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COURT OF APPEALS

CRIMINAL LAW - PROCEDURE - MARYLAND RULE 4-215 - REVOCATION OF EXPRESS WAIVER OF COUNSEL - COUNTY ADMINISTRATIVE JUDGE PROPERLY EXERCISED DISCRETION TO DENY A POSTPONEMENT OF TRIAL DATE WHERE A DEFENDANT ATTEMPTED TO REVOKE A WAIVER OF COUNSEL ON THE DAY OF TRIAL, AFTER INSISTING ON SELF-REPRESENTATION FOR SIX MONTHS

Facts: Carl Eugene Jones, Jr. was convicted in the Circuit Court for Anne Arundel County of several crimes after a car-jacking, high speed chase, and kidnaping. The transcripts of various preliminary court proceedings showed that Jones was explained the importance of counsel and offered representation four times before the day of trial, but declined each time. A knowing and voluntary waiver of counsel was found by the court. The transcripts also showed that some difficulty accompanied the State's delivery of discovery requested by Jones. Because of this difficulty, at a hearing on the discovery dispute, Jones was offered three times a continuance of his trial, scheduled for the following week, but he declined, insisting instead on dismissal of all charges. At this hearing, it was established that the State had complied with Jones's request for discovery. Dismissal was rejected.

On the morning of trial, Jones appeared before the Administrative Judge's designee. At this time, he requested a postponement of his trial, claiming that he had not had enough time to review discovery and that he wanted to procure an attorney. After listening to arguments and reviewing prior proceedings, the Administrative Judge's designee denied Jones a postponement of trial, finding that Jones had many prior opportunities to request a postponement, that he had many prior opportunities to secure or request a lawyer, and that the State, all of whose witnesses were present, would be prejudiced by granting Jones's day-of-trial request.

Returned to the trial judge, Jones requested to be sent back to the Administrative Judge's designee to seek again a postponement of trial to secure counsel. Finding that the request was considered already and denied by the Administrative Judge's designee, the trial judge denied Jones's request. After a five day trial, the jury convicted Jones of two counts of second degree assault, two counts of kidnaping, one count of resisting arrest, one count of reckless driving, one count of negligent driving, and one count of failure to maintain a reasonable and prudent speed. Jones was acquitted of two counts of first degree assault and one

count of second degree assault.

Jones appealed to the Court of Special Appeals, presenting four arguments for reversal: 1) he was improperly denied his right to the assistance of counsel; 2) his postponement requests were denied improperly; 3) the trial court failed to comply with the provisions of Maryland Rule 4-215; and 4) the trial judge erred in failing to merge for sentencing purposes the convictions for speeding and negligent driving into that for reckless driving. The intermediate appellate court concluded that no errors occurred as to the first three issues, but that the convictions for negligent driving and speeding should be merged into the reckless driving offense.

Granting Jones's petition for writ of certiorari, the Court of Appeals accepted the case to consider whether the Administrative Judge's designee and the trial judge properly exercised their respective discretion regarding Jones's postponement requests and his attempt to revoke his waiver of the right to counsel.

Held: Affirmed. Maryland Rule 4-215(b) requires that if a defendant, having waived counsel expressly, desires thereafter to revoke that waiver, no postponement of a scheduled trial date will be granted to obtain counsel unless the trial court finds it is in the interest of justice to do so. The trial court has discretion to determine whether a postponement is in the interest of justice. The Court held that the prevailing common law standard for the review of the exercise of trial court discretion – an abuse of discretion exists when a ruling does not logically follow from the findings upon which it supposedly rests or when a ruling has no reasonable relationship to its announced objective – suffices to guide trial courts in acting on a request for postponement of trial based on a defendant's desire to secure counsel after initially waiving counsel.

Turning to the issue of whether the denial of Jones's request for a postponement was "an abuse of discretion," the Court noted that only a County Administrative Judge, or that judge's designee, may act on a postponement request advanced in a circuit court criminal trial according to Maryland Rule 4-271. In the present case, the Administrative Judge's designee properly denied a postponement upon consideration of both Jones's desire for more time to review discovery and his late-blooming desire for an attorney.

The Court also rejected Jones's contention that he was denied improperly by the trial judge a second chance to appear before the Administrative Judge's designee. Finding that the designee had

considered Jones's request for a postponement on both bases (more time to review discovery and more time to secure counsel), the Court determined it was within the trial judge's discretion to send Jones back to the designee, but that he was not duty-bound to do so on the facts of the case.

Carl Eugene Jones, Jr. v. State of Maryland, No. 65, Sept. Term 2007, filed 13 February 2008, Opinion by Harrell, J.

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ESTATES AND TRUSTS - CONSTRUCTIVE TRUST – CONFIDENTIAL RELATIONSHIP – POWER OF ATTORNEY – EVIDENCE – HEARSAY STATE OF MIND EXCEPTION

Facts: Diane Marie Figgins, Petitioner, lived with her parents for most of her life; in the later period, she assisted her mother around the house and with the care of her father, James Cochrane, Jr., who was wheelchair bound. After her mother's health deteriorated, she became her father's primary caregiver. In November of 2001, her father contacted an attorney and executed a last will and testament, making several specific bequests to Ms. Figgins. In May of 2004, Mr. Cochrane executed a Durable General Power of Attorney. Section 1.13 of the Power of Attorney empowered Ms. Figgins to make reasonable gifts if reasonable after considering "the extent and nature of my assets; the federal transfer taxes that may result from a gift and/or from my death; the natural objects of my bounty and the federal estate and/or income taxes to which they may be subjected; and my potential need for long-term care, the costs thereof and the possibility of my qualification for any program of public or private benefits to pay for such costs." In September of 2004, Mr. Cochrane, again accompanied by his daughter, executed a codicil to his will, bequeathing to Ms. Figgins "any household furniture, including any dining room, living room or family room furniture," and giving her the exclusive right to occupy and purchase the home for three years after his death, as well as the right to purchase the property for 120 days immediately thereafter. In October of 2004, Mr. Cochrane, accompanied by Ms. Figgins, met with the attorney in the latter's

office, and according to the attorney, Mr. Cochrane informed him that a loan that he was supposed to be getting did not go through. At some point in time after the meeting, the attorney prepared a deed which would have, by its terms, conveyed the father's residence to Ms. Figgins, solely. Mr. Cochrane lapsed into a coma from which he never recovered, and died on November 10, 2004. Subsequently, Ms. Figgins returned to the attorney's office and signed the deed purportedly under the Power of Attorney.

A few months after Mr. Cochrane died, Respondent, Mr. Cochrane's Personal Representative, his son, William Andrew Cochrane, filed an action in the Circuit Court for Frederick County seeking to have the home returned to his father's Estate through the imposition of a constructive trust. During the trial, the judge excluded state of mind evidence offered by the attorney regarding Mr. Cochrane's intent during the meeting in October of 2004 to transfer the property to Ms. Figgins. The trial court ruled in favor of Respondent, returning the house to the Estate. Ms. Figgins noted an appeal to the Court of Special Appeals, which affirmed. *Figgins v. Cochrane*, 174 Md. App. 1, 920 A.2d 572 (2007). We granted Ms. Figgins petition for certiorari.

Held: Affirmed. The Court of Appeals held that a confidential relationship existed between Ms. Figgins and her father because Ms. Figgins had lived with her parents for most of her life, and at the end of Mr. Cochrane's life, she had assumed the role of Mr. Cochrane's primary caretaker, and that Ms. Figgins had not rebutted the presumption that the transfer of the house was the result of Ms. Figgins' undue influence on Mr. Cochrane. The Court of Appeals also held that the Power of Attorney did not authorize the property transfer because Section 1.13, the Gift Section, only authorized a transfer without consideration if the attorney in fact took into account the nature and extent of the assets, federal taxes, natural objects of the individual's bounty, and things of that nature, which Ms. Figgins did not do. As to the hearsay issue, the Court concluded that under Maryland Rule 5-803 (b)(3), evidence of a "forward-looking" state of mind is admissible only to show that the declarant, not the hearer, subsequently acted in accord with his or her stated intention; therefore, the attorney's testimony about Mr. Cochrane's state of mind was inadmissible because Mr. Cochrane took no further action in accordance with his stated intention.

Diane M. Figgins v. William Andrew Cochrane, Personal Representative of the Estate of Robert James Cochrane, Jr., No. 46, September Term 2007, filed February 15, 2008. Opinion by Battaglia, J.

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MOTOR VEHICLE ADMINISTRATION - DR-15 ADVICE OF RIGHTS - MEDICAL ADVISORY BOARD

Facts: On May 6, 2006, at approximately 2:30 in the morning, Lianne Marie Delawter was involved in a single motor vehicle crash on Potomac and Main Streets in Boonsboro, Washington County, Maryland. Deputy First Class J. Garrett Mills of the Washington County Sheriff's Office arrived at the scene, determined that Ms. Delawter was the driver of the vehicle, and upon approaching her, detected a strong odor of alcohol about her person and noticed that her eyes appeared red and glassy. Deputy Sheriff Mills arrested Ms. Delawter for driving under the influence and provided her with a DR-15 Advice of Rights form, which advised her of the potential administrative sanctions she faced. Ms. Delawter was not subjected to field sobriety tests due to her injuries, but subsequently she had a blood sample taken, which indicated an alcohol concentration of .17. Four months later, on September 5, 2006, Deputy Sheriff Mills confiscated Ms. Delawter's driver's license, issued her a temporary license valid for forty-five days. The Deputy also served Ms. Delawter with an order of suspension for forty-five days, effective upon expiration of the temporary license.

Ms. Delawter requested a hearing before an administrative law judge. At the conclusion of the hearing, the ALJ determined that Deputy Sheriff Mills had reasonable grounds to believe that Ms. Delawter was driving while under the influence of or impaired by alcohol, that the Deputy believed that Ms. Delawter had consumed alcohol, that he had advised her of the administrative sanctions to be imposed and had requested that an alcohol concentration test be performed, that the test was performed, and that the test results reflected an alcohol concentration of .17. The ALJ reduced the suspension to twenty-five days. The ALJ also referred Ms. Delawter to the Medical Advisory Board ("MAB"), a group comprised of physicians and optometrists appointed by the MVA in order investigate the physical and mental condition of individuals who seek to drive.

Ms. Delawter filed a Petition for Judicial Review in the Circuit Court for Frederick County. The Circuit Court judge affirmed the suspension order, but reversed the referral to the Medical Advisory Board, noting that if Ms. Delawter had not requested a hearing, she would not have been referred to the Board by the ALJ and that she "was not given notice that her exercise of her right to a hearing may have subjected herself to a possible referral to the MAB."

We granted the MVA's petition for writ of certiorari.

Held: Reversed as to the MAB referral issue. The Court of Appeals held that notice that an administrative law judge, after conducting a hearing requested by a driver to modify the driver's license suspension could refer the driver to the Medical Advisory Board, need not be included in the DR-15 Advice of Rights form. The Court iterated that although anyone can contact the MVA about an individual driver's capability behind the wheel, potentially prompting a MAB referral, only the Administrator of the MVA has the authority to refer to the MAB pursuant to the express language of Section 16-118 (c) of the Transportation Article, Maryland Code (1977, 2006 Repl. Vol.). The Court also stated that the MVA has informed the ALJs of this, explaining that regardless of the terminology used, a "referral" to the Medical Advisory Board by an ALJ will be treated only as a recommendation. The Court noted that under Maryland's Implied Consent Law, a prerequisite to the MVA's suspension of a driver's license, after a hearing, is a finding that the police officer advised the driver of "the administrative sanctions that shall be imposed," Section 16-205.1 (b)(2)(iii) of the Transportation Article, Maryland Code (1977, 2006 Repl. Vol.); the Court concluded that a referral to the MAB is not an "administrative sanction[] that shall be imposed," but instead is a "mere potentiality" because it does not affect any right, interest, privilege or legal status of the driver.

Motor Vehicle Administration v. Lianne Marie Delawter, No. 63, September Term, 2007. Opinion by Battaglia, J., filed February 13, 2008.

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COURT OF SPECIAL APPEALS

CONTRACTS - ARBITRATION - APPEAL OF ORDER DENYING PETITION TO ARBITRATE FILED IN BREACH OF CONTRACT ACTION - SCOPE OF ARBITRATION AGREEMENT - DUTY OF CIRCUIT COURT TO DECIDE WHETHER SUBJECT MATTER OF DISPUTE IS WITHIN THE SCOPE OF THE PARTIES' AGREEMENT TO ARBITRATE.

Facts: The Essex Corporation entered into an agreement with The Susan Katharine Tate Burrowbridge, LLC, The Elizabeth Tate Winters, LLC, and the Andrew Patrick Tate, LLC ("Tate," collectively) on February 28, 2005, to purchase Tate's wholly owned subsidiary, The Windemere Group. The purchase agreement divided payment into several components, with the final payment in the form of a defined "Earn Out" on May 31, 2006. The agreement also included an arbitration clause and provisions for Tate's access to documents and information after closing.

As the time for the Earn Out payment approached, the parties disagreed on how to calculate it. The Tate Group demanded the maximum Earn Out payment, and when no agreement was reached, filed a complaint for breach of contract, alleging that Essex failed to provide access to documents and pay the maximum Earn Out as required under the purchase agreement. Essex responded with a petition to compel arbitration and to stay or dismiss without prejudice the litigation pending arbitration. The court denied both petitions and gave Tate discovery of the documents it sought. Essex appealed the court's denial of its petitions.

Held: Reversed and remanded with instructions to enter order compelling arbitration. The Court held that a denial of a petition to compel arbitration is immediately appealable as a final judgment. In ruling on a petition to compel arbitration, a circuit court is limited to determining whether there is an agreement between the parties to arbitrate the subject matter of their dispute. Language in the purchase agreement stating the parties shall submit to arbitration "in the event of any dispute regarding the Earn Out" required the court to grant the motion to compel arbitration as to the dispute and any related discovery. Discovery in a circuit court action involving a petition to compel arbitration is limited to what relates to the existence and scope of any arbitration agreement.

Essex Corporation v. Susan Katharine Tate Burrowbridge, LLC, et al., No. 27, September Term, 2007, filed January 31, 2008.

Opinion by Eyler, Deborah S., J.

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CONTRACTS - CONSTRUCTION AND OPERATION OF CONTRACTS, INTENTION OF PARTIES, LANGUAGE OF INSTRUMENT: *COCHRAN V. NORKUNAS*, 398 MD. 1 (2007). DISPUTE BETWEEN THE STATE AND TOBACCO MANUFACTURERS PARTICIPATING IN THE MASTER SETTLEMENT AGREEMENT REGARDING THE INDEPENDENT AUDITOR'S FAILURE TO APPLY A NONPARTICIPATING MANUFACTURER ADJUSTMENT FOR THE 2003 CALENDAR YEAR WAS SUBJECT TO ARBITRATION UNDER THE PLAIN LANGUAGE OF THE AGREEMENT, WHICH PROVIDES THAT DISPUTES "ARISING OUT OF OR RELATING TO" THE INDEPENDENT AUDITOR'S CALCULATIONS AND DETERMINATIONS ARE ARBITRABLE. IN CALCULATING EACH PARTICIPATING MANUFACTURER'S ANNUAL PAYMENT, THE INDEPENDENT AUDITOR IS EMPOWERED AND COMPETENT TO DETERMINE, AS PART OF A CALCULATION OR DETERMINATION, WHETHER TO APPLY THE ADJUSTMENT. FURTHERMORE, THERE IS NO LANGUAGE IN THE ARBITRATION CLAUSE OR THE AGREEMENT THAT NARROWS OR CREATES EXCEPTIONS TO THE SUBSTANTIVE SCOPE OF THE ARBITRATION CLAUSE AS WRITTEN OR ESTABLISHES CONDITIONS PRECEDENT TO INVOKING THE RIGHT TO ARBITRATE. AFTER GIVING EFFECT TO EACH CLAUSE OF THE AGREEMENT AND CONSTRUING THE AGREEMENT IN ITS ENTIRETY, THE CIRCUIT COURT PROPERLY FOUND THAT THE QUESTION OF "DILIGENT ENFORCEMENT" WAS SUBJECT TO ARBITRATION.

Disputes and Matters Arbitrable Under Agreement: In a series of 2003 settlement agreements, the original participating manufacturers waived their right to contest adjustments to their payments under the Master Settlement Agreement for certain enumerated calendar years. On appeal, the parties dispute whether the original participating manufactures also waived their right to contest issues related to an application of a nonparticipating manufacturer adjustment for 2003. As the circuit court properly opined, paragraph 8 of the 2003 agreements expressly reserves the original participating manufacturers' right to seek a non-participating adjustment in 2003. Furthermore, even though the series of agreements contained no

arbitration clause, the dispute over whether the June 2003 agreements prohibited the original participating manufacturers from contesting diligent enforcement in 2003 falls within the purview of the independent auditor's determination concerning the applicability of the non-participating manufacturer adjustment and, therefore, must be presented as part of the arbitration process.

Facts: The State sought declaratory relief from the Circuit Court for Baltimore City (Brown, J.), asking the court to rule that the dispute over diligent enforcement of Maryland's escrow statute is an issue within the Circuit Court for Baltimore City's exclusive jurisdiction to implement and enforce the Master Settlement Agreement and not an issue subject to arbitration pursuant to the Agreement. The trial court found that, based upon the language and structure of the Master Settlement Agreement, the arbitration provision was clearly applicable. The State appealed.

Held: Affirmed.

I. After giving effect to each clause of the Master Settlement Agreement and construing the Agreement in its entirety, the circuit court properly found that the question of "diligent enforcement" was subject to arbitration;

II. The dispute over whether the June 2003 agreements prohibited the original participating manufacturers from contesting diligent enforcement in 2003 can be resolved by paragraph eight of the agreements, which expressly reserves the original participating manufacturers' right to seek a non-participating adjustment in 2003 and, additionally, even though the series of agreements contained no arbitration clause, the dispute *sub judice* falls within the purview of the independent auditor's determination concerning the applicability of the non-participating manufacturer adjustment and, therefore, must be presented as part of the arbitration process.

State of Maryland v. Philip Morris, Incorporated et al., No. 2844, September Term, 2006, decided February 1, 2008. Opinion by Davis, J.

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COURTS AND JUDICIAL PROCEEDINGS - JURY DELIBERATIONS - ALTERNATE JUROR - WAIVER - PRESERVATION - PREJUDICE - REBUTTABLE RESUMPTION - MD. RULE 4-331.

Facts: In July 2005, Edinson Ramirez was tried by a jury on numerous counts relating to a home invasion that occurred in October 2004. Shortly before the jury delivered its verdict, the judge disclosed that the alternate juror briefly entered the jury deliberation room with the regular jurors when the jury was first released to begin deliberations. At that time, appellant did not voice any objection or seek any particular relief. The jury then returned its guilty verdict. A few days later, the State filed a "Motion for Appropriate Relief in Clarification of Alternate Juror's Presence in Jury Deliberation Room for Establishment of a Factual Appellate Record," which appellant opposed. At an evidentiary motion hearing held in October 2005, appellant moved, for the first time, for a mistrial or a new trial, claiming prejudice based on the presence of the alternate juror at the outset of jury deliberations.

At the motion hearing, the State presented two witnesses: the alternate juror and the bailiff who retrieved her. They testified that the alternate was in the jury room for about five minutes, including a visit to the bathroom. In that time, the jurors had not engaged in any discussion about the case. The bailiff then removed the alternate.

The court denied appellant's motions in an Order entered November 8, 2005. Among other things, the court found that deliberations had not yet begun.

On appeal, appellant claimed error because the alternate juror was in the jury room during deliberations. He also claimed that the court lacked authority to conduct an evidentiary hearing to ascertain what occurred, so as to allow the State to attempt to rebut the presumption of prejudice that flowed from the presence of the alternate.

Held: Affirmed. The waiver doctrine applies to a defendant's claim of prejudice based on the presence of an alternate juror during jury deliberations. The presence of an alternate during jury deliberations does not automatically compel a new trial. Appellant had to ask for relief, by way of a mistrial or a new trial, yet he did not do so until weeks after the verdict was rendered. Ramirez was not entitled to the remedy of a motion for new trial under Md. Rule 4-331, because his motion was untimely. Similarly, it was too late to ask for a mistrial. Moreover, the Court of Special Appeals concluded that the State did not waive its right to attempt to rebut the claim of prejudice, nor did the

trial court err in conducting the hearing several weeks after the trial.

Even if preserved, the Court of Special Appeals was satisfied that State rebutted any presumption of prejudice arising from the alternate juror's presence in the jury room. Although the alternate was in the jury room "after the door was shut," the evidence clearly showed that she was there for just a few minutes, and at a point when actual deliberations had not yet begun. The alternate did not talk with the jurors and she did not hear any conversation among the regular jurors. During the few minutes of her presence, she put her personal belongings on the table, went to the bathroom, returned, and was promptly confronted by the bailiff, who immediately ushered her out of the jury room.

Edinson Herrera Ramirez a/k/a Edinson Merrera-Ramirez v. State of Maryland, No. 2383, September Term, 2005, filed February 8, 2008. Opinion by Hollander, J.

