Circuit Court for Baltimore County
Case No.: 03-C-13-008260 ML

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 130

September Term, 2016

ERIC UNDERWOOD

v.

MEYERS CONSTRUCTION COMPANY, INC.

Meredith,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Meredith, J.

Filed: October 1, 2018

This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Eric Underwood, appellant, hired Meyers Construction Company, Inc. ("Meyers"), appellee, to perform home repairs after an 80-foot tree fell on Underwood's house during the derecho storm that tore through Maryland on June 29, 2012. Before Meyers completed its work, a trespasser entered Underwood's property during the night, stole the air conditioning unit, and also tampered with a copper fuel-line that was connected to the oil tank, which resulted in a flood of heating oil in the basement of Underwood's home.

Meyers eventually filed a petition in the Circuit Court for Baltimore County, seeking a mechanic's lien against Underwood's property for amounts it claimed to be due for work it performed at the property, and Underwood filed a counterclaim seeking compensation for alleged faulty work and the damages caused by the oil flood.

The case proceeded to trial. At the conclusion of the trial, the trial judge found in favor of Meyers on the claim for a mechanic's lien, and the court established a lien in the amount of $80,868.55. The court did not enter any ruling with respect to Meyers's claim for breach of contract, and did not rule on Meyers's request that it enter an order for the property to be sold to satisfy the mechanic's lien.

Also, at the conclusion of the trial, the trial judge submitted to the jury Underwood's claim that negligence on the part of Meyers was a proximate cause of the damages Underwood incurred as a result of the oil spill. The jury found in favor of Underwood on the negligence claim, and awarded compensatory damages in the amount of $47,263.82.

After judgment was entered on the jury's verdict, Meyers filed a timely motion for judgment notwithstanding the verdict, and argued, *inter alia*, that the jury's award of

damages should be reduced because Underwood had been compensated by his own homeowner's insurer in the amount of $11,700, and had received oil-spill clean-up funds from the Maryland Department of the Environment ("MDE") in the amount of $19,500. The trial judge ruled that the collateral damages rule does not apply to tort cases seeking compensation for property damages. On that basis, the court granted Meyers's motion for judgment notwithstanding the verdict, and reduced the amount of the judgment in favor of Underwood to $12,587.00, which represented the amount Underwood had paid to the oil remediation contractor minus the amounts he had recovered from his homeowner's insurer and the MDE clean-up fund.

Despite the fact that there was not a final judgment disposing of all claims against all parties at that point in time, Underwood noted an appeal, and Meyers filed a cross appeal. As we explained in an unreported opinion, *see Eric Underwood v. Meyers Construction Company, Inc*., No. 1740, Sept. Term 2014, 2015 WL 6108022 (unreported opinion filed September 24, 2015), we concluded that we had no jurisdiction to hear the appeals due to the lack of a final judgment disposing of all claims, and, we dismissed those appeals as premature.

After the case was sent back to the circuit court, the parties agreed to resolve all remaining undecided issues by way of a stipulation. As Underwood states in the brief he filed in the current appeal, although he "disputed Meyers Construction's claim," he "settled the mechanics lien/judgment for the court ordered $80,868.55 to finalize all matters and expedite an appeal." But, he emphasizes, "[a]s a condition of settlement, [Underwood]

preserved the right to appeal his counter-claim." A stipulation signed by counsel for all parties was filed in the circuit court stating that the parties had agreed "to the dismissal of [Meyers's] Counts I (Mechanic's Lien) and Count II (Breach of Contract) *with prejudice*."

Underwood again noted an appeal, and Meyers again noted a cross-appeal.

QUESTIONS PRESENTED

In this appeal, Underwood presents the following questions in his brief, which we have slightly reordered:

1. Whether the trial court erred in dismissing [Underwood]'s breach of contract claim arising out of a home improvement contract when [the] contract was neither sold nor ratified by a licensed home improvement contractor or salesman?

2. Whether the trial court erred in dismissing Underwood's breach of contract claim on the grounds of res judicata resulting from the mechanic's lien judgment?

3. Whether the trial court erred in excluding substantial portions of Underwood's expert's testimony because [Meyers] refused to pay [the] expert's fee in *advance* of his scheduled two hour deposition, did not conduct one, and instead claimed "surprise" at trial?

4. Whether the trial court erred by finding that Underwood was not entitled to the collateral source rule on evidence and by refusing to instruct the jury on said rule?

5. Whether the trial court erred in ordering remittitur?

In its cross-appeal, Meyers adds the following question:

6. Should the trial court have granted Meyers'[s] motions for judgment notwithstanding [the verdict] as to the negligence count in Underwood's Counter-Claim when Underwood failed to demonstrate the existence of a tort duty?

