

Circuit Court for Montgomery County  
Case No. 397288-V

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 620

September Term, 2017

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SANDRA GOTTLIEB

v.

RAY MARVIN GOTTLIEB

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Nazarian,  
Arthur,  
Friedman,

JJ.

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Opinion by Arthur, J.  
Dissenting Opinion by Friedman, J.

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Filed: August 3, 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.

Following the grant of an absolute divorce, appellant Sandra Gottlieb alleged that her ex-husband, Dr. Ray Marvin Gottlieb, had breached an agreement regarding the division of marital property by failing to disclose a marital asset – an idea for an invention. A Montgomery County jury returned a seven-figure judgment in Ms. Gottlieb’s favor. However, the trial judge granted a motion for judgment notwithstanding the verdict on the grounds that there was no credible evidence that the idea was an asset or that its value was based on anything but speculation.

Ms. Gottlieb noted this timely appeal. We affirm.

#### **FACTUAL AND PROCEDURAL HISTORY**

In the summer of 2012, after 25 years of marriage, the Gottliebs separated. That August, Ms. Gottlieb filed a complaint for absolute divorce.

In March of 2013, while he was living apart from his wife, Dr. Gottlieb had a dream about the early fighter planes with synchronization gears that allowed the pilot to fire a machine gun through the arc of the spinning propeller without striking the blades. From this dream, the idea of a flossing toothbrush was born. Dr. Gottlieb thought that the same principles of “pulsating action” and “rotating action” that he saw in his dream could be applied to a toothbrush and could revolutionize the industry.

Excited about the possibilities, Dr. Gottlieb called his former patient and friend, Robert Kressin, for advice. Mr. Kressin had been the CEO of a cellular telephone company and had pursued six patents in the past. He advised Dr. Gottlieb to do sketches of the invention and to call a patent attorney.

In May of 2013, Mr. Kressin saw what he described as three, very detailed pages of sketches depicting the invention. (Dr. Gottlieb claimed that they were simple “doodles.”) During the summer of 2013, Mr. Kressin and Dr. Gottlieb orally agreed to split the interest in the invention 70-30, in favor of Dr. Gottlieb, and Mr. Kressin signed a non-disclosure agreement. They also discussed topics such as the market for the device, as well as beach houses that Dr. Gottlieb might buy with the proceeds from the sale of the idea.

According to Mr. Kressin, Dr. Gottlieb refused to go to a patent attorney at that time because he did not want to disclose the idea to Ms. Gottlieb, to whom he was still married. Dr. Gottlieb, Mr. Kressin said, was “adamant that nothing was to be in writing before the divorce was finalized.” “He didn’t want to leave any kind of trail, because he didn’t want his ex-wife to find out about it.”

On November 18, 2013, after six mediation sessions that occurred amidst contentious divorce litigation, the Gottliebs entered into an agreement on the division of their marital property. The agreement stated, in pertinent part:

DISCLOSURE: The parties represent that they have disclosed all assets in this litigation. That they have made full disclosure to each other, should a party discover an asset that was not disclosed in this litigation, the discovering party shall be entitled to ½ of the value of the asset as of the date of this agreement.

At the time of the agreement, Dr. Gottlieb had not informed his wife of the idea for a flossing toothbrush.

On December 4, 2013, 16 days after he signed the agreement regarding the division of marital property, Dr. Gottlieb consulted with a patent attorney. Dr. Gottlieb

hired the attorney five days later. On December 26, 2013, the attorney informed Dr. Gottlieb that his idea did not appear to be the subject of any existing patent.

On January 27, 2014, the Gottliebs' divorce became final. On that same day, Dr. Gottlieb filed the articles of organization for STEVI LLC, the limited liability company that would ultimately take an assignment of the patents for his invention. Dr. Gottlieb had conceived of the name "STEVI" in November or December of 2013, before the divorce became final.

On February 4, 2014, eight days after the divorce became final, Dr. Gottlieb filed a provisional application for a patent on his idea for a flossing toothbrush. Two days later, on February 6, 2014, he assigned his rights in the application to STEVI LLC. A formal application for a patent was filed on November 24, 2014, and a patent was eventually granted on May 17, 2016.

