Legal Year in Review

Civil Procedure and Evidence

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LEGAL YEAR IN REVIEW 2014
DEVELOPMENTS IN CIVIL PROCEDURE AND EVIDENCE

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I. INTRODUCTION

The cases summarized below are identified by the Rule of Civil Procedure or Evidence addressed in the case, and organized in the same order in which the Rules appear in the Rule book. We hope these summaries provide a helpful overview of the Law Court's jurisprudence on these topics.

We would like to acknowledge our friend and colleague Paul Macri, Esq., whose cogent and comprehensive analysis of the Law Court's case law on Civil Procedure and Evidence was a feature of the Legal Year in Review for many years, until his untimely death last year. His bright smile and quick legal mind will be missed.

II. RULES OF CIVIL PROCEDURE

A. Rule 6(b): Excusable Neglect in the Late Designation of an Expert Witness

Estate of Ruth E. O'Brien-Hamel, 2014 ME 75, 93 A.3d 256

The estranged daughter of Ruth O'Brien-Hamel challenged Ruth's will, which Ruth had executed a day before her death from late-stage lung cancer. The will left all of Ruth's property to her husband, whom Ruth had married on the same date. Obviously, Ruth's capacity to make the will was a central issue in the case.

At hearing, the Probate Court admitted the testimony of Dr. Austin, Ruth's treating physician in hospice, rejecting a motion *in limine* by the daughter who objected to Dr. Austin's late designation, several weeks after the expert witness deadline.

On appeal, the daughter argued the husband had not shown excusable neglect as he was required to do by M.R.Civ.P. 6(b), applicable in the Probate Court pursuant to Probate Rule 6. The Law Court rejected that argument, holding that no showing of excusable neglect was required because the daughter was not unfairly surprised.

The husband's expert had been designated three weeks before the Probate hearing, and the daughter had access to the hospice physician's records well in advance, which contained medical information relevant to Ruth's capacity. In fact, the daughter's own expert had reviewed these records in forming his opinion. Because there was no unfair surprise, the husband did not need an excuse for the late expert designation.

Arguably, this holding is *dicta* as the Law Court also noted that any error was harmless, as Dr. Austin ultimately did not offer an expert opinion on testamentary capacity.

B. Rule 7(b): The Court's Authority to Decide a Motion Without a Hearing

Estate of Harold Forrest Snow, 2014 ME 105

After the parties settled a will contest in Probate Court, putting the terms of the settlement on the record at a deposition, the plaintiff moved to enforce the settlement agreement.

The Probate Court granted the plaintiff's motion without a hearing and the defendant appealed, arguing among other points that the Probate Court had erred in granting the motion without hearing or trial.

The Law Court pointed out that M.R.Civ.P. 7(b)(7), which applied pursuant to Probate Rule 7, gives the trial court discretion to rule on a motion without hearing. The Court went on to explain that a motion to enforce may require an evidentiary hearing, if the existence of a binding settlement agreement is not unambiguously proven by supporting documents. In this case, the deposition transcript that memorialized the terms of the settlement agreement held the same weight as if the parties had recited the terms of their agreement into the record before the court. There was no ambiguity, and thus no evidentiary hearing was required.

C. Rule 25: The Right of Intervention

Almeder v. Town of Kennebunkport, 2014 ME 12

This case was initiated by beachfront homeowners at Goose Rocks Beach, who sought to quiet title in their property and restrict the public's access to the beach. Approximately 200 homeowners located near, but not on, the beach (the "backlot" owners) intervened and filed counterclaims, and the State later intervened to assert the public's right to use the intertidal zone of the beach. Overall, the case involved some sixty-three causes of action.

The trial court granted the backlot owners standing to intervene based on their ability to use the beach without permits and to rent their homes based on proximity to the beach, as well as the inflated tax value of their property due to proximity to the beach.

On appeal, the Law Court criticized the trial court for analyzing the issue generally as a matter of standing, rather than applying the specific criteria of M.R.Civ.P. 24 on standing to intervene. To intervene by right, Rule 24(a) requires the applicant claim an interest relating to the property; to intervene by permission, Rule 24(b) requires the applicant's claim have questions of law or fact in common with the parties. The Law Court held that the backlot owners had failed to prove any private easement for the beach, and had no other interest in the beach or legal claims relating to the beach that differed from the public's. Their inclusion "served only to add to [the litigation's] expense and delay."

Rule 54: Entry of Final Judgment

The trial court scheduled a bifurcated trial, to first address claims based on use of the beach, and then address claims based on title. Prior to trial, it granted summary judgment on the use claims, entering a final judgment on those claims pursuant to M.R.Civ.P. 54(b)(1). The remaining title based claims were set for trial.

On appeal, the beachfront homeowners argued that the trial court erred in entering final judgment. The Law Court wasted little time in holding that due the extraordinary circumstances of a case costing litigants and taxpayers substantial time and money, the trial court did not abuse its discretion in entering final judgment on the use claims. It cited the six-part test in *Marquis v. Town of Kennebunk*, emphasizing the economic effect of delays in appeal, and the utility of a final judgment in expediting the trial court's work.

