Circuit Court for Baltimore County
Case No. 03-C-18-002380

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1558

September Term, 2024

IN THE MATTER OF CALEB R. KELLY, III

Wells, C.J.,
Berger,
Lazerow, Alan C.,
(Specially Assigned),

JJ.

Opinion by Wells, C.J.

Filed: November 25, 2025

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

The Board of Appeals for Baltimore County ("the Board of Appeals" or "the Board") denied appellant Caleb R. Kelly III's request for a variance to permit a pole barn to remain in a side yard, rather than behind his house, as is required by the Baltimore County Zoning Regulations ("Zoning Regulations").[1] The Circuit Court for Baltimore County affirmed the Board of Appeals' decision to deny the variance request.

This appeal followed. Kelly presents four questions for our review, which we have rephrased for clarity:[2]

I. Whether the Board of Appeals erred in determining the subject property is unique;

II. Whether the Board of Appeals erred in applying the correct standard for granting a variance;

III. Whether the Board of Appeals erred in determining that strict compliance with the Zoning Regulations would not result in "practical difficulty" to Kelly; and

IV. Whether the Board of Appeals erred in determining that any "practical difficulty" or "unreasonable hardship" to Kelly was "self-inflicted."

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[1] The petition was appealed to the Board of Appeals from an administrative law judge's decision to deny the appellant's variance request on March 13, 2017.

[2] Kelly's verbatim questions are:

1. Did the Board of Appeals correctly determine that the subject property is unique?
2. Did the Board of Appeals misconstrue the applicability of this Court's decision in *Montgomery County v. Rotwein*, 169 Md. App. 716 (2006) and otherwise misconstrue the applicable standard for granting a variance?
3. Did the Board of Appeals err in not concluding that strict compliance with the Zoning Regulations would result in "practical difficulty" to Mr. Kelly?
4. Did the Board of Appeals err in determining that any practical difficulty or unreasonable hardship to Mr. Kelly was "self-imposed"?

We hold there was sufficient evidence in the record to sustain the Board of Appeals' determination that the subject property is unique. We conclude, however, the Board was unclear in which standard it used in denying the variance. Despite this, the Board did not err in concluding Kelly suffered no practical difficulty if the zoning restrictions were strictly enforced. Finally, the Board did not err in determining any practical difficulty Kelly suffered was self-inflicted. We, therefore, affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Board of Appeals recited the relevant factual background in its written decision. We produce that summary here:

> [Petitioner Mr. Kelly's] property is approximately 1.64 acres and is zoned RC-5. Mr. Kelly's house sits on the far western part of his property and is accessed from Padonia Road by a narrow 900-foot strip used as the house's driveway. At the end of the 900-foot shared driveway, the driveway splits in two, with one split providing access to [Protestant Ms. Brockmeyer's] residence and to Mr. Kelly's residence, and the other providing access to Mr. Kelly's garage. [He] began constructing, without permits, a detached pole barn. After receiving a stop work order from Baltimore County, [Mr. Kelly] was instructed to seek variance relief.
>
> Mr. Kelly's property forms, what [his] counsel describes as a "9-sided oblong, polygon." Mr. Kelly's house sits on a hill at the rear of the western end of the property. Traveling east from Mr. Kelly's house in the direction of Padonia Road, his property slopes downward and reaches its lowest point in the area where the driveway splits. Mr. Kelly's home is a two-story, wood frame, dwelling with an attached garage. On the west, or left side of the house is a circular driveway that leads from the front of the house around to an attached garage on the back of the house. As testified to by Mr. Kelly, he obtained a variance to construct the garage in order to park his four cars. He explained that he designed the garage so that it is an extension of the house. There are large windows inside the garage.
>
> Testimony was provided by Mr. Kelly that the "pole barn" at issue is approximately 67 x 17 square feet and is located in the west side of the house

at the end of the right leg of the driveway. Behind the newly constructed pole barn is a shed that was previously located on the present footprint of the pole barn. As depicted in Petitioners Ex. 8A-D and as testified to by Mr. Kelly, Mr. Kelly keeps lawn mowers, a snowplow, a John Deere tractor and wagon, a log splitter, chainsaws, a power washer, wheel barrels, deck furniture, bow saws, shovels and materials such as pots, hay, dirt, salt, cement, firewood and grass seed in the pole barn. Mr. Kelly testified that these materials and equipment are necessary to maintain the property, as he is the sole person in the subdivision who maintains the 900-foot driveway and the 36-foot right of way which extends on either side of the driveway and is shared by other property owners in the subdivision. The maintenance includes snow removal in the winter months.

