ANNUAL REVIEW OF CASELAW AND ETHICS

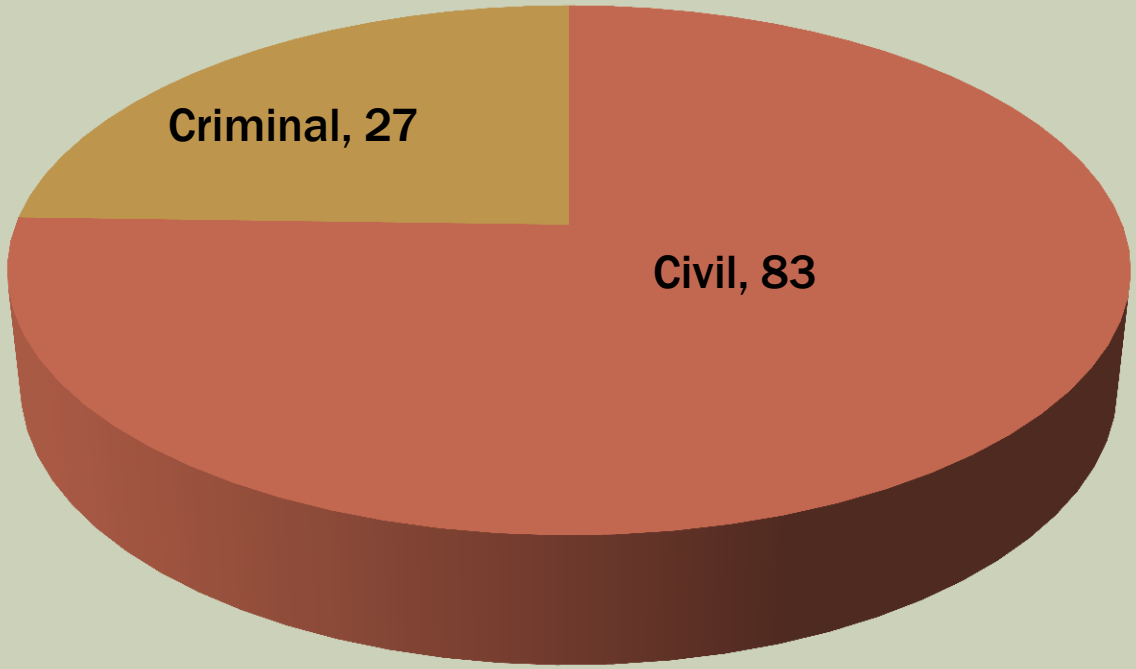
AUGUST 1, 2013

Notable Civil Decisions of the Maine Law Court

August 2012–July 2013

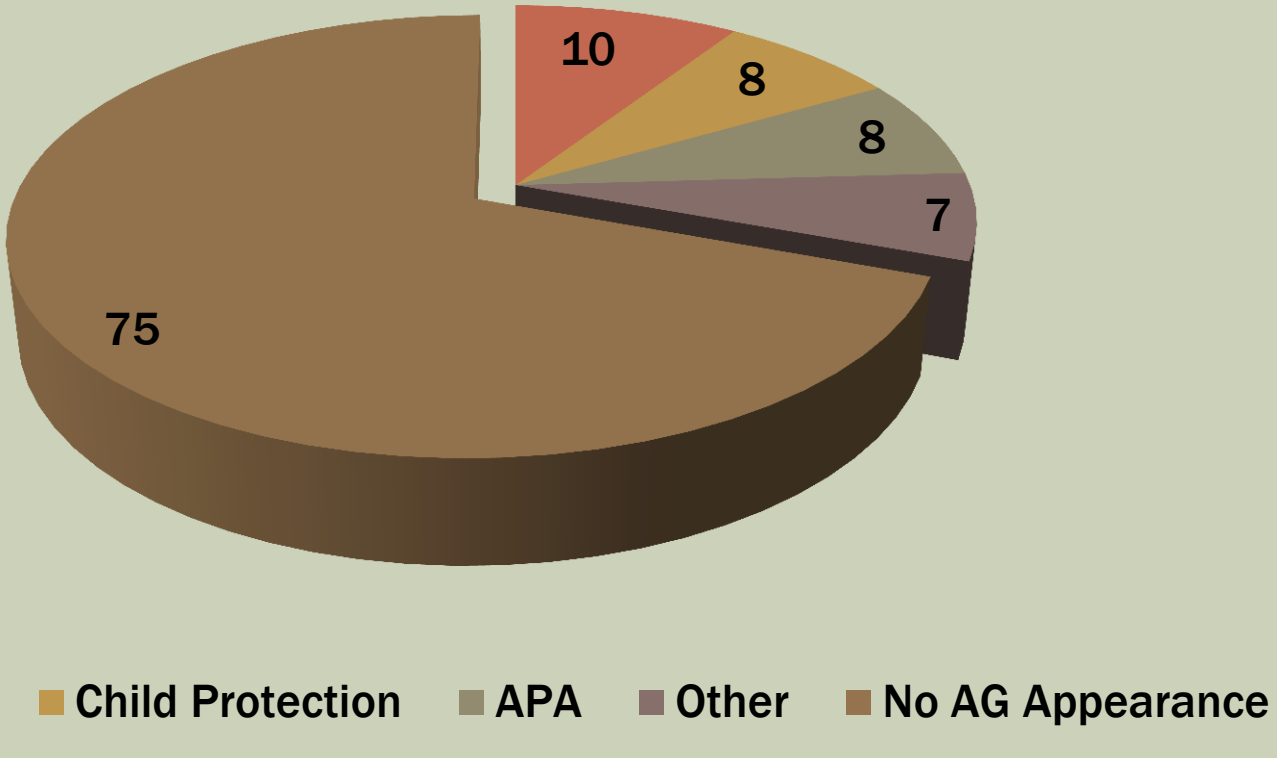
HIGHLIGHTS OF THE PAST YEAR

The Law Court issued a total of 110 decisions between August 2012 and July 2013



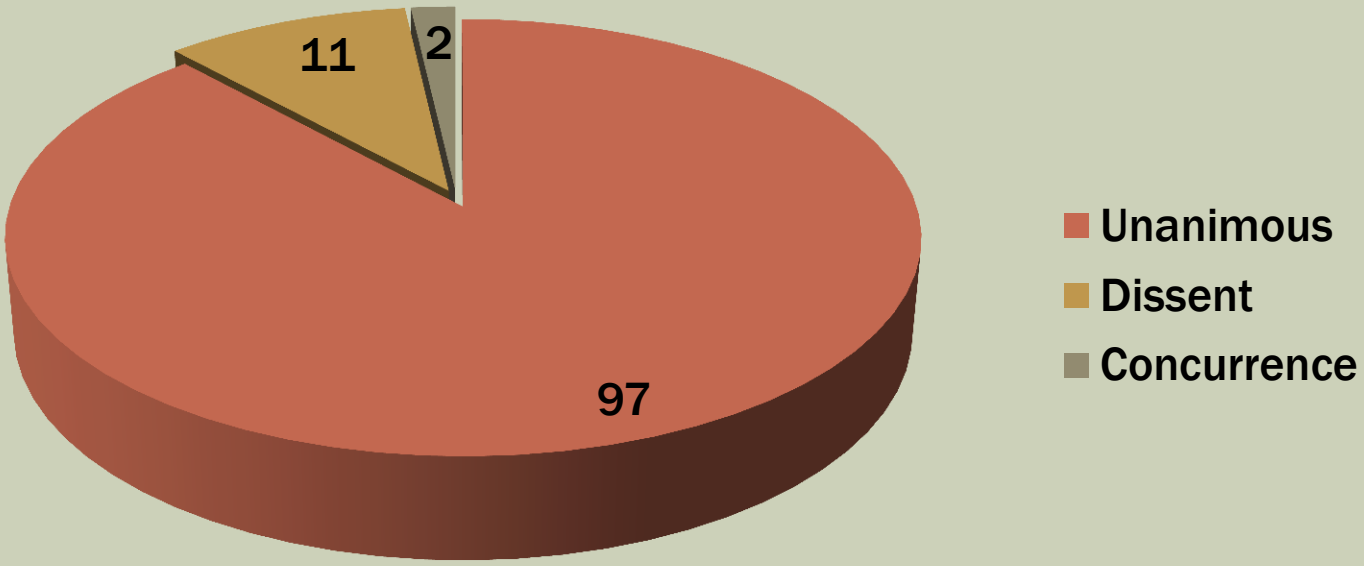
HIGHLIGHTS OF THE PAST YEAR

The Attorney General appeared in 35 of 110 cases (32%) in which a decision was issued.



HIGHLIGHTS OF THE PAST YEAR

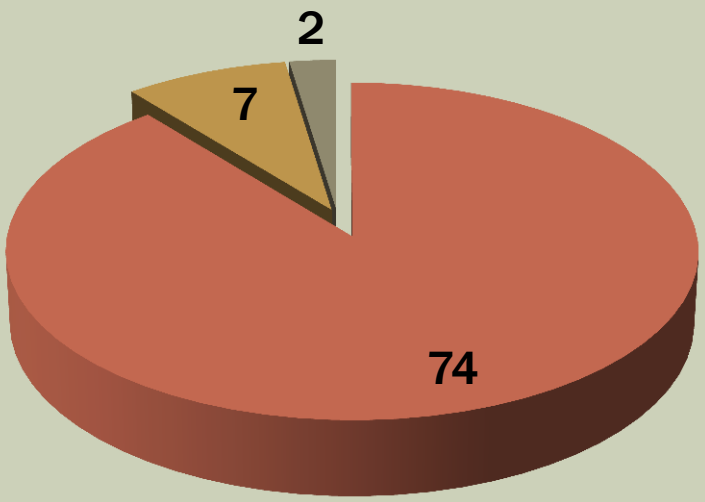
97 Decisions (88%) Were Unanimous



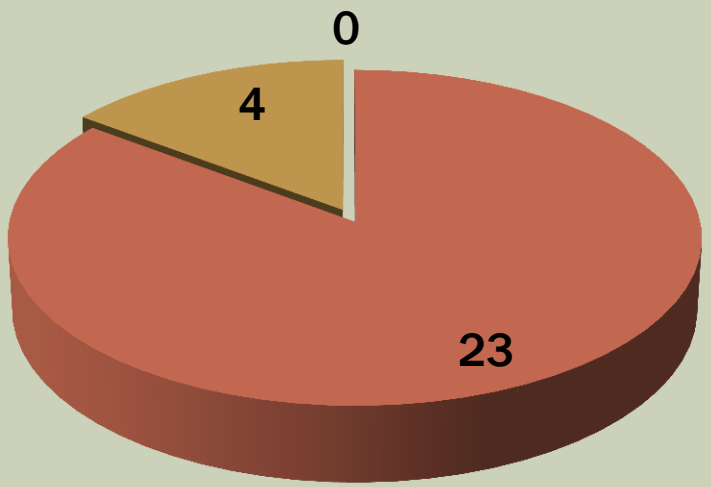
Total: 110 Decisions

HIGHLIGHTS OF THE PAST YEAR

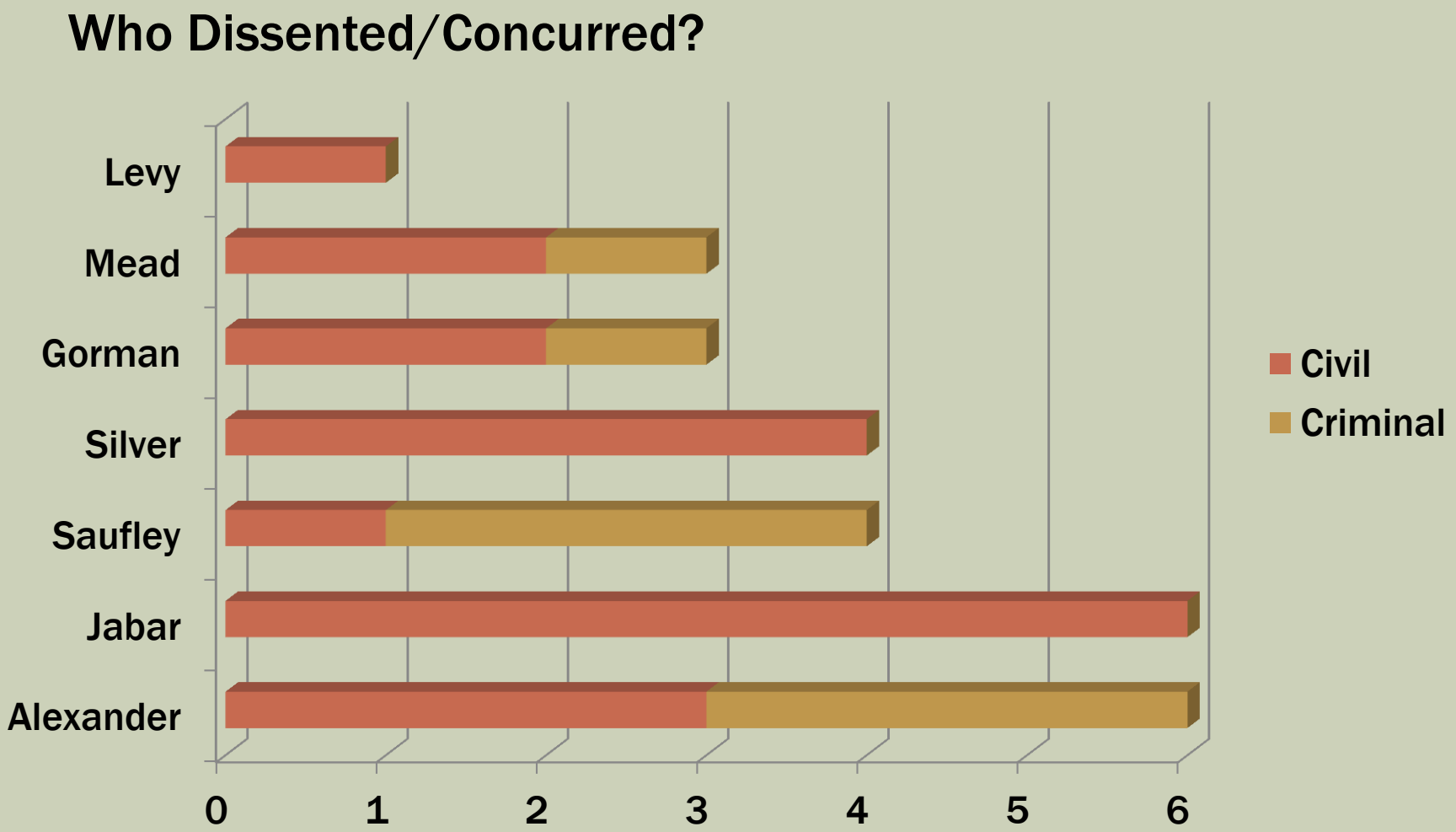
89% of Civil Cases Unanimous



85% of Criminal Cases Unanimous



HIGHLIGHTS OF THE PAST YEAR



HIGHLIGHTS OF THE PAST YEAR

- Five appeals were decided 4-3 (3 civil, 2 criminal)
- Civil 4-3 decisions:
  - *Doe I v. Williams*
  - *Fuhrmann v. Staples Office Superstore East, Inc.*
  - *Graves v. Brockway-Smith Co.*
    - Interpreted the Workers' Compensation Act's statute of limitations to allow tolling for injured workers in certain circumstances (Gorman, Saufley, and Alexander dissenting)
- Jabar most frequently in dissent/concurrence in civil cases (6)
  - 2 solo dissents; joined by Silver 4 times and Alexander once
- Levy least frequently in dissent/concurrence
- Longest decision was *Doe I v. Williams*: 53 pages

Doe I v. Williams

2013 ME 24 | Decided: March 5, 2013

- Challenge to the constitutionally of "SORNA"
  (Sex Offender Registration and Notification Act of 1999)
- Facts
  - Legislature in 2005 made SORNA retroactive, requiring all sex offenders sentenced after 1981 to register.
  - Litigation ensued.
  - In 2009, the Legislature created exceptions to the retroactive registration requirement
    - Offenders sentenced from 1982 to 1999 (enactment date of SORNA) became eligible for removal from registry in certain circumstances
    - Reporting requirements scaled back
    - Attempt by legislature to respond to *Letalien* decision
  - Does continued to claim SORNA violated numerous constitutional and statutory provisions

Doe I v. Williams

2013 ME 24 | Decided: March 5, 2013

- Majority (Saufley, Levy, Mead, Gorman)
  - Mootness: Claims of de-listed Does were moot
  - Ex Post Facto: SORNA as amended not sufficiently punitive to override civil intent
    - Reduced burdens of registration "looms large" as a factor
    - Scheme of imposing registration at sentencing distinguishes *Letalien*
  - Equal protection: SORNA does not treat "similarly situated" sex offenders differently
  - Procedural due process: SORNA does not implicate liberty or property interests
  - Substantive due process: No fundamental right to "keep private the fact of conviction."
  - Attorneys' Fees: Rejected Does' theory they were "prevailing party" because their claims were the "catalyst" for legislative changes

Doe I v. Williams

2013 ME 24 | Decided: March 5, 2013

- Dissent (Silver, Alexander, