumption hadn't been *rebutted*,

it doesn't dispel the *prima facie* presumption. And again, deficiencies in the petition—assuming this petition had any—are balanced "against the overall purpose of the CINA statute." *In re M.H.*, 252 Md. App. at 48.

The Department alleged consistently that A was a CINA, and the mere fact that A was safety-planned temporarily to Father didn't rebut the presumption that the court had jurisdiction. Indeed, our decision in *In re E.R.*, 239 Md. App. 334, 339 (2018), forecloses Mother's contention. There, a mother also argued that the Department had failed to plead in its CINA petition that fathers were "unable or unwilling to care for the children, [so that] the children were not 'in need of assistance,' and the trial court did not have jurisdiction to award custody to the fathers under CJ § 3-819(e)." We stated that a problem arises when "the local department does not know who the noncustodial parent is or whether that person is willing and able to take on custody." *Id.* at 341. The "best course," we held, would be for DSS to "plead, directly or by implication, that a noncustodial parent has 'acquiesced' in leaving the child with the unfit custodial parent." *Id.* at 342.

The Department believes it met this minimal pleading standard by referencing the safety plan because that plan showed that Father had an "inability to protect A.R. absent Mother's agreement," and thus that he was otherwise "unable . . . to assume custody." We agree. The evidence presented at the adjudication hearing revealed that A was able to return to Father's physical custody only under the juvenile court's shelter order, and therefore, as the Department asserts correctly, "the evidence established that Father needed a custody order to ensure that Mother could not interfere in A.R.'s ongoing safety."

Mother attempts to distinguish *In re E.R.* in two ways: *first*, she argues that *In re E.R.* involved an emergency situation, and *second*, that Father was known to the Department and believed by the Department to be willing and able to care for A. Based on the record in this case and *In re E.R.*'s continued analysis, we find each of Mother's distinctions unavailing. The "minimal pleading" was not even present in *In re E.R. Id.* ("Here, [DSS] did not make even this minimal pleading."). "Nevertheless," the Court continued (after finding the "minimal pleading" standard unmet), "we are unwilling to afford mother relief for this deficiency":

> First of all, we do not see (and at oral argument mother's counsel was unable to supply) a reason why a custodial parent who is unable to care for the children should receive a benefit from the local department's inability to plead necessary facts about the noncustodial parent. We cannot fathom how returning the children to an unsafe situation with mother provides an appropriate remedy for the local department's deficient pleading with respect to the fathers. But more importantly, a juvenile court need not dismiss a defective or incomplete CINA petition. *In re Najasha B.*, 409 Md. 20, 40 (2009) (A local department is not prohibited from maintaining a CINA petition "through the adjudicatory hearing stage of a case, despite changed circumstances that throw doubt on the facts that supported the original petition."). Thus, the trial court did not err in proceeding upon the petitions filed by []DSS.

Id. at 342–43. Likewise, we hold that the trial court did not err in proceeding on the petitions in this case.

Moreover, and although subject matter jurisdiction may be raised at any time, including for the first time on appeal, *see County Council of Prince George's Cnty. v. Dutcher*, 365 Md. 399, 405 n.4 (2001), the Department notes that Mother never raised the

issue below and, further to the point, that she "conceded" that A was a CINA by agreeing to the OCC. "The right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right to appeal." *In re M.H.*, 252 Md. App. at 45–46 (cleaned up). And although we are hesitant to apply this "well settled" principle, *see Osztreicher v. Juanteguy*, 338 Md. 528, 534 (1995), in the CINA context in light of the liberty interest of parents, we agree that in this case it warrants consideration on the question of whether the presumption of jurisdiction has been rebutted. Mother's position throughout these proceedings was inconsistent with any argument that the juvenile court lacked jurisdiction. The case was ongoing for nearly a year, she had agreed to an OCC (which necessitated the court's CINA finding), and she took the position at the adjudicatory hearing that she would comply with another OCC. Because "a juvenile court need not dismiss a defective or incomplete CINA petition," *In re E.R.*, 239 Md. App. at 342, the trial court did not err in exercising its general jurisdiction, *see In re John F.*, 169 Md. App. at 182. Mother disagrees with the court's ultimate decision to transfer custody, but her position that A was a CINA was entirely inconsistent with her arguments and position up until the court's adverse decision. *See Osztreicher*, 338 Md. at 535 ("a litigant who acquiesces in a ruling is completely deprived to the right to complain about that ruling"). In light of the record, Mother has failed to rebut the presumption of jurisdiction in this case.

