Circuit Court for Baltimore County
Case No. 03-C-15-13362

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 794

September Term, 2017

NANCY M. GITTINGS

v.

ALVIN WALTER MAUERHAN

Arthur,
Leahy,
Beachley,

JJ.

Opinion by Beachley, J.

Filed: May 18, 2018

This appeal arises out of an automobile accident involving appellant Nancy Gittings and appellee Alvin Mauerhan. On December 8, 2015, appellant filed a complaint against appellee in the Circuit Court for Baltimore County, alleging that she had sustained injuries as a result of appellee's negligence. Following a three-day trial in June 2017, a jury found that appellee was not negligent. Appellant noted a timely appeal, and presents the following three questions for our review, which we have slightly rephrased:

1. Did the trial court commit prejudicial error by invoking the "residual exception" to the hearsay rule in order to admit into evidence a repair invoice appellee offered to prove the truth of the statements set forth therein?

2. Did the trial court commit prejudicial error by precluding appellant from testifying that appellee had an odor of alcohol on his breath immediately following the accident?

3. Did the trial court commit prejudicial error by precluding any reference to appellee's liability insurance?

We hold that the trial court erred by admitting the repair invoice under the residual exception to the hearsay rule, and that the error was prejudicial. Accordingly, we reverse the circuit court's judgment and remand for a new trial. For guidance to the trial court on remand, we shall address the other evidentiary issues appellant raised: the general admissibility of "odor of alcohol" evidence, and the trial court's redaction of any reference to liability insurance.

FACTUAL AND PROCEDURAL BACKGROUND

On December 22, 2012, appellant was driving a 2008 Pontiac G8 on Belair Road in Baltimore County, Maryland. At approximately 1:30 p.m., while appellant was stopped in

traffic near the intersection of Belair Road and Olde Forge Lane, she was rear-ended by appellee, who was driving a 1993 Dodge Dakota pickup truck.

On December 8, 2015, appellant sued appellee, alleging that she had sustained injuries as a result of appellee's negligent operation of his pickup truck. Appellee filed an answer asserting a variety of defenses, including "brake failure." In June 2017, after a three-day trial in the Circuit Court for Baltimore County, a jury found that appellee was not negligent with respect to the December 22, 2012 accident, and judgment was entered in his favor. We shall provide additional facts as necessary to address the evidentiary questions presented in this appeal.

STANDARD OF REVIEW

"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) (quoting *Ruffin Hotel Corp. of Md., Inc. v. Gasper*, 418 Md. 594, 619 (2011)). With regard to hearsay determinations,

> [T]he trial court's ultimate determination of whether particular evidence is hearsay or whether it is admissible under a hearsay exception is owed no deference on appeal, but the factual findings underpinning this legal conclusion necessitate a more deferential standard of review. Accordingly, the trial court's legal conclusions are reviewed de novo, but the trial court's factual findings will not be disturbed absent clear error.

Gordon v. State, 431 Md. 527, 538 (2013) (citations omitted).

DISCUSSION

I.

At trial, appellee moved to introduce a car dealership's invoice for repairs to his pickup truck. Appellant objected on hearsay grounds to the following statements contained within the invoice: "Customer states rear compartment of master cylinder empty. Pedal went to floor. No brakes. Tech verified concern. Found steel brake lines rotted through. Tech removed damaged brake lines, manufactured and installed new brake lines, flushed and bled brake system." Although no employee from the car dealership testified at trial, appellee argued that because he kept regular records of his vehicle's maintenance, the invoice was admissible as his own record under the business records exception to the hearsay rule.

After hearing argument from both parties, the trial court implicitly rejected appellee's argument that the invoice was admissible as a business record, but found that the invoice was admissible pursuant to Maryland Rule 5-803(b)(24), known as the "residual exception" to the hearsay rule. The court ruled:

> Okay. The [c]ourt finds under Rule 5-803(b)(24), the following are not excluded by [the] hearsay rule and that is a statement not specifically covered by any of the hearsay exceptions listed in Rule 5-803 or in Rule 5-804 but having equivalent circumstantial guarantees of trustworthiness if the [c]ourt determines that the statement is offered as evidence of material fact. The [c]ourt determines that these statements are offered as evidence of material fact. B, the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. The [c]ourt also finds that this statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. And finally C, the general purpose of

> these rules and the interest of justice will best be served by admission of the statements into evidence.