We conclude that the trial court erred in granting Meyers's motion for judgment notwithstanding the verdict and reducing the judgment it had initially entered in favor of Underwood in accordance with the jury's verdict. Otherwise, we perceive no reversible error. We shall remand the case with instructions for the circuit court to vacate the judgment entered on December 16, 2014, and then reinstate and reenter the judgment in favor of Underwood against Meyers in the amount originally entered on September 11, 2014, *i.e.*, $47,263.82.

STANDARD OF REVIEW

In *Sage Title Grp., LLC v. Roman*, 455 Md. 188, 201 (2017), the Court of Appeals described the pertinent standard of appellate review as follows:

> Upon review of a trial court's grant or denial of a motion for JNOV, made pursuant to Maryland Rule 2-532, we review whether the trial court's decision was legally correct. *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 349, 71 A.3d 30, 58 (2013). We must "resolve all conflicts in the evidence in favor of the [non-moving party] and must assume the truth of all evidence as may naturally and legitimately be deduced therefrom which tend to support the plaintiff's right to recover." *Id.* (quoting *Smith v. Bernfeld*, 226 Md. 400, 406, 174 A.2d 53, 55 (1961)). "If the non-moving party offers competent evidence that rises above speculation, hypothesis, and conjecture, the judgment notwithstanding the verdict should be denied." *Cooper v. Rodriguez*, 443 Md. 680, 707, 118 A.3d 829 (2015) (quoting *Barnes v. Greater Balt. Med. Ctr., Inc.*, 210 Md. App. 457, 480, 63 A.3d 620,633–34(2013)).
>
> As we said in *Piquette v. Stevens*, 128 Md. App. 590, 598 (1999):
>
> "A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence and is reviewed under the same standard as a motion for judgment made during trial." *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 190, 702 A.2d 422 (1997), *cert. denied*, 349 Md. 104, 707 A.2d 89 (1998). "In reviewing a trial court's denial of a motion for judgment in a jury trial, we must conduct the same analysis as the trial court,

> viewing all evidence in the light most favorable to the non-moving party." *Id.* at 189, 702 A.2d 422. Moreover, "we must assume the truth of all credible evidence and all inferences of fact reasonably deductible from the evidence. . . ." *Id.* at 190, 702 A.2d 422. "If there exists any legally competent evidence, however slight, from which the jury could have found as it did, we must affirm the trial court's denial of the motion." *Id.* at 191, 702 A.2d 422. Conversely, we must reverse the trial court's grant of the motion if there exists any legally competent evidence from which the jury could have found as it did.

BACKGROUND

When a huge tree fell upon Underwood's home on June 29, 2012, Underwood contacted his insurance carrier, and the insurer hired Meyers to respond to the home, remove the tree, and install weather protection on the roof. In September 2012, Underwood entered into a contract with Meyers to perform repairs of the storm damage as well as some upgrades to the home for a total price of $141,491.92. Underwood moved into a rental apartment to wait for the repairs to be completed. The contract called for the work to be "substantially completed within *approximately seventy five (75) business days*," but the contract did not state that time was of the essence.

On October 22, 2012, while Meyers's repair personnel were at the job site, a stranger came on the property and asked to take the damaged air conditioning unit for scrap metal. The stranger was asked to leave. The following morning, when Meyers's framing contractor arrived at the job site, the workmen observed that, during the night, someone had tampered with a copper fuel-line that was connected to the furnace, which resulted in a flood of heating oil in the basement of Underwood's home. And the air conditioning unit was gone. There was no sign of forced entry. Meyers's management contacted

Underwood's insurance carrier, and then contacted an oil spill mitigation company --- Clean Ventures --- to assist with the oil in the basement. The remediation process cost over $40,000 and took approximately two months to complete, during which period little progress could be made on the items covered by Meyers's contract.

After Underwood moved back into the home in March of 2013, he raised a number of complaints about Meyers's work. Meyers responded to Underwood's requests for corrective work, but Underwood eventually began communicating only through counsel, and the disputes led to litigation in the Circuit Court for Baltimore County. The initial pleading filed in this litigation was a petition for a mechanic's lien filed by Meyers; Underwood filed a counterclaim alleging breach of contract, res ipsa loquitur, and negligence.

We shall provide additional facts as pertinent to the issues discussed below.

DISCUSSION

1. Home improvement contract

The first argument raised by Underwood asserts that the circuit court should have declared that Meyers's contract was unenforceable because the officer of Meyers who negotiated and signed the contract --- Mr. Hale Shilling --- was not licensed as a home improvement salesperson pursuant to Maryland Code (1992, 2004 Repl. Vol.), Business Regulation Article ("BR"), § 8-601(c), which, at the pertinent time, stated: "Except as otherwise provided in this title, a person may not sell or offer to sell a home improvement in the State unless the person has a contractor license or salesperson license." (Effective

