Amicus Curiarum

VOLUME 28
ISSUE 1 JANUARY 2011

A Publication of the Office of the State Reporter

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Attorney Grievance Commission v. Christopher A. Palmer, Misc. Docket AG No. 49, September Term, 2009, filed 30 November 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/49a09ag.pdf

ATTORNEY GRIEVANCE – DISBARMENT = MRPC 1.1; 1.15(a), (c); 8.4(b), (c), (d); MARYLAND RULE 16-609; MARYLAND CODE (2000, 2010 REPL. VOL.), BUSINESS OCCUPATIONS & PROFESSIONS ARTICLE § 10-306 – DISBARMENT IS WARRANTED, IN THE ABSENCE OF "COMPELLING EXTENUATING CIRCUMSTANCES," WHERE AN ATTORNEY: (a) REPEATEDLY AND INTENTIONALLY MISAPPROPRIATES CLIENT FUNDS (UNEARNED FEES) BY TRANSFERRING THEM FROM THE FIRM'S ESCROW ACCOUNT TO THE FIRM'S GENERAL ACCOUNT, IN ORDER TO APPEAR AS IF HE IS BRINGING IN MORE INCOME TO THE FIRM; (b) REPEATEDLY MISREPRESENTS TO HIS EMPLOYER THAT HE HAS INITIATED SUITS ON BEHALF OF CLIENTS, WHEN SUCH SUITS WERE NOT FILED, AND (c) FABRICATES PLEADINGS TO MAKE IT APPEAR AS IF HE IS REPRESENTING CLIENTS ADEQUATELY.

Facts: The Attorney Grievance Commission (AGC) charged Christopher A. Palmer with violating the following Rules of Professional Conduct: 1.1 (competence); 1.15(a), (c) (safekeeping property); 8.4 (b), (c), (d) (misconduct); Maryland Rule 16-609 (prohibited transactions); and Maryland Code (2000, 2010 Repl. Vol.), Business Occupations & Professions Article, § 10-306 (misuse of trust money). On 30 March 2010, The Honorable Brett W. Wilson of the Circuit Court for Dorchester County conducted an evidentiary hearing, and on 6 May 2010, filed findings of fact and proposed conclusions of law.

Palmer graduated from the University of Maryland School of Law in 1998, and, following a one-year judicial clerkship, began working for a law firm in Ocean City, Maryland. The hearing judge found that, in 2008, Palmer transferred funds belonging to clients from the firm's escrow account to the firm's general account before corresponding fees had been earned. Palmer made these monetary transfers in order to make it appear that his collected fees were higher than they actually were, so as to improve his prospects of being offered a partnership interest in the Firm. Further, Palmer failed to represent adequately three clients by drafting complaints which he never filed, misrepresenting to partners of the Firm that the complaints had been filed, and, in at least one case, fabricating court documents to support his falsehoods.

The hearing judge found that it was Palmer's desire to achieve a balance between family and work life, coupled with increased pressure to become a partner at his law firm, that likely triggered his first instance of misconduct in June 2008 and the series of misconduct that followed. The hearing judge noted that Palmer sought counseling with a psychologist in January 2009 and that Palmer was not diagnosed as suffering from any mental illness or condition. In mitigation, the hearing judge found that Palmer was forthcoming about and remorseful for his misconduct, and the hearing judge noted numerous letters of reference submitted to the court vouching for Palmer's character and professional ability generally.

The hearing judge concluded ultimately that Palmer violated Rules of Professional Conduct 1.1 (competence); 1.15(a) and (c) (safekeeping property); 8.4(b)-(d) (misconduct); Maryland Rule 16-109(a) (prohibited transactions); Maryland Code (2000, 2010 Repl. Vol.), Business Occupations & Professions Article, § 10-306 (misuse of trust money). Before the Court of Appeals, Bar Counsel sought disbarment. Palmer, contesting only the sanction, sought a les severe disciplinary response.

Held: The Court agreed that the hearing judge's findings and conclusions were supported by clear and convincing evidence. The only issue before the Court, then, was the appropriate sanction.

The AGC cited *AGC v. Vanderlinde*, 364 Md. 376, 773 A.2d 463 (2001) in support of its recommendation that the Court disbar Palmer. Noting "much angst and consternation . . . [that had] arisen in applying *Vanderlinde* to attorney discipline cases in the almost decade since it was filed," the Court took the opportunity to revisit *Vanderlinde* and what it stands for. The Court analyzed *Vanderlinde*, agreeing that it held that "in cases of intentional dishonesty, misappropriation cases, fraud, stealing, serious criminal conduct and the like, [the Court] will not accept as 'compelling extenuating circumstances' [sufficient to mitigate to a sanction less than disbarment] anything less than the most serious and debilitating mental or physical health conditions, arising from any source that is the 'root cause' of the misconduct *and* that also result in an attorney's utter inability to conform his or her conduct in accordance with the MRPC." What remained unresolved according to the Court, however, was whether "a mental disability that is the 'root cause' of the misconduct [is] the only mitigating factor for which th[e] Court will impose a sanction less than disbarment," or, alternatively, that "*Vanderlinde* [was] intended to merely stand for the proposition that, *when faced with proffers of mitigation involving mental disability*, such proffers must pass the 'root

cause' analysis." The Court concluded that *Vanderlinde* and subsequent cases applying its reasoning supported the latter understanding.

The Court first looked to *Vanderlinde* itself to conclude that it was only intended to apply to cases in which proffers of mitigation involving mental disabilities are made to the hearing judge. Specifically, the Court quoted the road map which *Vanderlinde* said its analysis would follow: "we shall address those concerns, then discuss the history of the cases of this Court where similar problems have been proffered as mitigation . . . . We shall then declare and reiterate once again the current position of the Court in respect to the appropriateness of using such matters to mitigate findings of sanctions in cases involving theft, misappropriation or other forms of dishonest conduct." The Court reasoned that the usage of the phrases "similar problems" and "such matters" informed the Court that *Vanderlinde* intended its holding to apply only to situations where similar mental disability mitigation defenses are offered by a respondent. This conclusion, the Court noted, was consistent with the "long-chanted mantra that the appropriate sanction in an attorney-discipline matter 'depends on the facts and circumstances of each case.'"

The Court found *Vanderlinde* relevant to Palmer's case as he, in attempting to explain his misconduct, proffered evidence from his post-misconduct visits with a psychologist. The Court established that, when *Vanderlinde* is pertinent, it mandates a three-step process to determine whether a mental disability rises to the level of mitigating disbarment to a less severe sanction. First, there "needs to be almost conclusive, and essentially uncontroverted evidence that . . . the attorney had a serious and debilitating mental condition." Second, the mental condition must serve as the "root cause" for the misconduct, meaning that it must "affect[] the ability of the attorney in normal day to day activities, such that the attorney was unable to accomplish the least of those activities in the normal fashion." Finally, the mental condition "must also result in the attorney's utter inability to conform his or her conduct in accordance with the law and with the [Rules of Professional Conduct]." The Court noted that the evidence as to Palmer's encounters with his psychologist failed all three tests, considering that he was not diagnosed as suffering from any mental illness that caused the misconduct, nor was there a mental disability that caused Palmer to be incapable of conforming his conduct in accordance with the law, Rules of Professional Conduct, or other statutory or regulatory requirements.

The Court held *Vanderlinde* inapposite in dealing with other mitigating factors found by the hearing judge, including Palmer's remorse, cooperation with bar counsel, otherwise fine reputation in the legal and professional communities, a lack of pecuniary loss to clients, and some degree of self-reporting to the partners of the law firm of portions of his misconduct. The Court analogized the facts of the present case to those in *AGC v. Ezrin*, 312 Md. 603, 541 A.2d 966 (1988), a case in which an attorney stole large sums of money from his law partners. In that case, the Court reviewed similar arguments made in mitigation – stellar reputation as an attorney, good character, lack of prior disciplinary actions, restitution to his law partners, and cooperation with bar counsel – ultimately finding that none of those proffers constituted the requisite "compelling extenuating circumstances" sufficient to mitigate the sanction to anything less than disbarment. The Court in the present case reasoned that Palmer similarly had a fine general reputation in both the legal and general communities, the lack of financial harm suffered by his law firm or its clients, full cooperation with bar counsel, and the absence of a prior disciplinary record, yet that it was not aware of a case where "this cocktail of mitigating factors has been recognized as sufficient to mitigate analogous violations . . . to anything less than disbarment."

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Attorney Grievance Commission v. David E. Fox, Misc. AG No. 6, September Term, 2009 Filed December 20, 2010, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2010/6a09ag.pdf

ATTORNEY GRIEVANCE COMMISSION – SANCTIONS – DISBARMENT

Facts: Respondent was hired in two separate auto tort cases. In the first case, he filed a complaint but did not serve the defendant. The case was later dismissed for lack of service, and Respondent took no significant steps to reopen the case. In the second case, Respondent sought payments from his client's insurance company for injuries sustained by the client during an accident with an uninsured motorist. Respondent settled the case, without first consulting his client, and the insurance company repeatedly mailed checks to Respondent to be passed along to the client, but the client never received the checks from Respondent.

In neither case did Respondent take the actions necessary to provide his clients with the relief they sought. Each case languished for several years due to Respondent's inattentiveness. During that time, Respondent failed to communicate timely with his clients. Additionally, he told the clients in the first case that he had been to court for their case, when, in fact, he had not. Finally, in both cases, the clients sought new counsel and Respondent did not respond to the new attorneys when they inquired about the cases.

The Office of Bar Counsel investigated Respondent's conduct relating to each of the two cases. During the investigation of the second case, Respondent repeatedly failed to respond in a timely manner to requests by Bar Counsel for information. Eventually, after multiple requests and extensions of time from Bar Counsel, Respondent produced the information sought.

The hearing judge, after reviewing evidence presented by the parties, produced findings of fact and concluded that Respondent violated Maryland Lawyers' Rules of Professional Conduct 1.1, 1.2, 1.3, 1.4, 1.16(d), 8.1(b), and 8.4(a), (b), and (d). The hearing judge also found no mitigation in favor of Respondent. Petitioner filed no exceptions, and recommended disbarment as the appropriate sanction. Respondent filed exceptions to the conclusions of the hearing judge that he violated the Rules of Professional Conduct and to the judge's finding of no mitigation. Further, Respondent recommended reprimand as the appropriate sanction, or, at worst, a short suspension.

Held: Respondent violated Rules 1.1, 1.2, 1.3, 1.4, 1.16(d), 8.1(b), and 8.4(a), (b), and (d), did not sufficiently demonstrate any mitigation, and the appropriate sanction is disbarment.

Overruling the exceptions, the Court of Appeals held that Respondent violated: Rule 1.1 (competence) by failing to take the proper steps to pursue his clients' cases; Rule 1.2 (scope of representation and allocation of authority between client and lawyer) by taking no action to achieve the purposes for which he was hired by the clients and by not consulting with his client prior to settling with the insurance company; Rule 1.3 (diligence) by failing to pursue, or even monitor, his clients' cases; Rule 1.4 (communication) by not responding to repeated inquiries from his clients about the status of their cases; Rule 1.16 (declining or terminating representation) by effectively abandoning the representation of his clients and then not communicating with the new lawyers; Rule 8.1(b) (disciplinary matters) by failing repeatedly to respond to Bar Counsel in a timely manner; Rule 8.4(a) (professional misconduct) by violating the above-mentioned Rules; Rule 8.4(b) (misrepresentation) by telling his clients that he had been to court for their case when, in fact, he had not; and Rule 8.4(d) (conduct prejudicial to the administration of justice) by failing to cooperate with Bar Counsel's investigation.