D. Rules 26(g) and 37 and the Court's Authority to Impose a Monetary Sanction;

U.S. Bank Nat'l Ass'n v. Manning, 2014 ME 96

In this foreclosure case, the Law Court delineated the trial court's authority to dismiss an action and order monetary sanctions in resolving a discovery dispute.

In the opening salvo of the discovery dispute, a home owner defending a foreclosure action wrote to the Superior Court pursuant to Civil Rule 26(g)(1) to request a hearing regarding "an ongoing discovery dispute." The homeowner sought an order compelling discovery, as well as attorney's fees. The court ordered the Bank to respond to discovery and pay the homeowner $150 within thirty days, stating also that failure to comply with the order would result in dismissal with prejudice of the foreclosure complaint.

When the Bank paid the $150 discovery sanction several days late, the homeowner moved the court for dismissal with prejudice—the threatened sanction for failure to comply with the courts order—and the court granted the motion.

The Bank appealed, challenging the trial court's authority to levy such an extreme sanction. The Law Court affirmed the trial court's power under Rule 26(g) to compel a party to respond to discovery, although it encouraged trial courts to facilitate "active interaction between the parties and the court" in order to resolve discovery disputes before they become the primary focus of the litigation, as occurred here.

The Law Court held that Rule 37(a) did not give the trial court authority to impose such a drastic sanction for payment of a $150 penalty between four and eight days late.

The Law Court also concluded that the Bank had not actually paid the sanction late. Although the homeowner argued that the thirty day deadline in the order began running on the date the order was signed, the court looked to the plain language of Rule 58 in explaining that the deadline began to run on the date the order was entered in the docket. Three days would then be added to the deadline under M.R.Civ.P. 6(c), because the court specified in its order that the parties would receive the order in the mail. Thus, the Bank's payment was timely.

The Law Court also entertained the possibility that the thirty day deadline could have run from the date that the order was put into the mail to the parties. Because the order was entered in the docket and put in the mail to the parties on the same date, this would not change the due date.

Rule 52: Findings of Fact and Conclusions of Law

At some point after its order dismissing the case with prejudice, the court amended the order, without hearing or trial, to reflect a dismissal without prejudice. When the homeowner moved for findings of fact and conclusions of law under Rule 52(a), the trial court ordered the parties to submit proposed findings of fact; it then adopted some of each party's findings of fact and reinstated its order dismissing the case with prejudice, based on the findings it had adopted.

The Bank appealed the trial court's authority to make findings of fact or conclusions of law when there had been no hearing or trial. Although Rule 52(a) states that findings of fact are unnecessary on motions other than a motion under Rule 50(d), it does not altogether bar them, and a treatise on Maine Civil Procedure cited by the homeowner placed a request for findings of fact on a motion in the trial judge's discretion.

The Law Court looked to the broader context of the rules, noting that Rule 52(a) describes findings of fact in the context of a non-jury trial, and Rule 52(c) emphasizes the trial court's opportunity to judge the credibility of witnesses, in setting the standard for review by an appellate court.

The Court held that findings of fact under Rule 52 must be made on an evidentiary record, and used to clarify or expand the court's rationale for a prior decision rather than making initial, foundational findings in lieu of a hearing or trial. The trial court erred by its findings of facts in this case.

E. Rule 41(b)(2): Dismissal With Prejudice For Failure to Comply With a Court Order

Dee v. State, 2014 ME 106

In this brief decision, the Law Court approved a Superior Court's dismissal of the plaintiff's claim under M.R.Civ.P. 41(b)(2), for failure to comply with the Court's prior order. Due to the plaintiff's repeated, unsuccessful, and duplicative challenges to Maine statutes criminalizing marijuana, the Superior Court had issued an order in 2007 enjoining him from filing further similar lawsuits without prior approval.

When the plaintiff filed suit based on these same theories but without seeking the court's approval, the trial court granted a motion to dismiss. The Law Court affirmed, citing to the section of Rule 41 that allows dismissal with prejudice for failure to comply with court order.

F. Rule 43(a): The Requirement That Testimony Be Taken In Open Court

Hutchinson v. Cobb, 2014 ME 53, 90 A.3d 438

In a divorce proceeding focused on custody and visitation rights regarding the parties' six year old child, the trial judge took the child's testimony in chambers in the presence of a clerk, but without either party present and off the record.

On appeal by the father, the Law Court noted that Rule 43 embodies cornerstone values of the Anglo-American judicial system, which is based on open and accessible public proceedings. Rule 43 also provides civil litigants the same right to cross-examine adverse witnesses as in criminal trials.

The Law Court declined to follow the jurisdictions that recognize implied exceptions to Rule 43, holding that only express exceptions in statute or rule would apply. In this case, Maine's statutory exception for interviews in child protective proceedings did not apply.

The Law Court did recognize another type of exception, however—that of waiver. Because both parties had agreed to the in-chambers interview, the Law Court found the father had waived his right to appeal on that ground.

Nevertheless, the Law Court vacated the trial court's decision for its own reasons, because the trial court had neglected to put the child's statements on the record and an administrative order enacted pursuant to Rule 76H requires all testimonial proceedings in family and civil matters to be recorded.

