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In Court of Appeals opinions

Judge Davidson protected fairness, advocated changes in law to benefit people

By ANN G. SJOERDSMA
Daily Record Law Columnist

Doris A. Foster may have repeatedly stabbed the motel manager with a screwdriver, before she robbed her, or she may have been sleeping in another room while her husband Tommy killed the landlady, following a heated argument about overdue rent.

Foster may have awakened to discover Tommy and her stepdaughter outside the room, standing over the victim's body, preparing to transport it to the Chesapeake Bay and a Hitchcockian watery burial. She may then have assisted her husband in ransacking the victim's room, stealing her money and her TV.

Or Foster herself, with the aid of her stepdaughter may have loaded the landlady's body into the car trunk, and disposed of the evidence of the murder she had committed in the Bay.

The motel manager's death may have occurred in any one of these ways, or by yet another scenario. When Doris A. Foster was tried for murder in Cecil County, at least two factual versions of the crime came to light, along with numerous inconsistencies and bogus alibi defenses. No one in the Foster family was credible, but only Doris Foster was prosecuted. The other two made deals with the State, and left Doris to convince the jury that Tommy, not she, had killed their landlady.

Doris Foster was not that convincing. She was convicted of felony murder and sentenced to die. Letters Tommy Foster had written shortly after the murder, letters in which he implicated himself as the killer, were not enough to exculpate Doris. Hearsay evidence which proved that Tommy had previously threatened to kill the victim had been proffered by the defense, but excluded. The late Judge Rita Charmatz Davidson of the Maryland Court of Appeals changed all that, however, in a controversial 4-3 opinion. She admitted the hearsay evidence and remanded the case for a new trial.

"We conclude that the hearsay rule excluded evidence that was critical to the defense and that bore persuasive assurances of trustworthiness," she wrote for the Court. "As a result of this exclusion, the accused's defense was far less persuasive than it might have been had the husband's threat been admitted."

Consequently, she determined, in the face of a strong dissent by Judges Robert C. Murphy, Marvin H. Smith and Lawrence F. Rodowsky (a common voting bloc alignment on the court), that Doris A. Foster was denied a fair trial. Associate Judges Harry A. Cole, John C. Eldridge and James F. Couch, Jr. joined Judge Davidson in the majority. However, Eldridge wrote a separate concurring opinion, in which he stated that the case could, and should, be based on common law evidence, not on constitutional grounds.

DAILY RECORD file photo

The late Judge Rita C. Davidson as she appeared for her 1979 Court of Appeals investiture.

opinions, majority and dissent, in a joint effort with her law clerks. According to 1983-84 clerk Charles F. Jacobs,

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It was a "groundbreaking" case, recalls Paul A. Green, Judge Davidson's only law clerk at the time (1982-83). It was the "right decision." The testimony of the victim's friend to the effect that the victim told her that Tommy Foster had threatened to kill the victim — a problem of double hearsay — should have been admitted, he says. Sufficient indicia of reliability existed including Tommy Foster's letters of confession and his presence in the courtroom and availability for cross-examination, to allow the testimony into evidence, he explains. Further, it was "critical" to the defense.

"The Court decided that the Constitution required that this hearsay be admitted," Green says. "We really went all out, further than any court had ever gone before. I think we made the right decision."

In *Foster*, as she so often was, Judge Davidson was the maverick, leading the way to great heights of constitutional reasoning. Some believed she strained to find legal support for her pro-defense perspective in criminal trials, and demanded perfection before she would uphold a conviction. Some thought she was too imaginative, too innovative. However, it is a matter for individual interpretation. For if there is anything the late Associate Judge who died Nov. 11 at age 56, did not leave behind her in her opinions, it is guesswork. She was thorough. She made her case.

Opinionwriting

Judge Davidson wrote all of her now an associate at Frank, Bernstein, Conaway & Goldman, he would research the case and then prepare a draft opinion for the judge's inspection.

"She would literally rip it apart," Jacobs recalls, "and we'd start from scratch." The end product, after long hours of revision was always the judge's language and her logic. Jacobs shared his thoughts, ideas and time, but the opinion itself was vintage Davidson.