June 30, 2016, this provision was recodified as BR § 8-601(b).) Underwood argues in his brief that the fact that Hale Shilling was not licensed caused the contract with Meyers to be "void *ab initio* because no licensed contractor ever signed on to perform the work." He asserts in his brief: "The law is clear in Maryland that '[C]ontracts made *by unlicensed persons* subject to the [Home Improvement] statute are illegal as against public policy and will not be enforced.' *Harry Berenter, Inc. v. Berman*, 258 Md. 290, 298-99 (1970), *see also* BR § 8-612." (BR § 8-612 provides: "A person may not perform or sell a home improvement with or through another person who is required to be licensed under this title but is not licensed.") Other cases cited by Underwood in support of this argument are: *Stalker Brothers, Inc. v. Alcoa Concrete Masonry, Inc.*, 422 Md. 410 (2011); *Citramanis v. Hallowell*, 328 Md. 142, 163 (1992); *Goldsmith v. Mfrs. Liability I. Co.*, 132 Md. 283, 286 (1918); *Baltimore Street Builders v. Stewart*, 186 Md. App. 684, 697 (2009); and *Brzowski v. Maryland Home Improvement Commission*, 114 Md. App. 615, 628 (1997).

In its brief as appellee, Meyers provides no response whatsoever to appellant's argument on this question. We are left to speculate why no response was forthcoming.

At trial, Meyers did not dispute that Hale Shilling held no license as either a home improvement contractor or salesperson. But Meyers presented evidence that its principal owner and president, Michael Shilling, held a home improvement contractor's license and did business as Meyers Construction Co., Inc.

At the close of evidence at trial, when the parties made their respective motions for judgment as to the mechanic's lien claim, counsel for Meyers argued that the contract with

Underwood was not a contract to perform a "home improvement" because Meyers was "not adding, . . . not altering and . . . not improving," but instead was "restoring" and "rebuilding." But counsel added that, in any event, Meyers was licensed because Michael Shilling held the requisite license.

In denying Underwood's motion for judgment, and ruling in favor of Meyers on its mechanic's lien claim, the trial court rejected Underwood's arguments about the impact of Hale Shilling's lack of a home improvement salesperson's license. The court explained:

> [THE COURT:] I also find that the argument made by [counsel for Mr. Underwood] as to the failures of Meyers Construction Company to meet the requirements of licensing, licensure requirements of various State law, including home improvement laws, COMAR, etcetera, that we are dealing with a contract here and a situation here where someone's home was clearly devastated by a large tree falling on it. And there's no question that there was an urgency to this situation, an exigency to this situation to first of all get the house covered, get it protected. And then following that to, which included removing the tree and then continuing work – commencing work with the actual restoration to put the house back in the way it was before the tree fell. I hear [sic] no evidence in this case that there was ever – law has been cited by Counsel [for Mr. Underwood]. There's no evidence in this case that it – Meyers was ever given any citations, any charges were ever levied against Meyers Construction Company for failing to follow licensing, licensure laws in Maryland or it's been determined that they have been acting illegally. Mr. Hale Shilling is an officer of the company, a Vice President. He's also someone who has been with the company for a significant period of time, has handled many jobs, supervised many jobs, including this one that he has authority to enter into contracts. That this contract was for the restoration of a damaged home as opposed to the building of a new home or adding an – putting an addition on an existing home. I don't find that there was an illegal contract here.
>
> * * *
>
> . . . [A]nd I also want to go back before I finish that, Meyers Construction Company, Inc. has been in business for a long time. And that it strikes me that the – for me to follow the argument of the Defendant [sic] of the

> company essentially not being able to do business because of – in the manner of licensing that has been described is just not – it doesn't strike me as that's what the law is one [sic]. And that that is certainly reasonable in the sense of any company being able to do business. Otherwise contractors, subcontractors would not be able to do business, as I understand that business, that industry to be. So with all that I am going to – I find that Meyers Construction Company, Inc. . . . has met its burden.

As a preliminary matter, we disagree with the trial court's apparent conclusion that the contract between Meyers and Underwood was not a home improvement contract. BR § 8-101(g)(1) defines "Home improvement" as follows:

> "Home improvement" means:
> (i) the addition to or alteration, conversion, improvement, modernization, remodeling, **repair, or replacement of a building or part of a building** that is used or designed to be used as a residence or dwelling place or a structure adjacent to that building; or
> (ii) an improvement to land adjacent to the building.

(Emphasis added.)

The work covered by Meyers's contract with Underwood appears to fall within this definition, and is not excluded by any of the exceptions listed in BR § 8-101(g)(3).[1]

[1] BR § 8-101(g)(3) states that a "Home improvement" does not include:

> (i) construction of a new home;
> (ii) work done to comply with a guarantee of completion for a new building project;
> (iii) connection, installation, or replacement of an appliance to existing exposed plumbing lines that requires alteration of the plumbing lines;
> (iv) sale of materials, if the seller does not arrange to perform or does not perform directly or indirectly any work in connection with the installation or application of the materials;
> (v) work done on apartment buildings that contain four or more single-family units; or
> (vi) work done on the commonly owned areas of condominiums.

But, even though Maryland cases have consistently held that the courts will not assist an unlicensed person in obtaining payment for home improvement services performed without a home improvement contractor's license, the present case is distinctly different from all of those cited by Underwood. In this case, the party seeking the mechanic's lien was the corporate entity through which a duly licensed home improvement contractor conducted business. None of the cases cited by appellant in which the courts denied compensation for home improvements was a case in which the contractor held a license despite the fact that the corporate officer who negotiated the contract did not. Perhaps the case cited by Underwood with the most analogous facts is the *Stalker Brothers* case, in which the Court of Appeals declined to hold that a subcontractor's lack of home improvement license precluded the subcontractor from recovering payment from the contractor. 422 Md. at 420 (stating: "[we] hold that the Maryland Home Improvement Law does not render unenforceable a contract between a home improvement general contractor and an unlicensed subcontractor").

In any event, as a result of events that occurred subsequent to trial in this case, we need not decide the licensing issue. We conclude that, when Underwood settled the mechanic's lien claim by paying Meyers the full amount remaining due on its contract, Underwood abandoned his argument that Meyers could not recover any payment because of Hale Shilling's lack of license.

After we remanded this case to the circuit court for resolution of undecided issues, the case was set for a hearing on December 16, 2015. When the case was called, counsel

for Underwood advised the court that the parties had settled the mechanic's lien claim: "What we've decided to do is pay the entire amount of the Judgment . . . on the Mechanic's Lien." The court clarified that the parties were specifically addressing the mechanic's lien that had been entered in favor of Meyers. And then Underwood's counsel explained the terms of the settlement of that aspect of this case: "We're paying the entire amount and [counsel for Meyers] has agreed to dismiss the remaining counts and charges." Counsel further stated:

> [COUNSEL FOR UNDERWOOD]: Okay. So what we've decided is that the Court had entered, had found, well had decided a Mechanic's Lien issue, the Mechanic's Lien issue, and determined that the lien would be in the amount of $80,868.55. . . . And so what we've determined[,] before the Court even enters a Judgment in that matter, we've determined that we'll take that figure from the Court and pay that to Meyers Construction today.

Counsel for Underwood explained: "Now we intend to prosecute our issues with regard to the other matters on appeal, but that would effectively finalize the Judgment in all matters in this case." Counsel for Meyers confirmed that Meyers's claim for attorney's fees was being withdrawn as well, and that "$80,868.55 is the amount of the settlement amount that we have agreed to accept in exchange for dismissing the Mechanic's Lien and the Breach of Contract [claims]."

In our view, this settlement of Meyers's claim for payment of the balance due on its contract precludes Underwood from now arguing that he owed Meyers nothing because of Hale Shilling's lack of a home improvement license. It would be totally inconsistent for Underwood to both agree that he owed the money claimed under Meyers's contract and at the same time argue that there was no enforceable contract because Hale Shilling lacked a

license. Having settled the amount due Meyers on its contract, Underwood can no longer contest the validity of Meyers's contract.

2. Res judicata

Underwood's second question asks whether the trial court erred in dismissing his breach of contract counts on grounds of *res judicata*. We agree with Meyers that the trial court did not base its ruling upon *res judicata.* At the close of evidence, the trial judge said that, "putting the security issue aside," "there are really no damages that the jury can consider as to [Underwood's claim of] breach of contract as to the . . . actual work done." The jury "would be essentially having to speculate or to guess as to what damages would be. So, I am going to grant the Motion at the end of the case. . . ."

Accordingly, we answer this question "no."

3. Expert's testimony

The third question challenges the trial court's exclusion of certain testimony of one of Underwood's experts on the ground that the proffered testimony was not covered by the report authored by the expert that had been provided to opposing counsel prior to trial pursuant to Maryland Rule 2-402(g)(1). The trial judge *permitted* the expert to testify to the opinions contained in the pretrial report, and we perceive no abuse of discretion in the trial judge's ruling on this dispute regarding the expert. *Cf. Rodriguez v. Clarke*, 400 Md. 39, 56 (2007) ("Trial judges are vested with great discretion in applying sanctions for discovery failures.").

4. Tort duty to secure property.

In appellee's brief, Meyers argues that the trial court erred in denying its motion for judgment notwithstanding the verdict as to the damages caused by the oil spill. (*See* the sixth Question Presented above.) Meyers notes that this Court held in *Evergreen Associates, LLC v. Crawford*, 214 Md. App. 179, 188 (2013): "Generally, there is no duty to control the conduct of a third person and prevent him or her from causing physical harm by criminal acts, absent a 'special relationship.'" Although that is indeed the "general" rule, in the present case, there was testimony that Meyers had assumed the duty to secure the property each evening, and had failed to do so on the fateful night of the theft and oil spill.

Underwood's contention at trial was that Meyers was negligent in failing to secure the property on October 22, 2012, as part of its duty as the contractor in charge of the job site, and especially on that date because a stranger had come to the property earlier that day looking for scrap metal and asking if he could take the air-conditioning unit. Early the next morning, October 23, 2012, Meyers's framing contractor arrived on site to find that the air-conditioning unit was missing, the oil line leading from the oil tank to the furnace was "crimped," and there was a large quantity of fuel oil spilled on the floor of Underwood's basement. The framing contractor also observed that there was no sign of any forced entry, and a basement window was open.

Meyers defended against the claim of negligence by asserting that there was nothing in its contract that required the contractor to secure the premises, and arguing that the

encounter with the suspicious stranger who was observed on the property on October 22 did not give rise to a heightened duty on the part of Meyers to prevent third-party criminal activity.

The trial judge denied Meyers's motion for judgment on the negligence count based upon the testimony of both Hale Shilling and Michael Shilling. The trial judge explained: "[T]here's evidence in the case . . . that there is a recognition that a house cannot simply just be left by itself . . . ." "I think that there is testimony that was testified to [in] the record that Meyers had in this case and . . . whether that creates any additional foreseeability or notice to Meyers. I think it's a jury question. . . ."

When Michael Shilling testified, he gave the following testimony about his company's "standard procedure" of securing the premises every evening:

> [COUNSEL FOR UNDERWOOD]: . . . Mr. Shilling, did you all secure Mr. Underwood's residence every evening?
>
> MR. M[ICHAEL] SHILLING; To the best of my knowledge, yes, sir. It's standard procedure.
>
> [COUNSEL FOR UNDERWOOD]: Standard procedure?
>
> MR. M. SHILLING: Yes. Sir.
>
> [COUNSEL FOR UNDERWOOD]: And securing the residence, including making sure the doors were locked, correct?
>
> MR. M. SHILLING: Typically. Yes, sir.
>
> [COUNSEL FOR UNDERWOOD]: And the windows were locked, correct?
>
> MR. M. SHILLING: Typically. Yes, sir.

[COUNSEL FOR UNDERWOOD]: Or boarded up, isn't that right?

MR. M. SHILLING: Yes, sir.

[COUNSEL FOR UNDERWOOD]: All right. And you did that because why?

MR. M. SHILLING: Because it needed to be done. It –

[COUNSEL FOR UNDERWOOD]: All right. And why is it important to secure buildings that you're working in?

MR. M. SHILLING: To protect the, the property. To protect the contents within the property.

[COUNSEL FOR UNDERWOOD]: All right. And protect it from what?

MR. M. SHILLING: From potential – from individuals that might wanna break in, steal something.

[COUNSEL FOR UNDERWOOD]: All right. And based upon your years of experience, 40 you've indicated, is it your position that these things happen on jobs at times?

* * *

[COUNSEL FOR UNDERWOOD]: People break into buildings, people break into buildings that are under restoration or rehabilitation?

MR. M. SHILLING: It does happen.

Hale Shilling gave similar testimony:

[COUNSEL FOR UNDERWOOD]: Sir, ah, is it your policy to lock and leave ah, Mr. Underwood's home every evening?

MR. H[ALE] SHILLING: Yes.

[COUNSEL FOR UNDERWOOD]: All right. And would you say that that is part of performing your job in a workmanlike manner?

MR. H. SHILLING: Yes.

* * *

[COUNSEL FOR UNDERWOOD]: All right. And when you secured the building or leave it – or lock and leave, I think that was the names that you had used in the past, um, that includes the windows as well, isn't that right, sir?

MR. H. SHILLING: That's correct.

* * *

[COUNSEL FOR UNDERWOOD]: . . . When you arrived at the house in regard to the oil spill, did you believe that a crime had been committed when you arrived?

MR. H. SHILLING: Yes.

In our view, the testimony of the Shillings – two top officers of Meyers – about their recognition of their company's duty to lock and secure this job site each night was sufficient to support the jury's finding that there had been a breach of that duty on the evening of October 22. When considered in combination with the uncontroverted testimony that there was no sign of forced entry and that a window was open when Meyers's framing contractor arrived at the site on the morning of October 23, it was reasonable for the jury to find that a failure to secure the property was a cause of a trespasser entering the property and tampering with the oil line that resulted in the oil spill.

5. Collateral source rule and remittitur.

During trial, the court overruled Underwood's objection to the introduction of evidence that the cost of cleaning up the spilled oil had been partially reimbursed by Underwood's own insurer and by the MDE cleanup fund. Because there was a breach of

contract count pending at that point in time, and the collateral source rule is not applicable to contract claims, it was not error to admit the evidence during trial. The jury heard testimony and argument about the insurance and MDE payments, along with evidence of the cost of remediation and Underwood's expenditures occasioned by the delay caused by the oil spill remediation, including his costs to rent a storage unit and lease an apartment.