B. The Court Did Not Abuse Its Discretion When It Transferred Custody Of A To Father.

Mother's *next* contention is that the juvenile court abused its discretion when it determined that she is unable to care safely for A and, as a result, transferred custody to Father. Mother contends *first* that "there was insufficient evidence for the court to sustain [paragraph 8] as written," that "there was no evidence that mother had a 'long history' with DSS . . . ." *Second*, Mother argues that the juvenile court abused its discretion in finding "neglect," and she disputes that her actions constituted "neglect." Father responds that "[n]early all evidence presented at disposition supported the court's ultimate finding," and the Department states as well that "the overwhelming evidence in the record supports the court's findings that A.R. was neglected . . . ."

Under CJ § 3-819(e), a juvenile court has the discretion, if a CINA finding is sustainable against one parent, to award custody to the other parent:

> [a] juvenile court has discretion to award custody under § 3-819(e) only if the court, by a preponderance of the evidence: (a) sustains allegations in a CINA petition that are sufficient to support a CINA disposition against one, but only one, parent; and (b) finds that the other parent is able and willing to care for the child[.]

In re T.K., 480 Md. 122, 133 (2022). If those prerequisites are met, the court considers the best interest of the child. *Id.* The proponent of the custody transfer bears the burden of proof. *Id.* at 149.

1. There was sufficient evidence that Mother had a "long history of involvement with the Department" and any error with respect to Mother's specific history involving different children was harmless.

Preliminarily, Mother argues the court should have adopted amendments to paragraphs 7, 8, and 10 of the second amended CINA petition, but only makes argument with respect to paragraph 8. We review her contention, a factual determination, with great deference and will not overturn a decision absent clear error. *See In re Ashley S.*, 431 Md. at 704.

The contested paragraphs states:

> 8. [Mother] has a long history of involvement with the Department. She has had multiple case[s] of neglect and abuse for the different children in her care. She has been Indicated for physical abuse and was also Unsubstantiated for neglect.

A social worker testified that the Department had investigated Mother three times since 2018, before this case. Mother admitted "there are records of me being in CPS," but explained that it's because "people use CPS as a weapon against me."

Regardless, any error with respect to Mother's specific history involving different children was harmless. The court referred to Mother's "historical record" with the Department in its ruling but did not reference any former cases. Instead, it referenced the history of this *specific case*, emphasizing that "the Department on multiple occasions went to the home to try to fix and help Mother fix the inappropriate living conditions for both [children] and much of the time it was met with resistance" and highlighting that the unsafe condition of the home was "not an isolated incident." As the court found, "[t]here were

multiple times in which the Department attempted to keep the children in the home by attempting to visit the home prior to either an Order Controlling Conduct or a safety plan for removal by shelter."

2. There was sufficient evidence of neglect on Mother's part.

This brings us to Mother's *next* contention, that the sustained findings did not establish neglect. Mother disputes the court's fact-finding, but argues that there was no competent evidence that Mother was unable to care for A *presently*. She relies on *In re T.K.*, 480 Md. at 147, to argue that the sustained petition findings must show a "present inability" to provide proper care. But by statute, "neglect" means that either "[t]he child's health or welfare is harmed or placed at substantial risk of harm" or that "[t]he child has suffered mental injury or been placed a substantial risk of mental injury." FL § 3-801(s)(1)(i)–(ii). We can consider "'neglect' as an overarching pattern of conduct." *In re Priscilla B.*, 214 Md. App. 600, 625 (2013). And after reviewing the record, we hold that Father and the Department—together as proponents of the custody transfer—met their burden of proving by a preponderance of the evidence that Mother was presently unfit to provide proper care to A.