Each majority opinion — there were more than 85, according to a Lexis search — Judge Davidson wrote for the Court of Appeals Jacobs says, follows a basic organized style. It usually opens with a presentation of the issues before the Court, and is followed by a full description of the facts and procedural posture of the case, by a survey of the applicable law, by an application of the law to the facts, and then by a conclusion. In arriving at her conclusion, she inevitably considered social policy and sometimes used favorite "catch-phrases," according to Jacobs.

In her dissenting opinions, she would restate the majority's conclusion, explain briefly why it went awry, state that she "respectfully dissents," and then develop her analysis as fully as she did when she wrote for the majority. Her language was precise and clear, never conclusory. Her source citations were extensive.

"Obviously, her opinions are extremely scholarly," says George E. Burns, Jr., of the Maryland State Public Defender's Office. "She went to the

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trouble to give her reasoning in detail, and to look to the future."

Her opinions are "very well drafted and artful," agrees litigator M. Albert Figinski of Melnicove, Kaufman, Weiner & Smouse Her views may have been criticized, says Figinski, but her opinions were not.

Dissents

Judge Rita C. Davidson is known for her dissents, in cases where she challenged the imposition of the death penalty, the vitality of the contributory negligence doctrine in Maryland, and the limitation of landowner liability to injured persons on the basis of their status, and where she endorsed a cause of action for educational malpractice. According to a Lexis search, she wrote, or joined, more than 70 dissenting opinions during her five-year tenure on the Court.

"Her dissents were often motivated by a desire either for justice in a particular case, or from a desire to modernize the law in Maryland," says University of Maryland Law School Prof. William L. Reynolds, II, who has written two law review articles critically evaluating the Court of Appeals.

"Her dissents helped to present the other side of the issue so that those who disagreed with the result in a case would know what the arguments were."

Another Baltimore attorney suggests that "she followed where her ideas led her," which often meant championing for "the little guy," and for "people who hurt."

"In all of the cases where there were social policy issues, she would make the law less harsh," he says. She felt that "all or nothing was unfair." She ameliorated the results.

In dissenting, she performed a valuable service. She preserved her persuasive reasoning, and the sides of an issue, for the legislature, future litigants, and another day in court. Judge Davidson had a strong sense of social justice and fairness, and would not allow *stare decisis* to lock her into perpetuating law which she believed no longer benefited the people.

Judges created common law, she would often write, and they can abrogate it.

Death penalty

Perhaps no legal issue is more readily identified with Judge Rita Davidson than imposition of the death penalty. She never voted to affirm a death sentence. In the first nine death penalty cases reviewed by the Court after restoration of the sentence in Maryland, the first four were reversed unanimously, and the next five were overturned by 4-3 decisions, with Davidson, Couch, Cole and Eldridge in the majority.

In November, 1983, when the Court upheld the first death penalty case, Rita C. Davidson was in the dissent, as she was thereafter.

"In all of the cases, she found some reason other than the death penalty itself for overturning the conviction," says Deborah K. Chasanow, Chief of Criminal Appeals and Correctional Litigation for the Attorney General's Office. "In her view, there was always something wrong in the case — she didn't need to reach the rest of it." She never "squarely opposed" the death penalty on Eighth Amendment (cruel and unusual punishment) grounds, Chasanow notes.

She never would say that the death

17-year-old youth sentenced to die for his heinous rape and murder of a teenaged girl. His age was unsettling. In a sole dissent, Davidson found the State's Attorney's closing argument objectionable in that case, *Trimble v. State* (1984). His attack on the defendant's psychiatrist, she wrote, was a "contradiction of the judge's instruction" to the jury to consider an expert's opinion with all of the other evidence. The prosecutor's comment that the psychiatrist was "eminently unqualified" to give an opinion was misleading and confusing, she decided.

Judge Davidson's opinion was not a convincing one, but it was an understandable one. Other criminal cases she ruled upon were more clearly error-ridden. Regardless of how one felt about her criminal appeal decisions, Judge Davidson could hardly be faulted for her desire to be fair and for her compassion. She cared deeply for all people, victim and accused alike.