Meanwhile, on November 6, 2014, Ms. Gottlieb brought suit against Dr. Gottlieb because of his failure to comply with provisions of the agreement other than the provision concerning the disclosure of assets. Soon thereafter, Ms. Gottlieb learned of Dr. Gottlieb's business venture involving the invention of a dental device. She amended her complaint to include an allegation that he breached the agreement by failing to disclose the idea for the invention.<sup>1</sup>

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<sup>1</sup> Dr. Gottlieb and Mr. Kressin had a falling-out in October 2014, when Dr. Gottlieb sought to reduce his partner's interest in the invention from 30 percent to five percent. It appears that after the falling-out Mr. Kressin informed Ms. Gottlieb or her attorney of the invention.

Dr. Gottlieb took the position that he did not need to disclose the idea because, he said, on the date of the agreement, it was not an asset, and it had no value. He moved for a protective order to ensure that his idea remained confidential while he pursued a patent.

A circuit court judge granted a protective order. In essence, the court appears to have prohibited Ms. Gottlieb from obtaining information about the nature of the invention until she was able to show that it was an “asset” as of November 18, 2013, the date of the agreement. The judge permitted Ms. Gottlieb to conduct discovery about whether the invention was an “asset” as of the relevant date, by inquiring about when Dr. Gottlieb had the idea, when he took steps to pursue a patent, and when he created any business organization for use in pursuing the patent. The judge reasoned that if Ms. Gottlieb could demonstrate that the idea was an “asset” as of the date of the agreement, she could move to the next step of obtaining discovery about the details of the invention.

At one hearing concerning the motion for a protective order, the judge suggested that the trial might be bifurcated: the first jury would decide whether the idea was an asset as of the relevant date; and if that jury answered the question affirmatively, a second jury would decide its value. Dr. Gottlieb’s attorney expressly agreed to the concept of bifurcation, but Ms. Gottlieb’s attorney did not.

On two subsequent occasions, Ms. Gottlieb moved to modify the protective order. In those motions she argued that she had an expert in patent law who would testify that the idea was an “asset” at the time of the agreement. She also argued that, through the

process of applying for a patent, Dr. Gottlieb had put information about the invention into the public domain. The judge declined to modify the protective order.<sup>2</sup>

In the proceedings concerning the protective order, Ms. Gottlieb was focused on obtaining the drawings that Dr. Gottlieb had made before the date of the agreement. She requested those documents in a trial subpoena that she served on Dr. Gottlieb two weeks before trial was scheduled to begin before a different circuit court judge. On the Friday before the trial began, the trial judge denied a motion to quash the subpoena and ordered Dr. Gottlieb to produce “any drawings relating to the patent.”

When the jury trial began, Ms. Gottlieb did not argue that the issue should be limited to whether Dr. Gottlieb’s idea was an “asset” as of November 18, 2013, and that the court should convene a second trial if the jury resolved that issue in her favor. Nor did Ms. Gottlieb argue that the protective order had impaired her ability to prove the value of the idea as of November 18, 2013. Instead, she proceeded to trial and attempted to prove that the idea was an asset that had considerable value.

Ms. Gottlieb called Dr. Gottlieb in her case. In response to a question from his own attorney on cross-examination, Dr. Gottlieb opined that the idea was “worthless” as of November 18, 2013.

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<sup>2</sup> The dissent asserts that the discovery judge abused his discretion in precluding Ms. Gottlieb from obtaining discovery about the details of the invention until she had shown that the idea was an asset as of the relevant date. In support of that assertion, the dissent cites a number of persuasive authorities, none of which Ms. Gottlieb cited either in the circuit court or in this Court. The discovery judge could not have abused his discretion by failing to give due weight to authorities that no one cited to him.

Ms. Gottlieb also called an expert to testify about whether the idea was an “asset” that Dr. Gottlieb was required to disclose. On direct examination, however, Ms. Gottlieb’s expert was not asked to render an opinion as to the value of the idea as of November 18, 2013. Furthermore, when asked on cross-examination about the value of the idea on that date, the expert said that she did not know. She testified that she was not there to say what the value of the idea was, other than that “it was an asset.” She allowed that the idea “may end up having zero value.” She appeared to liken the idea to an unexercised stock option, which may have little or no value for much of its existence, but may ultimately become quite valuable.