G. Rule 45: A Non-Party Witness' Standing to Quash a Subpoena

State v. Peck, 2014 ME 74, 93 A.3d 256

In an appeal from a judgment of the District Court charging Ms. Peck with a civil violation for cruelty to animals, Ms. Peck argued that the District Court had abused its discretion in quashing a subpoena that the defendant had served on a veterinarian three days before trial.

The Law Court clarified that although the veterinarian was a non-party witness and no Maine case law or rule explicitly authorizes a non-party witness to quash a subpoena *ad testificandum*, such a right is recognized in the Advisory Committee notes to the 2007 amendment to Rule 45.

Additionally, the trial court acted within its discretion in granting the veterinarian's motion to quash, when the subpoena allowed the veterinarian only one business day to prepare and clear his schedule, and would have resulted in cancelling meetings with twenty-five to thirty clients and missing a lunchtime retirement party for his employee of twenty years.

Lastly, the Law Court held that although it is generally a best practice to allow parties to be heard on a motion to quash, Rule 45(e) incorporates Rule 26(g), which allows the trial court to decide motions without hearing.

H. Rule 50 (b): The Standard for Judgment as a Matter of Law

Tobin v. Barter, 2014 ME 51, 89 A.3d 1088

In a breach of contract action arising from discussions between a writer/publisher and an artist for production of a book displaying the artist's work, the defendant artist moved at trial for judgment as a matter of law pursuant to Rule 50(a), after the plaintiff writer/publisher rested his case. The artist argued that although the parties agreed there was a contract, the plaintiff had presented no evidence of its breach.

After a jury verdict in favor of the plaintiff writer/publisher, the artist renewed his motion for judgment as a matter of law pursuant to Rule 50(b). The trial court granted the motion, finding the writer/publisher had not met his burden to prove a meeting of the minds and the existence of a contract.

On appeal, the Law Court overturned the judgment, holding that under the standard of Rule 50, there was a reasonable view of the evidence that could sustain a verdict for the writer/publisher. The artist himself had conceded in his Rule 50 motion that the parties agreed on the existence of a contract, and there was evidence from which a rational jury could find that the parties' agreement was sufficiently definite to fix their legal liabilities.

Rule 52: Findings of Fact and Conclusions of Law

At some point after its order dismissing the case with prejudice, the court amended the order, without hearing or trial, to reflect a dismissal without prejudice. When the homeowner moved for findings of fact and conclusions of law under Rule 52(a), the trial court ordered the parties to submit proposed findings of fact; it then adopted some of each party's findings of fact and reinstated its order dismissing the case with prejudice, based on the findings it had adopted.

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The Law Court looked to the broader context of the rules, noting that Rule 52(a) describes findings of fact in the context of a non-jury trial, and Rule 52(c) emphasizes the trial court's opportunity to judge the credibility of witnesses, in setting the standard for review by an appellate court.

The Court held that findings of fact under Rule 52 must be made on an evidentiary record, and used to clarify or expand the court's rationale for a prior decision rather than making initial, foundational findings in lieu of a hearing or trial. The trial court erred by its findings of facts in this case.

I. Civil Rules 55(c) and 60(b): Judicial Review of a Default Judgment

Samsara Memorial Trust v. Kelly, Remmel & Zimmerman, 2014 ME 107

After a default judgment was entered against two inter-related trusts as a sanction for discovery violations in a suit alleging fraudulent transfers by the trusts, the trusts appealed to the Law Court. They argued the trial court judge who entered the default judgment was biased and should have recused himself.

The Law Court emphasized that under established case law, Rules 55(c) or 60(b) provide the only basis for review of a default judgment. Because the trusts failed to raise the issue of judicial bias and recusal with the trial court prior to the default judgment, or after the default judgment through a Rule 55(c) or 60(b) motion, the Law Court had no record on appeal that would allow an informed review.

Based on the limited record before it, the Law Court determined there was no obvious error in the Superior Court judge's failure to recuse himself, *sua sponte*, for a case in which a former colleague's current law firm (but not the former colleague himself) was involved as a party.

J. Rule 56: Summary Judgment Practice

Lubar v. Connelly, 2014 ME 17, 86 A.3d 642

Lubar obtained a judgment of foreclosure against the homeowner Connelly, through a summary judgment motion supported by loan documents and an affidavit. On appeal, the Law Court vacated the summary judgment and judgment of foreclosure, because Lubar had not met his burden as a foreclosure plaintiff to establish basic facts, including the amount due on the mortgage note along with attorney's fees and costs.

Although Lubar's affidavit stated that $7,671.40 was due in attorney's fees and costs, the record citation supported a different amount, and the judgment of foreclosure awarded yet another amount, $8,649.75. Due to this failure to support the judgment amount with a statement of material fact that was in turn supported by a record reference (as well as other failures of proof), the Law Court found there were genuine issues of material fact that precluded summary judgment.

In *dicta*, the Law Court went on to criticize statements in Lubar's affidavit.. His affidavit statements such as "I was advised that . . ." or "it was represented to me that. . ." violated Rule 56(e) as not based on personal knowledge, and represented inadmissible hearsay because they were cited in the statement of material facts for the truth of the matter asserted.