Mr. Kelly believes that keeping his equipment in the pole barn protects it from theft and removes the equipment from being an eyesore to the neighbors.

A. <u>Bruce Doak</u>

Expert testimony regarding the "uniqueness" of [Mr. Kelly's] property was provided by Bruce Doak. Mr. Doak testified that the property is unique because of its shape and the orientation of the house on the lot. He states that there is no other lot in the area that has the same or similar shape. He notes that none of the houses in the Caleb Acres subdivision or in the area are oriented in the same direction. Accordingly, Mr. Doak notes that none of the properties in the Caleb Acres would require a variance to place a garage or barn in a comparable location on their properties. Mr. Doak further noted that there is nowhere else to put the pole barn on the Property that would not require a variance. Mr. Doak, who lives on a farm himself attested to the fact that a pole barn was necessary for housing the amount of material and equipment necessary to maintain a property such as Mr. Kelly's. Consequently, Mr. Doak testified that the denial of a variance would impose a practical difficulty or unreasonable hardship on Mr. Kelly.

B. <u>Protestant, Adele L. Brockmeyer</u>

Ms. Brockmeyer testified that although, she and her family no longer reside at the house adjacent to [Mr. Kelly], they are opposed to the granting of a variance for [his] pole barn. Ms. Brockmeyer testified that they have experienced flooding problems in their home in the past, and that she believes that the increased footprint of the newly constructed pole barn will further

> exacerbate the flooding problem due to water runoff from [Mr. Kelly's] property.

(cleaned up) (citations omitted).

The Board of Appeals denied Kelly's variance request. Although it found that the irregular shape of the property "constrains, to some extent, the available building envelope" thereby rendering the property "unique," the Board concluded that under the zoning laws, any practical difficulty to Kelly's use and enjoyment of the property was self-created. Board member Kendra Randall Jolivet concurred in the result but dissented as to the majority's finding that the property was unique. Kelly petitioned for judicial review in the circuit court, which affirmed the Board of Appeals' decision.

Kelly then appealed to this Court. Additional facts are incorporated in the analysis as needed.

STANDARD OF REVIEW

When reviewing the decision of an administrative agency, this Court "looks through the circuit court's [decision] . . . and evaluates the decision of the agency." *People's Counsel for Balt. Cnty. v. Surina*, 400 Md. 662, 681 (2007). Maryland's courts afford substantial deference to administrative agencies, and judicial review of their actions is narrow. *United Parcel Serv., Inc. v. People's Counsel for Balt. Cnty.*, 336 Md. 569, 577 (1994); *Younkers v. Prince George's Cnty.*, 333 Md. 14, 18 (1993). The role of the reviewing court is "limited to determining if there is substantial evidence in the record as a whole to support the agency's findings and conclusions, and to determine if the administrative decision is premised upon an erroneous conclusion of law." *United Parcel*

Serv., 336 Md. at 577. Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion[.]" *Snowden v. Mayor & City Council of Balt.*, 224 Md. 443, 448 (1961) (quoting *Consolidated Edison Co. of N.Y.C. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938)).

DISCUSSION

I. The Board of Appeals Did Not Err in Determining Kelly's Property is Unique.

A. Parties' Contentions

Kelly first contends the Board of Appeals was correct in determining that his property was unique. He argues his property is clearly unique, as evidenced by its oblong shape resembling a "9-sided polygon" and its 900-foot panhandle. It is also unique in the way it sits: the house is on the rear of the property and is oriented to the north rather than the east or northeast, like most other properties in the area. Kelly contends no other property owner in the area would need a variance to construct a barn in the same location to their house.