After the parties had rested their cases, the court instructed the jury about Ms. Gottlieb’s burden to prove the value of the idea. Ms. Gottlieb did not object to the instruction. Nor did she argue that the damages phase of the trial should occur only after the jury had decided whether the idea was an asset.

The jury found that Dr. Gottlieb had failed to disclose an asset and that the asset had a value of \$2,145,000.00, of which Ms. Gottlieb was entitled to half. On May 9, 2016, the court entered judgment against Dr. Gottlieb in the amount of \$1,070,500.00. On May 18, 2016, Dr. Gottlieb moved for judgment notwithstanding the verdict.

At a hearing on that motion on March 13, 2017, the trial judge stated that he had had “significant reservations” about sending the case to the jury. The judge saw no credible evidence that the idea was an asset that was capable of being exchanged for value as of November 18, 2013, and no credible testimony about the value of the idea as of that date. He explained that he had submitted the case to the jury in the erroneous

belief that the jury would return a verdict in Dr. Gottlieb’s favor because of the absence of any evidence about the value of the idea on the relevant date. Consequently, the court granted judgment in Dr. Gottlieb’s favor notwithstanding the verdict.

### QUESTIONS PRESENTED

Ms. Gottlieb presents her questions as follows:

1. Did the trial court commit reversible error in granting Appellee’s motion for judgment notwithstanding the verdict?
2. Did the trial court err in failing to allow appellant to conduct certain discovery and precluding appellant from obtaining discovery regarding the value of the asset at issue?

We affirm the judgment.

### STANDARD OF REVIEW

The standard of review for a ruling on a motion for judgment notwithstanding the verdict is whether the trial court was legally correct. *See, e.g., Shabazz v. Bob Evans Farms, Inc.*, 163 Md. App. 602, 643 (2005). In reviewing the grant of a judgment notwithstanding the verdict, an appellate court must ““resolve all conflicts in the evidence in favor of the [non-moving party]”” and must determine “whether the trial court’s decision was legally correct.” *Sage Title Group, LLC v. Roman*, 455 Md. 188, 201 (2017) (alteration in original) (quoting *Exxon Mobil Corp. v. Albright*, 433 Md. 303, 349 (2013)). ““If the non-moving party offers competent evidence that rises above speculation, hypothesis, and conjecture, the judgment notwithstanding the verdict should be denied.”” *Id.* (quoting *Cooper v. Rodriguez*, 443 Md. 680, 707 (2015)).



“Appellate courts ordinarily review discovery decisions for abuse of discretion.”

*See Maryland Bd. of Phys. v. Geier*, 225 Md. App. 114, 143 n.19 (2015).

### DISCUSSION

In her brief, Ms. Gottlieb devotes several pages to the argument that her ex-husband’s idea was marital property and, hence, that it was an “asset” that he was required to disclose under the agreement regarding the division of marital property. She devotes considerably less space, however, to the more challenging argument that she proved the value of the idea as of the relevant date.

We have no difficulty concluding that Ms. Gottlieb generated sufficient evidence for a reasonable jury to find that the idea was an “asset” (i.e., that it was something of value) as of the relevant date: Dr. Gottlieb could have pitched the idea to potential investors as of that date; he already had an agreement to divide the profits with Mr. Kressin; and he had gotten a non-disclosure agreement with Mr. Kressin, which would have been unnecessary unless he wanted to prevent his partner from misappropriating something of value. Dr. Gottlieb’s own conduct lends further support to a finding that the idea had value: if the idea had no value, why did he conceal it from his wife during the divorce proceedings, and why did he snap into action in his pursuit of a patent as soon as the divorce became final? In short, the trial judge would have erred in entering judgment notwithstanding the verdict if the sole ground was Ms. Gottlieb’s putative failure to prove that the idea was an “asset.”

It is true that as of November 18, 2013, Dr. Gottlieb did not yet have the protections that patent law would afford for his idea. As of that date, for example, Dr.

Gottlieb did not have the right to prevent others from developing a flossing toothbrush like his if they had come up with the idea on their own. Still, he had the right to sell his idea to anyone who might be interested in investing money to develop it, to enter into an agreement (like the one with Mr. Kressin) to divide any profits from the exploitation of the idea, and to enter into an agreement (again, like the one with Mr. Kressin) under which the other party could have access to the idea only if he or she agreed not to disclose it to others. A jury could reasonably have found that the idea was an asset.

Ms. Gottlieb, however, can point to no evidence of the specific value of the asset as of the relevant date. The only relevant testimony was that as of November 18, 2013, the idea was “worthless” (as Dr. Gottlieb opined), or that its value was unknown (as Ms. Gottlieb’s expert testified). Consequently, Ms. Gottlieb is reduced to arguing that an asset must have some value; that Dr. Gottlieb attempted to conceal the idea from her, which implies that it had some value; that he expended \$300,000.00 on the invention (after the agreement); and that he told Mr. Kressin that they might have a “billion-dollar type deal.” None of this evidence establishes the specific value of the asset as of November 18, 2013.<sup>3</sup>

Ms. Gottlieb appears to argue that the idea should be treated like an unexercised and unvested stock option, which is valued on an “if, as, and when” basis, so that each

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<sup>3</sup> It is unsurprising that Ms. Gottlieb made no attempt prove the value of the idea as of November 18, 2013, because it would be almost an insurmountable task to show, with reasonable certainty, that it had anything more than a nominal value then. As of November 18, 2013, no one knew whether the idea could be patented at all, or whether it was already covered by an existing patent, or whether someone else had come up with the

spouse gets a percentage of the profit if, as, and when the option is exercised. *See, e.g., Otley v. Otley*, 147 Md. App. 540 (2002); *Green v. Green*, 64 Md. App. 122 (1985). Ms. Gottlieb appears to contend that she should receive half of the value of the idea when it becomes (in her words) “vested” by being “patented and developed.” As the trial court pointed out, however, the agreement in this case required that the idea be valued as of a specific date, not some future date when it might be said to have come to fruition.

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same idea and was about to obtain a patent on it. Even if the idea was patentable and was not covered by an existing (or soon-to-be existing) patent, no one knew whether another inventor could make a colorable allegation of infringement, and how much it would cost to defend against such an allegation. Nor did anyone know whether the idea, if it was patentable, could be described in broad enough terms to ensure that similar devices would be covered by the patent, so that their inventors might be required to pay royalties to Dr. Gottlieb. And no one knows how much it would cost to litigate the question of whether any similar devices might infringe Dr. Gottlieb’s hypothetical patent. As of November 18, 2013, no one had anything more than a casual, speculative idea of the value of any potential market for a device based on the idea. No one had any idea of how much it would cost to obtain a patent, build a prototype, and eventually find someone to manufacture and distribute the device. No one knew how, where, and whether Dr. Gottlieb could find the investors whom he would need to put up the (unknown) amount of money that it would take to develop the idea into a patented, marketable product. Because no one knows how big the potential market was or how much it would take to turn the idea into a marketable product, no one knew whether or when a product based on the idea would ever become profitable. Finally, even if the product ever became profitable, no one knew how much of the profit Dr. Gottlieb would have been required to give up to his investors.

For that reason, an “if, as, and when” valuation method could not apply in this case, even if it were possible to ascertain precisely when the idea had “vested.”<sup>4</sup>

“It is well established in Maryland that damages based on speculation or conjecture are not recoverable as compensatory damages.” *Kleban v. Eghrari-Sabet*, 174 Md. App. 60, 95 (2007). Therefore we hold that the trial court properly granted judgment notwithstanding the verdict.<sup>5</sup>

Perhaps recognizing that she did not come forward with evidence about the value of the idea as of the relevant date, Ms. Gottlieb argues that the failure of proof resulted from the grant of the motion for a protective order. She argues that the protective order erroneously deprived her of the information that she needed to prove value. Yet in the conclusion of her brief, where she is required to state “the precise relief sought” (Md. Rule 8-504(a)(7)), she does not suggest that this Court should vacate the judgment and compel additional discovery. Instead, as the only relief requested for the alleged error,

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<sup>4</sup> Ms. Gottlieb cites *In re Marriage of Monslow*, 912 P.2d 735 (Kan. 1996), as support for the proposition that if patent rights are marital property, a court may divide the future royalties between the spouses. We agree that if a marital asset is generating a stream of income at the time of a divorce, as a patent does in generating royalties, a court may divide the stream of income between the spouses. In this case, however, Dr. Gottlieb’s idea was generating no income at the relevant date.