On appeal, appellant argues that the trial court erred by admitting the invoice under the residual exception to the hearsay rule. We agree.

A. RESIDUAL HEARSAY EXCEPTION

The Maryland Rules define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Md. Rule 5-801(c). "Hearsay, under our rules, *must* be excluded as evidence at trial, unless it falls within an exception to the hearsay rule excluding such evidence or is 'permitted by applicable constitutional provisions or statutes.'" *Parker v. State*, 408 Md. 428, 436 (2009) (quoting *Bernadyn v. State*, 390 Md. 1, 8 (2005)).

In the instant case, the parties do not dispute that the statements contained in the repair invoice concerning the condition and repair of appellee's brakes are hearsay. Indeed, appellee sought to use the opinion contained in the statements to corroborate his sole defense at trial, i.e. that his truck's brake failure caused the accident. Although the trial court implicitly rejected appellee's argument that the invoice was admissible under the business records exception, the court admitted the invoice pursuant to the residual hearsay exception.

Maryland Rule 5-803(b)(24), which contains the residual exception to the hearsay rule, states that:

> Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent

> circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

In *State v. Walker*, 345 Md. 293 (1997), the seminal case in Maryland on the residual exception to the hearsay rule, the Court of Appeals held that the following requirements must be satisfied for evidence to be admissible under the residual hearsay exception[1]:

> [1] there must be "exceptional circumstances";
> [2] the statement must not be specifically covered by any of the other exceptions;
> [3] it must have "equivalent circumstantial guarantees of trustworthiness";
> [4] the court must determine that (i) the statement is offered as evidence of a material fact, (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts, and (iii) the general purposes of the rules and the interests of justice will best be served by admission of the statement into evidence; and

[1] At the time *Walker* was decided, the residual hearsay exception was located at Maryland Rules 5-803(b)(24) and 5-804(b)(5). *State v. Walker*, 345 Md. 293, 331 (1997) (Chasanow, J., dissenting). The two rules were identically worded, with the only difference being that Rule 5-804(b)(5) required the unavailability of the hearsay declarant. *Id.* We note that after *Walker* was decided, the residual exception was deleted from Rule 5-804(b)(5) and consolidated in Rule 5-803(b)(24), which is now the only residual hearsay exception. *See Wood v. State*, 209 Md. App. 246, 327 n.22 (2012); Rules Order (Nov. 8, 2005). Because *Walker* was decided under the former Rule 5-804(b)(5), the Court's analysis included the additional requirement that the declarant be unavailable. *Walker*, 345 Md. at 318. Nevertheless, the *Walker* Court's analysis of the former Rule 5-804(b)(5) continues to guide our analysis and application of Rule 5-803(b)(24). *Wood*, 209 Md. App. at 327 n.22.

> [5] the proponent of the statement has given the requisite advance notice of its intention to use the statement.

Id. at 318-19 (footnote omitted). Significantly, the Court further held that:

> [N]otwithstanding that the actual text of the rule purports to require findings by the trial court only with respect to element [4], we believe that, when the rule is read in light of its purpose and legislative history, it is incumbent on the trial court to make a specific finding, on the record, as to *each* conditional element. Evidence is not admissible under the residual exception unless each of the stated conditions is satisfied. Those conditions are in the nature of "[p]reliminary questions concerning the … admissibility of evidence" under Md. Rule 5-104(a), and it is necessary that the record reflect the court's determination of them.

Id. at 321-22. Further explicating the importance of trial court findings in this context, the *Walker* Court stated,

> It is, of course, helpful to both the parties and any reviewing appellate court to know what factors the trial court relied on in making its findings and conclusions. A reasoned explanation may suffice to forestall an appeal, but even if an appeal is taken, a more detailed record will serve to focus the arguments and discussion and possibly alert the appellate court to important factors that might otherwise be overlooked.