The Law Court noted that under Supreme Court precedent, a party's version of the facts that is "utterly discredited" by the record will not generate issues of material fact. According to the Law Court, Lubar's affidavit statement that he personally handled the loan application at issue, when the loan application itself states that it was taken by telephone by a "Lot Bates," lacked overall trustworthiness.

In this decision, the Law Court signals that trial courts can and should consider the trustworthiness and reliability of affidavit statements in deciding a motion for summary judgment.

K. Rule 60: The Right to Relief from a Default Judgment

Cody Corp. v. Kelly Earthworks, Inc., 2014 ME 93

Defendant Kelly failed to respond to both a complaint for a mechanic's lien and a motion for summary judgment, after which the court entered judgment against Kelly in the amount requested by the plaintiff, ordering Kelly to sell property to satisfy the judgment.

After Kelly appeared and moved to set aside the default under Rule 55(c) and for relief from judgment under rule 60(b), the trial court denied both motions.

On appeal, the Law Court was unconvinced by Kelly's argument that the plaintiff had made fraudulent representations in its summary judgment briefing, and also affirmed the trial court on other grounds. Because Kelly had failed to protect its own interest by defaulting on the complaint and failing to oppose summary judgment, it was not in a position to move the court for relief from judgment, because Rule 60(b) "presupposes that a party has performed (its) duty to take legal steps to protect (its) own interest in the original litigation."

In essence, Rule 60(b) does not allow relief from a default judgment imposed for failure to appear and defend.

L. Rule 66: The Trial Court's Authority to Impose a Civil Monetary Penalty

Jackson V. MacLeod, 2014 ME 110

In a family law proceeding in which a mother sought to end overnight visitation between her younger child and the child's father, the mother sought to establish the father's general lack of parenting skills, introducing evidence that he had enrolled the parties' teenage son in a driver's education course against the mother's wishes and signed the driver's permit application as the son's custodial parent, although the court's then-existing order gave him no authority to do so.

The trial court ended the father's overnight visits with the younger child, and also imposed a $1,000 civil fine for the father's "obvious attempt at subterfuge concerning the driver's license."

On appeal, the father argued that the trial court had no authority to impose a civil monetary penalty. The Law Court agreed, noting that Rule 66(b) only authorizes the court to impose a civil penalty for contempt committed in the court's presence. Rule 66(c) and Maine statute authorize a civil penalty for non-compliance with a parental rights and responsibilities order, *upon motion* and a finding of contempt. Because there was no motion for contempt pending before the court, it lacked authority to impose a civil penalty.

M. Rule 66: Incarceration for Contempt of Court

Murphy v. Bartlett, 2014 ME 13, 86 A.3d 610

In another family law case, the Law Court vacated a trial court's sanction of imprisonment for any future non-compliance with a divorce judgment.

The ex-wife had filed a motion for contempt under Rule 66(d) alleging that the ex-husband had missed child support and spousal support payments due under a divorce judgment, and stopped making court-ordered payments towards a mortgage, real estate taxes, and home owner's insurance and credit card debt. After a hearing, the court held the ex-husband in contempt and committed him to ninety (90) days in jail, suspended, subject to making each payment specified in the divorce judgment for three years, at which point he would have purged himself of contempt.

On appeal, the Law Court held the threat of incarceration for prospective nonpayment was improper, as the trial court had not found the husband had the ability to make the required payments over the next three years, and Rule 66(d)(3)(A) allows coercive imprisonment as a remedial sanction for contempt only when the contemnor "carries the keys of his prison in his own pocket." In other words, he must have the ability to free himself at any time by making payments.

The trial court did have the authority to threaten incarceration if the ex-husband did not apply the proceeds from sale of the marital home to his credit card debt and the ex-wife's attorneys fees, as ordered by the court, because the ex-husband's obligation to make those payments would arise when the house was sold, at which point he would have the funds to comply with the court's order.

N. Rule 80M: Challenges to a Medical Malpractice Screening Panel Decision

Nickerson v. Carter, 2014 ME 19, 86 A.3d 658

After a medical malpractice trial in which the unanimous findings of the medical malpractice screening panel were admitted into evidence and the jury delivered a defense verdict, the plaintiff challenged the admissibility of the panel findings on two grounds.

First, the plaintiff argued the panel's findings were inconsistent with the evidence presented to it. The Law Court affirmed the trial court's refusal to review the evidence presented to the screening panel, citing to both the Maine Health Security Act and Rule 80M(g)(10), which provides that the proceedings and evidence presented during a panel hearing are generally confidential. In essence, the Law Court confirmed that the confidentiality of the panel process makes the panel's decisions unreviewable.

The Plaintiff also argued that the panel findings were inadmissible because the panel chair based her decision on evidence not presented to the panel. At the panel, experts from both parties had testified as to a general practitioner's duty to schedule a follow-up cholesterol screening for a patient. In her email notifying counsel of the panel's findings after the hearing, the panel chair happened to add: "for what it is worth, my family physician has never scheduled a follow up visit for me, but, rather, asks me to do it myself. Furthermore, her practice does not schedule more than six months in advance so I have to remember to call every year for my annual exam. THUS, [I] found [the defendant's expert] more credible regarding the practices of reasonable physicians."