Tort law

In civil lawsuits, Judge Davidson was ever aware of changing social circumstances, and was eager to amend the common law to respond to new realities. She was not content to let the legislature decide whether to abandon firmly established, but archaic, legal doctrines. She saw it as her judicial duty to accommodate the law to the needs of society.

In *Harrison v. Montgomery County Board of Education* (1983), where the majority deferred to the legislature for abrogation of the Maryland doctrine of contributory negligence, Judge Davidson was adamant in her rejection of the doctrine, and in her endorsement of comparative negligence.

Contributory negligence "is a harsh and arbitrary rule because its 'all or nothing' approach permits fault on the part of an injured person to relieve another person partially responsible for the injury from all liability," she wrote. The doctrine "has become unsound under the circumstances of modern life."

"The need for stability in the law cannot justify a court's perpetuation of outmoded and unfair court-made decisions," she continued. ". . . I will not abdicate what I view as judicial responsibility to accommodate the law to the changing needs of society and to assure substantial justice."

She was alone in her dissent, and the Maryland General Assembly has yet to abolish the contributory negligence doctrine.

She was also alone in urging the majority to apply traditional principles of negligence to trespassers on land. Rather than continue to view a landowner's duty toward a person injured on his property in terms of the injured person's status as a trespasser, licensee or invitee, Judge Davidson thought it eminently more reasonable to use standard tort principles.

In dissent, Judge Davidson wrote, "In my view, it is time to abolish judicially-determined status distinctions as the sole determinant of the standard of care owed by an owner or occupier of land to an injured party. I would apply the traditional principles of negligence, including the test of foreseeability and the standard of reasonable care under all the circumstances, with respect to trespassers, as well as with respect to invitees and licensees."

The majority deferred to the legislature for abolition of the common distinctions. They still remain viable law in Maryland.

Judge Davidson also recognized an action for malpractice against a school

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penalty itself was unconstitutional," adds another Baltimore lawyer, "but she would in every case find some procedural irregularity. She was very, very meticulous on the insistence of procedural niceties."

Davidson has been criticized by the print media as opposing the death sentence on a variety of "technical" — and, therefore, "trivial" — points. It was an accusation that she denied "really strenuously," says Paul Green, her one-time clerk, now an attorney with the Pension Benefit Guaranty Corporation in Washington, D.C.

"We often discussed whether she should face [the death sentence] squarely," he recalls, "and not deal with the other issues.

She finally did, in *Tichnell v. State* (1983), in a detailed explanation of her views on proportionality of sentencing.

"In my view," she wrote in a sole dissent, "'death-eligible murder cases in which the prosecutor could have, but did not seek the death penalty' must be included in the inventory of relevant cases [for the Court to review] in order to achieve the goal of proportionality review — the consistent and fair application of the death penalty."

As long as the Court, in its review of "similar cases" for proportionality in sentencing, looked at only those cases where the death penalty had actually been sought by the State, and not those where the prosecutor could have sought it, but did not, Judge Davidson would not agree with the majority. A death sentence should not depend on whether the accused was tried in Baltimore City or Cecil County. Geographical roulette is unfair.

It is necessary, she wrote, "to proceed with the utmost caution and the greatest care, for . . . at stake is the delicate balance between the life and death of a human being."

Criminal law

Judge Davidson was concerned about that "delicate balance" between life and death, imprisonment and freedom, and became known as a defense lawyer's judge. She carefully guarded the rights of the criminally accused. "There was no question that Judge Davidson was 'liberal' in the sense that she very often joined an opinion, or wrote an opinion, reversing a conviction," says Chasanow. "Her position was to find fault with what we had done. Her position was to look for error."

She was, after all, a perfectionist who demanded near-perfection when the human stakes were high.

"She was concerned," George Burns notes, "that at least if you couldn't have a perfect trial, you could have a fair trial." That was always her objective: fairness. As is obvious from her opinions, she was also humane.