Id. at 324. The trial court's failure to announce these subsidiary findings and conclusions, however, does not necessarily require reversal if the record is sufficient to undertake appellate review. *Id.*

Here, the trial court failed to address two of the five requisite conditions for admissibility under Rule 5-803(b)(24)—"exceptional circumstances" and "advance notice." Moreover, although the court determined that the remaining three conditions had been met, it did not explain on the record what factors it considered, the weight it gave to those factors, or the reasoning process it employed. While this omission does not

necessarily mandate remand or reversal, *id.* at 322, we conclude, based on this record, that reversal is required for multiple reasons: (1) "exceptional circumstances" were not present; (2) advance notice was not provided; (3) the record is insufficient for us to effectively review whether the statement in the repair invoice was "more probative on the point for which it [was] offered than any other evidence which the proponent [could] produce through reasonable efforts"; and (4) the record is likewise insufficient to effectively review if the statement offered had "equivalent circumstantial guarantees of trustworthiness." We further conclude that the improper admission of the repair invoice was not harmless. We explain.

Exceptional Circumstances

Though the trial court completely failed to address "exceptional circumstances," we conclude that, on this record, the requirement of exceptional circumstances as contemplated by the residual exception cannot be met. The Committee Note to Maryland Rule 5-803(b)(24) provides the following guidance:

> The residual exception provided by Rule 5–803(b)(24) does not contemplate an unfettered exercise of judicial discretion, but it does provide for treating new and presently unanticipated situations which demonstrate a trustworthiness within the spirit of the specifically stated exceptions. Within this framework, room is left for growth and development of the law of evidence in the hearsay area, consistently with the broad purposes expressed in Rule 5–102.
>
> It is intended that the residual hearsay exception will be used very rarely, and only in exceptional circumstances. The Committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in Rules 5–803 and 5–804(b). The residual exception is not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major

> revisions are best accomplished by amendments to the Rule itself. It is intended that in any case in which evidence is sought to be admitted under this subsection, the trial judge will exercise no less care, reflection, and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

The Court of Appeals, citing its endorsement of this Committee Note, has clarified that the "exceptional circumstances" condition was intended to limit the residual hearsay exception to "those rare situations that were not anticipated." *Walker*, 345 Md. at 325-26.

A brief review of *Walker* and its progeny illustrates this point. In *Walker*, the defendant, Walker, robbed a biker at knifepoint. *Id.* at 296. A few days later, Walker's girlfriend contacted police and informed them that Walker told her that he had committed the robbery. *Id.* Walker and his girlfriend married prior to his trial, and when the State summoned Ms. Walker to testify as a witness, she invoked her spousal privilege and refused to testify against her husband. *Id.* at 297. The court admitted Ms. Walker's prior statement to police under the residual hearsay exception, but the Court of Appeals reversed, holding that:

> As we have indicated, to warrant admission of the statement under Rule 5-804(b)(5) against a hearsay objection, the proponent must show an exceptional circumstance, not anticipated when the rule was adopted, and we fail to see how the exercise of a privilege based on legislatively declared public policy that predated the rule by nearly 30 years can constitute such an exceptional circumstance. There is nothing "unique" or exceptional about a spouse invoking his or her statutory privilege.

Id. at 329.

Maryland appellate courts have consistently construed the "exceptional circumstances" rule narrowly. *See Wood v. State*, 209 Md. App. 246, 333 (2012) (holding

that victim's hearsay statements made prior to death were not admissible under the residual exception, because the Maryland Rules "clearly contemplate[] situations in which a declarant is deceased and yet his or her statement is admissible pursuant to a hearsay exception."); *Nixon v. State*, 140 Md. App. 170, 185-86 (2001) (holding that child protective services agent's testimony that a mentally disabled sixteen-year-old teenager told the agent she had been sexually abused was not admissible under the residual exception to the hearsay rule, because existing law covered the admission of statements by child abuse victims, and was limited to cases where the victim was under the age of twelve).