The appellees are Kelly's neighbors, John Turnbull, III and Adele Brockmeyer, (hereafter "the Neighbors"). The Neighbors contend the Board of Appeals was wrong in determining the subject property is unique. They contend that under *Cromwell v. Ward*, 102 Md. App. 691, 694–95 (1995), uniqueness of a property "requires that the subject property have an inherent characteristic not shared by other properties in the area," and "[m]anmade characteristics, like unusual architectural structures and wall[s], cannot be a basis to render a finding that a property is unique[.]" The subject property here, they argue,

does not greatly differ from the inherent characteristics shared by other properties in the area. Further, they argue, the evidence Kelly points to about the property's uniqueness consists of improvements he made upon the property, which do not contribute to "uniqueness" under *Cromwell*.

At oral argument, however, the Neighbors conceded that they were not contesting the Board of Appeals' finding of the property's uniqueness, and they did not cross-appealed on this issue. Nonetheless we briefly address the issue because it was raised below and in the Neighbors' brief.

B. Analysis

We begin our analysis by stating the inquiry an agency must undertake in deciding whether to grant or deny a variance request. Generally, "the authority to grant a variance should be exercised sparingly and only under exceptional circumstances." *Cromwell*, 102 Md. App. at 694–95. This Court has said that consideration of a variance request requires a two-step inquiry. *Id. First*, the applicant must establish the property in question possesses conditions or circumstances that are unique or peculiar to the land or structure itself and the unique or peculiar characteristics make it unlike surrounding properties. *Id. Second*, once uniqueness has been established, the applicant must demonstrate that a strict enforcement of the zoning ordinance would result in either practical difficulty or unreasonable hardship. *Id.* The uniqueness of the property must be established as a threshold requirement before considering whether practical difficulties or unreasonable hardships exist. *Id.* at 699.

In *North v. St. Mary's County*, we discussed the uniqueness requirement:

> In the zoning context the "unique" aspect of a variance requirement does not refer to the extent of improvements upon the property, or upon the neighboring property. "Uniqueness" of a property for zoning purposes requires that the subject property has an inherent characteristic not shared by other properties in the area[.]

99 Md. App. 502, 514 (1994) (cleaned up).

We disagree with the Neighbors' contention that Kelly's property is not "unique" under *Cromwell*. Rather, we determine substantial evidence exists on the record for the Board of Appeals to determine the property is unique. Under the substantial evidence standard, "more than a scintilla of evidence" must support the Board's findings. *Eastern Outdoor Advert. Co. v. Mayor & City Council of Balt.*, 128 Md. App. 494, 515 (1999).

Here, Bruce Doak, Kelly's proffered expert in zoning regulations, testified to the irregular shape of the property which limits the available building area. Additionally, Kelly and Doak both testified that the property faces away from the main road while most other properties in the area face the road, demonstrating an inherent characteristic different from that of surrounding properties. Kelly also entered evidence including site plans and aerial photographs to further demonstrate the topography of the property is different compared to surrounding properties. Thus, "more than a scintilla" of the record evidence supported the Board of Appeals' finding that Kelly's property is unique. Because their finding was supported by substantial evidence in the record, the Board of Appeals did not err.

II. The Board of Appeals Did Not Clearly State Which Standard It Used in Considering Kelly's Variance Request, and It Misapplied *Rotwein*.

III.

A. Parties' Contentions

Kelly contends the Board of Appeals misconstrued the standard for granting a variance by conflating the "practical difficulty" standard with the "unreasonable hardship" standard. He argues the Board relied exclusively on the fact that Kelly could use his garage to store his equipment in determining that he could make reasonable use of his property without the barn, which does not reflect the practical difficulty standard. It is his contention that the "practical difficulty" standard does not require him to prove that he needs the barn, but it only considers whether not granting the variance interferes with a permitted purpose.

He further argues the Board's misconstruction of the standard is in part due to their reliance on *Montgomery Cnty. v. Rotwein*, 169 Md. App. 716 (2006). Kelly contends *Rotwein* required an applicant show they cannot make reasonable use of their property when they argue that a practical difficulty exists because of some economic loss. Since Kelly did not argue he would suffer a practical difficulty because of some economic loss, Kelly asserts *Rotwein* is not applicable, and therefore he was not required to show that he was unable to make reasonable use of his property without the barn.

The Neighbors contend both the Board of Appeals and the Circuit Court correctly applied *Rotwein*, which according to them, held "practical difficulty or hardship is not found when an owner can make reasonable use of their property." They further contend the Board correctly applied *Mills v. Godlove*, 200 Md. App. 213 (2011), in determining the

correct standard of review in zoning matters. While *Mills* makes clear a variance applicant must only meet the lesser standard of showing "practical difficulty" rather than an "unreasonable hardship," the Neighbors argue the Board of Appeals was correct in finding Kelly showed neither.

B. Analysis

Under *Cromwell*'s two-step analysis, once the petitioner establishes the property is unique, they must then show that strict enforcement of the zoning rules would cause either a "practical difficulty" or "an unreasonable hardship." 102 Md. App. at 694–95. *See also* Md. Code, Land Use § 4–206(b)(2) ("The modifications in a variance . . . (2) may only be allowed where . . . a literal enforcement of the zoning law would result in unnecessary hardship or practical difficulty as specified in the zoning law[.]"). "The determination of which standard to apply, 'practical difficulties' or 'undue hardship,' rests on which of two types of variances is being requested: 'area variances' or 'use variances.'" *Rotwein*, 169 Md. App. at 728.

With a use variance, a petitioner seeks to change the character of property within the zoned district. "Use variances permit a use other than that permitted in the particular district by the ordinance, such as a variance for an office or commercial use in a zone restricted to residential uses." *Id.* (cleaned up) (citations omitted). Use variances typically require the petitioner to satisfy the higher burden of demonstrating undue hardship. *Anderson v. Bd. of Appeals*, 22 Md. App. 28, 39 (1974).

By contrast, an area variance, such as the one Kelly requested in this case, is defined as a "variance permitting deviation from zoning requirements about construction and placement, but not from requirements about use." *Variance*, BLACK'S LAW DICTIONARY (12th ed. 2024). Put differently, area variances "are variances from area, height, density, setback, or sideline restrictions, such as a variance from the distance required between buildings." *Rotwein*, 169 Md. App. at 728. In contrast to use variances, a petitioner seeking an area variance typically must only satisfy the lesser burden of practical difficulty when the terms "practical difficulty" and "unreasonable" or "undue hardship" are used in the disjunctive—with the connector "or"—as articulated here:

> 1) Whether compliance with the strict letter of the restrictions governing area, setbacks, frontage, height, bulk or density would unreasonably prevent the owner from using the property for a permitted purpose or would render conformity with such restrictions unnecessarily burdensome.
>
> 2) Whether a grant of the variance applied for would do substantial justice to the applicant as well as to other property owners in the district, or whether a lesser relaxation than that applied for would give substantial relief to the owner of the property involved and be more consistent with justice to other property owners.
>
> 3) Whether relief can be granted in such fashion that the spirit of the ordinance will be observed and public safety and welfare secured.

Anderson, 22 Md. App. at 39 (cleaned up) (citations omitted). "[This] lesser burden is permitted because the impact of an area variance is viewed as being much less drastic than that of a use variance." *Id.*

The regulation at issue, § 400.1 of the Zoning Regulations, requires accessory structures—such as garages, pools, or sheds—in a residential zone to be located in the rear

yard of the principal structure (typically the house). Section 307.1, however, provides authority to the county to grant variances from § 400.1, stating:

> The Zoning Commissioner of Baltimore County and the County Board of Appeals, upon appeal, shall have and they are hereby given the power to grant variances from height and area regulations, from off-street parking regulations, and from sign regulations only in cases where special circumstances or conditions exist that are peculiar to the land or structure which is the subject of the variance request and where strict compliance with the Zoning Regulations for Baltimore County would result in **practical difficulty or unreasonable hardship**.

Balt. Cnty. Zoning Reg., § 307.1 (emphasis supplied). Here, Kelly is seeking an area variance because he wants to finish constructing his barn in the front of his home. As a result, after he showed the uniqueness of his property, he needed only to have proven that placement of pole barn anywhere but the side yard posed a practical difficulty to obtain the variance.