It undoubtedly disturbed her greatly when she reviewed the case of a proper evaluation, placement or teaching of a student. In her sole dissent, she first acknowledged the inherent value of a teacher, referring to the cause of action she was proposing not as "educational" malpractice, but as "professional" malpractice. People who use a teacher's professional services, she said, have a right to expect the educators to use their skill and knowledge with some degree of competence.

She also acknowledged the reality of the present school system's failures, and again saw her duty to be one of effecting a positive change.

"Her dissents were o desire either for jus case, or from a desire in Maryland," — says land Law School Pr nolds, II.

"It is common knowledge," she wrote, ". . . that the failure of schools to achieve educational objectives has reached massive proportions. It is widely recognized that, as a result, not only are many persons deprived of the learning that both materially and spiritually enhances life, but also that society as a whole is beset by social and moral problems. *These changed circumstances mandate a change in the common law.*"

Judge Davidson would have recognized a cause of action for malpractice by educators, and would have done what courts have always done: provide a remedy to a person harmed by the negligence of another.

"Our children deserve nothing less," she said.

In another malpractice case, Court of Special Appeals Judge Davidson set the stage for the first major "informed consent" ruling by the Court of Appeals.

Sard v. Hardy (1976) involved a woman who had become pregnant after her doctor performed a tubal ligation. In her lower court dissent, Judge Davidson found an obligation resting with the physician "to disclose to the patient all *material facts* reasonably necessary to provide the basis of an informed, intelligent decision as to proposed treatment." The doctor had failed to inform the plaintiff that the sterilization procedure was not 100 percent effective, or to advise her of all the available means of birth control.

Her dissenting opinion was a painstaking survey of the law on informed consent. The Court of Appeals reversed the decision against the plaintiff, and adopted Davidson's opinion.

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Other protections

In her other dissents, Judge Davidson was often the protectorate of individual rights. Among those opinions are:

• *Little v. State/Odom v. State; sobriety checkpoints:* In sole dissent, Judge Davidson found, in light of alternative mechanisms for controlling drunk driving (e.g., comprehensive police alcohol enforcement programs), that "the incremental contribution, if any, to highway safety resulting from a program utilizing unpredictably located, non-permanent roadblocks was too marginal to justify the practice under the Fourth Amendment."

• *State v. Frazier, speedy or "prompt" trial:* In a number of cases where the State had failed to bring a criminally accused to trial within the statutorily mandated time (now 180 days), Judge Davidson rejected the majority's excusal of trial postponements for "good cause," exposing what she felt to be fallacious, circular reasoning. She agreed that unavailability of a court resulting from "chronic court congestion," in and of itself, ordinarily does not constitute "good cause," whereas unavailability of a court resulting from "nonchronic court congestion" does. However, she disputed the majority's view of "chronic," and charged the Court with allowing chronic court congestion to constitute good cause for delay.

Judge Davidson was exacting in the demands she placed on the lower trial courts, and found breaches of the State's duty to bring an accused to trial, where the majority found only "isolated instances" of error by court personnel. She interpreted the statutory prompt trial requirements as being broader in scope and applicability than the Sixth Amendment speedy trial requirement, and therefore, more effective in reducing delay. She considered the prompt trial rule a protection of "society's interest in an effective criminal justice system."

• *Hagerstown Reproductive Health Services v. Fritz/abortion:* In an unlikely pairing, Judge Davidson joined Associate Judge Marvin H. Smith in a dissent protesting the majority's decision to decide a highly-publicized abortion case on the ground of mootness. A pregnant woman's husband had obtained an injunction from a trial court enjoining her from having an abortion; but, by the time the case came before the Court of Appeals, the injunction had been delayed long enough for Bonny Ann Fritz to obtain her abortion. Davidson would have dealt with the case on its merits.

• *Condore v. Prince George's County/Equal Rights Amendment:* The issue in *Condore* was whether the common-law doctrine of necessaries, which imposes a legal duty on a husband to supply his wife with "necessaries" suitable to her station in life, but does not impose on the wife a corresponding obligation, should be abrogated, or extended to women, in light of Maryland's ERA. In a rather uncharacteristic dissent, Judge Davidson joined Judge Lawrence F. Rodowsky in supporting expansion.