Next, the Court overruled Respondent's exceptions to the hearing judge's conclusion that he demonstrated no mitigation. The Court acknowledged Respondent's assertions that he suffered health problems, used a manual calendar and case tracking system, had inconsistent mail delivery to his office, and sustained a flood in his office. The Court held that, given the multi-year span during which Respondent effectively abandoned the cases, and his repeated failure to communicate timely with either his clients or with Bar Counsel, none of the facts asserted, even if true, mitigated the violations. In addition, the Court held, based on the requisite deference to the hearing judge's finding, that Respondent did not prove any genuine remorse for his problematic behavior.

Finally, by analogizing the facts of this case to those of *Attorney Grievance Comm'n v. Kwarteng*, 411 Md. 652, 984 A.2d 865 (2009), in which disbarment was ordered, the Court determined that disbarment is the appropriate sanction for Respondent.

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Ahmed M. Ali v. CIT Technology Financing Services, Inc., No. 7, September Term, 2010, filed 21 October 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/7a10.pdf

COMMERCIAL LAW – STATUTE OF LIMITATIONS – TOLLING PROVISION GENERALLY – PETITION IN INSOLVENCY – THE PROVISION TOLLING THE GENERALLY APPLICABLE THREE YEAR STATUTE OF LIMITATIONS UPON THE FILING OF A "PETITION IN INSOLVENCY" OPERATES UPON THE FILING OF A FEDERAL BANKRUPTCY PETITION UNTIL THE DISMISSAL OF THAT PETITION. AT THE TIME OF THE TOLLING PROVISION'S ENACTMENT, THE WORD "PETITION IN INSOLVENCY" WAS UNDERSTOOD TO ENCAPSULATE WHAT IS CURRENTLY WITHIN THE AMBIT OF FEDERAL BANKRUPTCY LAW, AND ANY DISTINCTION THAT EXISTED BETWEEN BANKRUPTCY AND INSOLVENCY PROCEEDINGS LARGELY HAD DISAPPEARED AT THE PROVISION'S ENACTMENT.

Facts: Pursuant to a 17 June 1997 lease, the predecessor of CIT Technology Financing Services, Inc. (CIT), leased medical equipment to Dr. Ali for a period of sixty months. Following a car accident affecting his ability to earn through the practice of medicine, Dr. Ali defaulted on the loan, at which time CIT accelerated the balance due and demanded payment.

On 11 June 2001, Dr. Ali filed a Chapter 11 bankruptcy petition in federal court. At that time, pursuant to federal law, an automatic stay went into effect, whereby CIT (and all other creditors) were barred from filing suit on any pre-petition debts. Prior to September 2003, CIT filed a motion to lift the automatic stay, which the bankruptcy court granted. On 21 June 2006, allegedly because Dr. Ali did not comply with bankruptcy procedures in completing a plan of reorganization, the bankruptcy court dismissed Dr. Ali's petition for bankruptcy.

Approximately six months after the dismissal of the bankruptcy suit, on 18 January 2007, CIT filed suit in the Circuit Court for Prince George's County to enforce its rights under the lease. Before the Circuit Court, Petitioner did not deny that he breached the lease; rather, he argued that CIT's suit was barred by Maryland Code (1974, 2006 Repl. Vol.) Courts & Judicial Proceedings Article, § 5-101, which provides the generally applicable three year statute of limitations. The Circuit Court entered judgment in favor of CIT, rejecting Dr. Ali's claim that the suit was time-barred, explaining that § 5-202 – which tolls the generally-applicable statute of limitations upon a debtor filing a "petition in insolvency" – operated to toll the statute of limitations for a period of time sufficient to make CIT's suit timely.

Dr. Ali appealed timely to the Court of Special Appeals (COSA), which, in a reported opinion, *Ali v. CIT Tech. Fin. Servs., Inc.*, 188 Md. App. 269, 981 A.2d 759 (2009), affirmed the decision of the Circuit Court. Before the COSA, the question was whether a federal bankruptcy petition constitutes a "petition in insolvency," within the meaning of § 5-202, sufficient to toll the generally applicable statute of limitations. The COSA undertook a lengthy and impressive survey of the history of state insolvency and federal bankruptcy law, noting that insolvency and bankruptcy proceedings, while once purely an issue of state law, had shifted predominately to the federal arena. The COSA concluded that, considering the shift from state law to federal law, had the Legislature intended a federal bankruptcy petition not to constitute a "petition in insolvency," it would have repealed the statute. Rather, because the statute survived many legislative sessions and recodifications without material change, presumably, the Legislature intended that the tolling provision remain in effect. Dr. Ali filed a petition for writ of certiorari, which we granted, to consider "whether the lower court erred when it upheld the trial court's decision which held that the statute of limitations on respondent's claim had not expired at the time the instant complaint was filed."

Held: Affirmed. Like in the COSA, the issue before the Court was whether a federal bankruptcy petition constitutes a "petition in insolvency" within the meaning of § 5-202, sufficient to toll the generally applicable three-year statute of limitations. Dr. Ali argued that the Legislature could not have intended a federal bankruptcy petition to constitute a "petition in insolvency," as no federal bankruptcy procedures were authorized in 1814, when the tolling provision was first enacted. Further, Petitioner argued that the Legislature's continual recodification of the statute, without expressly designating federal bankruptcy petitions as "petitions in insolvency," evinces a legislative intent for the phrase not to encapsulate federal bankruptcy petitions. CIT argued that the Legislature's repeated recodification of the provision, during a time when federal bankruptcy practice burgeoned, evinces its intent for the state provision to apply to federal bankruptcy petitions.

In determining whether a federal bankruptcy petition constitutes a "petition in insolvency," the Court was faced with the task of construing the phrase "petition in insolvency." Looking to the plain meaning of the statute, various 19th-century dictionaries were examined and the Court concluded that a "petition in insolvency" is a petition "filed by one in relation to his or her inability to pay off his or her debts in full." Noting that federal bankruptcy proceedings only involve

individuals unable to pay off debts in full, the Court concluded that a federal bankruptcy petition falls squarely in the definition of "petition in insolvency."

The Court also concluded that the statutory context and legislative purpose underlying § 5-202 confirms the conclusion of the plain-meaning analysis. The Court noted that, while at one time there was a distinction between "insolvency" and "bankruptcy," in 1814 – the statute's inception – there was no clear line of demarcation between the two terms. Therefore, "the Legislature presumably intended for § 5-202 to apply to what was once segmented into 'bankruptcy' and 'insolvency' proceedings, and to what is now predominantly under the purview of federal bankruptcy law." Further, the Court concluded that Dr. Ali's construction of the statute would undermine the legislative purpose in enacting § 5-202. The Court noted that the statute was enacted to prevent debtors from manipulating the bankruptcy and insolvency process by entering bankruptcy, waiting for the statute of limitations to expire, and subsequently dismissing the bankruptcy proceeding. Thus, "because the Legislature has repealed most of Maryland's insolvency laws, if § 5-202 is read only to apply to state insolvency laws (or their scant remains), the tolling provision . . . and its accompanying policies preventing debtor abuse, would be rendered largely meaningless." The Court, therefore, concluded that the plain-meaning, legislative history, and legislative purpose of § 5-202 "mandate the conclusion that a federal bankruptcy petition constitutes a 'petition in insolvency.'"

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AGV Sports Group, Inc., et al. v. Protus IP Solutions, Inc., et al., Misc. No. 2, September Term, 2010, Filed December 20, 2010, Opinion by Barbera, J.

http://mdcourts.gov/opinions/coa/2010/2a10m.pdf

CONSUMER PROTECTION ACT - STATUTE OF LIMITATIONS – CJP § 5-102 – STATUTORY SPECIALTIES – MARYLAND TELEPHONE CONSUMER PROTECTION ACT

Facts: AGV brought suit against Protus and other defendants in the United States District Court for the District of Maryland, seeking damages for alleged violations of the Federal Telephone and Consumer Protection Act ("FTCPA") and the Maryland Telephone Consumer Protection Act ("MTCPA"). The FTCPA and MTCPA claims are based upon Protus having allegedly sent numerous unsolicited facsimile advertisements to AGV, some of which were sent more than three years prior to the filing of suit.

In the course of the litigation, the parties disputed the applicable statute of limitations period for a claim brought under the MTCPA. Specifically, Protus disagreed with AGV's contention that the MTCPA was a statutory speciality subject to a twelve-year limitations period under § 5-102 of the Court and Judicial Proceedings Article ("CJP"). Noting that neither the MTCPA itself nor a Maryland court had determined the applicable limitations period, the United States District Court for the District of Maryland certified the question to the Maryland Court of Appeals, pursuant to the Maryland Uniform Certification of Questions of Law Act, Maryland Code (1973, 2006 Repl. Vol.), §§ 12-601 to 12-613 of the CJP.

Accordingly, the Maryland Court of Appeals was asked to decide whether "the Maryland Telephone Consumer Protection Act [is] a statutory 'specialty' law with a statute of limitations of twelve-years pursuant to Maryland Courts and Judicial Proceedings § 5-102(a)(6)?"

Held: Certified question answered "No." The Court of Appeals held that the MTCPA is not a CJP § 5-102(a)(6) "[a]ny other specialty" subject to a twelve-year limitations period.

The Court explained that absent from CJP § 5-102 is a definition for "[a]ny other specialty." Accordingly, the Court looked to the recent decisions of *Greene Tree Home Owners Ass'n v. Greene Tree Assocs.*, 358 Md. 453, 749 A.2d 806 (2000), and *Master Fin., Inc., v. Crowder*, 409 Md. 51, 972 A.2d 864 (2009), to answer the question. Based on criteria set forth in *Crowder*,

a statutory action will constitute a specialty if (1) the duty, obligation, prohibition, or right sought to be enforced is created or imposed solely by the statute, or a related statute, and does not otherwise exist as a matter of common law; (2) the remedy pursued in the action is authorized solely by the statute, or a related statute, and does not otherwise exist under the common law; and (3) if the action is one for civil damages or recompense in the nature of civil damages, those damages are liquidated, fixed, or, by applying clear statutory criteria, readily ascertainable.

The Court then applied this framework to the MTCPA. The Court noted that the MTCPA authorizes a plaintiff to pursue $500 in statutory damages per violation, or alternatively, actual damages for the violation(s). Actual damages, reasoned the Court, are by definition not liquidated or for a fixed sum. Assessment of damages for MTCPA claims would include, for example, costs of the paper and ink used in processing the unsolicited faxes, diminution in the value of the facsimile machine associated with the receipt of those unsolicited faxes, and the lost employee productivity associated with the receipt, review, and disposal of the unwanted faxes, none of which is a fixed or liquidated sum. Furthermore, the Court explained that the conduct prohibited by the MTCPA is also addressable by the common law actions of trespass to chattel and conversion. In light of these characteristics, the Court concluded that the MTCPA does not meet the *Crowder* criteria and, therefore, is not a statutory speciality within the meaning of CJP § 5-102(a)(6).

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Bayly Crossing, LLC, et al. v. Consumer Protection Division, Office of the Attorney General, No. 8, September Term, 2010, filed 22 November 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/8a10.pdf

CONSUMER PROTECTION – MARYLAND HOME BUILDER REGISTRATION ACT – HOMEBUILDER VERSUS EXEMPT REAL ESTATE DEVELOPER – IN DETERMINING WHETHER A PERSON OR ENTITY "UNDERTOOK" TO ERECT OR OTHERWISE CONSTRUCT NEW HOMES, WITHIN THE MEANING OF THE HOME BUILDER REGISTRATION ACT, SUCH THAT THE PERSON OR ENTITY MUST REGISTER AS A HOME BUILDER WITH THE HOME BUILDER REGISTRATION UNIT OF THE CONSUMER PROTECTION DIVISION, ALL PROVISIONS OF A RELEVANT CONTRACT MUST BE ANALYZED, CONSISTENT WITH THE PRINCIPLES OF CONTRACT INTERPRETATION.

CONSUMER PROTECTION – MARYLAND CONSUMER PROTECTION ACT – PROHIBITION AGAINST LIMITING OR PRECLUDING CONSEQUENTIAL DAMAGES – A GENERAL RELEASE THAT DISCHARGES THE SELLER OF CONSUMER REALTY FROM "ANY AND ALL ACTIONS OR CAUSES OF ACTION RELATING TO THE CONSTRUCTION OF [A] HOUSE" VIOLATES SECTION 13-301(13) OF THE ACT, WHICH PROHIBITS THE USE OF "A CLAUSE LIMITING OR PRECLUDING THE BUYER'S RIGHT TO OBTAIN CONSEQUENTIAL DAMAGES AS A RESULT OF THE SELLER'S BREACH OF CANCELLATION OF THE CONTRACT."

Facts: On 19 November 2002, Julia B. Passyn, Theodore B. Passyn, and their son, Theodore B. Passyn, III ("the Passyns"), acquired Bayly Crossing, LLC ("Bayly"), with each taking a one-third interest. Bayly's main assets were thirty undeveloped, single-family residential lots in the eponymously-named Bayly Crossing subdivision in Dorchester County, Maryland. Bayly entered into contracts with various buyers to produce new homes on certain of these lots.

As Bayly was not a registered home builder in Maryland, the contracts specified that Bayly would subcontract with T.B. Passyn & Sons, Inc., a registered home builder in Maryland, to build the homes. This understanding was expressed in the written, essentially form contracts as follows: Bayly, as "SELLER," agreed to "sell and construct . . . a house substantially similar to the seller's model . . . ." Bayly agreed, in a later provision, to "complete . . . a dwelling substantially similar to SELLER'S Model House . . . ." Near the end of the contracts, buyers acknowledged, by signature, that "On __ (date), my home builder, T.B. Passyn & Sons, Inc., MHBR [Maryland Home Builder Registration] # 455 Provided me with a copy of [a] consumer information pamphlet . . . ."

In an addendum entitled "Builder's Notice of Standards and Buyer's General Release to Landowner and Buyer's Acknowledgment of Receipt of Consumer Pamphlet Information," buyers were advised that "T.B. Passyn & Sons, Inc. MHBR 455 is the Builder for [their] house . . . and hereby agrees to grant to the Buyers of said house a One-Year Limited Warranty . . . ." "In exchange or [the] Limited Warranty," the addendum continues, "the Buyer's [sic] hereby grant a general release to Bayly Crossing, LLC ([the Passyns]) Landowners . . . and forever discharge the said Bayly Crossing, LLC ([the Passyns]) from any and all actions or causes of action relating to the construction of the house[s] . . . ."

Between 19 November 2002 and 22 October 2004, seven homes were constructed on Bayly's lots pursuant to similarly limned contracts. The purchase-price amounts in the contracts were paid to Bayly. On 22 October 2004, Bayly sold the remaining undeveloped twenty-three lots to an unrelated real estate development company.

On 12 July 2005, the Consumer Protection Division of the Attorney General's Office ("the Division") filed a Statement of Charges against the Passyns and Bayly, alleging violations of Maryland's Home Builder Registration ("HBRA") and Consumer Protection Acts ("CPA"). These charges alleged that Bayly was operating as a home builder, without properly registering with the State Home Builders Registration Unit ("HBRU").

On 28 September 2005, an Administrative Law Judge ("ALJ") of the Office of Administrative Hearings (OAH), after conducting an evidentiary hearing on the charges, issued a written Proposed Ruling, concluding that Bayly was exempt from the registration requirements of the HBRA. The ALJ reasoned that Bayly "f[ell] squarely within the [statutory] exception [for real estate developers who do not construct homes], and hence, outside of the registration requirement . . . ." The Division filed exceptions to its own adjudicative arm, "the Agency." The Agency granted those exceptions, concluding that Bayly, in fact, "was required to have registered as a home builder" because it "undertook" to construct new homes. The Agency remanded the case to the OAH for "any further proceedings required to resolve factual or legal issues that have not been resolved by [this] ruling . . . ."

Before the remand hearing was held, the Division filed an Amended Statement of Charges against Bayly and the Passyns, alleging a violation of CPA § 13-301(13). Specifically, it claimed that Bayly and the Passyns engaged in an unfair or deceptive trade practice by asking in the contracts for the buyers to grant a general release, in exchange for a one-year

home warranty. After a remand hearing, the ALJ issued a second Proposed Ruling, concluding (as now required) that Bayly and the Passyns violated the "[HBRA] . . . by failing to register as a home builder under the [HBRA]" and "[CPA] §13-301(13) by . . . limiting or precluding the buyer's right to obtain consequential damages as a result of the seller's breach or cancellation of the contract." Bayly and the Passyns filed exceptions to the second Proposed Ruling. On 3 August 2007, the Agency issued a Final Order, upholding the ALJ's Second Proposed Ruling and imposing penalties and costs for the violations.

On 29 August 2007, Bayly and the Passyns filed, in the Circuit Court for Baltimore City, a petition for judicial review of the Final Order. The Circuit Court affirmed the Agency action, prompting an appeal to the Court of Special Appeals by Bayly and the Passyns. The intermediate appellate court affirmed the Agency action, in a reported opinion, while dismissing Bayly "as a party to this appeal for lack of standing." *Bayly Crossing, LLC v. Consumer Prot. Div., Office of the Attorney Gen.*, 188 Md. App. 299, 981 A.2d 777 (2009). Bayly's dismissal was grounded on the fact that its corporate charter in Maryland had lapsed.

A petition for certiorari to this Court, filed by the Passyns alone, ensued, which we granted. *Bayly Crossing v. Consumer Protection Division, Office of the Attorney General*, 412 Md. 255, 987 A.2d 16 (2010). Before oral argument, the Passyns filed a motion to add Bayly as a petitioner.

Held: Reversed in part and affirmed in part. The Passyns did not preserve adequately the question of whether Bayly was dismissed properly as a party by the intermediate appellate court, as neither their initial petition for certiorari nor subsequent motions sought to add the question for our review. As to the HBRA registration question, the Passyns and Bayly did not undertake contractually the obligation to construct new homes and, therefore, were not required to register as homebuilders. Finally, the general release, which protected the Passyns and Bayly from "any and all actions or causes of action relating to the construction of the house[s]," violated the CPA by precluding buyers' rights to obtain consequential damages in the event of contract breach.

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J. Michael Stouffer v. Eric Holbrook, No. 25, September Term, 2010, filed 22 November 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/25a10.pdf

CRIMINAL LAW – DIMINUTION GOOD-CONDUCT CREDITS – RATE OF ACCRUAL – TERM OF CONFINEMENT – DRUG-RELATED OR VIOLENT OFFENSE – CORRECTIONAL SERVICES ARTICLE, SECTIONS 3-701 AND 3-704(B)(2) – RULE OF LENITY – THE GENERAL STATUTORY DIRECTION TO AGGREGATE MULTIPLE SENTENCES INTO A SINGLE TERM OF CONFINEMENT SHOULD BE SUBORDINATED, WHERE NECESSARY, TO AFFORD INMATES A BENEFIT MANDATED BY THE LEGISLATURE. WHEN THE LEGISLATURE USED THE PHRASE "TERM OF CONFINEMENT" IN SECTION 3-704(B)(2), EITHER IT ENVISIONED INMATES LIKE HOLBROOK EARNING GOOD-CONDUCT CREDITS "AS THOUGH THERE WERE NO EXISTING SENTENCE" OR IT INJECTED ENOUGH UNCERTAINTY IN THE STATUTE TO IMPLICATE THE RULE OF LENITY.

Facts: In 1999, Respondent Eric Holbrook was convicted of several non-violent, non-drug offenses in the Circuit Court for Wicomico County. At about the same time, he was convicted also for distributing cocaine. The 1999 non-drug convictions resulted in combined sentences, including active and suspended time, that expired on 5 May 2009. The lone drug offense, however, expired much sooner – on 20 October 2003.

In April 2003, Holbrook was released on parole and, while on parole, committed an assault in the second degree. According to Maryland Code (2002), Criminal Law Article, § 14-101, second degree assault is not a crime of violence. The Circuit Court found that the assault constituted a violation of the terms and conditions of Holbrook's parole. As a result of the parole violation, on 5 May 2006, the court ordered Holbrook to serve five years of "back-up" time. For the second degree assault conviction, the court sentenced Holbrook, on 14 November 2006, to a three year term, to run consecutively to the back-up time.

While re-incarcerated, Holbrook earned certain diminution good-conduct credits against his original, pre-parole sentences. The computation of those credits is not at issue here. Trouble arose, however, with the 598 good-conduct credits Holbrook earned against his new, post-parole sentence for second degree assault (computed originally at a rate of ten credits per month). Sometime after May 2007, the Division disallowed half of these credits, reducing them to 299.

The Division claimed that, under Md. Code (1999, 2008 Repl. Vol.), Corr. Servs. Art. (CS), §§ 3-701 and 3-704(b)(2), Holbrook should have received just five credits per month. Under CS § 3-

701, when a defendant is convicted of multiple crimes, he or she may receive multiple sentences, which are normally aggregated into a single "term of confinement," defined as "the period from the first day of the sentence that begins first through the last day of the sentence that ends last." If the term of confinement includes a violent or drug-related offense, the defendant may earn only five, as opposed to ten, good-conduct credits a month. *See* CS § 3-704(b)(2). Because Holbrook's term of confinement included the sentence for the 1999 drug-related crime (distributing cocaine), the Division posited that he was entitled only to the lesser accrual rate of five good-conduct credits a month. In reply, Holbrook charged that the Division used improperly the ambiguous statutory definition of the phrase "term of confinement" as a "device" to deny him the more favorable rate.

Holbrook sought habeas corpus relief from the Circuit Court for Baltimore City. That Circuit Court found significant that the actual sentence for the 1999 drug conviction – the conviction and sentence upon which the Division relied to disqualify Holbrook from receiving ten good-conduct credits a month – had expired. Consequently, the court concluded that it was improper for the Division to include that conviction in the calculus of the relevant term of confinement. It ordered the Division to restore the revoked credits.

The Division appealed, and the Court of Special Appeals, in an unreported opinion, affirmed. After conducting an extensive canvass of diminution credits jurisprudence (mostly cases of this Court), the intermediate appellate court did not find particularly meaningful the expiration of the sentence on the drug conviction. Rather, it concluded that the "predomina[nt] legislative intent, under the rule of lenity" demands that "inmates who are serving sentences for non-violent, non-drug offenses earn [good-conduct credits] at the rate of ten days per [month]." Thus, it affirmed the judgment of the Circuit Court for Baltimore City.