<sup>5</sup> We pause to add that, although Ms. Gottlieb did not prove the value of the idea as of the date of the agreement, the lack of patent protection would obviously have resulted in a value significantly less than the value that the idea might have had by the time of trial. It is even conceivable that, as of the relevant date, the value of the idea may have been less than the cost of an expert hired to prove what that value actually might have been (though, this too, is mere speculation). *See supra* n.3.

she asserts that we should reinstate the jury verdict. Obviously, however, we cannot reinstate a jury verdict that was supported by no admissible evidence.<sup>6</sup>

On the penultimate page of her brief, Ms. Gottlieb, asserts that “[t]he problem with the Court’s reasoning, as [she] argued below, is that this was not a bifurcated trial.” We interpret this assertion to mean that the trial court should have acceded to Ms. Gottlieb’s request to “set in a further hearing on damages,” which she first made after the court had announced its intention to grant judgment notwithstanding the verdict. There are several difficulties with that assertion.

To begin with, Ms. Gottlieb appears not to have informed the trial judge of her contention that the protective order would thwart her ability to establish the value of the asset as of the relevant date. For example, she did not argue that, in light of the protective order, the trial should be bifurcated – that one jury should determine whether the idea was an asset; and that, if the jury agreed that it was an asset, she should get additional discovery and a second trial before a second jury to determine the value of the

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<sup>6</sup> One might ask why Ms. Gottlieb did not pursue a claim of common-law fraud, under which she might have been entitled to punitive damages (*see Ellerin v. Fairfax Savings, F.S.B.*, 337 Md. 216 (1995)) had she proved that the idea had some value – perhaps even a rather trifling value – as of the relevant date. *See Shell Oil Co. v. Parker*, 265 Md. 631, 644 (1972) (holding that “to support an award of punitive damages in Maryland there must first be an award of at least nominal compensatory damages”). The short answer is that Ms. Gottlieb did allege a claim of common-law fraud, but abandoned it before the case went to the jury. In any event, she did not assert a claim for punitive damages, which would have been an impediment to her ability to recover them had she not abandoned the fraud claim.

asset as of the relevant date. Instead, she proceeded to trial, undertook to put on evidence of value, and acquiesced in the jury instructions that directed the jury to value the idea.

In addition, in opposing Dr. Gottlieb’s motions for judgment at trial and his motion for judgment notwithstanding the verdict, Ms. Gottlieb did not argue that the protective order had impaired her ability to prove value or that she should have been afforded additional discovery before the trial (or the trial on valuation) ever began. Nor did she argue that the damages phase of the trial should not have occurred until after the jury had decided whether the idea was an asset (and after she had gotten additional discovery). To the contrary, she argued (as she does in the first part of her brief on appeal) that she had generated sufficient proof of value to carry the issue to a jury. For example, she argued that the idea was akin to a stock option that was worth whatever value it would have “if, as, and when” it “vested.” Ms. Gottlieb suggested that the court should hold a separate hearing on “damages” only after the trial judge had announced his ruling on the motion for judgment notwithstanding the damages verdict that the jury had reached.

In summary, at no time before the case had been fully tried on all issues did Ms. Gottlieb inform the trial judge of her contention that the case should be bifurcated. To the contrary, when the discovery judge proposed bifurcation, she demurred even though her adversary would have agreed. We cannot reverse the court for failing to do something that Ms. Gottlieb did not ask it to do.

Finally, Ms. Gottlieb does not identify the additional information that, in her view, she should have gotten in discovery. Similarly, she does not explain how that

unidentified information would have assisted her in quantifying the value of the idea as of the relevant date. *See supra* n.3. In continuing to liken the unpatented and undeveloped idea to an unvested and unexercised stock option, she continues to focus on the value of the asset as of a date other than the relevant date under the agreement. The only discovery that she clearly claimed to need was of the drawings that Dr. Gottlieb made in 2013 – and the trial judge ordered that they be produced to her before the trial. At some point, while the parties were still proceeding in discovery, a substantial body of information about the device became public as a result of the patent application. Hence, even if we assume that the discovery judge erred or abused his discretion in entering the protective order, we do not see how Ms. Gottlieb has suffered any prejudice. Because she has the burden of proving both prejudice and error (*see, e.g., Crane v. Dunn*, 382 Md. 83, 91 (2004)), we have no basis to set aside the judgment.<sup>7</sup>

**JUDGMENT OF THE CIRCUIT COURT  
FOR MONTGOMERY COUNTY  
AFFIRMED. COSTS TO BE PAID BY  
APPELLANT.**

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<sup>7</sup> The dissent argues that we should vacate the judgment and remand the case to the circuit court, so that Ms. Gottlieb can take additional discovery on the value of the asset. The dissent, however, does not take note of Ms. Gottlieb’s failure to identify the discovery that she would have obtained but for the protective order or how any such discovery might have assisted her in proving the value of the idea as of November 18, 2013. In other words, the dissent, like Ms. Gottlieb, does not address how she sustained any prejudice as a result of the error.

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My colleagues conclude that the circuit court did not abuse its discretion by granting Dr. Gottlieb’s motion for judgment notwithstanding the verdict because Ms. Gottlieb failed to produce any satisfactory evidence of the value of his invention of a new dental instrument. Slip op. at 10. I agree that she failed to produce the requisite evidence of value. I attribute this failure, however, to the trial court’s entry of an erroneous protective order that prevented Ms. Gottlieb from conducting any of the discovery that might have allowed her to produce such evidence. Moreover, unlike my colleagues, I think that Ms. Gottlieb objected sufficiently to preserve her challenge to the erroneous protective order. As a result, I would vacate the judgment, remand to the trial court with instructions to enter an appropriate protective order, and allow Ms. Gottlieb to conduct real discovery before a new trial.

#### **I. THE PROTECTIVE ORDER**

As is clear from the majority’s discussion, the parties’ divorce agreement required each to disclose and share, 50/50, all unidentified marital assets. Slip. op. at 2. In this action, Ms. Gottlieb asserted that Dr. Gottlieb had withheld information about a marital asset—his invention of a new dental instrument—to avoid sharing its value with Ms. Gottlieb. At Dr. Gottlieb’s behest, the trial court entered a protective order that in relevant part stated:

[Ms. Gottlieb] is prohibited from compelling from [Dr. Gottlieb] the production of any and all information and/or material things that are directly or indirectly related to ... a dental product for which [Dr. Gottlieb] is currently seeking a patent *unless and until [Ms. Gottlieb] is able to sustain her burden of showing that the information sought is related to a relevant previously undisclosed marital asset.*

(emphasis added). Thus, the protective order restricted Ms. Gottlieb from obtaining any information about the invention unless she could first prove to the court that the invention was, in fact, a marital asset.

In my view, this protective order was clearly wrong. *First*, discovery in Maryland is broad. Md. Rule 2-402; JOHN A. LYNCH, JR. & RICHARD W. BOURNE, MODERN MARYLAND CIVIL PROCEDURE § 7.1, 7-2-3 (2d ed. 2004) (discussing Maryland’s adoption of “the liberal discovery philosophy of the federal rules”). Ms. Gottlieb was entitled to conduct discovery “relevant to [any] subject matter involved in the action.” Md. Rule 2-402(a); LYNCH & BOURNE § 7.2 at 7-7 (noting that “relevancy” in the context of discovery can be broader than “relevancy” in the context of admissibility of evidence at trial because “it permits discovery of matter logically related to the issues that may themselves be inadmissible at trial, but that may lead to the discovery of admissible evidence.”). Thus, Ms. Gottlieb should have been entitled to discovery regarding the invention, Dr. Gottlieb’s concealment of the invention, and the invention’s value.<sup>1</sup>

*Second*, I think the circuit court’s protective order—requiring Ms. Gottlieb to prove that the invention was an asset first, and only then, be permitted to obtain discovery about its value—was based on a flawed premise. To qualify as an asset, the invention had to be “something of value.” Slip. op. at 8. By forcing Ms. Gottlieb to prove that the invention was an asset *first*, the trial court required Ms. Gottlieb to prove that Dr. Gottlieb’s invention

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<sup>1</sup> The majority provides an impressive list of things unknown. Slip op. at 9 n.3. It seems to me that filling in this list, or at least trying to, is the point of discovery. *See also* Slip op. at 14 n.7.

was *something of value* without the benefit of discovery on whether the invention, in fact, *had any value*. Thus, the trial court imposed a condition that could never be satisfied. Its circular reasoning tied Ms. Gottlieb’s hands and prevented her from obtaining the information vital to her case.

*Third*, and most critically, the protective order failed to balance Ms. Gottlieb’s legitimate right to conduct discovery against Dr. Gottlieb’s legitimate interest in the pre-patent secrecy of his invention as is contemplated by the Maryland discovery rules. Md. Rule 2-403(a)(8) (trial court may enter an order protecting a person from whom discovery is sought including “that a trade secret or other confidential research, development, or commercial information ... be disclosed only in a designated way”); LYNCH & BOURNE § 7.8 at 7–130-32 (“in light of the generally liberal discovery policy of the Maryland Rules, ...complete denials of discovery should be relatively rare, particularly where the matter sought is *highly* probative with respect to the issues involved in a suit.”) (emphasis in original). There are many examples for how the needs of secrecy and the needs for discovery may be accommodated in areas of law including intellectual property, trade secrets, and patents. *See, e.g.*, MANUAL FOR COMPLEX LITIGATION, FOURTH, § 11.432 (2004) (“In fashioning the [protective] order, it is important to balance the movants’ legitimate concerns about confidentiality against the legitimate needs of the litigation, individual privacy, or the commercial value of information.”); ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 23:70 (4th ed. 2017) (suggesting how to implement confidentiality agreements in protective orders); Timothy S. Durst &

Cheryl L. Mann, *Behind Closed Doors: Closing the Courtroom in Trade Secrets Cases*, 8 TEX. INTELL. PROP. L.J. 355, 366 (2000) (suggesting various methods courts use in drafting appropriate protective orders to maintain confidentiality of information during and after discovery); *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122-23 (3d Cir. 1986) (discussing effectiveness of blanket protective orders that maintain confidentiality of all documents exchanged during discovery).<sup>2</sup>

For these reasons, I think the protective order entered by the circuit court constituted an abuse of discretion. *Tanis v. Crocker*, 110 Md. App. 559, 573 (1996) (we review the decision to grant a protective order to “determine whether the trial court abused its discretion when it rendered its decision.”).

## II. WAIVER

The majority skips over the defective protective order but finds, nevertheless, that Ms. Gottlieb, by her conduct at trial and after, waived her right to complain. Slip op. at 10-12. In my view, we need to begin the waiver analysis earlier. When we do, the question of whether Ms. Gottlieb waived her challenge to the circuit court’s protective order is much closer. I believe that, on balance, Ms. Gottlieb did enough to preserve the issue.

Maryland Rule 8-131(a) provides that “ordinarily, the appellate court will not decide any ... issue unless it plainly appears by the record to have been raised in or decided by the trial court.” Md. Rule 8-131(a). Here, the trial judge was certainly aware of Ms. Gottlieb’s

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<sup>2</sup> The majority chides me for relying on authorities that Ms. Gottlieb did not provide the trial judge. Slip op. at 5 n.2. That’s not how preservation works: it is not the names of the books that had to be mentioned to the trial judge, just the ideas in them.

objection to the protective order, as she raised it on three occasions. *First*, in response to Dr. Gottlieb’s initial motion for a protective order, Ms. Gottlieb requested her own alternative protective order that would have permitted her to conduct discovery. But, her proposed order would also have required all deposition testimony and exhibits to be marked confidential and required Ms. Gottlieb, her counsel, her counsel’s legal staff, and the court reporter to sign confidentiality agreements obligating their non-disclosure of any information regarding the asset.<sup>3</sup> *Second*, Ms. Gottlieb objected two additional times before trial by filing motions to modify, or in the alternative, to terminate the protective order in which she argued that the trial court’s protective order prevented her from conducting meaningful discovery. *Finally*, Ms. Gottlieb attempted to meet the trial court’s condition by showing that Dr. Gottlieb’s invention was an asset so as to force the court to lift its prohibition on valuation discovery. The trial court declined to grant Ms. Gottlieb’s requested relief each time. Thus, in my view, the issue of the protective order’s effect on Ms. Gottlieb’s discovery was sufficiently raised in and decided by the trial court, even if she only made her objections pre-trial. Md. Rule 8-131(a).

