

COURT OF APPEALS CASES & DECISIONS UPDATE

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About This Update

The Department of Legislative Services, Office of Policy Analysis, reviews the opinions issued by the Court of Appeals of Maryland and reports on those decisions of significance to the General Assembly. The project is led by Douglas R. Nestor. Michelle Davis, Justin Kozinn, Heather Marchione, and Jennifer L. Young assisted in the preparation of this edition.

In this edition, the following cases are summarized:

- *State v. Bey*, 452 Md. 255 (2017): Section 3-315 of the Criminal Law Article is ambiguous as to whether separate convictions and sentences could be obtained for multiple uninterrupted 90-day intervals of a continuing course of conduct, as contradictory reasonable interpretations subsist with equal force even after the tools of statutory construction are exhausted. Thus, the rule of lenity mandates that the statute be construed so as not to provide multiple punishments for the criminal defendant.
- *Bellard v. State*, 452 Md. 467 (2017): Under § 2-304(a) of the Criminal Procedure Article, where the State gives notice of an intent to seek life imprisonment without the possibility of parole and where a defendant is convicted of first-degree murder, the trial court, not the jury, determines whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of parole.
- *Parker, et al. v. Hamilton, et al.*, 453 Md. 127 (2017): The statute of limitations on a wrongful death claimant's right to sue is tolled (suspended) during any period of minority or during the period in which a defendant engages in fraudulent conduct to prevent a cause of action. The Court's decision in *Waddell v. Kirkpatrick*, 331 Md. 52, 626 A. 2d. 353 (1993), that the statute of limitations on wrongful death claims brought by minor plaintiffs was not tolled during the period of minority was superseded by the General Assembly's 1997 amendment to the Courts and Judicial Proceedings Article.
- *Chateau Foghorn v. Hosford*, 455 Md. 462 (2017): Section 8-402.1(b)(1) of the Real Property Article, which requires a court to enter a judgment for the restitution of the possession of a rental property only if the court has found that a tenant breached the terms of a lease agreement and that the breach was "substantial and warrants an eviction," does not conflict with, and therefore is not preempted by, federal law and regulations mandating that federally subsidized, Section 8, project-based housing developments include provisions in tenant lease agreements providing that engaging in drug-related activity on or near the leased premises is grounds for termination of a lease.

Criminal Law – Sexual Assault Continuing Course of Conduct – Unit of Prosecution – Ambiguity

Case: *State v. Bey*, 452 Md.. 255 (2017)

Decision: Section 3-315 of the Criminal Law Article is ambiguous as to whether separate convictions and sentences could be obtained for multiple uninterrupted 90-day intervals of a continuing course of conduct, as contradictory reasonable interpretations subsist with equal force even after the tools of statutory construction are exhausted. Thus, the rule of lenity mandates that the statute be construed so as not to provide multiple punishments for the criminal defendant.

Background and Summary: Section 3-315 of the Criminal Law Article provides that a person may not engage in a continuing course of conduct which includes three or more acts that would constitute acts of first-degree rape, second-degree rape, first-degree sexual offense, second-degree sexual offense, or third-degree sexual offense over a period of 90 days or more, with a victim who is under the age of 14 years at any time during the course of conduct. Subsection (c) of § 3-315 further provides that in examining whether the requisite number of acts occurred, that the trier of fact (1) must determine only that the number of acts occurred, but (2) need not determine which acts constitute the basis of the required number of acts. Subsection (d) of § 3-315 provides further that an individual charged under the section may not be charged for both the underlying acts that constitute the continuing course of conduct, as well as the charge for the continuing course of conduct.

Douglas Ford Bey II was charged with sexual abuse of a minor and related counts for acts occurring over a period of approximately four years. The female minor victim testified at trial that she had been abused repeatedly by Bey from the ages of 10 to 14. The acts varied in nature and began with Bey performing cunnilingus on the victim at age 10, progressed to Bey forcing the victim to view pornography with him and engage in fellatio and intercourse by age 11, and occurred multiple times a week when the victim was 12 and 13.