On the Division's petition, we issued a writ of certiorari. *Stouffer v. Holbrook*, 413 Md. 228, 991 A.2d 1273 (2010).

Held: Affirmed. The general statutory direction to aggregate multiple sentences into a single term of confinement should be subordinated, where necessary, to afford inmates a benefit mandated by the Legislature. When the Legislature used the phrase "term of confinement" in Section 3-704(b)(2), either it envisioned inmates in Holbrook's situation earning good-conduct credits "as though there were no existing sentence[],"

Secretary of Public Safety and Correctional Services v. Hutchinson, 359 Md. 320, 331, 753 A.2d 1024, 1030 (2000), or it injected enough uncertainty into the statute to implicate the rule of lenity.

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Ashanti Cost v. State of Maryland, No. 116, September Term, 2009, filed on December 17, 2010. Opinion written by Adkins, J.

http://mdcourts.gov/opinions/coa/2010/116a09.pdf

CRIMINAL LAW – JURY INSTRUCTIONS – PARTICULAR INSTRUCTIONS – EVIDENCE – PRESUMPTIONS & INFERENCES

Facts: Petitioner Ashanti Cost is an inmate at the Maryland Correctional Adjustment Center in Baltimore City. According to the State, Cost attacked another MCAC inmate, Michael Brown, on September 28, 2005, and Cost was charged with assault in the first degree, assault in the second degree, openly wearing and carrying a deadly weapon with intent to injure, and reckless endangerment.

According to Brown, Cost grabbed Brown's clothing through a food slot in the cell door, pulled him close to the door, and stabbed him in the abdomen with an approximately six-inch long metal weapon "like an ice pick." Brown claimed that the wound "was bleeding a lot . . . running like water." Brown testified that he was admitted to Johns Hopkins Hospital and treated for "internal bleeding, dizziness, a lot of things like that."

Photographs taken of Brown's cell showed significant red staining on the floor of the cell, which Brown identified as his blood, and a towel which Brown had used to try ands top his abdominal bleeding. Major Donna Hansen testified that she did not collect any towels or bedding as evidence, as that would be the responsibility of the Department of Public Safety and Correctional Services's Internal Investigative Unit ("IIU"). Hansen contacted the IIU duty officer, expecting that he would conduct the examination.

By the time another IIU officer made it to the cell, five days later, the cell had been cleaned. In addition, no physical evidence had been preserved from the cell – neither towels nor bedding had been stored for Griffiths's review. Testimony at trial failed to identify who was responsible for unsealing the cell or cleaning it. Brown's clothing from the night of the alleged attack, which the IIU had collected, was not accepted by IIU's crime lab "because of the age and the lack of chain of custody."

At trial, petitioner requested a jury instruction pertaining to the destroyed evidence, and his request was denied. The jury ultimately acquitted Cost of assault in the first degree, assault in the second degree, and openly wearing and carrying a deadly

weapon with intent to injure, but convicted him on the charge of reckless endangerment. Cost was sentenced to five years incarceration, to be served consecutive to his existing prison term. On appeal, the Court of Special Appeals affirmed the judgment of the trial court with respect to refusing to instruct the jury on the missing evidence.

Held: Reversed. The trial court erred in denying the requested jury instruction. Maryland evidentiary law recognizes that missing evidence or spoliation of evidence can be a proper subject for a jury instruction, as instructions on the destruction of evidence are allowed in both civil cases and in criminal cases where a defendant has destroyed the evidence. Missing evidence instructions emphasize that a jury may infer that a party destroying evidence had consciousness of a weak case, or that the evidence was unfavorable to the spoliator. The purpose of such instructions is to draw attention to the fact that a party ordinarily does not withhold beneficial evidence.

This was equally true in this case, where the evenhanded application of the missing evidence inference would provide a remedy for the State's destruction of evidence. This remedy is a matter of substantive evidence law, and does not touch on constitutional due process issues.

Although *Patterson v. State*, 356 Md. 677, 741 A.2d 1119 (1999), addressed a similar issue. that case does not determine the outcome here. *Patterson* held that a defendant must show bad faith by the State to establish a due process violation, and that Maryland evidence law "generally" did not require a missing evidence instruction. *Patterson* left open the possibility that Maryland evidence law could provide for a remedy for destroyed evidence, in the case of more egregious actions than were present there. The current case presents such compelling circumstances, and thus that it is the exception to the rule establish in *Patterson*.

This holding is consistent with an emerging consensus of courts which have rejected, under multiple theories, a universal requirement that a defendant show "bad faith" by the State before being entitled to any remedy. That requirement has its origins in a Supreme Court case, *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333 (1988). Most states and commentators that have considered *Youngblood* have refused to require a showing of "bad faith" in all circumstances.

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State of Maryland v. Jason Mayers, No. 30, September Term 2010. Opinion filed December 22, 2010 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2010/30a10.pdf

CRIMINAL LAW - SEXUAL ASSAULT

Facts: Jason Mayers was convicted by a jury in the Circuit Court for Somerset County of second degree sexual offense, second degree assault, and fourth degree sexual offense, involving an encounter with S.C., an eighteen-year-old sophomore at the University of Maryland–Eastern Shore (UMES), in which Mayers fondled S.C.'s breast and vagina and also performed oral sex or cunnilingus on S.C. against her will. Mayers was charged in a five count criminal information with offenses committed against S.C. in November of 2003, although only the fourth count, dealing with the second degree sexual offense related to the act of cunnilingus, was at issue in this appeal.

At a one day trial, S.C. described that she was a student living in a residence hall suite at UMES during the Fall of 2003, along with five other female suite mates. She recounted that on Friday, November 14, 2003, her roommate informed S.C. that her boyfriend was visiting the campus with a male friend for the weekend. The roommate did not disclose that Mayers was the male friend; S.C. and Mayers had engaged in consensual sexual intercourse on one occasion several months earlier, but had not been in touch since then. S.C. testified that on the night of November 14, she had a headache and decided to stay home and rest in the lower berth of the bunk bed she shared with her roommate, rather than join her friends at a campus party. At about 6:45 a.m. the next morning, Mayers came to the suite, knocked on the door, and was admitted by one of S.C.'s other roommates, who permitted Mayers to go to S.C.'s bedroom to find his male friend. S.C. testified that when Mayers entered the room, she was asleep on the bottom bunk bed, facing the wall. Mayers tugged on her shoulder and S.C. said "no." S.C. further testified that Mayers smelled of alcohol and marijuana and although she repeatedly said "no," he began fondling her breast and vagina. S.C. pushed Mayers's hands away when he attempted to touch her breast and to digitally penetrate her. Despite her protestations, Mayers then climbed on top of S.C. and performed cunnilingus. S.C. testified that she "froze" and was "horrifically scared" that Mayers would continue to rape her, force her to perform fellatio on him, or that she would contract a sexually transmitted disease from the unprotected sex. S.C.'s suite mates also testified regarding S.C.'s depressed emotional state after the attack.

Mayers moved for judgment of acquittal at the close of the State's case, arguing that there was not sufficient evidence of "force or the threat of force" under Section 3-306(a) of the Criminal Law Article, which defines a second degree sexual offense. Specifically, Mayers asserted that there was no evidence of verbal threats or that S.C. had sustained any physical injury. Judge Daniel M. Long denied the Motion. After less than a half hour of deliberation, the jury found Mayers guilty of second degree assault, second degree sex offense, and fourth degree sex offense.

On appeal, when faced with the sufficiency of the evidence of Mayers's use of "force or the threat of force" in order to perform cunnilingus, a majority of the panel of the Court of Special Appeals determined that there was insufficient evidence that Mayers employed force, either actual force or the threat of force. The dissent, authored by Judge Deborah S. Eyler, opined that a rational jury could conclude that Mayers applied force to overcome S.C.'s resistance, because S.C. said "no" over and over again, and attempted to push Mayers's hands away when he tried to touch her breast and when he tried to penetrate her digitally, and also reasoned, regarding threats of force, that whether S.C.'s fear that Mayers would force her to perform fellatio was reasonable, was a jury question.

Held: The Court of Appeals reversed. The Court reviewed the legislative history of Section 3-306(a) of the Criminal Law Article, as well as jurisprudence considering the notion of force as coextensive with resistance on the part of the victim, and emphasized that resistance is relative and should be measured by the fact-finder. The Court rejected Mayers's argument that an assailant's use of force or threats of force must be more violent than in the present case to constitute a violation of the statute, because an assailant's use of force or the threat of force is within the purview of the trier-of-fact. The Court concluded that a reasonable jury could have determined that Mayers employed force or the threat of force to perpetrate the act of cunnilingus on S.C., because S.C. verbally resisted Mayers's advances and also physically resisted, pushing his hands away from her breast and vagina. In addition, S.C. testified regarding her fear of Mayers; she recounted that she was awakened from sleep, having complained of being ill, and also that Mayers smelled of alcohol and marijuana. S.C. further testified that she repeatedly said "no," but that Mayers would not relent, and also physically resisted, to no avail, such that she feared that Mayers would use her for his own sexual gratification regardless of her unwillingness.

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Winston Elliott v. State of Maryland, No. 24, October Term 2010, filed December 21, 2010. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2010/24a10.pdf

CRIMINAL LAW AND PROCEDURE – SUA SPONTE REVIEW – INEVITABLE DISCOVERY

CRIMINAL LAW AND PROCEDURE – DISCLOSURE OF A CONFIDENTIAL INFORMANT

Facts: In mid-2006, Winston Elliott was arrested in a shopping center parking lot in Prince George's County, based on information provided by a confidential informant. On the morning of April 12, the confidential informant told the police that Elliott would be delivering a large amount of marijuana to the shopping center that afternoon. The informant gave a physical description of Winston, and told police that he would arrive at the location at a certain time. Based on the tip, the police set up a surveillance unit in the parking lot. When Elliott arrived, he exited his vehicle and was immediately apprehended by the SWAT team. While police aimed weapons at him, Elliott was ordered to the ground, handcuffed, and his keys were removed from his pants pocket. Once Elliott was secured, a K-9 unit arrived on the scene and the K-9 dog alerted to marijuana in the trunk of Elliott's car. The police then drove Elliott and his car to the police station for processing. At the station, 20 pounds of marijuana was found in the trunk of the vehicle.

Elliott was charged with possession and possession with intent to distribute marijuana. Prior to trial, Elliott filed a motion to suppress the evidence seized, and a motion to compel disclosure of the identity of the confidential informant. Elliott argued that he was unlawfully arrested when he was initially apprehended and therefore the evidence seized from the vehicle should be suppressed. Elliott also argued that the identity of the informant should be disclosed because the identity was relevant and helpful to the defense. The Circuit Court denied both motions, finding that Elliott was merely detained, rather than arrested, at the time of the search and that the identity of the informant was not relevant to the defense. Elliott was convicted of both counts in a jury trial.

Elliott appealed his conviction, arguing that the trial court erred in denying his motions. The Court of Special Appeals affirmed his conviction. The intermediate appellate court agreed with Elliott in holding that he was arrested rather than merely detained, when he was apprehended. The court, however, invoked

the doctrine of inevitable discovery *sua sponte* and held that the evidence was lawfully admitted despite the unlawful arrest. The court also affirmed the trial court's denial of the motion to compel, holding that the defense did not meet its legal burden of proving why the identity was material.

Held: Reversed and remanded for a new trial in the Circuit Court for Prince George's County.