The Law Court agreed that the panel chairs consideration of outside evidence violated the Maine Health Security Act, as well as Rule 80M(g)(9)'s requirement that the screening panel "make its findings based on the issues and evidence presented at the hearing."

The Court also noted that screening panels are agencies of the court, held to the standards of administrative agency decision makers, who are required by due process to limit their decision making to matters in evidence. This view of the screening panel as an agency of the court is supported by the advisory committee notes to Rule 80M, which describe the panel chair as a quasi-judicial officer.

Because the screening panel failed to comply with the Health Security Act and Rule 80M, the trial court's inherent power to protect the integrity of the judicial process by controlling the presentation of evidence allowed it to exclude the panel's findings.

The Law Court took care to explain that the trial court's authority is limited to consideration of whether the screening panel finding itself violated the Health Security Act, and does not extend to review of the panel proceedings. This raises the issue of how a trial court could know whether a panel finding violates the Health Security Act, if the panel proceedings are confidential and unreviewable. The panel chair in this case had no obligation to explain the basis for her decision—she merely happened to mention that her decision was based on her own personal experience with her physician's office.

O. Rule 93(j): Dismissal of a Foreclosure Case with Prejudice for Failure to Mediate in Good Faith

Bayview Loan Servicing v. Bartlett, 2014 ME 37, 87 A.3d 941

In the first of two decisions this year based on Rule 93(j), the Law Court dismissed a foreclosure action with prejudice as sanction for the lender's failure to attend three mediation sessions despite increasingly dire warnings by the court. It held the trial court was reasonable in taking into consideration the lender's repeated failures to appear at mediation, the fact that this deprived the homeowners of the opportunity to resolve the case, and the lender's failure to respond to warnings and lesser sanctions.

Also, the limitation in Rule 93(d)(1) on filing of a dispositive motion until five days after the completion of mediation and the filing of a final mediator's report did not apply here, as rule 93(j) clearly allowed the court to impose the sanction of dismissal, and therefore the aggrieved party should be able to request that sanction.

U.S. Bank, N.A. v. Sawyer, 2014 ME 81, 95 A.3d 608

Homeowners sued in a foreclosure action sought a loan modification from the Bank and provided the requested documentation even prior to mediation. Throughout the course of four successive mediations, the Bank and then its successor in interest promised to respond to the request for modification, yet never acted. When the trial court ordered the Bank to appear at a show cause hearing and explain why the case should not be dismissed, the Bank retained counsel only a few days prior to the hearing and presented no witness or evidence. The court dismissed the complaint with prejudice.

On appeal, the Bank argued that the sanction was excessive under the circumstance and created a windfall for the homeowner, and there was no evidence the Bank had acted in bad faith. The Law Court reaffirmed its holding in *Bartlett*, that the fact of a windfall to the homeowner did not preclude dismissal with prejudice,

The Law Court also held that the trial court was not required to find bad faith to support a dismissal – Rule 93(j) only requires it to find a lack of good faith, which it could have found based on the Bank's repeated agreements to provide offers for a loan modification and then failure to do so, and the emotional distress, costs, attorney's fees and other expenses suffered by the homeowners as a result of the Bank's delay.

III. RULES OF EVIDENCE

A. Evidence Rule 401: The Standard for Relevance

In Re M.S., 2014 ME 54, 90 A.3d 443

After the district court terminated a father's parental rights towards his daughter, he appealed the court's exclusion of testimony from a DHHS caseworker about the positive nature of his relationship with his other daughter, a half-sister. The court excluded the testimony as irrelevant, because the jeopardy of the half-sister

was not at issue. Emphasizing the low standard for the relevancy of evidence, the Law Court held that exclusion of the testimony was clear error. The father's loving relationship with the half-sister was relevant to his ability to act as a fit parent, and the guardian *ad litem*'s opinion that the regular visits between the sisters occurring under the father's supervision were a positive factor that DHHS should maintain and encourage, was relevant to the daughter's best interest.

Nevertheless, because the father himself testified about his relationship with the half-sister, the relationship between the two sisters, and his ability to care for both of them, the error probably did not affect the outcome of the case and was therefore harmless.

B. Evidence Rule 401: Relevance

State v. Logan, 2014 ME 92

A criminal defendant convicted of unlawful sexual contact appealed his conviction, arguing among other issues that the trial court erred in excluding evidence that the mother of his child victim had been sexually abused herself as a child. He argued the evidence was relevant to show that she was "hypersensitive" about sexual abuse and had raised her children in a manner that caused them to perceive innocuous contact as sexual. The Law Court held there was no abuse of discretion, as the trial court permitted testimony that the mother was especially vigilant about her children, and it was not error to exclude testimony on the cause of her vigilance, as irrelevant.

C. Evidence Rule 403(b): The Balancing Test

State v. Norwood, 2014 ME 97

A criminal defendant convicted for possession and distribution of oxycodone argued on appeal that the State's evidence that individuals leaving his residence two days before his own arrest, had themselves been arrested and found to possess oxycodone, should have been excluded under M.R.Evid. 403(b).

The Law Court held the evidence was relevant to show that oxycodone pills found in the defendant's possession at the time of his arrest were pills he possessed with the intent to distribute. Although there was no conclusive proof the oxycodone pills seized from the individuals leaving his residence came from the defendant, a jury could infer they did. The defendant's conviction was affirmed.

D. Evidence Rule 403(b): Evidence of Refusal to Consent to a Warrantless Search

State v. Glover, 2014 ME 49, 89 A.3d 1077

A criminal defendant accused of sexual assault was asked by a sheriff's deputy to voluntarily provide a DNA sample to "clear himself" of the charge. He refused. The deputy then obtained the DNA through a warrant, and the defendant was tried and convicted for the crime.

On appeal, he argued that the trial court abused its discretion in declining to exclude evidence of his refusal under Rule 403(b). The State brought up the refusal in its opening, arguing it was inconsistent with the defendant's initial assertion that no

sexual contact had occurred; it elicited testimony about the refusal from the deputy; and it argued in closing that the refusal fit the State's theme that the defendant had lied repeatedly throughout the investigation, stating: "[His] whole story got blown up by the DNA, which, remember, he did not voluntarily give. Had to get a search warrant."

Although the trial court's decisions under Evidence Rule 403(b) are given considerable deference, and although the defendant had not objected to this evidence so that Evidence Rule 103(e) allowed the Law Court to rule on the issue only if it found obvious error, the Law Court vacated the defendant's conviction because the refusal evidence should have been excluded.

The Law Court noted the defendant was exercising a constitutional right, and evidence of the assertion of that right at trial to prove consciousness of guilt would compromise the integrity of the constitutional protection. Additionally, the refusal had thin probative value because a person may choose to exercise his Fourth Amendment right "to be let alone" for many reasons other than consciousness of guilt.

The Law Court signaled for future reference that the minimal probative value of a criminal defendant's refusal to consent to a search "will almost always be substantially outweighed by the danger of unfair prejudice."

E. Evidence Rule 407: Evidence of Remedial Measures

Estate of Boulier v. Presque Isle Nursing Home, 2014 ME 22, 86 A.3d 1169

After a nursing home patient fell and hit her head in the bathroom while the aide who had come to assist her had momentarily left the room to fetch a pair of rubber gloves, the nursing home installed glove dispensers in each resident's bathroom, and required its staff to carry rubber gloves at all times.

The patient died of her injuries and the estate sued the nursing home for negligence; the home moved *in limine* to exclude evidence of the subsequent remedial measures under M.R. Evid. 407.

During trial the home's director testified that installation of the glove dispensers was feasible, and that it was feasible for staff to carry rubber gloves. On cross-examination of the aide who had been caring for the resident, she was asked her why she had not been carrying gloves with her, and replied it was an individual decision due to concern for spreading infection.

The trial court excluded evidence of the remedial measure. After a defense verdict the estate appealed, arguing that the aide's testimony placed the feasibility of the remedial measures at issue, making evidence of the measures admissible. The Law Court rejected that argument, holding that when a plaintiff elicits testimony on feasibility on cross-examination of a defendant, this does not generate an issue of feasibility making the remedial measure admissible under Evience Rule 407.

F. Evidence Rule 408(a) and Communications of Sympathy

Strout v. Central Maine Medical Center, 2014 ME 77, 94 A.3d 786

A patient sued his surgeon for informing him that he had a large, inoperable, cancerous tumor on his liver and that his life expectancy was measured in months, when the surgeon had not yet received biopsy results that ultimately showed the patient had a much less aggressive disease with a good prognosis. At trial, the patient admitted into evidence a portion of a letter from the president of the hospital that sued the surgeon, stating: "That being said, he [Dr. Reight] realizes now that prior to sharing his clinical impressions with you, he needed to wait for the results of the biopsy to confirm what the cancer was."

After a verdict for the patient, the hospital appealed, arguing the entire letter was inadmissible under Maine's 'Apology Statute' 24 M.R.S.A. § 2907(2), and that the sentence in question was inadmissible as an offer to compromise under M.R.Evid. 408(a), and under M.R.Evid. 403(b).

Based on the plain language of the Apology Statute, which states that expressions of sympathy or apology are inadmissible in evidence, but nothing in the statute prohibits the admissibility of a statement of fault, the Law Court held the portion of the letter admitted in evidence was a statement of fault, admissible even though coupled with statements of sympathy or apology.

Evidence Rule 408(a) did not apply, as there was no evidence of a dispute between the parties at the time the statement was made, long before the patient filed a notice of claim with the hospital.

Because the Law Court had been provided with no transcript of the trial itself as required by Appellate Rule 5(b)-- only a pre-trial conference in chambers at which admission of the statement was discussed-- the Law Court declined to review the trial court's decision on Evidence Rule 403(b) grounds, as this would involve a review for abuse of discretion that could only be carried out with the trial transcript itself.

G. Evidence Rule 503: The Interplay Between Evidentiary Privilege and HIPAA

State v. Black, 2014 ME 55, 90 A.3d 448

The defendant in an aggravated assault and attempted murder case moved the trial court to suppress his personal medical records, which the prosecution had obtained through a search warrant after the defendant refused to produce them. The trial court denied the motion to suppress because the State's use of the search warrant was valid, but also ruled that the State could not present evidence obtained directly or indirectly from medical records protected by the healthcare provider privilege codified in M.R. Evid. 503.