Applying *Walker* and its progeny, we conclude that there is nothing unique or exceptional about the admissibility of automobile repair invoices. *Walker*, 345 Md. at 329. As we have noted on multiple occasions, invoices may be admitted into evidence under the business records exception to the hearsay rule.[2] *See, e.g.*, *Sail Zambezi, Ltd. v. Md. State Highway Admin.*, 217 Md. App. 138, 157 (2014). Furthermore, there is nothing unique or exceptional in evidence law about the admissibility of the statements and opinions attributed to the automotive technician that appellant specifically objected to. Because the admissibility of regularly-kept business records and opinion evidence is expressly contemplated by the Maryland Rules,[3] this case does not present the "exceptional

[2] Indeed, appellee's counsel argued for the application of the business records exception at trial. We shall address the business records exception *infra*.

[3] To the extent that all or part of the repair invoice may be admissible as the dealership's business record, the second conditional element for the residual exception — that the "statement must not be specifically covered by any of the other exceptions" — would likewise not be satisfied.

circumstances" required by the residual hearsay exception. We therefore hold that the trial court erred by admitting the repair invoice under Rule 5-803(b)(24).

Advance Notice

We further conclude that appellee failed to provide advance notice of his intention to introduce the repair invoice as prescribed by Rule 5-803(b)(24), which states in relevant part that:

> A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.

Although appellee's trial counsel stated that appellee provided all of the vehicle's maintenance records in discovery, he admitted that he had not given opposing counsel notice that he intended to introduce the repair invoice at trial as evidenced by the following colloquy:

> THE COURT: When did you notify [appellant's counsel] that you intended to use these records at trial?
>
> [APPELLEE'S COUNSEL]: At trial -- I don't think I notified him they would be used at trial.

Effective appellate review of a trial court's determination of "advance notice" under the Rule would typically require review of the trial court's underlying fact findings. Here, however, appellee conceded that he failed to give appellant notice that he intended to introduce the repair invoice. We have no difficulty concluding on this record that appellee, in direct contravention of Rule 5-803(b)(24), failed to notify appellant "sufficiently in

advance of the trial" of his intention to admit the repair invoice as evidence. For this second, independent reason, the trial court erred in admitting the invoice pursuant to the residual exception.

Other Conditional Elements

We are also unable to determine from the record whether the trial court properly concluded that the statement contained in the repair invoice was (1) "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts," and (2) offered "equivalent circumstantial guarantees of trustworthiness."

1. More Probative on the Point for Which It Is Offered Than Any Other Evidence Which the Proponent Can Produce Through Reasonable Efforts

In *Nixon*, we held that the testimony of a child protective services agent regarding the statement of a mentally disabled teenage victim was not "more probative on the point for which it was offered than any other evidence which the proponent can introduce through reasonable efforts"—namely, the testimony of the victim herself:

> [T]he hearsay statement is not "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts." [The victim's] live trial testimony, subject to cross-examination, was the most probative evidence. But for a short recess taken at the beginning of her testimony, the witness did not appear to have any problem understanding and answering questions. She withstood cross-examination and the State even called her as a rebuttal witness.

Nixon, 140 Md. App. at 187.

Based on the record here, we cannot conclude that the statement in the repair invoice regarding appellee's brakes was more probative on the point for which it was offered than

any other evidence appellee could have produced through reasonable efforts. For instance, the record does not indicate whether the technician who actually performed the work on appellee's vehicle was available as a witness. The automotive technician's testimony, subject to cross-examination, would be more probative than statements embedded in the repair invoice. Similarly, testimony from an independent expert concerning the condition of the truck's brakes would be more probative than the unsworn statements contained in the invoice.