On the verdict sheet, the jury found: 1) Meyers "was negligent, and that such negligence was the cause of the vandalism which caused oil to spill onto Eric Underwood's basement floor"; and 2) Underwood had shown, by a preponderance of the evidence, that he was entitled to receive $47,263.872 from Meyers Construction "as a result of the vandalism that caused oil to spill onto his basement floor."

We agree with Underwood's contention that, when the court submitted only the negligence claim to the jury, an instruction on the collateral source rule should have been given. But Underwood does not appear to have suffered prejudice from the lack of an instruction regarding the collateral source rule; the jury's verdict did not appear to deduct any amount for the reimbursement Underwood had received from collateral sources. After the jury returned a verdict in favor of Underwood in the amount of $47,263.82, the court entered judgment on the verdict on September 11, 2014.

But, in response to post-trial motions, the court later vacated the judgment that was based on the jury's verdict and entered judgment for Underwood in the amount of $12,587.00 on December 16, 2014. Underwood challenges that downward revision as an unwarranted JNOV and remittitur. (*See* the fourth and fifth Questions Presented above.)

At the argument on Meyers's motion for judgment notwithstanding the verdict, or in the alternative to reduce the jury's verdict, Meyers contended that, if Underwood was entitled to any recovery, he was only entitled to recover $12,587.00 in out-of-pocket expenses. Meyers argued that, although the total bill for cleaning up and remediating the effect of the oil came to $43,787.00, Underwood had received payments toward the cleanup from his homeowner's insurance carrier in the amount of $11,700, and from a special fund of the Maryland Department of the Environment in the amount of $19,500. According to Meyers, "[a]nything above that $12,587.00 is a windfall, which is not permissible in a property damage action."

Underwood argued that the evidence of these payments should have been excluded from evidence pursuant to the collateral source rule, and that the jury should have been instructed --- as he had timely requested --- not to consider the payments Underwood had received from others.

The court granted Meyers's motion for JNOV in part, and reduced the verdict to $12,587.00. The court explained its ruling as follows:

> [BY THE COURT]: . . . [A]s to the Motion J.N.O.V. and/or in the alternative to reduce the verdict, I'm going to deny the Motion as to the A and B questions raised [in which Meyers had argued there was no duty to secure the premises, and that liability on Underwood's negligence claim was barred by res judicata because of the court's ruling on the mechanic's lien]. This is a case that was tried at one time, although the issues were clear from the beginning that the Court was trying the Mechanic's Lien part of the case and the jury was being or they did decide the Counterclaim aspect of the case. They were instructed as to what the law was. They were the trier of facts as to evidence presented as to the issue of negligence as to the oil spill that occurred when the house was being repaired. And I find that --- I, I --- although I hear [counsel for Meyers's] argument and understand it, I don't

> find it to be persuasive as to the issues as to the knowledge of prior criminal vandalism, a duty therefore, whether that --- there is a duty established or the second point raised that of res judicata barring, essentially barring the Jury's Verdict that I believe that the Jury had, it was --- they were --- it was within their province to make a decision as to the amount or as to the finding of negligence in that regard.
>
> As to the third point, however, **I am persuaded that the matter is not --- this is not a case that where the collateral source [rule] is applicable. This is a property damage case. This is not a personal injury case.** The evidence is clear as to the amount of damages that were caused by the oil spill and clean up. It was also clear as to the monies that Mr. Underwood would have received from the insurance companies to compensate him for at least part of the cleanup and other damages that may have been caused by it. And those numbers are pretty clearly stated. And I, I do address [counsel for Underwood]'s comment about the Jury Verdict Sheet not being broken down first of all. And therefore, there is no basis to, for the Court to do anything with that. Well first of all, it was a very specific dollar amount that they found, $47,263.82. So it's not just a, a general or I'd say a rounded off number where there might speculation [sic] as to what they did? All of the, the monies that would have been paid by the insurance company or other sources would have been included in that very specific dollar and cent amount. I find that the Verdict needs to be reduced and I do reduce Verdict to the amount stated of $12,587.00. So I would enter Judgment for Mr. Underwood for that amount on the Counterclaim.

(Emphasis added.)

We perceive no legal authority for the trial court's conclusion that, as a matter of law, the collateral source rule is not applicable in a tort case arising out of damages to property. The trial judge cited no case in support of its ruling.

Nor did Meyers cite any case in its brief in this Court that stands as legal authority for the trial court's view of the collateral source rule. Indeed, in its brief, Meyers acknowledges: "Underwood does not misapprehend the Collateral Source Rule, nor the policy considerations behind its application." Meyers asserts that the evidence was

admissible at trial at the time the evidence was offered because "Underwood was still maintaining his breach of contract action in the counter-claim." We agree with Meyers as to the *admissibility* of the evidence.