After learning the victim was pregnant, Bey brought her to the University of Maryland Medical Center to have an abortion performed. Afterwards, Bey continued to sexually abuse the victim. The victim eventually reported the sexual abuse to her therapist, who raised the issue with the appropriate authorities.

At trial, Bey was charged with a 7-month long course of conduct charge, from the time the abuse began while the victim was 10, until the time she turned 11. Bey was charged with additional continuing course of conduct counts for the time the victim was 11, 12, and 13 years old, each year, for each specific sexual act committed. For example, for the year the victim was 11 years old, Bey was charged with three continuing course of conduct counts, one alleging three or more acts of second-degree rape, one alleging three or more acts of fellatio, and one alleging three or more acts of cunnilingus. Ultimately, the jury found Bey guilty of all the continuing course of conduct offenses and the court imposed consecutive terms of imprisonment of 25 and 30 years as to each offense for a total of 265 years. The trial

court imposed additional consecutive and concurrent terms of imprisonment on the other counts totaling 125 years for an aggregate sentence of 390 years.

As part of a motion for judgment of acquittal, and then on appeal to the Court of Special Appeals, Bey's counsel argued that the continuing course of conduct counts should be merged. The motion for judgment of acquittal was denied, but the Court of Special Appeals upheld his conviction while vacating his sentence and remanding for a new proceeding. The case was then appealed to the Court of Appeals.

The Court of Appeals determined that the plain language of § 3-315 provides that separate types of prohibited sexual acts do not constitute separate units of prosecution. The Court held that the State's interpretation regarding that discrete issue was unreasonable under the plain language of the statute. Therefore, § 3-315 prohibits separate convictions and sentences of each type of sexual act as separate continuing courses of conduct during an uninterrupted statutorily defined course of conduct.

The Court further held that § 3-315 is ambiguous as to whether multiple convictions and sentences may be obtained for multiple 90-day minimum intervals of an uninterrupted continuing course of conduct. Section 3-315(a) provides that "[a] person may not engage in a continuing course of conduct which includes three or more acts... over a period of 90 days *or more*[" (emphasis added). The plain language provides that a course of conduct must be at least 90 days. The Court held that it is a reasonable interpretation of the plain language of § 3-315(a) that the State is limited to a single conviction for one continuing course of conduct, even when the course of conduct extends beyond 90 days. Furthermore, it is also reasonable to interpret § 3-315(a) as setting forth a unit of prosecution that is at least 90 days. The latter interpretation would permit multiple course of conduct units of prosecution for consecutive 90-day intervals even when there has not been an interruption in the course of conduct.

The Court determined that the legislative history and purpose of the statute did not absolve the statute of ambiguity in favor of either party's proffered interpretations. Contradictory, reasonable interpretations subsisted with equal force even after the application of the tools of statutory construction, and thus the rule of lenity compelled the result. The Court stated, "ambiguous units of prosecution..., pursuant to the rule of lenity, must normally be construed in favor of the defendant, effectively merging the offenses." *Triggs v. State*, 382 Md. 27, 43, 852 A.2d 114, 124 (2004) (quoting *Melton v. State*, 379 Md. 471, 488, 842 A.2d 743, 753 (2004)). Therefore, the convictions for the continuing course of conduct counts were merged upon remand for a new sentence.

Sentencing Procedures – Life Imprisonment Without the Possibility of Parole

Case: *Bellard v. State*, 452 Md. 467 (2017)

Decision: Under § 2-04(a) of the Criminal Procedure Article, where the State gives notice of an intent to seek life imprisonment without the possibility of parole and where a defendant is

convicted of first-degree murder, the trial court, not the jury, determines whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of parole.

Background and Summary: Darrell Bellard (“Bellard”) was charged with four counts of first-degree murder and related offenses arising out of crimes which resulted in the deaths of two women and two children. On February 4, 2011, the State filed a notice of intent to seek the death penalty. Prior to the start of Bellard’s trial, in 2013, the General Assembly passed and the Governor of Maryland approved Senate Bill 276, repealing the death penalty. The Act took effect on October 1, 2013.