It was error for the Court of Special Appeals to raise the issue of inevitable discovery *sua sponte*. The record from the suppression hearing was not sufficiently developed for the State to prove that the evidence would have inevitably been discovered. Further, applying the doctrine *sua sponte* would result in unfair prejudice to the defendant. Nonetheless, the Court of Appeals affirmed the denial of the motion to suppress the evidence because, based upon an independent constitutional appraisal, the Court held that the K-9 alert of the vehicle provided sufficient probable cause to justify the search and that the illegal arrest was not necessarily causally related to the discovery of the marijuana.

The Court of Special Appeals also erred in upholding the denial of the motion to compel disclosure of the identity of the confidential informant. Although Maryland recognizes the privilege of the State to protect an informant's identity, the privilege is limited. The Court applied the balancing test outlined by the Supreme Court in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L. Ed. 2d. 639 (1957), which requires that a court balance the State's interest in protecting the informant's identity with the defendant's interest in a fair trial and right to prepare a defense. Neither the Court of Special Appeals nor the Circuit Court properly performed this balancing test. The identity of the informant was material to Elliott's defenses and the determination of probable cause. Because the Circuit Court and the Court of Special appeals did not apply the correct legal principles, the case is remanded for a new trial.

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In re Adoption/Guardianship of Tatianna B., No. 36, September Term 2010. Opinion filed December 3, 2010 by Battaglia, J.

http://mdcourts.gov/opinions/coa/2010/36a10.pdf

FAMILY LAW - CINA

Facts: On December 8, 2009, a TPR hearing regarding the parental rights of Hyacinth M., as they pertained to her three-year-old daughter, Tatianna B., commenced in the Circuit Court for Montgomery County, sitting as a juvenile court. During the hearing, the Montgomery County Department of Health and Human Services asked the court to qualify Dianna McFarlane, a licensed clinical social worker, as an expert. Ms. McFarlane testified that she is licensed by the State of Maryland in the field of clinical social work, that she possesses a master's degree in the field of social work and has six years' experience working for the Department. As to her familiarity with the case, she stated that it was assigned to her in her role as a foster care worker, after Tatianna B. was adjudicated as a child in need of assistance. She, then, laid out the factors she considered in her assessment regarding the risk to Tatianna B., if she were to be placed back into the care of her mother. Ms. M.'s counsel objected to the admissibility of her testimony, arguing that Ms. McFarlane could provide expert testimony generally in relation to social work matters but that she could not opine regarding the risk of future harm to Tatianna B. were she to be returned to the care of Ms. M., i.e., a "risk assessment." The juvenile judge overruled Ms. M.'s counsel's objection. Thereafter, the juvenile judge issued a written order terminating the parental rights of Ms. M. for unfitness, determining that she "pose[d] an unacceptable risk to . . . [the] future safety" of Tatianna B. Ms. M. appealed the juvenile judge's ruling to the Court of Special Appeals, and the Court of Appeals granted certiorari on its own initiative prior to any proceedings in the intermediate appellate court.

In the Court of Appeals, Ms. M. argued that the juvenile judge erred "by accepting Ms. McFarlane as an expert witness capable of determining whether Ms. M. posed a risk to Tatianna [B.] . . . ." The State argued, conversely, that it was not an abuse of discretion to qualify a licensed clinical social worker as an expert in social work, with experience and training in risk assessment, permitting him or her to testify regarding the risk of future harm to a child in a household. The State contended, moreover, that "Ms. McFarlane was eminently qualified to testify as an expert witness in this case."

Held: The Court of Appeals affirmed. The Court first reviewed the statute governing the licensure of social workers in the State of Maryland. The Court noted that, under the statute, an individual must have extensive education and training in order to be licensed as a clinical social worker. The Court determined that, because of Ms. McFarlane's education, training and expertise as a licensed clinical social worker, it was not an abuse of discretion for the juvenile judge to qualify her as an expert in social work, a finding to which Ms. M.'s trial and appellate counsel conceded. The Court further determined that the juvenile judge did not abuse her discretion in permitting Ms. McFarlane to opine regarding the risk of future harm to Tatianna B., because the case was assigned to Ms. McFarlane in her role as a foster care worker, which required her to "always assess for risk" and "always ensur[e] that the child is safe," as well as the fact that, to prepare for this, she had attended trainings and workshops regarding risk assessment, and that she had maintained an additional caseload, for which she had presented opinions regarding risk assessment in court. The Court noted, moreover, that Ms. McFarlane had experience with Tatianna B. and Ms. M, as well, in which she monitored the child's health and emotional well-being concomitant with monthly visits and had monthly contact with Ms. M., in which she interviewed Ms. M. and provided referrals to enable Ms. M. to seek appropriate treatment. The Court also observed that, once a child is adjudicated as a child in need of assistance, under the Code of Maryland Regulations, a social worker must thoroughly assess the risk of harm to the child in recommending a permanency plan involving whether the child does or does not return to the care of his or her parents.

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Michele Collins v. Nat'l. R.R. Pass. Corp., No. 143 September Term, 2009, filed December 1, 2010. Opinion by Greene, J.

http://mdcourts.gov/opinions/coa/2010/143a09.pdf

FEDERAL EMPLOYEE'S LIABILITY ACT - JURY INSTRUCTION – ASSUMPTION OF RISK- CIVIL PROCEDURE – MOTION FOR JUDGMENT

Facts: Robert Collins was fatally injured while working on the catenary system owned and operated by the National Railroad Passenger Corporation. Subsequently, his surviving widow brought survivorship and wrongful death actions against the company pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§ 51– 60 (2006). The Railroad contended that the Decedent was the sole cause of his fatal injuries because he: violated a safety rule, which required employees to remain at a three-foot distance from electrified equipment, that he chose to encounter electrified equipment even though there were alternatives, and that he, and the entire crew, were well aware of the dangers of working with electrified equipment. Essentially, the Railroad pursued a contributory negligence defense. Under the Act, an employer may allege contributory negligence, but not assumption of risk, as an affirmative defense. Assumption of risk is barred explicitly by the statute. At trial, the Plaintiff asked the judge to instruct the jury that it could not find the Railroad to be not negligent because the Decedent assumed the risks of his injury. In the Plaintiff's view, the evidence adduced by the Railroad, which focused on knowledge of the dangerous condition and the voluntary encounter with the electrified equipment, implicitly raised the barred assumption of risk defense. The trial judge declined to give the proposed instruction. The Railroad prevailed at trial and on appeal.

Because the intermediate appellate court affirmed the trial judgment, which was favorable to the Railroad, it did not address the issue of the propriety of the trial court's denial of the Railroad's motion for judgment at the close of evidence.

Held: The Court of Appeals reversed. In this case, the evidence tended to show Decedent's knowledgeable, voluntary encounter with the energized equipment aboard the Cat Car, a dangerous condition of his work environment, while executing customary duties as a member of the maintenance crew. Consequently, the jury may have relieved Amtrak of liability by finding that the Decedent was the sole cause of his fatal injury because he assumed the risks involved in performing a dangerous job. Therefore, the trial judge erred in failing to give a cautionary instruction to clarify that only negligence and

contributory negligence were applicable to the case. Petitioner was prejudiced because a finding of contributory negligence would have resulted in apportionment of damages, but a finding of contributory negligence disguised as assumption of the risk would result in a complete bar to recovery.

Because the Court of Appeals remanded the case to the Court of Special Appeals, with directions to remand to the Circuit Court for Baltimore City for a new trial, the Railroad's question as to the propriety of the trial court's denial of its motion for judgment is moot.

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Sonja D. Bates v. Edward S. Cohn, No. 28, September Term, 2010, filed 16 December 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/28a10.pdf

REAL PROPERTY – DEED OF TRUST – FORECLOSURE PROCEEDINGS – EXCEPTIONS – MARYLAND RULES – PROCEDURE FOLLOWING SALE – COURTS' EQUITY POWER – ONCE FORECLOSURE SALE OCCURS, RULE 14-305 LIMITS EXCEPTIONS TO PROCEDURAL IRREGULARITIES OF THE SALE ITSELF OR THE LENDER'S STATEMENT OF INDEBTEDNESS. A CLAIM THAT THE LENDER FAILED TO COMPLY WITH FEDERALLY-MANDATED PRE-SALE LOSS MITIGATION REQUIREMENTS, ON THE OTHER HAND, IS RIPE IMMEDIATELY AND, THEREFORE, ORDINARILY MUST BE RAISED BEFORE SALE AS A GROUND TO STAY OR ENJOIN SALE.

Facts: In February 1999, Sonja D. Bates purchased a residence at 8706 Tryal Court, Gaithersburg, Maryland. She did so with a $148,773.00 loan extended by GMAC Mortgage LLC ("GMAC"), and guaranteed by the Federal Housing Administration ("FHA"). In 2007, Bates encountered difficulty paying her deed of trust note. Although her account with GMAC fell into (and never left) default beginning in October 2007, the lender-declared default that led to the relevant 3 June 2009 foreclosure sale occurred on 2 September 2008. At that point in time, she was $3,072.76 in arrears, according to GMAC.

Between the declaration of default and the ultimate foreclosure sale, GMAC and Bates were in contact on multiple occasions, beginning with a 13 October 2008 notice of default sent to her by GMAC. Over the course of their interactions, GMAC advised Bates that there were options to avoid a foreclosure sale. On 26 November 2008, Bates responded by calling a GMAC representative and inquiring about a loan modification. Eventually, however, because Bates failed to reinstate her account, GMAC referred the matter to its Maryland foreclosure counsel, Cohn, Goldberg & Deutsch, LLC, on 6 January 2009.

Ultimately, on 1 April 2009, Bates phoned GMAC again. She represented to the trial court that she had not pursued earlier and more aggressively a loan modification because, according to her testimony, she was "waiting for the new . . . [federal Home Affordable Modification Program ("HAMP")] to become available . . . ." As Bates discovered, however, HAMP proved ultimately inapplicable to her situation. The representative informed Bates that, to secure a loan modification, she would first have to complete and submit financial "package," so GMAC may determine if she qualified. Despite several submissions of the package, the facts demonstrated ultimately that Bates did not qualify because

her monthly liabilities exceeded her monthly income.

During these events, Bates had been advised that selling her home, pre-foreclosure sale, was another option to consider, should a loan modification be deemed unavailable. Although Bates contacted a real estate agent, by the time the foreclosure sale occurred, the home had not been listed. Bates testified that she did not attempt to sell her home earlier because she did not want to lose money on the sale.

On 3 June 2009, the property was sold at public auction, pursuant to a docketed foreclosure action, to 101 Geneva LLC, a bona fide purchaser for value. After the sale, Bates sought counsel and filed exceptions to the sale in the Circuit Court for Montgomery County, under Maryland Rule 14-305(d). Bates asserted that GMAC did not comply with the federal Housing and Urban Development/FHA pre-foreclosure loss mitigation requirements referred to indirectly in her deed of trust. Because GMAC, it was plead, did not comply with these requirements, Bates posited that the "sale was [not] fairly and properly made," Md. Rule 14-305(e)(2), and the Circuit Court should set it aside.

GMAC responded that Bates waived her claim. It relied on precedent for the proposition that once a sale has taken place, the debtor "may challenge only procedural irregularities at the sale . . . ." *Greenbriar v. Brooks*, 387 Md. 683, 688, 878 A.2d 528, 531 (2005). Because Bates filed exceptions after the sale, GMAC contended that she was limited to asserting complaints regarding procedural irregularities associated with the conduct of the sale, which did not include GMAC's alleged failure to follow pre-sale loss mitigation efforts required by HUD.