Though it is unclear whether appellee could have reasonably produced testimony from the technician who worked on appellee's brakes, one of the dealership's employees did come into the courtroom during trial. Later, during argument on the admissibility of the repair invoice, appellee's counsel stated that, "And Your Honor, I hope not -- I probably made a bad strategic call. That gentleman who came in, I didn't know who he was. He was from the . . . dealership. And it had been my understanding from our discussion -- and I told him he could go." Moreover, appellee's counsel acknowledged that, "I withdrew my brake expert on purpose before this trial." Accordingly, we cannot conclude that the statement in the repair invoice regarding appellee's brakes was more probative on the point for which it was offered than any other evidence appellee could have produced through reasonable efforts.

2. Equivalent Circumstantial Guarantees of Trustworthiness

Rule 5-803(b)(24) also requires that the statement at issue have circumstantial guarantees of trustworthiness equivalent to the other hearsay exceptions enumerated in

Rule 5-803 and Rule 5-804. In *Nixon*, we examined a mentally disabled teenager's statement to a social worker concerning sexual abuse to determine whether that statement had the required circumstantial guarantees of trustworthiness:

> The following facts suggest that the statements did not satisfy this requirement: (a) the complainant had an IQ of forty-six; (b) her own mother testified that the complainant was a liar; (c) although the complainant denied it, there was testimony that she had an argument with Mr. Nixon on the morning she made the allegation; (d) there were inconsistencies between the first and second statements regarding the allegations of anal intercourse and attempted fellatio; (e) there was no corroborating medical evidence—according to Dr. Goertzen, the absence of a hymen and the yeast infection were not necessarily the result of sexual abuse; (f) neither Mr. Nixon's hair nor semen were found on the bed sheet where the complainant alleged he had ejaculated; and (g) Janet Milbourne testified that the complainant told her that the abuse had not occurred, that she was mad at Mr. Nixon and that was why she made the allegation.

Nixon, 140 Md. App. at 186.

Here, although the circuit court found the existence of "equivalent circumstantial guarantees of trustworthiness," it failed to make the subsidiary findings to support its determination. We note that the repair invoice provided no information about the identity or qualifications of the technician who evaluated and worked on the pickup truck's brakes. On this record, we fail to see how the technician's statements and opinions concerning the pickup truck's brakes had the "circumstantial guarantees of trustworthiness" required by Rule 5-803(b)(24).

Harmless Error

Finally, having established that the court erred in admitting the repair invoice, we further hold that this error was prejudicial.

> It has long been the policy in this State that this Court will not reverse a lower court judgment if the error is harmless. The burden is on the complaining party to show prejudice as well as error.
>
> Precise standards for determining prejudice have not been established and depend upon the facts of each individual case. Prejudice can be demonstrated by showing that the error was likely to have affected the verdict below; an error that does not affect the outcome of the case is harmless error. We have also found reversible error when the prejudice was substantial. The focus of our inquiry is on the probability, not the possibility, of prejudice.

Flores v. Bell, 398 Md. 27, 33 (2007) (citations omitted).

In *Kapiloff v. Locke*, 276 Md. 466 (1975), Locke and Jackson, an architectural firm, sued the defendant, Dr. Kapiloff, after he refused to pay for architectural services in connection with the construction of a building. *Id.* at 468. After a jury ruled in favor of the architects, Dr. Kapiloff appealed, arguing that he had been prejudiced by the admission of two letters from the vice president of a large reputable bank. *Id.* The Court of Appeals agreed with Dr. Kapiloff that the letters were inadmissible hearsay:

> In this case the letters purportedly written by [the bank's vice president], exhibits 9 and 10, were clearly inadmissible hearsay. The letters were offered to prove the truth of the matters asserted, namely, that Dr. Kapiloff "owed" money to Locke and Jackson for architectural services performed. The letters suggested that the services which Dr. Kapiloff received were worth more than Dr. Kapiloff was obligated to pay. The statements contained in the letters were unsworn to by [the vice president], and he was not available for cross-examination.

Id. at 471. The Court further held that the admission of the letters was prejudicial, reasoning that:

> [T]he letters were from a third party passing judgment on the ultimate issues in the case. Our review of the record reveals that the only testimony during the trial tending to establish the existence of a debt owed by Dr. Kapiloff came from [one of the plaintiff architects]. Thus, in light of the weight which the jury was likely to attribute to the apparently unbiased information and

> opinions contained in the letters, and the inability of Dr. Kapiloff to cross-examine the author, we believe that Dr. Kapiloff was prejudiced by the admission into evidence of the two letters.

Id. at 474.

In the instant case, the repair invoice contained the following statement: "Customer states rear compartment of master cylinder empty. Pedal went to floor. No brakes. Tech verified concern. Found steel brake lines rotted through. Tech removed damaged brake lines, manufactured and installed new brake lines, flushed and bled brake system." In evaluating the likely effect of this evidence, we note that appellee's sole defense to negligence at trial was that he had applied the brakes "in plenty of time[,]" but that the vehicle's brake failure prevented him from avoiding the collision with appellant's car. The only evidence corroborating appellee's brake failure defense were the technician's statements in the repair invoice, including the technician's finding that the truck's "steel brake lines [were] rotted through." The weight that the jury likely attributed to the opinion of an automotive technician, as well as the inability of appellant to cross-examine the technician who rendered the opinion, lead us to conclude that the admission of the repair invoice was prejudicial.

B. BUSINESS RECORDS EXCEPTION

At trial, appellee attempted to introduce the repair invoice pursuant to the business records exception to the hearsay rule. On appeal, appellee argues that even if the invoice was not admissible under the residual exception, it was admissible under Rule 5-803(b)(6) as his personal business record. Although the court did not admit the repair invoice under

the business records exception, we address this argument because "we can affirm when the trial court's decision was right for the wrong reasons." *Yaffee v. Scarlett Place Residential Condo, Inc.*, 205 Md. App. 429, 440 (2012). On this point, we agree with the trial court that the repair invoice was not admissible under the business records exception.

Maryland Rule 5-803(b)(6) provides that a record of regularly conducted business activity is not excluded by the rule against hearsay if:

> (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

"The rationale underlying the business records exception is that because the business relies on the accuracy of its records to conduct its daily operations, the court may accept those records as reliable and trustworthy." *Dep't of Pub. Safety & Corr. Servs. v. Cole*, 342 Md. 12, 30 (1996). "[E]ven when material is offered under the business record exception, a custodian of records must testify in order to authenticate the records." *In re Adoption/Guardianship No. 95195062/CAD in Circuit Court for Baltimore City*, 116 Md. App. 443, 464 (1997).[4]

[4] Maryland Rule 5-902(b) provides a means to authenticate business records without the in-court testimony of the custodian of the records.

We initially note that appellee made no attempt to authenticate the repair invoice as the dealership's business record. Instead, appellee claimed that the invoice was his own business record because he kept regular maintenance records for his personal vehicles. There was, however, no evidence that appellee kept these records in connection with a business, profession, occupation, or calling of any kind. While we acknowledge that personal records kept for business reasons may be admissible under Rule 5-803(b)(6) in certain cases,[5] the repair invoice here was generated by the dealership, apparently pursuant to its business routine. *Cole*, 342 Md. at 30. The repair invoice was the dealership's business record, not appellee's. The repair invoice, therefore, was not admissible under Rule 5-803(b)(6) as appellee's business record.

Because the repair invoice was improperly admitted, and the error was not harmless, we reverse the trial court's judgment and remand for a new trial.

II.

To assist the trial court on remand, we will also briefly address appellant's two remaining arguments, beginning with her contention that the trial court erred by preventing her from testifying that she "smelled a strong odor of alcohol on [a]ppellee's breath" following the collision.

[5] *See Keogh v. Comm'r*, 713 F.2d 496, 499-500 (9th Cir. 1983) (holding that a casino card dealer's personal diary containing his wage and tip income was admissible under the business records exception); *United States v. Huber*, 772 F.2d 585, 591 (1985) (holding that a gun collector's inventory of his firearms was admissible under the business records exception).