After reviewing the record and the Board's written findings and order, it is difficult to say which standard the Board used. We quote verbatim from the Board's written decision:

> The part of the *Cromwell* analysis that requires closer scrutiny is, if the variance is denied, would the Petitioner experience practical difficulty or hardship? As noted by the ALJ in the prior proceeding, under Maryland law, variance relief is properly denied when an owner can make "reasonable use of his property." In denying variance relief in *Rotwein* the Court of Special Appeals held the owner had "made more than reasonable use of her property, as it houses not only her residence, but among other things, a swimming pool and a tennis court."

The Board continued, "[t]he facts in this matter are somewhat analogous to the facts in *Rotwein*," and ultimately concluded "any practical difficulty or hardship suffered by

[Kelly] as a result of his request for a variance being denied, is self-imposed[]" thereby rejecting his variance request.

It is not clear that the Board applied, or even considered, the lesser standard of practical difficulty. The Board seems to have conflated the two standards by only considering whether Kelly could still make "reasonable use of his property"—reflecting unreasonable hardship—without considering whether strict compliance would unreasonably prevent him from using the property for a permitted purpose—reflecting practical difficulty.

Furthermore, while the Board of Appeals was correct in stating that under *Rotwein*, variance relief was properly denied when the owner had made more than reasonable use of their property, we agree with Kelly that it misapplied *Rotwein* to the present case. In *Rotwein*, the petitioner argued she had practical difficulties justifying a variance because (1) she was an elderly woman that needed a covered garage for accessibility reasons; and (2) it would be more expensive to build her garage elsewhere on the property. 169 Md. App at 730. This Court dismissed both bases as insufficient to establish practical difficulties. *Id.* We explained that the practical difficulty standard "requires the zoning board to find 'more than that the building allowed would be suitable or desirable or could do no harm or would be convenient for or profitable to its owner.'" *Id.* at 731 (citing *Kennerly v. Mayor & City Council of Balt.*, 247 Md. 601, 606 (1967). In rejecting her financial loss argument, we noted that "[e]conomic loss alone does not necessarily satisfy the 'practical difficulties' test, because, as we have previously observed, every person

requesting a variance can indicate some economic loss." *Rotwein*, 169 Md. App at 732. Regarding her accessibility argument, we found that Rotwein's "hardships" complained of were "self-created" because "the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's." *Id.* at 733 (citations omitted).

Kelly advances no such similar argument. For these reasons, we conclude the Board was at least unclear which of the two applicable standards it applied in denying the variance.

IV. The Board of Appeals Did Not Err in Determining Strict Compliance with Zoning Regulations Would Not Result in "Practical Difficulty" to Kelly.

A. Parties' Contentions

Kelly contends complying with the Zoning Regulations would unreasonably prevent him from using his property for a "permitted purpose"—maintaining and upkeeping his property. The barn is, according to him, necessary to store his machinery, equipment, and tools, which he argues is necessary for maintaining his property. He further argues granting the variance would do substantial justice as it would allow Kelly to "fully enjoy his property" without imposing any injustice on other property owners. Kelly contends there is no lesser variance that he could obtain to build the barn on his property, and he would need a variance no matter where he places the barn. Finally, he argues granting the variance "would be in strict harmony with the spirit and intent of the regulations" because "the reason why Zoning Regulations require accessory structures in the rear yard is to prevent the negative visual impact on neighbors as well as those driving

on public roads[,]" and by placing the barn on the western side of his home, it is behind the house and away from the road. For those reasons, Kelly argues he would suffer "practical difficulty" by strictly complying with the Zoning Regulations.

The Neighbors argue that even if the property is unique, no practical difficulty or unreasonable hardship would exist by denying the variance. They argue Kelly makes more than reasonable use of his land without the variance, such as by landscaping his property, expanding the already existing shed, and constructing a two-level, four-car garage, which they contend has ample space to store Kelly's equipment.

B. Analysis

Despite being unclear about which standard it was applying, the Board of Appeals was nonetheless correct in its conclusion that strict compliance with the Zoning Regulations would not result in "practical difficulty" to Kelly.