Rodowsky pointed out in the opinion that under the old necessaries doctrine, the wife was viewed as an agent of the husband to "pledge his credit." The husband was not liable to a third party if the extension of credit was solely to the wife in her own right.

The doctrine actually protected creditors more than it did spouses. However, the dissenters felt that an "even-handed extension" of the common law rule would make the family support obligation mutual, and would preserve a support remedy.

Judge Rita C. Davidson obviously did more than just dissent while she was on the Court of Appeals. She also wrote her fair share of majority opinions. But most students of the Court agree that her most significant cases were those in which she filed a sole, courageous dissent.

Majority opinions

Judge Davidson was highly regarded by both her judicial colleagues and members of the Bar as an expert in zoning and administrative law. In the 1960s, she served in Montgomery County as the nation's first zoning hearing examiner. She was also a member of that county's Board of

often motivated by a ...tice in a particular ...to modernize the law ...University of Mary... ...rof. William L. Rey...

Appeals and the Maryland-National Capital Park and Planning Commission. She knew the inner workings of local government, and helped to establish the highly sophisticated administration that runs Montgomery County.

"She had a great deal of expertise in — and she undoubtedly knew more than other members of the Court — about zoning," says Associate Judge John C. Eldridge, adding that she was adept at interpreting federal and state statutory provisions pertaining to administrative law.

According to M. Albert Figinski, Judge Davidson had an "incredible impact" on Maryland administrative law.

"She helped to incorporate federal administrative law concepts into Maryland administrative law," he explains. "She brought into Maryland through her opinions a great reliance on federal administrative law cases. She molded administrative law in this State."

Indeed, it seemed to Paul Green that he and Judge Davidson were forever drafting opinions interpreting and applying the "exhaustion of remedies" and "final judgment" rules in administrative proceedings. When she wrote these numerous opinions, Judge Davidson wrote for a *unanimous* majority.

"No one knew the administrative law as cold as Rita Davidson did," says Risselle R. Fleisher, General Counsel for the Maryland Commission for Human Relations. During oral argument, Fleisher would often search Judge Davidson's expressive face for approval.

In several of the "exhaustion" cases involving MCHR, the employer, which had stepped outside of the statutory administrative procedure and sought judicial intervention, claimed that it was actually challenging MCHR's "authority" or "jurisdiction" to interpret a rule, a question appropriately addressed to a court. Judge Davidson would consider the argument in her opinion, and then expose the jurisdictional point as obfuscating, dismissing the case for failure to exhaust the available administrative remedies.

Judge Davidson was often called upon to determine whether an administrative agency's decision was final, entitling a party to immediate judicial review, or whether further administrative proceedings were required. She was also proficient at interpreting hospital regulations and arbitration clauses in contracts. When she was construing statutes, rules, regulations and contractual provisions, Judge Davidson was in her analytical element, and she had the other six judges with her.

Marital property

In two infamous statutory construction cases, Judge Davidson "long altered the state of marital property in this State," according to Maryland Court of Special Appeals Judge Rosalyn B. Bell.

In *Harper v. Harper*, a unanimous 1982 decision, Judge Davidson created the controversial "source of funds" theory, protested by many women's rights groups. This year, she applied the theory again in another unanimous opinion, *Grant v. Zich*.

In *Harper*, Judge Davidson considered the question whether real property, titled solely in a husband's name, purchased in part by payments made before the marriage, and in part with payments during the marriage, constituted "marital property" within the scope of Maryland's Property Disposition in Divorce and Annulment Act.

As she always did, Judge Davidson considered, in exhaustive fashion, the various theories used by other state courts in deciding similar questions. She settled on an analysis then used in California and Maine: the "source of funds" theory. Under that theory, she wrote, "when property is acquired by an expenditure of both nonmarital and marital property, the property is characterized as part nonmarital and part marital," regardless of how it is titled. She defined "acquired" as the "on-going process of making payment for property."

