JAMES SAMPSON	*	**IN THE**
	*	**COURT OF APPEALS**
v.	*	**OF MARYLAND**
	*	**Petition Docket No. 244 September Term, 2014**
VICTORIA BASSO	*	**(No. 1697, Sept. Term, 2013 Court of Special Appeals)**

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Mary Ellen Barbera

Chief Judge

*Harrell, J., dissents

DATE: September 3, 2014

Harrell, J., dissents:

> "I think that this situation absolutely requires a really futile . . . gesture be done on somebody's part."
>
> Otter in Animal House
> (Universal Pictures, 1978)

It is now abundantly clear that a majority[1] of the present Court, even without the participation of retired judges (see *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 69 A.3d 1149 (2013)), lacks the will and vision to unseat the Court's concededly less fair doctrine of contributory negligence, in favor of a system of comparative fault. *See Coleman*, 432 Md. at 739, 69 A3d at 1185 (internal citation omitted) ("a system premised on comparative negligence for apportioning fault appears to be 'a more equitable system of determining liability and a more socially desirable method of loss distribution'") (concurring opinion of three members of the Court and a retired, recalled judge). Although my dissent in *Coleman*, 432 Md. at 695-738, 69 A.3d at 1158-84, and again here may appear to be the sort of "really futile gesture" contemplated by Otter, I feel compelled to bear witness to the Court's poor judgment in continuing inferentially to hide behind *stare decisis* or the skirts of the General Assembly. I explained in my dissent in *Coleman* why *stare decisis* does not stand as an insurmountable hurdle to the Court jettisoning the doctrine of contributory negligence. 432 Md. at 703-15, 69 A.3d 1163-1170. Whatever regard the Court holds for purity and consistency in its application of the doctrine of *stare decisis* is, in my view, subject to reasonable suspicion. *See Unger v. State*, 427 Md. 383,

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[1] To my chagrin, the "future majority" I foresaw in my dissent in *Coleman v. Soccer Association of Columbia*, 432 Md. 679, 696, 69 A.3d 1149, 1158-59 (2012), has not arrived on the scene yet.

48 A3d 242 (2012) (noting especially my concurring and dissenting opinion, 427 Md. at 430-33, 48 A.3d at 269-71).

After *Coleman* was decided (9 July 2012), further reasons have accrued in support of this Court turning out contributory negligence in Maryland. As the Petition for Writ of Certiorari, at page 2, points out in the present case:

> Lest there be any doubt that the General Assembly is not going to fix contributory negligence, four judges of this Court, concurring in *Coleman*, believed the legislature "may be poised to take up the issue" and thought it "wise" to encourage it "to do so." 432 Md. at [740, 69 A.3d at 1186] .... [T]he 2014 Session of the General Assembly has now come and gone – without a contributory or comparative bill; without a commission to study the issue; without a commitment to take up the issue at any time in the future.

How much longer will the Court be content to stand on the sidelines observing the benign neglect or inertia of the General Assembly in failing to grapple meaningfully with this dilemma, or, at best, the stalemate for change when the gladiators for the plaintiffs and defense bars fight again to a draw in the legislative arena? Glaciers move at a better pace.

Crediting for the moment Petitioner's version of the facts of the present case,[2] they seem more compelling than those in *Coleman*. Petitioner, a legally blind person, was a pedestrian crossing Pratt Street in downtown Baltimore, on his way to work. Respondent was a motorist, also on her way to work, in the far left lane of Pratt Street. Pratt Street, at

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[2] A late-filed answer to the Petition filed with the Court by Respondent did not take exception to Petitioner's recitation of the facts. There is no opinion of the Court of Special Appeals because the Petition here asks us to take the appeal on bypass of the intermediate appellate court.

its intersection with Sharp Street, is a four lane thoroughfare, with all four lanes traveling one-way, west-to-east. The intersection is controlled by a traffic signal that includes pedestrian walk lights and a wide pedestrian cross-walk.

At approximately 7:00 a.m., on 9 April 2010, Petitioner arrived at the southwestern corner of this intersection. Though blind in his left eye, Petitioner possessed sufficient residual visual acuity in his right eye to allow him to manage without a white cane. The "walk" light was illuminated, so he began to cross in the crosswalk. He got safely to the third lane, but was struck at that point by Respondent's vehicle.

Respondent, who turned onto Pratt Street several blocks before Sharp Street, established herself immediately in the far left-hand lane. As she traveled the rush hour thoroughfare, she encountered an uninterrupted series of green lights for traffic headed in her direction. Nothing blocked her view of traffic or pedestrians to her right. Until the impact with Petitioner, she saw nothing out of the ordinary – no cars panic-stopping or swerving, no horns honking, and no tires squealing.

Shortly after she crossed the Sharp Street intersection, Respondent felt, or heard, something come into contact with her car. She stopped and, once out of her car, discovered Petitioner lying next to it. This was the first time she saw him. Regarding the point of impact, she placed it several feet to the west of her car, because that is where her vehicle was located when she got out of the car.

Respondent defended against Petitioner's negligence action in the Circuit Court for Baltimore City partly on the basis of contributory negligence. The trial judge rejected Petitioner's proposed comparative fault jury instructions (to which he noted exceptions)

and, instead, gave a contributory negligence instruction (to which Petitioner objected timely). They jury found Respondent negligent, and Petitioner contributorily negligent. Judgment was entered for Respondent.

If the Court hesitates because it is over-awed by the list of questions it feels it might have to confront were it to embrace comparative fault (see concurring opinion in *Coleman*, 432 Md. at 740, 69 A.3d at 1185-86), I recommend highly the confidence boost it might get from reading Professors Gifford's and Robinette's post-*Coleman* law review article. Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 Md. L. Rev. 701 (2014). The Court need not defer to the legislative process for answers to its questions.

I am left but to hope that another 30 years will not pass, as did between *Harrison v. Montgomery County Board of Education*, 295 Md. 442, 456 A2d 894 (1983), and *Coleman*, before the Court will re-examine the coherence of contributory negligence in modern Maryland, consign it to the tar pit of history, and adopt comparative fault as part of the common law jurisprudence of Maryland negligence law.