Despite Ms. Gottlieb’s strong pre-trial objections, my colleagues conclude that Ms. Gottlieb did not do all that was required to preserve the issue for appeal. *First*, my colleagues suggest that Ms. Gottlieb could have requested a bifurcated trial, where whether

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<sup>3</sup> This is precisely the sort of protective order that the experts on complex litigation recommend and that, to my mind, would have been appropriate in this case. MANUAL FOR COMPLEX LITIGATION, FOURTH, § 11.432; ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 23:70; Timothy S. Durst & Cheryl L. Mann, *Behind Closed Doors*, 8 TEX. INTELL. PROP. L.J. at 366.

Dr. Gottlieb's invention qualified as a marital asset would be decided at a first trial and a second trial would be held to determine its specific valuation. Slip op. at 11. That way, they reason, Ms. Gottlieb would have had the opportunity to prove the invention was an asset, thereby forcing the trial court to lift its protective order and allowing her to conduct discovery on the value of the invention. As I have already discussed, however, Ms. Gottlieb should have received the benefit of discovery on value from the outset, particularly when to meet her burden of proof that the invention was an asset, she needed to prove that it was something of value. That she did not request bifurcation as a means to convince the trial court to lift its erroneous protective order does not, in my view, cancel out her clear and repeated objections to the protective order itself. Md. Rule 8-131(a).

*Second*, my colleagues conclude that, by failing to raise the argument that the protective order limited her ability to discover the necessary information on value during trial, Ms. Gottlieb waived her right to complain on appeal. Slip. op. at 11-12. But, once the trial began, I have difficulty imagining how Ms. Gottlieb could have effectively renewed her objection. Had she explained that the protective order prevented her from discovering sufficient evidence of value, she would have essentially admitted that she could not prove her case. Instead, Ms. Gottlieb put on the best case she could despite the unfair limitation placed on her discovery by virtue of the protective order, and *won*.

*Finally*, my colleagues place great weight on the fact that, in her opposition to Dr. Gottlieb's motion for judgment notwithstanding the verdict, Ms. Gottlieb did not address the effect that the protective order had on her discovery regarding the value of Dr.

Gottlieb’s invention. Slip op. at 11-12. To me, however, the fact that Ms. Gottlieb chose to defend the successful record that she produced in opposition to Dr. Gottlieb’s motion does not defeat her repeated pre-trial objections to the court’s protective order. I agree with my colleagues that Ms. Gottlieb could have argued in opposition to the motion that she had proved valuation, but that alternatively, if the circuit court found that she had not, it should attribute that lack of proof to the erroneous protective order. Certainly, had Ms. Gottlieb made this argument, she would have avoided the waiver issue altogether. But I am not persuaded that she was *required* to have argued it. Thus, I would hold that Ms. Gottlieb sufficiently preserved her objection to the court’s protective order. Md. Rule 8-131(a).

### **III. CONCLUSION**

In my view, Ms. Gottlieb did not waive her challenge to the circuit court’s unfair limitation on her ability to conduct discovery by way of its erroneous protective order. I agree with my colleagues, however, that the relief Ms. Gottlieb seeks on this appeal cannot be granted. She asks us to reverse the court’s grant of judgment notwithstanding *both* the jury’s verdict that the idea for a dental instrument was an asset and its seven-figure award of damages. We cannot do that here, when it is clear that the jury based its award of damages on pure speculation. Slip op. at 10. What we could have done, though, is remand this case to the circuit court with instructions to enter an appropriate protective order (in light of the considerations discussed above), allow Ms. Gottlieb to conduct discovery on the specific value of the invention and then retry the case on the issue of value, alone. Md. Rule 8-604(a)(5), (d).

Therefore, I dissent.