The Law Court dismissed the defendant's denial of his motion to suppress as interlocutory, but went on to signal its position on issues raised by the appeal, in *dicta*.

The Court noted the defendant might have a confidentiality interest in his medical records separate from the evidentiary privilege of Rule 503-- a confidentiality interest recognized and protected by the Health Insurance Portability and Accountability Act (HIPAA). Because the State had obtained a court-ordered search warrant for the records, HIPAA's exception allowing disclosure of information pursuant to a court order or court-ordered warrant applied, though. The Law Court noted it would be "unlikely" the defendant would be convicted after a trial in which his medical records are used against him, "given the strictures of M.R. Evid. 503."

H. Evidence Rule 611: Leading Questions; Rule 802: Hearsay; and Rule 401: Relevance

Dalton v. Dalton, 2014 ME 108

In an appeal from the District's Court's decision on post-judgment motions attacking the court's award of custody and parental rights and responsibilities in a divorce judgment, the Law Court decided several evidentiary issues, although without much discussion.

The Law Court affirmed the trial court's rulings on leading questions, holding that questions signaling witnesses to respond with a 'yes' or 'no' answer because the question ended in "correct?" were leading questions in blatant disregard of the trial court's admonition to counsel to stop asking leading questions.

It held that out-of-court statements by the children—for instance a statement one child made in response to a time-out—were offered for the truth of the matter asserted and thus inadmissible hearsay. Without comment, the Law Court noted that the trial court properly exercised its discretion in excluding DHHS records from evidence because foundational requirements to meet the business records exception to the hearsay rule in M.R.Evid. 803(6) had not been met.

I. Evidence Rules 702: Expert Testimony; and Rule 901(a) : Chain of Custody

State v. Diana, 2014 ME 45, 89 A.3d 132

This appeal from a murder conviction where the victim's body was found in the woods wrapped in a quilt with two strips of purple towel tied around the quilt, raises two evidentiary issues concerning the strips of purple towel and another purple towel found in a trash area near the defendant's residence.

On appeal, the defendant argued that the purple towel found in a plastic bag near his residence, along with other incriminating items found in the same bag, were inadmissible because the State failed to establish a chain of custody sufficient to authenticate the items pursuant to M.R.Evid. 901(a). The Law Court held that although the chain of custody was not airtight, the trial court did not commit clear error in admitting the evidence, because the trash area where the plastic bag was found was enclosed by a privacy fence and marked with a "no trespassing" sign, the gate was kept closed, and the officer who found the towel testified that he searched the bag "very methodically" and that although he was called away midway through his search of the bag the towel was in the same position on top of the bag when he came back.

The Law Court also found no error in allowing the testimony of a police evidence technician, who testified the purple strips found around the body were "similar" to the purple towel found in the trash area near the defendant's house, because this statement was a factual observation that a lay witness could make.

The defendant also appealed the admission of expert testimony by a State Police forensic specialist, that jagged edges in the torn edges of the towel and strips could be matched back together, fitting into each other "almost like a jigsaw puzzle" and showing they were once a single towel. The Law Court noted the specialist had adequate specialized knowledge and training to testify as an expert under Rule 702, as he had testified regarding his training as a forensic specialist, his work in the discipline of physical matching, the process involved in physical matching and why it requires expertise, the several hours that he spent on a visual examination of the towel pieces in question, the peer reviewed nature of his work, and his prior testimony on physical matching in two previous homicide cases.

J. Evidence Rule 702: Expert Testimony

Bratton v. McDonough, 2014 ME 64, 91 A.3d 1050

Plaintiffs sued a landlord for elevated levels of lead in their children's blood, after discovering that the home they rented contained lead paint. The plaintiffs sought to present testimony from a Ph.D. level toxicologist that the children "have suffered a poisoning by lead," and testimony from a brain injury treatment specialist holding an Ed.D. that the children's cognitive deficits were caused by lead exposure. The trial court excluded that testimony as insufficiently reliable under M.R.Evid. 702, because neither expert possessed a medical degree.

On appeal, the Law Court held that exclusion of the toxicologist's expert testimony was clear error, because the majority of federal courts trying toxic tort cases admit the testimony of a Ph.D. trained toxicologist on the issue of causation.

It was also error to exclude the brain injury specialist's testimony, because he had extensive training, education, and experience running treatment and rehabilitation programs for people with brain injuries, was the only member on the editorial board of the Journal of Neurology who did not have a medical degree, and was certified by the American Academy for the Certification of Brain Injury Specialists. His opinion was based on the children's medical history and the results of psychological and neurophysiological testing. He was able to describe how lead is absorbed into the body and damages the brain, and the effect of such damage on the brain development of children. The Law Court noted that in developing his opinion, he relied on established scientific principles with which he was clearly familiar. Thus, any challenges to his testimony went to the weight of his opinion, not its admissibility under Evidence Rule 702.