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<u>CRIMINAL LAW - CONSTITUTIONAL LAW - FOURTH AMENDMENT SEARCH AND SEIZURE: POLICE DID NOT VIOLATE DEFENDANT'S RIGHT OF PRIVACY WHEN THEY USED A GLOBAL POSITIONING SYSTEM ("GPS") DEVICE, AFFIXED TO THE EXTERIOR OF HIS CAR WHEN IT WAS PARKED OUTSIDE OF A MOTEL, AND A "PING" SURVEILLANCE OBTAINED FROM THE DEFENDANT'S CELLULAR PHONE COMPANY, TO FOLLOW HIM IN ORDER TO LOCATE HIM TO ARREST HIM</u>.

<u>Facts</u>: The appellant, Donald Leroy Stone, was convicted of second-degree assault, possession of a controlled dangerous substance, possession of drug paraphernalia, and felony theft. He filed a pretrial motion to suppress certain evidence.

At the suppression hearing evidence was introduced that on October 6, 2005, Judith Reisman complained to the Frederick County Sheriff's Office that her home had been burglarized between 7:30 a.m. and 2:30 p.m. The burglars had stolen a Nikon

camera among other items..

Investigating officers reviewed with Reisman a local pawn shop's surveillance video tape from October 6, 2005. The tape showed a man and woman enter the shop together, and the woman completing the sale of a camera to the shop about 12:30 p.m. Reisman recognized the camera as her own. She told the officers that the camera was worth about $1,000. One of the officers recognized the appellant on the tape. The woman who conducted the sale of the camera later was identified as Joanne Stone, the appellant's wife.

The investigating officers had the appellant's cell phone number on file and requested the cell phone service provider to conduct a "ping" of that phone. The "ping" showed that the phone was within a two-mile radius of the Frederick County Detention Center. By scouting the area, the officers located the Stones' pickup truck parked outside a motel. They did not arrest the Stones at that point, but attached a GPS device to the truck. The next day, an officer received transmissions from the GPS device via his cell phone. Using the transmissions, he tracked and located the pickup truck, which Joanne Stone was driving. The officer temporarily lost sight of the truck, but forty minutes later saw Joanne Stone driving a different pickup truck with the appellant in the passenger seat. The officer stopped the truck and arrested the couple for the burglary of the Reisman home and felony theft of the Nikon camera. In a search incident to the arrest, the officer recovered a glass pipe. Testing showed trace amounts of cocaine in the pipe. The appellant later made incriminating statements related to the Reisman burglary.

At the suppression hearing, the appellant argued that the officers did not have probable cause to arrest him for burglary or felony theft. He argued that the officers had potentially conducted an illegal search by using the cell phone "ping" and GPS device. Defense counsel attempted to cross-examine the investigating officers about their decisions to conduct the "ping" and attach the GPS device, but the motions court limited the scope of cross-examination to exclude testimony regarding these issues.

On appeal, the appellant contends that the suppression court erred in finding that the investigating officers possessed probable cause for the arrest; and it abused its discretion by limiting the scope of cross-examination that may have revealed the arrest was the fruit of a constitutionally illegal search. In addition, he claims that the trial court erred by allowing the prosecution to "improperly vouch" for one of its witnesses during closing argument, and the sentencing court abused its discretion

in denying his request for a continuance so he could hire new counsel.

Held: Affirmed. The officers had ample probable cause to arrest Stone for burglary or felony theft. Seeing him accompany his wife to the pawn shop to sell the stolen camera just hours after the Reisman residence was burglarized was sufficient for a reasonable officer to infer that he was in joint exclusive possession of recently stolen goods and, therefore, that he had participated in the theft/burglary.

The suppression court did not abuse its discretion in limiting the scope of cross- examination of the investigating officers to exclude testimony regarding their decisions to conduct the "ping" and attach the GPS device to the Stones' truck. In *United States v. Knotts*, 460 U.S. 276 (1983), the investigating officers had used a "beeper" to track the movements of a defendant's vehicle. The Supreme Court noted:

> Visual surveillance from public places along the [defendant's] route would have sufficed to reveal [the defendant's whereabouts] to the police [as revealed by the beeper]. . . . Nothing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case.

Id. at 282. In the present case, similar to *Knotts*, the investigating officers used technological enhancements through the "ping" and GPS device to collect information about what could have been observed through visual surveillance of the comings and goings of the Stones' truck. The "ping" and the attachment of the GPS device were not illegal searches under the Fourth Amendment. Thus, any cross-examination regarding the potential illegality of the use of these devices was irrelevant, and the suppression court did not abuse its discretion.

Stone's assignment of error regarding the trial court's alleged failure to stop the prosecutor from improperly vouching for a witness during closing argument was not preserved for appellate review. Stone's defense counsel failed to object during or after the prosecutor's closing argument.

Finally, the sentencing court did not abuse its discretion in denying Stone's request for a continuance of his sentencing hearing so that he could retain new counsel. The court had already postponed the hearing once. Stone had ample time before sentencing to obtain new counsel and to arrange for testimony by

his witnesses. Thus, the sentencing court did not abuse its discretion in denying Stone's request.

Donald Leroy Stone v. Maryland, No. 1447, Sept. Term, 2006, filed February 13, 2008. Opinion by Eyler, Deborah S., J.

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CRIMINAL LAW - DRIVING/ATTEMPTING TO DRIVE WHILE IMPAIRED BY ALCOHOL; §§ 21-902(b) AND 11-114 OF THE TRANSPORTATION ARTICLE; SUFFICIENCY OF THE EVIDENCE; DRIVING; ACTUAL PHYSICAL CONTROL OF MOTOR VEHICLE; OPERABLE MOTOR VEHICLE.

Facts: Following a bench trial in the Circuit Court for Anne Arundel County on January 16, 2007, Dwight Dukes, appellant, was convicted of driving or attempting to drive while impaired by alcohol, in violation of Md. Code (2006 & 2007 Supp.), § 21-902(b) of the Transportation Article ("Transp."), and driving on a revoked license, in violation of Transp. § 16-303(d).

The underlying incident occurred on October 3, 2006. At trial, the court was informed that the parties disputed whether appellant was "driving" at that time, within the meaning of the relevant statutes. Pursuant to an agreed statement of facts, the State showed that appellant was asleep in the driver's seat, and the vehicle keys were on the floor mat below the steering wheel. Notably, his "vehicle was stopped in a right turn lane with its headlights on, but they were dim."

The circuit court rejected the defendant's claim that, under *Atkinson v. State*, 331 Md. 199 (1993), the evidence was insufficient to support a conviction for driving while impaired. The circuit court concluded that Dukes was in actual physical control of the vehicle. It relied on the "fact that the vehicle [was] in a travel portion of the road, in a turn lane, and that the car is at that point being manipulated at least to the effect that the lights are on and that the Defendant is in the driver's seat. . . ." Moreover, the circuit court disagreed with Dukes's contention that, because the headlights were dim, the vehicle was not operable.

Held: Affirmed. Transp. § 11-114 defines "drive" as follows: "to drive, operate, move, or be in *actual physical control* of a vehicle...." (Emphasis added). The omnibus definition of "drive" thus encompasses "driving," "moving," "operating," and being in "*actual physical control*" of a vehicle. (Emphasis added.) The Court was not clearly erroneous in concluding that there was enough charge in the battery to light the car's headlights, even if they were growing dim. Thus, the vehicle's operability could be inferred from the circumstances. Further, the court was satisfied that the fact that appellant's vehicle was stopped in the roadway was a "determinative factor" in the "actual physical control" analysis.

The Court of Special Appeals discerned no error in these findings. It also said: "[T]he fact that appellant was intoxicated and asleep in the driver's seat of a vehicle that was stopped *in the roadway,* with its lights on, is powerful circumstantial evidence that appellant drove the vehicle to that location while intoxicated."

Dwight Dukes v. State of Maryland, No. 66, September Term, 2007, filed January 31, 2008. Opinion by Hollander, J.

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CRIMINAL LAW - SEARCH AND SEIZURE – SEARCH WARRANTS – PROBABLE CAUSE

Facts: While executing a search and seizure warrant in Christopher Lewis Carter's apartment, the Prince George's County Police Department recovered 22.60 grams of crack cocaine, 609.9 grams of marijuana, $12,308 in cash, a portable digital scale, a Ruger 9mm pistol loaded with fifteen hollow point bullets, a Mossberg shotgun, and shotgun ammunition.

At a hearing on Carter's motion to suppress, one of the detectives involved in the warrant execution testified that he applied for the search warrant for Carter's residence based on information received from an employee of M&T Bank and a

subsequent investigation. The employee had voluntarily informed the detective that Carter had made several currency deposits into his private account of small denomination bills that had a strong odor of marijuana and an unknown chemical mixture. The employee recognized the marijuana odor on the currency because she was a former member of the Anne Arundel County Police Department and had been trained to recognize controlled dangerous substances. The employee furnished the detective with Carter's mailing address. The detective then confirmed Carter's address and date of birth with the Motor Vehicle Administration's database. Upon arriving at Carter's residence, the detective noticed a trash dumpster in the parking lot in front of the Carter's apartment building. The detective obtained one bag of trash from the dumpster which contained a glassine baggie with trace amounts of suspected cocaine, a razor blade with trace amounts of suspected cocaine, a quantity of marijuana, a job application bearing Carter's address, and a cigar magazine cover bearing Carter's name and mailing address. A preliminary field test on the trace amounts of suspected cocaine confirmed the presence of cocaine.

The suppression court denied Carter's challenge that the information contained in the search warrant was illegal because, pursuant to Maryland Code (2003), § 1-302 of the Financial Institutions Article ("FI"), disclosure of financial records by a financial institution is prohibited. The circuit court examined the "four corners of the search warrant" and concluded that the information provided, Carter's name and mailing address, did not constitute financial records within the meaning of FI § 1-302.

Held: Affirmed. The employee did not disclose financial records within the meaning of FI §§ 1-301 & 1-302. Further, unlike the Maryland Wiretapping Statute, FI § 1-302 does not contain an exclusionary provision that would prohibit law enforcement officials from obtaining and using an unauthorized disclosure of financial records in support of a search warrant.

After receiving the information, the detective confirmed Carter's mailing address and, upon further investigation, found trace amounts of marijuana and cocaine in a bag of trash that contained other items that traced the trash to Carter and his apartment in the trash dumpster located across from Carter's residence. There being a substantial basis for concluding that evidence of drug trafficking would be found in Carter's residence, the warrant was properly issued.

Christopher Lewis Carter v. State, No. 2587, September Term, 2005, filed February 13, 2008. Opinion by Kenney, J.

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FAMILY LAW - SEPARATION AGREEMENT - CONSTRUCTION AND OPERATION: Dexter v. Dexter, 105 Md. App. 678 (1995); Parties entered into agreement which provided that one spouse would receive percentage of pension benefits, on periodic basis, when they become payable, and, further, when they are already payable and being paid, pensioned party may not hinder ability of party's spouse to receive payments bargained for by voluntarily rejecting, waiving or terminating pension benefits. Former husband waived his Army retirement pension, defeating provision that former wife would receive a percentage of pension benefits.

Facts: Appellee brought an action for arrearages against appellant after she did not receive her share of appellant's retirement benefits accrued as part of his military service pursuant to the separation agreement entered into by the parties. The Circuit Court for Harford County (Plitt, J.), entered judgment in favor of appellee in the amount of $75,810.97, plus interest at the post-judgment rate. Appellant appealed.

Held: Affirmed. Under Maryland contract law, former husband's waiver of his Army retirement pension, after entering into agreement with former wife that she would receive a percentage of pension benefits was a breach of contract, for which, under Maryland contract law, the measure of damages was that former wife was entitled to receive the amount she would have received had not the former husband committed the breach.

Horace M. Allen v. Carolyn Elaine Allen, No. 2066, September Term, 2006, decided February 6, 2008. Opinion by Davis, J.

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INSURANCE - COLLATERAL SOURCE DOCTRINE - Maryland Rule 5-411 which provides that "Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully" further provides that the Rule "does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness. *Haischer v. CSX Transp., Inc.*, 381 Md. 119, 134 (2004) (holding that the collateral source rule "permits an injured person to recover the full amount of his or her provable damages, regardless of the amount of compensation which the person has received for his injuries from sources unrelated to the tortfeasor."); *see also* Restatement (Second) of Torts § 920A (1979). Appellees' reference to appellants' insurance, during the cross-examination of appellants' president and principal Anders Johansson, was offered to impeach Johansson's prior statement that he initially believed appellees were at fault for the flood, which prompted the suit *sub judice*. Trial court properly concluded that impeachment of appellants' evidence relative to the "critical issue" of the case was probative of appellants' motivation to pursue litigation three years after the flood. Because, during the course of the cross-examination, appellees never suggested that appellants had been satisfied in whole or in part, through their insurance provider or prior litigation to implicate the collateral source rule, the trial judge did not abuse his discretion in allowing appellees to enter into evidence Johansson's note to his insurance provider and in permitting the cross-examination of Johansson regarding his relationship with the insurance provider.

Evidence–Weight and Conclusiveness in General: *Hartford Accident & Indem. Co. v. Scarlett Harbor Assocs.*, 109 Md. App. 217 (1996). The trial court's ruling admitting certified copies of the U.S. Department of Commerce's weather records for the Baltimore-Washington International Airport reporting rain patterns at the airport between the day of the roofing job and the date of the flooding was a proper exercise of discretion. Appellees offered the records as circumstantial evidence that their conduct did not cause the damage in question, but that some other intervening cause was at fault. Furthermore, the records were not beyond the grasp of a layperson's understanding as they merely quantified rainfall at a given location. Accordingly, the admission of the weather records was appropriate.

New Trial–Discretion of Trial Court: *A.S. Abell Co. v. Skeen*, 265

Md. 53 (1972). Appellants argued that trial court abused its discretion in denying their Motion for New Trial challenging the admission of certified weather records of rain patterns and evidence of insurance coverage.

Facts: Appellants brought a negligence suit against appellees in the Circuit Court for Baltimore City (Ross, J.) for damages resulting from a flood. At trial, over the objection of appellants, appellees introduced into evidence certified records of weather data and a letter written by appellants to their insurance carrier and questioned appellants regarding that correspondence. The jury returned a verdict for appellees. Appellants thereafter filed a Motion for New Trial and for Judgment Notwithstanding the Verdict, which was denied. Appellant appealed.

Held: Affirmed. Because appellees never suggested that appellants claims had been satisfied, in whole or in part, through their insurance provider, but had referenced appellants' insurance, during the cross-examination of appellants' president and principal to impeach his prior statement that he initially believed appellees were at fault for the flood, which prompted the suit at hand, reference to appellant's insurance coverage came within the exception to the collateral source doctrine, Maryland Rule 5-411, because it was offered as proof of bias or prejudice of a witness.

Trial judge did not abuse his discretion in denying motion for new trial challenging admission of correspondence related to insurance coverage and the admission of certified weather records offered to show that appellees' conduct did not cause the damage in question, but that some other intervening cause was at fault.

Titan Custom Cabinet, Inc. et. al. v. Advance Contracting, Inc. et. al., No. 1957, September Term, 2006, decided February 7, 2008. Opinion by Davis, J.

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REAL PROPERTY - REAL ESTATE FORECLOSURES – DISCOVERY RELATED TO EXCEPTIONS TO FORECLOSURE SALES

Facts: Appellees, substitute trustees Diane S. Rosenberg and Mark Meyer, initiated a real estate foreclosure action in the Circuit Court for Charles County against appellants, mortgagors Donna P. Jones and Tanya L. Jones, in late October, 2006. Appellants, unsuccessfully, sought to stay foreclosure prior to the foreclosure sale under Maryland Rule 14-209(b). The foreclosure sale occurred on November 29, 2006. Following the foreclosure sale, appellants filed exceptions to the sale under Maryland Rule 14-305(d) and sought discovery, and a hearing on the exceptions was scheduled for February 27, 2007. Prior to the hearing, appellants served notices of deposition and subpoenas *duces tecum* on appellees. Appellants sought discovery of the original loan documents, including the original deed of trust, in order to determine whether the mortgage was usurious and improper, as well as discovery of whether appellants received actual notice of the foreclosure sale. Appellees moved to quash the notices of deposition and subpoena *duces tecum*. The hearing occurred and the circuit court later issued an order that denied appellants' requested discovery, overruled appellants' exceptions, and ratified the foreclosure sale. Appellants noted an appeal from the ratification of the foreclosure sale, and moved to stay enforcement of the ratification of sale pending appeal under Maryland Rule 2-632(e). Appellants did not file a supersedeas bond with the motion, and the circuit court denied the motion to stay enforcement of the ratification of sale pending appeal. Appellants then filed a motion to alter or amend the judgment of ratification of sale under Maryland Rule 2-535, alleging there was extrinsic fraud or irregularity in the foreclosure sale, but the circuit court denied the motion.