On June 3, 2013, in response to the pending repeal of the death penalty, the State filed in the circuit court a “Notice to Withdraw Intent to Seek Death Penalty.” On June 6, 2013, the State filed a “Notice of Intent to Seek Sentence of Imprisonment for Life without Possibility of Parole.”

On March 5, 2014, and April 4, 2014 respectively, Bellard filed a “Notice of Defendant’s Election to be Tried by Jury and, if Convicted of First[-]Degree Murder, to be Sentenced by Jury” and a motion to strike the State’s notice of intent to seek life imprisonment without the possibility of parole. Bellard contended that the amended version of § 2-304 of the Criminal Procedure Article (“CP”) requires a jury to determine whether to impose a sentence of life imprisonment without the possibility of parole. Bellard also argued that a sentence of life imprisonment without the possibility of parole would violate his rights under the United States Constitution and the Maryland Declaration of Rights.

On April 7, 2014, the State filed a motion to strike Bellard’s notice of election to be sentenced by a jury. The State contended that, in repealing the death penalty, the General Assembly did not intend to create a statutory right for a defendant to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole. Following a hearing, the circuit court denied Bellard’s notice of election to be sentenced by a jury.

The case proceeded to trial and a jury convicted Bellard of four counts of first-degree murder and related offenses. On June 27, 2014, the circuit court sentenced Bellard to four consecutive sentences of life imprisonment without the possibility of parole, one for each conviction for first-degree murder.

Bellard filed an appeal with the Court of Special Appeals. The Court held that CP § 2-304 does not give a defendant the right to have a jury determine whether the defendant should be sentenced to life imprisonment with the possibility of parole or life imprisonment without the possibility of parole. The Court also rejected Bellard’s claim that CP § 2-304 was void for vagueness.

Bellard thereafter filed a petition for a *writ of certiorari*, which the Court of Appeals granted. The Court of Appeals held that, under CP § 2– 304(a), where the State has given notice of an intent to seek life imprisonment without the possibility of parole and where a defendant is convicted of first-degree murder, the trial court, not the jury, determines whether to sentence the defendant to life imprisonment or life imprisonment without the possibility of parole.

The Court held that CP § 2-304’s language is ambiguous and pointed to the conflict between CP § 2-304(a) and CP § 2-304(b). CP § 2-304(a) provides that a trial court shall conduct a

sentencing proceeding to determine whether to sentence a defendant who is convicted of first-degree murder to life imprisonment without the possibility of parole. CP § 2-304(b), although not a grant of authority for a jury to conduct a sentencing proceeding, appears to contemplate that a jury determine where to sentence a defendant to life imprisonment without the possibility of parole.

The Court examined CP § 2-304's legislative history and determined that, in repealing the death penalty and amending CP § 2-304(a), without amending CP § 2-304(b), the General Assembly did not intend to give a defendant who is convicted of first-degree murder the right to elect to have a jury determine whether to impose a sentence of life imprisonment without the possibility of parole. The Court concluded that the sole purpose of Senate Bill 276 was to repeal the death penalty and enact any necessary and related changes to effectuate the repeal of the death penalty. The General Assembly's intent to repeal the death penalty was demonstrated by the amendments that it enacted with respect to CP § 2-304. CP § 2-304(a) contained references to the death penalty, which the General Assembly deleted; whereas CP § 2-304(b) lacked references to the death penalty, and the General Assembly left CP § 2-304(b) intact. The Court noted that nothing in the purpose paragraph of Senate Bill 276 or elsewhere evidenced an intent by the General Assembly to create a right for a defendant who is convicted of first-degree murder to elect to have a jury determine whether to impose life imprisonment without the possibility of parole.

The Court concluded that CP § 2-304(b) is no longer operative in light of the General Assembly's repeal of the death penalty. The Court noted that CP § 2-304(b) does not contain a provision empowering a jury to conduct a sentencing proceeding independent of what previously existed in CP § 2-304(a)(2). Under CP § 2-304, subsection (b) became operative only if a jury chose not to impose the death penalty under CP § 2-304(a)(2). Standing alone, CP § 2-304(b) is not a grant of authority or empowerment for a jury to conduct a sentencing proceeding to determine whether to impose life imprisonment without the possibility of parole. Rather, CP § 2-304(b) merely explains how a jury's determination was to be handled under the circumstances that existed before the repeal of the death penalty.

The Court also concluded that, although CP § 2-304 is ambiguous, the rule of lenity did not apply because the tools of statutory construction did not fail. The legislative history of Senate Bill 276 clearly demonstrated that the General Assembly's sole purpose was to repeal the death penalty.

Lastly, the Court held that Maryland's sentencing scheme for life imprisonment without the possibility of parole does not violate the United States Constitution or the Maryland Declaration of Rights.

Wrongful Death – Statute of Limitations – Exceptions for Minors and Fraud

Case: *Parker, et al. v. Hamilton, et al.*, 453 Md. 127 (2017)

Decision: The statute of limitations on a wrongful death claimant's right to sue is tolled (suspended) during any period of minority or during the period in which a defendant engages

in fraudulent conduct to prevent a cause of action. The Court's decision in *Waddell v. Kirkpatrick*, 331 Md. 52, 626 A. 2d. 353 (1993), that the statute of limitations on wrongful death claims brought by minor plaintiffs was not tolled during the period of minority and was superseded by the General Assembly's 1997 amendment to the Courts and Judicial Proceedings Article.

Background and Summary: In August 2009, William Steven Hamilton shot and killed his farmhand, Craig Junior Parker. On June 9, 2015, the decedent's mother and minor child (the claimants) filed a wrongful death complaint in the Circuit Court for Dorchester County containing three wrongful death counts against Mr. Hamilton (the defendant). The complaint alleged that the defendant: (1) shot and killed the decedent on or about August 22, 2009; and (2) buried the decedents' remains in order to conceal the death.

The Circuit Court granted the defendant's motion to dismiss on the grounds that the wrongful death claims were time-barred by the three-year statute of limitations in the wrongful death statute under § 3-904 of the Courts Article. Specifically, the Court held that the provisions which toll the running of the three-year statute of limitations for civil actions in general, where the plaintiff was a minor or incompetent at the time of the wrongful death, or in certain cases of fraud, are not applicable to wrongful death claims.

The claimants appealed the dismissal to the Court of Special Appeals. The Court of Appeals granted a *writ of certiorari* while the case was still pending in the intermediate appellate court.

The Court of Appeals began by noting that under common law, a tort victim's dependents were not entitled to pursue an action for wrongful death. However, in 1852, Maryland adopted its wrongful death statute which allows a surviving family member to bring an action in the Court to be compensated for the losses occasioned by their family member's death. In 1971, the General Assembly amended the statute to extend the time period for making a claim under the statute from two years to three years from the date of the decedent's death. In doing so, the Court noted the General Assembly's stated intent to make the limits on the time period to file the same as the time limitations applicable to negligence claims.

The claimants argued that § 5-101 of the Courts Article establishes a general statute of limitations of three years for all civil actions unless a different time limitation is specifically established for an action. This statute of limitations is tolled or suspended under two circumstances. First, § 5-201 of the Courts Article, allows a minor or incompetent individual to file a wrongful death action within the lessor of three years or three years after the date the disability is removed. Second, § 5-203 of the Courts Article also extends the statutory period of limitation in cases where "the knowledge of the cause of action is kept from a party by the fraud of an adverse party." In these cases, the statutory period begins to accrue at the time of discovery or at the time that an individual through ordinary diligence should have discovered the fraud. The claimants contended that the exceptions to the general statute of limitations for civil actions also apply to the three-year limitation in the wrongful death statute as evidenced by the General Assembly's 1997 amendment which specifically applied the exception authorizing the tolling of the statute of limitations during a period of minority to wrongful death plaintiffs.

The defendant responded that the circuit court properly applied the Court of Appeals decision in *Waddell v. Kirkpatrick*, 331 Md. 52, 626 A. 2d. 353 (1993), which declined to apply the exceptions to the general statute of limitations for civil actions to wrongful death claims. As a result, the *Waddell* Court held that the statute of limitations on wrongful death claims brought by minor plaintiffs were not tolled during the period of minority. In explaining its reasoning, the *Waddell* Court distinguished between a ‘statute of limitation’ and a ‘broader limitation on liability.’ The former only limits the time in which a remedy may be pursued, the latter extinguishes the right to the cause of action itself. The *Waddell* Court determined that when the liability and the remedy are created by the same statute, as is the case with the wrongful death statute, the limit set by the time limitation on the remedy is to be treated as a limitation on the right to pursue a cause of action. In addition, the defendant argued that the claimants’ complaint did not sufficiently plead fraud to toll the statute of limitations on that basis.

The Court of Appeals reversed the judgment of the circuit court stating that since the *Waddell* decision, the General Assembly amended § 5-201 of the Courts Article to specifically reference the wrongful death statute in 1997 to read in part, “when a cause of action subject to a limitation under Subtitle 1 of this title or Title 3, Subtitle 9 of this article accrues in favor of a minor or mental incompetent, that person shall file his action within the lessor of three years or the applicable period of limitations after the date the disability is removed.” In addition, the Court of Appeals noted that the legislative history of the amendment contained in the bill file confirmed that the amended language “provides the same extension of time to wrongful death actions that [had been] provided to other actions with a statute of limitation. Accordingly, the court concluded that the minor plaintiff’s wrongful death claim was tolled during the period of his minority. In addition, the court held that the claimant’s complaint alleging that the defendant buried the decedent to conceal his wrongdoing, sufficiently pled fraud to toll the statute of limitations for the decedent’s mother on that basis.

Federal Housing Projects – Role of State Law in Eviction Proceedings

Case: *Chateau Foghorn v. Hosford*, 455 Md. 462 (2017)

Decision: Section 8-402.1(b)(1) of the Real Property Article, which requires a court to enter a judgment for the restitution of the possession of a rental property only if the court has found that a tenant breached the terms of a lease agreement and that the breach was “substantial and warrants an eviction,” does not conflict with, and therefore is not preempted by, federal law and regulations mandating that federally subsidized, Section 8, project-based housing developments include provisions in tenant lease agreements providing that engaging in drug-related activity on or near the leased premises is grounds for termination of a lease.

Background and Summary: In 1989, Wesley Hosford, a disabled tenant suffering from incomplete paralysis to his extremities resulting in muscle spasms, sensations, and chronic pain, and the required use of a wheelchair, began residing at Ruscombe Gardens Apartments, a residential property for low-income elderly and disabled tenants managed by Chateau

Foghorn LP (Foghorn) and subsidized through a federal Section 8 project-based rental subsidy program. In 2012, Hosford renewed his lease agreement, which included an addendum that contained provisions mandated under federal law and regulation providing that a tenant, member of the tenant's household, or guest or other person under the tenant's control, was prohibited from engaging in drug-related criminal activity on or near the project premises. The addendum also provided that a violation constituted a material violation of the lease agreement and good cause for the termination of tenancy. In June 2014, two exterminators hired by Foghorn to treat a bedbug infestation at Ruscombe entered Hosford's apartment and discovered a marijuana plant growing in a pot in his tub and reported the discovery to the apartment's management. Hosford was charged in the District Court of Maryland sitting in Baltimore City for possession of less than 10 grams of marijuana. Ultimately, a *nolle prosequi* was entered on the charge.

Subsequently, Foghorn notified Hosford of the termination of his lease. When Hosford did not vacate the unit within 30 days of the notice, Foghorn filed a complaint for eviction against Hosford in the District Court of Maryland sitting in Baltimore City claiming that Hosford had breached the terms of the addendum to his lease. Hosford moved for a jury trial on the ground that the value of his right to the apartment exceeded \$15,000 and the case was then transferred to the Circuit Court for Baltimore City.