On 20 August 2009, the Circuit Court conducted an evidentiary hearing on the exceptions. On 2 September 2009, the trial judge issued an oral opinion, in which she denied the exceptions and ratified the sale. After reviewing reported cases, the judge found no support for the proposition that "this affirmative defense," involving pre-sale loss mitigation, "[may be raised] after the foreclosure at the ratification phase." Moreover, with regard to any allowable post-sale claim of procedural irregularity in the sale itself, the Court found none.

Bates appealed to the Court of Special Appeals. The Court of Appeals, on its initiative, issued a writ of certiorari before the intermediate appellate court decided the appeal. *Bates v. Cohn*, 414 Md. 330, 995 A.2d 296 (2010).

Held: Affirmed. To stay or enjoin a foreclosure sale, a

homeowner must raise, pre-sale, defenses that are immediately ripe, including the defense that the lender failed to comply with federally-mandated pre-sale loss mitigation requirements. After a foreclosure sale occurs, a homeowner generally may file exceptions, challenging only the procedure of the sale itself or the lender’s statement of indebtedness.

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Montgomery County, Maryland v. Melody Butler d/b/a Butler Landscape Design, No. 27, September Term 2010, filed 16 December 2010. Opinion by Harrell, J.

http://mdcourts.gov/opinions/coa/2010/27a10.pdf

ZONING AND LAND USE – SPECIAL EXCEPTIONS – MONTGOMERY COUNTY CODE – ROLE OF PRESUMPTION OF COMPATIBILITY AND INHERENT AND NON-INHERENT ADVERSE EFFECTS

NOTWITHSTANDING THE CASELAW'S DISCUSSION OF THE ROLES OF A PRESUMPTION OF COMPATIBILITY, INHERENT ADVERSE EFFECTS, AND NON-INHERENT ADVERSE EFFECTS IN THE CONTEXT OF SPECIAL EXCEPTIONS (RAISED IN VARYING ZONING REGULATORY SCHEMES), MONTGOMERY COUNTY'S 1999 ZONING ORDINANCE REVISIONS (1) STATING THAT SUCH A PRESUMPTION DOES NOT ARISE IN ANY GIVEN SPECIAL EXCEPTION CASE WITH REGARD TO NEIGHBORING PROPERTIES MERELY BECAUSE AN APPLICANT ADDUCES EVIDENCE THAT ITS APPLICATION MAY COMPLY WITH THE LEGISLATIVE CONDITIONS AND REQUIREMENTS FOR THE PARTICULAR USE, (2) DEFINING THE TERMS "INHERENT ADVERSE EFFECTS" AND "NON-INHERENT ADVERSE EFFECTS," AND (3) REQUIRING THE LOCAL BOARD OF APPEALS TO CONSIDER BOTH CATEGORIES OF EFFECTS OF A PROPOSED SPECIAL EXCEPTION ON NEARBY PROPERTIES AND THE GENERAL NEIGHBORHOOD, WERE WITHIN THE COUNTY'S DISCRETION TO ENACT.

Facts: On 30 July 2007, Melody Butler filed an application for a special exception to operate a landscape contractor's business on her property in Montgomery County, which had theretofor been operating without the requisite special exception. Butler's business provides various landscape services and the materials incident to these services are stored on Butler's property. The company employs up to seven people, who drive to Butler's property, pick up the requisite materials, and are then dispatched to the location of the work to be performed.

The subject property is rectangular in shape, is narrow and deep, and is abutted on either side by two similarly-shaped lots, on each of which sat an occupied residence. The edge of the Butler's driveway lies, at its closest point, about forty-two feet from a neighbor's residence.

Neighbors complained about the noise created by the trucks associated with Butler's activities, including that of hydraulic lifts and the safety alert sounds when they were driven in reverse gear. One neighbor complained of an "offensive odor" perceived on the neighbor's adjacent property emanating from trash and delivery trucks on Butler's property. Finally, neighbors opined that the use of the Butler property for

contracting purposes had "severely diminished" the value of their homes.

On 8 February 2008, the hearing examiner recommended that the application be denied, reasoning that Butler's proposed use would have serious adverse consequences on a neighbor's lot, stemming from the unique configuration of both Butler and the neighbors' lots, singling out the proximity of the driveway to a neighbor's residence. By a vote of 3-1, the Board of Appeals concurred with the hearing examiner's recommendations, stating that "this particular location presents non-inherent adverse effects sufficient to warrant denial of this special exception." The Board highlighted the hearing examiner's findings that "(1) due to the proximity to Weeks's property, the commercial traffic traveling on the driveway would have serious adverse consequences on that property; (2) the noise generated by the trucks and the Bobcats, when operated in reverse, would have serious adverse consequences on both adjoining neighbors; and (3) the configuration of the lots and of the proposed use would produce traffic and noise on the property having immediate adverse effects on the adjoining neighbors."

Butler sought judicial review of the Board's decision by the Circuit Court for Montgomery County. The Circuit Court reversed the Board's decision, holding that "[t]he Board erred as a matter of law in concluding that the inherent effects of a landscaping company operation on the Property rise to the level of non-inherent effects." The County appealed timely to the Court of Special Appeals. On our initiative, we issued a writ of certiorari, *Montgomery County v. Butler*, 414 Md. 330, 995 A.2d 296 (2010), before the intermediate appellate court decided the appeal, to determine whether the "trial court err[ed] in its determination that [the] Board of Appeals had erred in its determination that inherent adverse effects of a landscaping business would become non-inherent adverse effects due to shape and configuration of the subject property."

Held: Circuit Court reversed. The Court revisited its line of cases exploring the essence of special exceptions, spanning from *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981), to *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008), "not to reaffirm, reverse, or modify their holdings, but rather to consider the extent to which a local legislative body . . . may establish a different analytical template for special exception applications than was considered . . . in those cases."

The Court explained some unique provisions of the Montgomery

County Zoning ordinance, most notably the fact that the ordinance does not endorse completely the notion that the use for which a special exception may be allowed by a zoning regulatory scheme is presumptively compatible with other uses permitted as of right in the same zone. Specifically, the Montgomery County ordinance provided that "[t]he fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties." Further, the Montgomery County ordinance defines expressly the terms "inherent adverse effects" – "the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations" – and "non-inherent adverse effects" – the "physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site" – terms that the Court's cases heretofore had not sought to define.

The Court traced the origins of the "presumption of compatibility," for if the presumption was a creature of the Maryland General Assembly, then the County legislature's efforts to, in its zoning ordinance, legislate around the presumption would be in doubt. The Court considered a number of possibilities as to the origins of the presumption of compatibility, noting that "[p]erhaps the presumption . . . stems from a judicially-created inference assigned to the legislative body's decision to allow . . . certain uses in certain zones by a grant of a special exception," and that "inherent in the essence of a special exception is a legislative determination that certain uses will be permissible . . . notwithstanding the likelihood of adverse effects . . . ." Next, the Court opined that the presumption of compatibility stems from the general presumption that reasonable zoning regulations are presumed to "promote the public safety, health, morals, welfare, and prosperity," and that, because a special exception is part of a comprehensive zoning regulatory scheme "that is itself accompanied by the presumption that it promotes public safety, health, and morals, it stands to reason that this broader presumption accompanying the zoning ordinance itself generates the specific presumption of compatibility associated with the . . . allow[ance of] special exceptions." Nowhere in the caselaw and treatises discussing the presumption of compatibility, the Court concluded, is the notion that the presumption is a creature of the Maryland General Assembly, and, accordingly, Montgomery County was free to craft its zoning ordinance as it did. Finally, noting that both the General Assembly and the Court had been silent in attempting to define "inherent adverse effects" and "non-inherent adverse effects," the Court concluded similarly

that the County acted within its discretion to define these terms in the ordinance.

After establishing that Montgomery County was free to enact its ordinance as it did, the Court applied the ordinance to the record made leading to the Board of Appeals's denial of Butler's special exception, stating that the issue as "whether there was substantial evidence in the record before the Board to support its conclusion that there were sufficient non-inherent adverse effects . . . ." The Court restated the evidence regarding the non-inherent adverse effects that was presented to the Board: the relative narrowness of Butler's lot and the surrounding lots, allowing Butler's driveway to come within twenty-two feet of a neighbor's property and forty-two feet of the neighbor's residence; that configuration was such that trucks would need to back up as much as 130 feet accompanied by their beeping sound when operated in reverse; and the lack of noise attenuation. Concluding that the issue of non-inherent adverse effects was at least "fairly debatable," the Court said it was required to defer to the judgment of the Board, which denied Butler's application for a special exception.

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COURT OF SPECIAL APPEALS

Christina Thompson v. State Farm Mutual Automobile Insurance Company, Case No. 977, September Term, 2009, filed December 2, 2010, Opinion by Zarnoch, J.

http://mdcourts.gov/opinions/cosa/2010/977s09.pdf

CONSTITUTIONAL LAW - SEPARATION OF POWERS

Facts: Appellant Christina Thompson was in an automobile accident in Anne Arundel County. The insurer for the other driver settled with appellant for its policy limit of $20,000, and she sought an additional $80,000 through her uninsured/underinsured motorists coverage policy with appellee State Farm. State Farm rejected appellant's claim, and she filed a complaint with the Maryland Insurance Administration ("MIA") against State Farm, alleging that denial of coverage by the insurer was not in good faith. The Associate Deputy Commissioner of MIA, acting on behalf of the Insurance Commissioner, rejected her contention. Appellant then filed a complaint against the insurer in the Circuit Court for Baltimore City requesting damages and a jury trial. The complaint was captioned as a civil action, not as a petition for judicial review under Md. Code Ann., Insurance (INS), § 2-215. State Farm moved to transfer the case to Anne Arundel County. Appellant claimed that by law she was entitled to a Baltimore City forum because she was seeking de novo judicial review of the MIA determination. The circuit court treated the case as a civil action, not a judicial review of MIA's decision, and granted the transfer request, finding that Thompson had no ties to Baltimore City. On appeal, appellant asserts a statutory right, under INS § 2-215, to a Baltimore City venue because she is seeking de novo judicial review of the MIA determination.

Held: Appellant is not entitled to a review of MIA's decision by a jury in Baltimore City. Under *Department of Natural Resources v. Linchester Sand & Gravel Corp.,* 274 Md.211 (1975), neither a court nor a jury can conduct a de novo review of an administrative agency determination. The MIA administrative determination is merely a precondition to civil suit, not an unconstitutional de novo judicial review.

In addition, the venue provision of INS § 2-215 allowing for review in Baltimore City only applies if appellant in fact had sought judicial review of a MIA determination. Appellant is not entitled to venue in Baltimore City because she did not comply with

most of the procedural requirements associated with filing a petition for judicial review.

Venue in this case is governed by the general venue statute, Courts and Judicial Proceedings Article (CJP), §6-201. Under CJP §6-201, the court's decision to transfer the case to Anne Arundel county was proper because it is where the accident occurred, where both appellant and the other driver reside, where some of appellant's medical providers are domiciled, and where the accident was investigated. All of the witnesses are located outside of Baltimore City. The fact that MIA, located in Baltimore City, rejected appellant's complaint does not tip the balance in favor of a City forum. She did not name MIA as a party. Nor did she seek review or consideration of MIA's decision. As such, the circuit court did not abuse its discretion in transferring the case to Anne Arundel County.