But the balance of Meyers's argument regarding the collateral source rule offers no support for the trial court's post-trial reduction of the jury's verdict; Meyers states in its brief:

> Even if this Court were to determine that the trial court erred in admitting the evidence of those payments or in refusing Underwood's requested jury instruction on the Collateral Source Rule, those errors were harmless to Underwood because the jury[] returned an award of $47,262.82, which was in excess of the $43,787.00 cost to clean up the oil spill (Apx. 95-96), such amount patently did not take into account or reduce the award based on the payments made to Underwood by others. [Footnote 4 adds: "Given the jury's question during deliberations as to interest, it is reasonable to assume that the jury included interest on the amount paid [by Underwood] for remediation[,] especially since Underwood's credit card statements were in evidence."[2]] Therefore, because the jury clearly did not [reduce the] award based on the collateral source evidence that Underwood claims was erroneously admitted and for which he sought an instruction, there was no harm to Underwood.
>
> **Should the Court determine that the trial court committed an error related to reducing the costs [recoverable relative to] the oil spill to $12,587.00, the only out-of-pocket expenses paid by Underwood for the oil spill cleanup (Apx. 106-107), then it should simply reinstate the**

[2] Soon after retiring to deliberate, the jury sent a note stating "the jury would like the total interest and fees on both credit cards of Mr. Underwood." After consulting with counsel, the court told the jury that it was "to consider what is in evidence," which included Underwood's credit card statements. Exhibit 24 was Underwood's Citibank credit card statement, reflecting a $24,719.42 payment to Clean Ventures (the oil-spill remediation company) on February 10, 2013; Exhibit 25 was Underwood's Discover statement reflecting payment of $7,925.46 in oil-spill-related costs; and Exhibit 26 was a personal check in the amount of $7,522.46 to Clean Ventures. Underwood testified that he had charged a total of $33,450.60 on his credit cards due to the oil spill. He also testified that Meyers charged him $6,250.00 in oil-spill-related work that he did not authorize.

> **jury's verdict of $47,263.82.** While Underwood goes to great lengths to manipulate certain figures to support his contention that a new trial on damages is warranted, he provides no legal justification for this Court to remand the case to the trial [c]ourt to seek additional damages as the jury considered all of the evidence and awarded damages in excess of the actual cost to clean the spill.

(Emphasis added.)

We hold that the partial grant of the JNOV and the reduction of the jury's verdict based upon the trial court's conclusion that the collateral source rule did not apply was in error, and we agree with Meyers's assertion that the appropriate remedy is for us to order the circuit court to "reinstate the jury's verdict of $47,263.82."

Although most of the cases addressing the collateral source rule arise in the context of insurance payments of medical expenses for personal injuries, we have found no Maryland case that has held that the rule is not applicable to claims for property damage. Indeed, in relatively recent cases from the Court of Appeals addressing the concept, the Court has traced the history of the rule without making any distinction for damages to property, and has thereby recognized that the collateral source rule is applicable in property damages cases.

For example, in *Kremen v. Maryland Automobile Insurance Fund*, 363 Md. 663, 671 (2001), the Court stated: "It is necessary first to provide a brief history of the collateral source rule, long established, under Maryland law." The Court noted that it had "provided a plenary explanation of the rule in *Plank v. Summers*, 203 Md. 552, [561-62], 102 A.2d 262, 267 (1954), . . . ," which the *Kremen* Court then quoted. The history quoted from

Plank recounted that several of the earliest cases applying the collateral source rule in Maryland were property damages cases:

> ["]In *Chesapeake Iron Works v. Hochschild*, (1913), 119 Md. 303, 86 A. 345, this Court held that in a suit for damages the fact of insurance could not be set up in mitigation of damages and it was no defense that the injured party had been indemnified by such insurance although he may have collected all or a part of it. In *American Paving & Con. Co. v. Davis*, (1916), 127 Md. 477 [96 A. 623], it was held that in an action for damages by fire through the negligence of the defendant, evidence that the plaintiff had received insurance money from fire insurance, which he had carried against loss by fire, is not proper for the consideration of the jury. In *Barnes v. United Ry. Co*., (1922), 140 Md. 14 [116 A. 855], it was held that the fact that the truck was insured did not disentitle the plaintiffs to maintain a suit for damage to the truck.["]

Kremen, 363 Md. at 671-72 (quoting *Plank*, 203 Md. at 561-62).

Neither *Kremen* nor *Plank* suggested that the cases applying the collateral source rule to property damages were no longer good law in Maryland.

In *Eastern Shore Title Company v. Ochse*, 453 Md. 303, 341 (2017), the Court of Appeals quoted, with apparent approval, the RESTATEMENT (SECOND) OF TORTS § 920A, which recognized, and summarized, the collateral source rule in subsection (2), as follows:

> (2) Payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor's liability, although they cover all or a part of the harm for which the tortfeasor is liable.