In characterizing property as either marital or nonmarital under the statute for purposes of granting a monetary award to a spouse, Judge Davidson said, the source of the contributions as payments are made is important, not the time at which title to or possession of the property is obtained. She extended the source of funds theory to an analysis of property titled as tenants by the entirety in *Grant v. Zich*, and expressly rejected the "presumption of gift" theory between spouses holding title to property as a marital unit.

While her decisions on marital property did not please women's advocates, who would have liked to have seen a transmutation to marital property of any property acquired with both marital and nonmarital funds, Judge Davidson did write the majority opinion in two ERA cases, and was generally regarded as a feminist.

In *Kline v. Ansell*, 1980, she abrogated the common-law action for criminal conversation, available only to men and not women, and found a State criminal statute prohibiting employers from hiring female, but not male, "sitters" unconstitutional. (*Turner v. State*, 1984).

In both unanimous opinions, she spoke of the laws providing different benefits to, and imposing different burdens on, men and women. Under the criminal statute, a man could be employed as a sitter (someone who circulates among tavern patrons producing drink sales), but a woman could not. An employer could legally hire a male sitter, but not a female sitter.

At common law, a husband could recover damages for his hurt feelings and injured honor, from his wife's paramour under "criminal conversation," but a wife could not similarly recover from her husband's mistress for his adultery. The elements of the civil wrong consisted of a valid marriage and an act of sexual intercourse between a married woman and a man other than her husband. Only a man could sue or be sued for criminal conversation.

Moreover, the judge explained, "a man who engages in an act of sexual intercourse with another man's wife is civilly liable for damages, but a woman who engages in a similar activity with another woman's husband is not." The law provided different burdens and benefits, based solely on sex.

Drawing upon one of the finest Davidson "catch phrases", the judge pronounced each law "a vestige of the past," and said, "It cannot be reconciled with our commitment to equality of the sexes."

The first woman Associate Judge of the Maryland Court of Appeals was committed to social justice and to equality in the treatment of all people. She left a written legacy that will light Maryland's future, and never be simply "a vestige of its past".

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Highlights of Judge Rita C. Davidson's Written Legacy

Court of Appeals Majority Opinions

Grant v. Zich, 300 Md. _____ (1984); marital property, "source of funds" theory, tenancy by the entireties

Gold Coast Mall, Inc. v. Larmar Corporation, 298 Md. 96 (1983); tenant-landlord arbitration

Scott v. State, 297 Md. 235 (1983); death penalty, 4-3 decision

Foster v. State, 297 Md. 191 (1983); due process, hearsay evidence

Maryland Commission For Human Relations v. Bethlehem Steel Corp., 295 Md. 586 (1983); exhaustion of administrative remedies

Harper v. Harper, 294 Md. 54 (1982); marital property, "source of funds" theory

In re Application of G.L.S., 292 Md. 378 (1982); character review, admission to the Maryland Bar

Schultz v. Pritts, 291 Md. 1 (1981); zoning, special use exception

Kline v. Ansell, 287 Md. 585 (1980); Equal Rights Amendment

Court of Appeals Dissents

Odom v. State/Little v. State, 300 Md. 485 (1984); Fourth Amendment and road sobriety checkpoints

Maryland Commission on Human Relations v. Greenbelt Homes, 300 Md. 75 (1984); "marital status" discrimination

State v. Frazier, 298 Md. 422 (1984); prompt trial, Sixth Amendment

Tichnell v. State, 297 Md. 1 (1983); death penalty, proportionality

Harrison v. Montgomery County Board of Education, 295 Md. 442 (1983); comparative negligence

Hunter v. Board of Education of Montgomery County, 292 Md. 481 (1982); "educational" malpractice

Murphy v. Baltimore Gas & Electric Co., 290 Md. 186 (1981); tort liability of landowner for trespasser injured on property

State v. Hicks, 295 Md. 310 (1979); prompt trial, Sixth Amendment

Court of Special Appeals

Sard v. Hardy, 34 Md. App. 217 (1976); informed consent, medical malpractice