Appellant testified that, after the accident, she remained seated in her car until emergency personnel arrived. Before the ambulance arrived, appellee walked over to appellant's car to check on her, and talked with her as he sat in the passenger seat of her car. During an interview with a representative from appellee's insurance company two days after the accident, appellant told the insurance representative that "the alcohol that came off [appellee] was ridiculous." The police officer who responded to the scene of the accident, however, did not issue a citation to appellee, nor did he include any reference to alcohol in his report.[6]

Prior to trial, appellee filed a motion *in limine* to preclude any testimony that appellant smelled a strong odor of alcohol on appellee following the accident. The motion was argued before the beginning of trial on June 6, 2017, after which the trial court granted the motion:

> With respect to [appellee's] motion in limine to preclude any testimony concerning alcohol, the [c]ourt's ruling is as follows: The motion is granted. The [c]ourt doesn't feel like it is effectively making a credibility determination with respect to whether or not [appellee] had had a drink or multiple drinks before the accident occurred. However, the [c]ourt does have an important gatekeeping function that even if there is some probative value regarding that evidence, the evidence must be excluded under rule 5-403 if that probative value is substantially outweighed by the danger of unfair prejudice. So the motion to exclude testimony concerning alcohol is granted.

[6] The officer testified at trial that he spoke with appellee at the scene of the accident. It does not appear that the officer had an opportunity to talk with appellant about the accident. In her deposition, appellant testified that she did not speak with police about the accident, and that "I don't even know who I talked to because when the paramedics got there, somebody . . . helped me get out of the car, put me on a board, and strapped me down, and I was gone."

Maryland Rule 5-403 states that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." We do not, however, exclude evidence merely because it is prejudicial or because it portrays a party in a negative fashion. *Moore v. State*, 84 Md. App. 165, 172 (1990). "There must be an additional showing that the prejudice rises to the level of 'unfair' by evoking such a strong emotional response—sympathy, hatred, or contempt to name a few—in the trier of fact that logic and reasoning cannot overcome the prejudice." *CSX Transp., Inc. v. Pitts*, 203 Md. App. 343, 382 n.15 (2012). We review a trial court's decision to exclude evidence under Rule 5-403 for an abuse of discretion. *State v. Simms*, 420 Md. 705, 725 (2011).

Here, the trial court apparently concluded that testimony regarding the odor of alcohol on appellee's breath would have been unfairly prejudicial to appellee. Although we decline to hold that this was an abuse of discretion, we note that the Court of Appeals has held that "[t]he question whether the driver of a motor vehicle was under the influence of intoxicating liquor at the time of an accident is relevant to the issue of his negligence." *Singleton v. Roman*, 195 Md. 241, 247 (1950). In *Singleton*, the defendant, Singleton, was driving with two passengers when he struck the concrete abutment of a culvert along the highway. *Id.* at 245. The two passengers were injured in the crash, and each sued Singleton for negligence. *Id.* At trial, Singleton claimed that he had been blinded by the headlights of an oncoming car, and the jury issued a verdict in his favor in both cases. *Id.* at 246. The

passengers appealed, arguing that the trial judge had erred by instructing the jury to disregard a State trooper's testimony that there was "a very slight odor of alcohol on [Singleton's] breath." *Id.* The Court of Appeals agreed, and held that:

> At the trial below, where there was testimony that there was a very slight odor of alcohol on the driver's breath, but he did not seem to be intoxicated, it was the province of the jury to determine whether he was actually under the influence of intoxicating liquor in any degree, however slight, and if he was, whether the intoxication contributed to the accident.

Id. at 247.

We further note that it makes no difference whether testimony about the odor of alcohol comes from a lay witness or from a police officer testifying as a lay witness. *See Warren v. State*, 164 Md. App. 153, 168 (2005) (holding that the rule of admissibility of lay opinion testimony is no different when the lay opinion is offered by a police officer). "Perceiving whether someone is intoxicated does not require specialized knowledge, because 'the condition of intoxication and its common accompaniments are . . . a matter of general knowledge.'" *Id.* at 167 (quoting *State v. Magaha*, 182 Md. 122, 130 (1943)). The Court of Appeals has commented that because "[t]he odor of alcohol is one of the 'practical aspects of daily life,' and its detection is 'how reasonable and prudent people' could come to suspect that another person is under the influence of alcohol . . . a trial court errs if it denies a jury the opportunity to consider such evidence[.]" *Motor Vehicle Admin. v. Spies*, 436 Md. 363, 376 (2013) (citations omitted).