Comments *b* and *c* accompanying § 920A explain:

> *b*. *Benefits from collateral sources*. Payments made or benefits conferred by other sources are known as collateral-source benefits. They do not have the effect of reducing the recovery against the defendant. The injured party's net loss may have been reduced correspondingly, and to the extent that the defendant is required to pay the total amount there may be a double compensation for a part of the plaintiff's injury. But it is the position of the law that a benefit that is directed to the injured party should not be shifted so

as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself. If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers. The law does not differentiate between the nature of the benefits, so long as they did not come from the defendant or a person acting for him. One way of stating this conclusion is to say that it is the tortfeasor's responsibility to compensate for all harm that he causes, not confined to the net loss that the injured party receives. Compare § 924, Comment c (recovery for harm to earning capacity though plaintiff was on vacation), § 914A (recovery for damage to earning capacity ordinarily not reduced by amount of income tax that was not imposed).

Perhaps there is an element of punishment of the wrongdoer involved. (See § 901). Perhaps also this is regarded as a means of helping to make the compensation more nearly compensatory to the injured party. (Cf. § 914A, Comment b).

c. The rule that collateral benefits are not subtracted from the plaintiff's recovery applies to the following types of benefits:

(1). Insurance policies, whether maintained by the plaintiff or a third party. Sometimes, as in fire insurance or collision automobile insurance, the insurance company is subrogated to the rights of the third party. This additional reason for keeping the tortfeasor's liability alive is not necessary, however, as the rule applies to insurance not involving subrogation, such as life or health policies.

(2). Employment benefits. These may be gratuitous, as in the case in which the employer, although not legally required to do so, continues to pay the employee's wages during his incapacity. They may also be benefits arising out of the employment contract or a union contract. They may be benefits arising by statute, as in worker's compensation acts or the Federal Employers' Liability Act. Statutes may subrogate the employer to the right of the employee, or create a cause of action other than by subrogation.

(3). Gratuities. This applies to cash gratuities and to the rendering of services. Thus the fact that the doctor did not charge for his services or the plaintiff was treated in a veterans hospital does not prevent his recovery for the reasonable value of the services.

> (4). Social legislation benefits. Social security benefits, welfare payments, pensions under special retirement acts, all are subject to the collateral-source rule.

As is true of Maryland cases addressing the collateral source rule, Restatement (Second) § 920A makes no distinction between torts concerning personal injury and those concerning damages to property. And one of the cases cited in the Reporter's Note was a case in which the dispute involved damage to an automobile, *viz*., *Jeffords v. Florence County*, 165 S.C. 15, 162 S.E. 574, 81 A.L.R. 313 (1932).

It is true that there is currently no Maryland pattern jury instruction that addresses the collateral source rule in the context of property damage. MPJI-Cv 10:8 (5th ed. 2018), captioned "DAMAGES – COLLATERAL SOURCE RULE," mentions only medical expenses and lost earnings.[3] But the absence of a pattern jury instruction provides no basis for the trial court to disregard pertinent cases from the Court of Appeals.

Because the trial court erred, as a matter of law, in ruling that this is not a case in which the collateral source rule is applicable and reducing the jury's verdict on that basis, we remand the case with instructions for the circuit court to vacate the judgment entered on December 16, 2014, and then reinstate and reenter the judgment in favor of Underwood

[3] MPJI-Cv 10:8 instructs:

> In arriving at the amount of damages to be awarded for past and future medical expenses and past loss of earnings, you may not reduce the amount of your award because you believe or infer that the plaintiff has received or will receive reimbursement for, or payment of, proven medical expenses or lost earnings from persons or entities other than the defendant, such as, for example, sick leave paid by the plaintiff's employer or medical expenses paid by plaintiff's health insurer.

against Meyers in the amount originally entered on September 11, 2014, *i.e.*, $47,263.82, with post-judgment interest accruing from September 11, 2014. *See Med. Mut. Liab. Ins. Soc. of Maryland v. Davis*, 365 Md. 477, 486 (2001) ("post-judgment motions or appeals, which may cause a money judgment for a plaintiff to lose some aspects of its finality, ordinarily do not have the effect of postponing the accrual of post-judgment interest from the date that the original money judgment was entered"); *Brown v. Med. Mut. Liab. Ins. Soc. of Maryland*, 90 Md. App. 18, 25 (1992) ("Here, the j.n.o.v. was, in fact, *reversed* on appeal, which means that the original jury verdict must be reinstated as if it had never been eliminated by the trial court. A reversal on appeal of a j.n.o.v. is, in effect, a finding that plaintiff's original judgment always existed.").

JUDGMENT REVERSED. CASE REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY WITH DIRECTION TO REINSTATE JUDGMENT UPON THE JURY AWARD OF $47,263.82 IN FAVOR OF ERIC UNDERWOOD AGAINST MEYERS CONSTRUCTION CO., INC. COSTS TO BE PAID BY APPELLEE.