The practical difficulty standard requires a showing by petitioner that strict adherence to the Zoning Regulations would "prevent the owner from using the property for a permitted purpose[.]" *Id.* Further, a variance request based primarily on convenience does not rise to the level of a practical difficulty. *See e.g.*, *Mills*, 200 Md. App. at 228; *Carney v. City of Balt.*, 201 Md. 130, 137 (1952) (denying an exceptions request based on practical difficulty because convenience is an insufficient exception to land requirements); *Rotwein*, 169 Md. App. at 731–32 (noting a variance cannot be granted because of convenience).

In *Mills v. Godlove*, the applicants sought a variance to allow them to park paving equipment on their property, arguing that off-site parking would create security concerns, increase retrieval time, and raise costs. 200 Md. App. at 228. They also explained the variance was necessary because their snow plowing contract with the State required them to mobilize within one hour of notice. *Id.* While this Court noted the validity of those concerns, it held they amounted to mere convenience rather than a practical difficulty arising from the unique characteristics of the property itself. *Id.*

Here, Kelly has made reasonable use of his property as evidenced by the construction of a two-level, four-car garage at the rear of the home. Kelly also testified that the barn is necessary to store his equipment and tools used for maintaining his property. Even though Kelly testified there is no room in his garage to store this equipment, the evidence on the record—including photographs of the garage itself—highlighted the fact that the equipment would fit in the garage if Kelly, for instance, chose to park his cars elsewhere.

In its written opinion, the Board of Appeals stated:

> As is clearly depicted in the photos, [Kelly] has already constructed a large garage, which now houses four cars. [Kelly] admittedly chooses not to store the tools and equipment used for maintaining his property in this garage space. Consequently, [Kelly] has the space to store and protect his equipment but has chosen to use that space for other purposes.

We agree with the Board; Kelly's argument as to his inability to store his equipment is unavailing. His supposed "practical difficulty" more resembles an inconvenience. Like the petitioner in *Mills* who thought it would be more convenient to park his equipment on his

property, on this record, we conclude Kelly finds it more convenient to have storage in the barn, rather than make space in his capacious garage. As explained, an inconvenience does not rise to the level of a practical difficulty.

V. The Board of Appeals Did Not Err in Determining Any "Practical Difficulty" to Kelly Was Self-Inflicted.

A. Parties' Contentions

Finally, Kelly contends the Board of Appeals incorrectly determined that his practical difficulty was self-inflicted. According to him, a self-inflicted difficulty arises from the "affirmative actions of the property owner" and not the impact of the Zoning Regulations. Therefore, as Kelly asserts, because the practical difficulty only arises from the uniqueness of his property and not through any affirmative action he undertook on his own, the practical difficulty he suffers due to the variance's denial cannot be said to have been "self-imposed."

The Neighbors contend both the Circuit Court and the Board were correct in finding that any hardship Kelly faced was of his own choosing as he built "a large garage and cho[se] not to utilize it to store his tools and equipment despite there being plenty of room to do so." They further reiterate that Kelly's alleged hardship is merely an inconvenience that can be easily remedied, making a variance unjustified.

B. Analysis

A self-inflicted hardship exists when the property owner takes an "affirmative action" that solely causes the need for the variance. *Id.* at 198. In *Cromwell*, this Court

discussed the importance of denying variance requests where the hardship faced is self-inflicted, stating:

> Were we to hold that self-inflicted hardships in and of themselves justified variances, we would, effectively not only generate a plethora of such hardships but we would also emasculate zoning ordinances. Zoning would become meaningless. **We hold that practical difficulty or unnecessary hardship for zoning variance purposes cannot generally be self-inflicted**.

102 Md. App. at 722 (cleaned up) (emphasis supplied). When the alleged hardship or difficulty is self-created, that fact alone is sufficient for a zoning agency to deny the variance request without the need for further review. *See Stansbury v. Jones*, 372 Md. 172, 204 (2002).

Kelly contends his "desire to improve his property with a barn" is not an "affirmative act," and thus his hardship is not self-inflicted. We disagree. Kelly decided to build the large garage in the rear of the home, a space where the barn could have been built without requiring the variance under § 400.1 of the Zoning Regulations. He also decided not to store his tools and equipment in the garage and instead kept his cars there, effectively creating his alleged practical difficulty by having no place to store said equipment other than the barn.

We conclude Kelly's affirmative actions created the very practical difficulty he now alleges. Finding no reversible error, we affirm.

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