The court made detailed factual findings in support of its finding of neglect against Mother:

> The Court finds [the social worker] testified credibly that there were approximately twelve attempts to schedule an appointment with the mother or to schedule a visit with the mother to be able to see the condition of the home, and that was not able to be completed, and for those reasons the Department created a safety plan.

> There were concerns not only of the condition of the home, the Court finds, but of missing school by the children, and the Court so finds because of that and seeing such things when the Department did have access to the home such as water damage, the Court found that when the safety plan was completed, there was still debris, there was still feces that was located, and still trash within the home.
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> This Court finds that due to that between September and November, there were concerns of [A] remaining in the home. The Court finds it's been proven to this Court that prior to this incident, there were three different cases in which Child Protective Services or the Department of Social Services were involved, including dating back to 2018.
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> The Court finds there was at that time safety concerns, including but not limited to allegations of physical abuse. The Court further finds that when there was an issue due to the home and school absences and a safety plan was put in place, at that time the child's Father . . . was a resource that was used by the Department, and there had been periods of time throughout this pending litigation and shelter Father has been acting in a custodial role.
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> * * *
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> [T]he Court finds that [A] also had a problem attending school, and that she was either late on multiple times or did not go multiple times. The Court did hear of illness and notes that were sent . . . that were not turned in, but there was an inability or unwillingness for Mother to follow up on that to make sure that there was good communication with the school.
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> However, even considering in the light most favorable to mother, absences due to illness, it does not satisfactorily explain to the Court why so much school was being missed.

Mother argues that these findings "do not show a significant, 'overarching pattern' of inaction over time that placed A.R. at substantial risk of harm in August 2023," *see In re Priscilla B.*, 214 Md. App. at 625–26, the time of the hearing. And indeed, there was evidence that Mother had moved to a new apartment and no evidence that the new home

was in a deteriorated condition. But in light of the court's findings that this case was "not an isolated incident," the record amply supports the juvenile court's determination that Mother's prior unwillingness to correct the issue, and more importantly Mother's failure to comply with an OCC, plus the documented educational neglect, left her unfit to care for A.

The educational neglect aspect of this case is problematic and Mother continues to minimize this issue. From November to February 2023, just over three months—the bulk of which Mother was subject to the OCC requiring A be present and on time for school—A had twenty-five absences, twenty-two of which were unexcused, according to school records. Mother states that her testimony was "not technically inconsistent with the school records" and that she gave "reasonable justification" for why the records identified excessive absences incorrectly. But the court wasn't persuaded by her "reasonable justification[s]" and we will not disturb the trial court's credibility determination on appeal.

Moreover, Mother argues that because DSS left J in Mother's home due to his age and resistance to leaving, "the home conditions could not have posed a grave danger" to A. But the opposite inference is possible too since Mother blamed J for the state of the home repeatedly (which also supports the court's finding of "potential harm in the home from [J] to [A]"). Mother testified at length about her inability to control J's behavior and that she needed help to deal with him, in addition to the social worker's expert testimony that J could pose a risk of physical harm to A. So although Mother had moved to a new apartment and there was no evidence of its present condition, the juvenile court, viewing

the totality of A's circumstances, had sufficient evidence to find by a preponderance of the evidence that Mother was unable to care properly for A. *See id.* at 621 (*citing In re Dustin T.*, 93 Md. App. 726, 735 (1992)).

3. Father's fitness was uncontested and there was sufficient evidence for the court to find him able and willing to care for A.

Once the court determined that Mother was unfit, it next had to determine whether A had another parent who was able and willing to care for her. CJ § 3-819(e). There was no evidence to suggest that Father was either unable or unwilling and, in this appeal, Mother offers none. We affirm this aspect of the juvenile court's ruling.

4. Transferring custody of A to Father was in her best interest.

Having found that Father was ready, willing, and able to undertake the care and custody of A, the juvenile court was prohibited from determining that A was a CINA and, instead, the statute permitted the court to transfer custody to Father. Remaining "mindful that '[q]uestions within the discretion of the trial court are much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred,'" *In re Shirley B.*, 419 Md. 1, 19 (2011) (*quoting In re Yve S.*, 373 Md. at 583), we see no abuse of the juvenile court's discretion and affirm.

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