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MEMC Electronic Materials, Inc., et al. v. BP Solar International, Inc., No. 1517, September Term 2009, Filed December 3, 2010. Opinion by Eyler, James R., J.

http://mdcourts.gov/opinions/cosa/2010/1517s09.pdf

CONTRACTS - STATUTE OF FRAUDS - A SERIES OF E-MAIL COMMUNICATIONS CAN AMOUNT TO A SUFFICIENT WRITING UNDER THE STATUTE AND, WHERE IT INCLUDES A TYPED NAME EXECUTED WITH A PRESENT INTENTION TO AUTHENTICATE A WRITING, CAN SATISFY THE SIGNATURE REQUIREMENT UNDER THE STATUTE.

CIVIL PROCEDURE - ADMISSIBILITY OF SUPERSEDED COMPLAINTS - THOUGH LEGAL CONCLUSIONS CONTAINED IN SUPERSEDED COMPLAINTS ARE GENERALLY NOT ADMISSIBLE AS EVIDENCE, VARIANCE IN FACTUAL ALLEGATIONS WITHIN AMENDED COMPLAINTS MAY BE ADMITTED AFTER DUE CONSIDERATION OF RELEVANCE, POTENTIAL PREJUDICE, AND ANY RULE OF EXCLUSION THAT MIGHT BE APPLICABLE TO SPECIFIC CONTENT.

Facts: MEMC Electronic Materials, Inc. served as a long-term supplier of silicon powder to BP Solar International, Inc., for use in its manufacture of solar panels. Between 1997 and 2000 the parties operated under a formally drafted sales agreement. Between 2001 and 2004, the parties entered into less formal arrangements consummated through and documented by e-mail exchanges. In 2004, BP Solar anticipated shortages in the market for silicon powder, and set out to secure a long term supply contract with MEMC. Between August 4, 2004 and November 9, 2004, authorized agents of each party communicated via e-mail concerning a long term supply arrangements. The primary dispute concerned the legal significance of those e-mail exchanges.

Pat Barron, BP Solar's warehouse manager, first e-mailed Sanjeev Lahoti, MEMC's product manager, requesting a quote via e-mail for 300 metric tons (MT) of silicon powder for the calendar years 2005 through 2007. Mr. Lahoti responded that MEMC "want[ed] to commit 150 MT of powder per year for the next 3 years. The pricing for 2005 would be $3.50/kg. Pricing for 2006 and 2007 would be negotiated in October of the previous year." Mr. Lahoti also stated that any additional quantities available would be offered to BP Solar. Mr. Barron clarified this proposal for Bill Poulin, his superior, with Mr. Lahoti carbon copied on the e-mail. Mr. Lahoti replied to both Mr. Barron and Mr. Poulin, confirming Mr. Barron's understanding of the parties' agreement. Several other e-mails regarding pricing and shipment information were exchanged. MEMC shipped nearly 224 MT of silicon powder during 2005, but ceased its deliveries after December 30, 2005. Upon inquiry, BP Solar was informed that it should not rely on further

shipments as MEMC was experimenting with ways to recycle its silicon powder in its own process.

BP Solar filed suit, seeking damages for breach of a contract allegedly formed through the parties' e-mail exchange. MEMC moved for summary judgment prior to trial, and for judgment during and after trial, arguing that the parties never reached a clear meeting of the minds necessary to form a contract. MEMC argued this lack of meeting of the minds was evidenced by BP Solar's inconsistent allegations during the pleading and discovery process regarding the terms of the alleged contract, including inconsistencies regarding the length of the contract and whether it was an output or supply contract. The trial court denied all of MEMC's motions.

During trial, MEMC attempted to offer into evidence each of BP Solar's amended complaints in an effort to demonstrate that because BP Solar could not conclusively state the terms of the contract, the requisite meeting of minds could not have occurred. The trial court, however, sustained BP Solar's objections to the admission of the superseded complaints. Ultimately, after a two-week trial, the jury found that the parties entered into a contract by which MEMC was obligated to supply appellee with silicon powder for the years 2005-07. As a result, the jury concluded MEMC breached the contract, and awarded partial cover damages that resulted from MEMC's failure to supply BP Solar with silicon powder in 2007.

Before the Court of Special Appeals, MEMC argued, *inter alia*, that the e-mails did not satisfy the Statute of Frauds as there was no confirmatory writing evidencing the agreement because there was no agreement to confirm.

Held: The Court of Special Appeals affirmed, holding that e-mail communication can satisfy the Statute of Frauds where the series of e-mails contains the necessary terms under the Statute. Here, the e-mails evidenced a contract for sale greater than $500, were signed by MEMC's agent, Mr. Lahoti, and contained a quantity term, whether interpreted to be all of MEMC's output of silicon powder or merely a 150 MT minimum. Additionally, the Court concluded that the trial court properly excluded BP Solar's amended complaints as they contained variations in legal conclusions, as opposed to variations in underlying factual assertions.

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Bryan Sivells v. State, No. 1480, September Term, 2009, filed December 2, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/1480s09.pdf

CRIMINAL LAW - PROSECUTORIAL VOUCHING - INVITED RESPONSE DOCTRINE - OPENED DOOR DOCTRINE

Facts: Two Baltimore police officers responded to a complaint of narcotics activity at the corner of 20th and Boone Streets in Baltimore City. Detective Wilson, an expert in the identification, packaging, and sale of narcotics, observed what he believed to be a drug transaction between appellant and an unknown woman.

At trial, during defense counsel's cross-examination of detectives Wilson and Carrington and during his closing argument, counsel attacked the credibility of the officers, stating that it was "insulting to ask you to believe" the detectives' testimony, and suggesting that the officers' account of events was " just pulled out of thin air." He went on to state that he had "seen some lame prosecutions," but "[t]his is about as thin as it ever gets." In response to defense counsel's attacks on the detectives' credibility, the prosecutor asserted several times during her rebuttal closing argument that the detectives were "honorable men" who "told the truth," and she stated that the officers were "two veterans who have a lot to loose [sic] by making things up, pensions, credibility, livelihood." She went on to describe the officers as "running towards it when the rest of us are running away from it," adding that "what they do is honorable." The circuit court overruled defense counsel's objections, and the jury convicted appellant of possession of cocaine.

Held: Reversed and remanded. Prosecutorial vouching for the credibility of a witness is improper. Prosecutor's repeated statements in rebuttal closing argument that police officers were "honorable men" who "told the truth," and statements that the police risked losing their livelihood if they lied, constituted improper vouching of the State's witnesses.

Prosecutorial vouching is not permissible as a response to defense argument pursuant to the "opened door" doctrine or the "invited response" doctrine. The opened door doctrine permits reference to otherwise irrelevant evidence that has become relevant in response to the presentation of the other side's case. The doctrine, however, does not permit the admission of evidence that is incompetent, *i.e.*, evidence that is inadmissible for reasons other than relevancy. Prosecutorial vouching involves comments that are incompetent. Thus, such comments are not admissible

pursuant to the opened door doctrine.

The invited response doctrine does not permit a prosecutor to vouch for the credibility of a witness in response to a defense attack on the witness' credibility. Rather, it provides that, if the defense makes an improper argument, a prosecutor's response that merely balances the unfair prejudice does not warrant a new trial. Here, defense counsel's comments regarding the credibility of the officers was not improper and did not invoke the invited response doctrine. Defense counsel's argument that this was one of the lamest prosecutions he had seen was improper, but the prosecutor's rebuttal argument, that the officers could lose their pensions and their livelihood if they lied, and that these honorable officers "told the truth," was not a reasonable response to this improper argument.

The prosecutor's improper comments were not harmless error, and they require a new trial. The prosecutor made not one, but several, improper comments. The comments all dealt with the credibility of the detectives, the central issue in the case. Under these circumstances, and given that the primary evidence against appellant was the detectives' testimony, we cannot say that the curative instructions given by the judge were sufficient to cure the potential prejudice from the improper vouching.

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Allen v. Ritter, No 2350 September Term, 2009, December 10, 2010. Opinion by Graeff, J.

http://mdcourts.gov/opinions/cosa/2010/2350s09.pdf

ESTATES AND TRUSTS - PERSONAL REPRESENTATIVE'S RIGHT TO RELEASE PRIOR TO DISTRIBUTION - JURISDICTION OF ORPHANS' COURT

Facts: On February 26, 2008, the Orphans' Court appointed Sharon Ritter as Successor Personal Representative of the Allen Estate pursuant to an agreement between the decedent's three children. There was much acrimony among the children over the administration of the Estate.

On September 17, 2008, Ms. Ritter filed a First and Final Administrative Account for the Estate, which the Orphans' Court approved. Before distributing the monies owed to the beneficiaries pursuant to the Final Account, Ms. Ritter requested that they sign a release pursuant to Md. Code (2001 Repl. Vol.), § 9-111 of the Estates and Trusts Article, which provides: "Upon making a distribution, a personal representative may, but is not required to, obtain a verified release from the heir or legatee."

The decedent's daughter signed the release and received her distribution. The appellants, the decedent's two sons, refused to sign the release, contending that Ms. Ritter was not entitled to a release. On September 21, 2009, Ms. Ritter filed a Petition for Release with the Orphans' Court. On November 10, 2009, the Orphans' Court ordered appellants to sign the releases and return them to Ms. Ritter. Appellants filed an appeal from the Orphans' Court's order.

Held: Judgment affirmed. Section 9-111 of the Estates and Trusts Article provides: "Upon making a distribution, a personal representative may, but is not required to, obtain a verified release from the heir or legatee." This language, providing that a personal representative "may . . . obtain" a release, indicates that the personal representative has a **right** to receive a release prior to distribution pursuant to a final account.

The Orphans' Court had the authority to order appellants to sign the release. The Orphans' Court is empowered to pass orders relating to the distribution of an estate. Here, the Orphans' Court had approved the Final Account presented by the personal representative, and the only thing impeding the distribution of the shares of the Estate was the distributees' refusal to sign a release, which the personal representative had the right to obtain pursuant to E.T. § 9-111. Without a court order, the final distribution of the estate remained unsettled. The Orphans'

Court’s order to the distributees to sign the requested releases prior to receipt of their distributive shares of the Estate was a proper order incident to the administration of the Estate.

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Mary Thomas v. Panco Management of Maryland, LLC, et al., No. 2508, September Term, 2008, filed October 1, 2010. Opinion by J. Salmon.

http://mdcourts.gov/opinions/cosa/2010/2508s08.pdf

NEGLIGENCE - ASSUMPTION OF RISK - IN A SLIP AND FALL CASE, A PLAINTIFF CAN BE HELD TO HAVE VOLUNTARILY ASSUMED THE RISK OF SLIPPING ON ICE OR SNOW EVEN IF THE PLAINTIFF HAS NO ALTERNATIVE SAFE ROUTE TO REACH HIS OR HER DESTINATION, PROVIDED, HOWEVER, THAT THE PLAINTIFF HAS SOME ALTERNATIVE COURSE OF ACTION.

Facts: Mary Thomas lived at apartment 202 in the Foxfire Apartment complex in Laurel, Maryland. Residing with her was her daughter, Jennifer Kay, and her granddaughter, Whitney Kay. Thomas had lived at apartment 202 since 1998. Immediately in front of the apartment building where Thomas lived was a parking lot. To get to the parking lot it was necessary to come down a set of covered stairs, then descend four additional stairs to the sidewalk.

On February 21, 2007, at approximately 8:00 a.m. Mary Thomas left for work. She noticed in different areas of the sidewalk that snow and ice had accumulated. In fact as she entered her vehicle, she had to hold onto it for support because there was ice. When she returned between 2:30 and 3:00, it was warmer and the ice and snow were gone. She did, however, notice that the sidewalk was wet and she saw no evidence that building maintenance had cleaned the snow or ice. Thomas left her apartment again around 6:00 p.m. to drive her granddaughter to a youth group meeting at the local church. Thomas noticed that the sidewalk was wet and there were no signs of salt or melting pellets on the sidewalk. At approximately 8:00 p.m. Thomas left her apartment to pick up her granddaughter from church. As she stepped down from the last step onto the sidewalk, she slipped on ice and fell. The portion of the sidewalk upon which Thomas stepped was covered with black ice. Thomas fell within a few feet of where her car was parked. She did not notice the ice before stepping onto the sidewalk. Thomas's neighbor, Ms. Gillette, along with another neighbor came to Thomas's assistance. As Ms. Gillette stepped onto the sidewalk, she saw what she believed to be black ice that caused her to slip but not fall.

Thomas testified that areas in front of her apartment building do not get much direct sunlight. As a consequence, in the winter, snow and ice tend to stay much longer than it did in other locations. And, as Thomas knew before the accident, when the snow and ice melted, the water would flow onto the sidewalk, and make the sidewalk wet. She also knew that: "as a consequence of the snow melting and running out onto the sidewalk at night" icy conditions could develop if temperatures fell below freezing.

Thomas's daughter testified that to her knowledge there would not have been any adverse consequences if her daughter had not attended the church meeting.

At the conclusion of plaintiff's case, the trial judge granted the defendant's motion for judgment on the grounds that Ms. Thomas had assumed the risk of injury.

Held: Judgment Affirmed. On appeal, Ms. Thomas questioned whether the court erred when it concluded, as a matter of law, that the appellant knowingly and voluntarily assumed the risk of slipping on "black ice" when she left her apartment to pick up her granddaughter at the local church. Ms. Thomas argued: "assuming *arguendo* that knowledge and appreciation of the danger of slipping on ice could be imputed to Ms. Thomas, satisfying the first two prongs of the assumption of risk defense, as to the third prong her assumption of the risk was not voluntary under applicable case law." Thomas stresses that she had no alternative means of egress from her apartment to the parking lot.

The Court of Special Appeals held that Ms. Thomas assumed the risk of falling when she left to pick up her granddaughter. "To establish the defense of assumption of risk, the defendant must show that the plaintiff: 1) had knowledge of the risk of the danger; 2) appreciate the risk; and 3) voluntarily confronted the risk of danger."

At the time of the accident, Thomas knew: 1) that when leaving for work at 8:00 a.m. on the date of the accident there was ice on the sidewalk causing her to hold onto her car for support, 2) that when snow melted it would make the sidewalk wet, 3) that as a consequence of the snow melting, when temperatures fell below freezing, icy conditions could develop, and 4) that at approximately 6:00 p.m. it was getting colder.

Under these conditions what was said in *Allen v. Marriott Worldwide Corp.* 183 Md. App. 460 (2008), was deemed to be apposite:

> To assume the risk as a matter of law, a plaintiff, objectively speaking, must have reason to know of the risk. In a case such as this, the risk is that of slipping on ice. The required knowledge is not knowledge that ice is actually present. It is the appreciation of the reasonable likelihood that, under the weather conditions and other circumstances, ice might well be present. The assumed risk is not that of stepping on ice *per se*. The assumed risk is that of stepping onto an unknown surface with an awareness that it might well be

> icy. With white ice you see it there, with black ice you infer the likelihood that it may be there. Either establishes the element of awareness.

Id. at 479.

The uncontradicted first-level facts developed in this case objectively showed that Thomas had, at the time of her fall, knowledge of the risk that she might be stepping down upon ice and that a reasonable person in her position would have appreciated the danger of that action. The court noted that although Thomas did not have an alternative safe path to her car, she did have a safe alternative course of action, i.e., she could have called building maintenance and requested that the icy spots be treated or she could have refused to take her granddaughter to church because, objectively speaking, she knew that the sidewalk might be icy.

The Court of Special Appeals held that under the circumstances of this case, Thomas's assumption of the risk of slipping on ice was volitional.

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Stanley Rochkind, et al., v. Danielle Finch, next friend of Tyaih Dodd, No. 1694, September Term 2008, filed December 1, 2010. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2010/1694s08.pdf

NEGLIGENCE – LEAD PAINT – MARYLAND RULE 5-401 – MARYLAND RULE 5-403 – BALTIMORE CITY HOUSING CODE – OWNER – OPERATOR – SPECIAL VERDICT SHEET

Facts: Danielle Finch, mother and next friend of Tyaih Dodd, sued Stanley Rochkind, Dear Management & Construction Company, Inc., and J.A.M. #18 Corporation, in the Circuit Court for Baltimore City, alleging that Tyaih was exposed to lead paint while living at 2212 East Lanvale Street in Baltimore City, a property managed by Dear Management and owned by J.A.M. #18, of which Rochkind was the sole shareholder. Finch alleged, among other things, that Rochkind was subject to personal liability because he qualified as an "owner or operator" under the Baltimore City Housing Code. At trial, Finch sought to admit a Consent Order into evidence that included 86 corporations, including Dear Management, and the Maryland Department of the Environment, and under which the corporations agreed to meet certain deadlines with respect to inspecting and/or abating lead from over 700 properties. *See* Administrative proceedings before the Maryland Department of the Environment, Waste Management Administration, Case Number SA-2001-0097 (2001). 2212 East Lanvale was among the properties listed in the Consent Order, and Rochkind signed it as guarantor in the event that the principal parties to the document failed to fulfill their financial obligations. The Consent Order also imposed a penalty of $90,000 for prior non-compliance with statutory lead-risk reduction standards. Defendants argued under Maryland Rule 5-401 that the Consent Order was not relevant to Finch's negligence case, and, alternatively, that any probative value in the Consent Order was substantially outweighed by the danger of unfair prejudice under Maryland Rule 5-403. The court found that the Consent Order was relevant and that it was not unfairly prejudicial, and admitted it into evidence. At the close of the evidence, defendants also sought to amend the multiple-question verdict sheet to include a separate question asking the jury whether it found that Rochkind was an owner or operator under the Housing Code. The court refused to include the owner/operator question. The jury returned a verdict in favor of appellee in the amount of $1,750,000, which the court later reduced to an award of $590,000 pursuant to § 11-108 of the Courts and Judicial Proceedings Article. The court subsequently denied the defendants' motion for judgment notwithstanding the verdict, and motion for a new trial, and Rochkind, J.A.M. #18, and Dear Management noted their appeal to the

Court of Special Appeals.

Held: The Court of Special Appeals reversed and remanded for further proceedings consistent with its opinion. Addressing the issue of the Consent Order, the Court held that the trial court erred in admitting the Order into evidence, because the Order was not relevant to the any of the elements of a *prima facie* lead-paint negligence claim, and because any probative value was substantially outweighed by the danger of unfair prejudice from Finch's insinuations that Rochkind was a party to the Order and that Dear Management and J.A.M. #18 were the subject of an investigation by Baltimore City authorities. With regard to the verdict sheet, the Court held that the trial court erred in refusing to include the owner/operator question. In so holding, the Court explained that, in order to use violation of the Housing Code to establish a *prima facie* case of negligence, a plaintiff must demonstrate that the provision in question applies to the defendant because the defendant is either an owner or an operator under the Code. Thus, if—and only if—the jury found that Rochkind was an owner/operator under the Code, would the jury have to determine whether he was negligent in exposing Tyaih Dodd to lead paint. The Court concluded, therefore, that a separate question on the verdict sheet was required for the jury to determine whether Rochkind was an owner/operator of 2212 East Lanvale Street.

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Lunique Estime v. Fairfax F. King, et al., No. 00713, September Term 2009, filed December 2, 2010. Opinion by Matricciani, J.

http://mdcourts.gov/opinions/cosa/2010/713s09.pdf

REVISORY POWER – IRREGULARITY OF PROCESS OR PROCEDURE – MARYLAND RULE 2-535 – MARYLAND RULE 1-321 CHANGE OF ADDRESS

Facts: In May of 2008, the City of Baltimore assumed control of Tax Sale Certificate No. 208703 for the property located at 2344 McCulloh Street, Baltimore, Maryland 21217 a tax sale for delinquent liens. At the time of the sale, title to the property belonged to appellees Fairfax F. King and Daisy B. King. Lunique Estime subsequently acquired the city's interest in the certificate and filed a complaint to foreclose all rights of redemption in the property, pursuant to Md. Code Ann. (1985, 2007 repl. vol.), §14-835 of the Tax Property Article in the Circuit Court for Baltimore City. This complaint listed appellant's address as 10169 New Hampshire Avenue, Suite 110, Silver Spring, Maryland 20903. Afer notice of the action had been published in accordance with the statutory requirements, Estime filed a proposed judgment foreclosing right of redemption, as well as a certificate of compliance, an affidavit of compliance with statutory notice provisions, and mailing results. The address listed in Estime's certificate of compliance was 4601 Presidents Drive, Suite 131, Lanham, Maryland 20706. The circuit court subsequently entered an order requiring additional documentation—specifically, the original certificate of sale for the property—within thirty days. Estime alleged that he never received this order, presumably because it was sent to the 10169 New Hampshire Avenue address. When no additional documentation was filed, the court entered an order dismissing Estime's complaint, without prejudice. Upon learning of the dismissal, Estime filed a motion to reinstate the complaint, which the circuit court denied. Estime then filed a motion for reconsideration and a request for a hearing, both of which were denied; he then noted his appeal to the Court of Special Appeals.

Held: The Court of Special Appeals reversed and remanded for further proceedings. The Court explained that under Maryland Rule 1-321(a), service of every pleading and other paper filed with the court shall be made upon every party by delivery of a copy or by mailing it to the address most recently stated in a pleading or paper filed by that party. Relying in part on *Gruss v. Gruss*, 123 Md. App. 311 (1998), the Court held that Estime's inclusion of his new address in his most recent pleadings was sufficient to put the court clerk on notice of the change, and that no separate notification of change of address was required. Thus, the Court concluded, the clerk's failure to send the order requiring

additional documentation and the order of dismissal to Estime's new address constituted an irregularity of process or procedure under Maryland Rule 2-535(b). Therefore, the Court held that the circuit court was required to exercise its discretion in determining whether appellant had acted with the good faith and due diligence necessary for him to be entitled to a revision of the order of dismissal, and a reinstatement of the complaint to foreclose the right of redemption.

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ATTORNEY DISCIPLINE

By an Opinion and Order of the Court of Appeals dated November 30, 2010, the following attorney has been disbarred from the further practice of law in this State:

CHRISTOPHER ALLEN PALMER
*

By an Order of the Court of Appeals of Maryland dated December 16, 2010, the following attorney has been disbarred by consent from the further practice of law in this State:

JOHN ARTHUS ELMENDORF
*

By and Opinion and Order of the Court of Appeals of Maryland dated December 20, 2010, the following attorney has been disbarred from the further practice of law in this State:

DAVID E. FOX
*