Section 8-402.1(b)(1) of the Real Property Article requires that a court issue an order of eviction only if it determines that a tenant breached the terms of a lease agreement and that the breach was "substantial and warrants an eviction." Foghorn filed a motion for summary judgment in the circuit court contending, in part, that the requirements of § 8-402.1 were preempted by federal law and regulation as relates to landlord-tenant disputes in the federal Section 8 project-based rental subsidy program.

The Supremacy Clause (Art. VI, § 2) of the United States Constitution provides that federal law "shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." State law may be preempted by federal law in three ways: (1) when Congress expressly states its intent to preempt state law (express preemption); (2) when Congress has not expressly stated the intent to preempt state law, but where the federal legislative or regulatory framework is so pervasive that there is no room for state law (field preemption, so termed because federal law is said to occupy the field); and (3) where state laws conflict with federal laws in a way that make it physically impossible to comply with both state and federal law or where state law acts as an obstacle to the achievement of Congressional legislative goals (conflict preemption).

The circuit court granted Foghorn's motion for summary judgment, holding in part that § 8-402.1 was preempted by federal law to the degree that it would permit a judge or jury in a state court to review *de novo* a landlord's exercise of discretion under federal law in deciding to proceed with an eviction action. Hosford filed a motion to alter or amend the circuit court's ruling, which was denied. Hosford then noted an appeal to the Court of Special Appeals on three issues, including the question of federal preemption of § 8-402.1.

In reversing the circuit court in favor of Hosford, the Court of Special Appeals agreed with the parties that the case presented a question of conflict preemption. The Court noted that the intent of Congress is the focus of a preemption analysis. As outlined by the Court, in cases of potentially conflicting federal and state law, there is a presumption that Congress does not intend to displace state law. The presumption is considered especially strong in areas of law that are traditionally the domain of the states, which the Court of Special Appeals determined includes landlord-tenant law. The Court held that a state law must do “major damage” to “clear and substantial” federal interests before it might be considered to be preempted by federal law and found that § 8-402.1 did not do major damage to the Congressional interests of (1) protecting residents of federally supported housing from criminal activity and drug-related criminal activity, and (2) giving landlords the discretion to initiate eviction proceedings in state courts without considering equitable factors in instances where criminal or drug-related activity were suspected. The Court of Special Appeals concluded a State court’s consideration of equitable factors required under § 8-402.1 is consistent with federal law and policy. Following the reversal, Foghorn petitioned the Court of Appeals for a *writ of certiorari*, which was granted.

The Court of Appeals upheld the decision of the Court of Special Appeals, with some modifications. First, the court agreed with the lower Court’s application of a heightened presumption against federal preemption in an area of law traditionally to the states and discussed at length the history of landlord-tenant law as a matter of state law. However, the Court declined to extend the standard of “major damage” to “clear and substantial” federal interests, which it noted had been used primarily related to cases involving domestic relations. In determining Congressional intent, the Court of Appeals reviewed federal statute and regulatory law, highlighting that statutory language, regulations, and guidelines noted that an eviction proceeding would occur in state court and in accordance with state and local landlord-tenant law. The Court concluded that Congress’ broad objective for the mandatory lease provisions was (1) to reduce drug-related crime in federally subsidized housing and (2) by vesting in housing providers in Section 8 project-based housing substantial discretion to bring an eviction action in state court, subject to state law. Distinguishing Maryland law from other states with “right to cure” provisions (requiring a landlord to allow a tenant in violation of a term to cure the violation before bringing a suit) or “innocent tenant” provisions (protecting tenants with no knowledge of illegal activity), which the Court characterized as limiting a housing provider’s discretion in bringing an eviction action, the Court of Appeals determined that § 8-402.1 did not conflict with the federal objectives and therefore was not preempted by federal law.

The Court of Appeals mentioned another potential issue with § 8-402.1 *in dicta* of the case. The Court noted that the question of whether the breach of a lease agreement is “substantial and warrants eviction” is a question to be determined by a judge or jury remains unresolved. The statute is silent on whether it is a question of law or fact, and the Court of Appeals declined to rule on it because the issue was not raised by either party to the case on appeal.