K. Rule 801(c): Out of Court Statements Offered to Prove Probable Cause

State v. Johnson, 2014 ME 83, 95 A.3d 621

A police officer was told by another officer over the radio that "two black males" may have been involved in an altercation at a bar, and that he had seen two black men waiting outside the entrance to the bar. He drove to the bar, interviewed a black male whom he saw outside the entrance and then patted him down, finding a folding knife and a driver's license. After the suspect was charged and convicted for possession of a dangerous knife, he argued that his Confrontation Clause rights were violated at a suppression hearing on the admissibility of the knife, when the officer who patted him down testified about the statement made by the radio-ing officer that led him to drive to the bar and interview the suspect.

Because the Confrontation Clause only applies if a statement is hearsay, the application of Evidence Rule 803(c) to the statement was at issue. The Law Court held the statement was not hearsay, as it was not offered to establish that the radio-ing officer had actually seen two black men outside the entrance to the bar, but instead to establish that the officer who heard the statement and performed the search had probable cause. Because it was not hearsay, it did not implicate the Confrontation Clause.

L. Evidence Rule 803(5): Videotaped Police Interview As a Recorded Recollection

State v. Cruthirds, 2014 ME 86, 96 A.3d 80

The only witness to a stabbing (other than the victim) was interviewed by a police officer on the night of the attack, and during the videotaped interview identified the defendant as the assailant and described the events that occurred before she fled to a neighbor's apartment to summon help. At a pretrial hearing, the witness testified that she did not remember anything about the day of the attack. Even after she was shown the videotaped interview she did not remember the interview or the events of that night. At trial, she also testified she did not remember the events of that night. The trial court admitted the videotaped interview in evidence as a recorded recollection under M.R.Evid. 803(5).

After a jury convicted the defendant he appealed on several grounds, among them the admission of the videotaped interview. The Law Court affirmed the trial court's ruling that the four foundational requirements for admissibility under Evidence Rule 803(5) had been met.

First, the videotape was a record of matters previously known to the witness, because she described the events of the attack chronologically and in some detail. She was in control of her faculties during the interview, spoke clearly, and answered questions appropriately. The victim's trial testimony corroborated that the witness was in a position to see what she described in the interview, and the witness's excited utterance to the upstairs neighbor in summoning help was consistent with the witness's story on the videotape.

Second, the witness's memory was fresh as the interview occurred only one hour after the attack. Third, presumably for the reasons described above, the witness accurately stated the facts during the interview, and fourth, the witness had testified at a pretrial hearing and at trial that she had no memory of the attack. The Law Court noted that the reasons for the witness's striking loss of memory—whether trauma or intimidation—were not relevant as the witness was not required to affirm anything about the videotaped interview or explain her present lack of memory for Rule 803(5) to apply.

M. Evidence Rule 803(6): The Business Records Exception to the Hearsay Rule

McCollor v. McCollor, 2014 ME 39, 87 A.3d 761

Two adult children defending a suit for undue influence and improvident transfer in their mother's transfer of her home to them, offered into evidence a document from the title company involved in the transfer. The document purported to show that an attorney employed by the title company met with the mother prior to the transfer. After a verdict in favor of the mother, the children appealed the trial court's decision to exclude the document.

At issue was the ability of the title company's attorney to establish a proper foundation for the document under M.R.Evid. 803(6), as a custodian or qualified witness. The Law Court held that although the attorney did not prepare the document and was not its custodian, his intimate involvement in and first-hand knowledge of the title company's business operations made him a qualified witness.

Thus, it was error to exclude the evidence, although the error was harmless as the document only established that the attorney had had a conversation with the mother, and therefore provided the adult children with no defense against the fraudulent transfer claim.

N. Evidence Rule 803(6): Authentication by a Qualified Witness

Bank of America v. Greenleaf, 2014 ME 89

In order to prove the amount due on a mortgate note, the Bank in a foreclosure action admitted into evidence a statement printed out from the Bank's database, presenting testimony from the Bank's litigation liason to establish the foundational requirements for admission as a business record under M.R.Evid. 803(6).

On appeal, the homeowner argued the court erred in admitting the record. The Law Court agreed and vacated the judgment of foreclosure on that ground and several others.

In considering whether the litigation liason was a custodian or other qualified witness for purposes of Evidence Rule 803(6), the Law Court looked only to the litigation liason's testimony prior to admission of the printout into evidence. Because there was no testimony about her involvement in recordkeeping operations, how long and in what capacities she had worked for the Bank, and whether and how her job as litigation liason gave her first hand familiarity with the printout in question, she could not provide a foundation for the document.

The fact that she testified she first saw the document when the Bank's attorney presented it to her, rather than creating the document herself from the Bank's database, sealed the Law Court's decision that she was not a custodian or qualified witness.

Even if she had been a custodian or qualified witness, her testimony failed to establish the foundational requirements of M.R.Evid. 803(6), because she did not testify about how the Bank's payment records were created, accessed, or checked for accuracy, or how that particular printout bore evidence that proper procedures for its creation and verification were followed.

Note that not only must the printout be proven to be a business record in order to be exempt from the Hearsay Rule, it must also be authenticated under M.R.Evid. 1001(2) by proof that it is an accurate reflection of the data it purports to show.