Here, it does not appear that the trial court considered *Singleton* when it excluded appellant's proffered testimony about an odor of alcohol on appellee's breath. We reiterate

that the determination whether evidence is unfairly prejudicial is governed "by balancing the inflammatory character of the evidence against the utility the evidence will provide to the jurors' evaluation of the issues in the case." *Smith v. State*, 218 Md. App. 689, 705 (2014). On remand, we encourage the trial court to consider *Singleton* in its "probative value versus unfair prejudice" calculus pursuant to Rule 5-403.

III.

Finally, we address the court's decision to exclude evidence of liability insurance. Prior to trial, appellant filed a motion *in limine* to offer evidence referencing appellee's liability insurance, namely a recorded conversation between appellee and a representative from his insurance company. The motion was argued before the beginning of trial on June 6, 2017, after which the trial court denied the motion, but ruled that "[appellant] can introduce the recorded statement and documents concerning damage to [appellant's] vehicle without any reference to [appellee's] liability insurance company."

Although the trial court determined that the recorded statement and documents were admissible, appellant argues the court erred by redacting any mention of insurance coverage or appellee's insurance company. Appellant alleges that appellee's statement to his insurer was different from the one that he gave at trial,[7] and claims that the fact appellee made the statement to his insurer was relevant to the issue of appellee's credibility.

[7] Specifically, appellant points out that although appellee told his insurance company that he applied the brakes and they did not work, he did not use the specific term "brake failure," which he later asserted as an affirmative defense in his answer to appellant's complaint.

"[O]ur courts generally prohibit the slightest reference to insurance in front of a jury because it may prejudice the issue of damages." *Abrishamian v. Barbely*, 188 Md. App. 334, 346 (2009). "The controlling principle has been that public policy frowns upon the injection of liability insurance in legal proceedings at which the insured defendant's underlying tort liability is being determined; the 'matter of liability insurance is irrelevant to the issue of the defendant's liability and is highly prejudicial.'" *Harford Mut. Ins. Co. v. Woodfin Equities Corp.*, 344 Md. 399, 412 (1997) (quoting *Wash. Metro. Area Transit Auth. v. Queen*, 324 Md. 326, 332-333 (1991)).

Maryland Rule 5-411[8] and our case law have carved out exceptions to this general prohibition. *Titan Custom Cabinet, Inc. v. Advance Contracting, Inc.*, 178 Md. App. 209, 224 (2008). One of these exceptions allows for evidence of a party's insurance to be admitted when "the fact of insurance may be relevant as bearing upon the credibility of a witness." *Id.*

Appellant asserts that "[t]he fact that [a]ppellee gave his statement to his insurer, to which he had both a legal and contractual obligation to tell the truth, also makes the identity of [a]ppellee's carrier both relevant and probative to the issue of [a]ppellee's credibility[.]"

[8] Maryland Rule 5-411 states that:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully. This Rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Appellant provides no authority in support of this proposition, and "[i]t is well settled that it 'is not our function to seek out the law in support of a party's appellate contentions.'" *Benway v. Md. Port Admin.*, 191 Md. App. 22, 32 (2010) (quoting *Diallo v. State*, 186 Md. App. 22, 33 (2009)). Furthermore, we note that the court admitted the substance of appellee's allegedly prior inconsistent statement, thereby providing appellant the opportunity to challenge appellee's credibility before the jury.[9] It is the content of appellee's statement to his insurer—not the fact that he is insured—that is relevant to his credibility. We therefore discern no abuse of discretion in the court's redaction of any reference to insurance from appellee's statement to his insurance company.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY REVERSED. CASE REMANDED TO THAT COURT FOR A NEW TRIAL. COSTS TO BE PAID BY APPELLEE.

[9] The redactions to the recorded statement were minimal, and covered only a handful of lines in a roughly eleven-page transcript.