Held: Affirmed. The Court of Special Appeals held the availability of discovery related to exceptions to a foreclosure sale under Rule 14-305(d)(2) rests in the sound discretion of the trial court, and that the circuit court did not abuse its discretion in denying appellants' requested discovery. The Court explained usury is not a proper ground for setting aside a foreclosure sale, and therefore, appellants' requested discovery of the lending documents, to determine whether appellant's loan was usurious or improper, was not necessary. The Court agreed with the circuit court's finding that appellants had sufficient time prior to the February 27, 2007 hearing to collect evidence on the issue of notice. Moreover, appellant's had actual notice of the sale no later than November, 2006.

Additionally, the Court of Special Appeals held the circuit court did not err in denying appellants' motion for an injunction

to stop foreclosure under Rule 14-209(b), filed prior to the foreclosure sale, because the motion was not in compliance with the requirements of the rule. Regarding appellants' exceptions to the foreclosure sale, the Court noted appellants' only challenge relating to procedural irregularities in the sale pertained to insufficient notice. However, the record contained affidavits by appellees stating that they gave notice of the foreclosure proceedings by regular and certified mail in compliance with statutory requirements, and attached to the affidavits were copies of the letters and postal receipts for the mailings. The Court held the circuit court did not err in overruling appellants' exceptions to the foreclosure sale and ratifying the foreclosure sale. The Court held the circuit court did not err in denying appellants' motion to stay enforcement of the judgment to ratify the sale because appellants did not file a supersedeas bond, which was required under Rule 2-632(e). Finally, the Court held appellants' motion to alter or amend the judgment contained no probative evidence showing extrinsic fraud or irregularity in the foreclosure sale, and therefore, the circuit court did not err in dismissing the motion.

Tanya Jones v. Diane Rosenberg, No. 124, September Term, 2007, filed January 31, 2008. Opinion by Eyler, James R., J.

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REAL PROPERTY - SUBDIVISIONS - ADEQUATE PUBLIC FACILITIES - CONCURRENCY MANAGEMENT CERTIFICATES - CONSTRUCTIVE CONTEMPT - INJUNCTIVE RELIEF - CONTRACTS - INTERLOCUTORY APPEALS.

Facts: In 2002, Carroll County granted the developer, Forty West, a concurrency management certificate ("CMC") for two separate subdivision projects. The certificates specified that the developer satisfied certain requirements as to adequate public facilities ("APF") to support the subdivision projects. Upon issuance of the CMCs, the developer expended millions of dollars to acquire the properties for the projects and began to undertake engineering work, percolation studies, etc., at

considerable cost

Carroll County adopted a Deferral Ordinance in 2003, mandating a 12-month deferral of all projects, including those of Forty West. The circuit court issued a preliminary injunction in 2003, barring the County from applying the Deferral Ordinance to the projects. Consequently, Forty West brought suit against the County, *inter alia*, for breach of contract. The court entered an order on November 13, 2003, granting Forty West's application for preliminary injunction and ordered the County to resume the development process with the developer.

In 2004, the County repealed the law under which the CMC's were issued for the projects, and enacted a more stringent adequate public facilities law. The County sought to apply the new law to the projects in issue. Therefore, in January 2005, Forty West amended its suit, alleging that the projects could not satisfy the new APF law, and asking the court to determine that the new APF law had no application to its projects. Forty West sought, *inter alia*, further injunctive relief, and to hold the County in contempt of the 2003 injunction.

On October 17, 2005, the circuit court granted partial summary judgment to Forty West, concluding that the CMCs were contractual obligations. It also found the County in constructive contempt of its prior order, and granted Forty West's motion for additional preliminary injunctive relief, which enjoined the County from applying the new APF law to the projects.

Held: Affirmed. The order as to the constructive contempt and preliminary injunction are appealable, Consideration of the circuit court's rulings requires analysis, *inter alia*, of the circuit court's determination that the CMC's constituted contracts. The circuit court correctly determined that the CMCs are enforceable as contracts, and that the County breached its obligations as to them. In reaching its conclusion, the circuit court properly looked to the plain language of the CMCs and the statutory scheme in effect when the CMCs were executed. Therefore, the circuit court did not err in its contempt and injunction rulings.

County Commissioners For Carroll County, Maryland v. Forty West Builders, Inc., et al., No. 1531, September Term, 2006, filed February 11, 2008. Opinion by Hollander, J.

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JUDICIAL APPOINTMENTS

On January 28, 2008, the Governor announced the appointment of ALEXANDER WRIGHT, JR. to the Court of Special Appeals. JUDGE WRIGHT was sworn in on February 27, 2008 and fills the vacancy created by the elevation of the Hon. Joseph D. Murphy, Jr. to the Court of Appeals.

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On January 28, 2008, the Governor announced the appointment of ROBERAT A. ZARNOCH to the Court of Special Appeals. JUDGE ZARNOCH was sworn in on February 27, 2008 and fills the vacancy created by the retirement of the Hon. James A. Kenney, III.

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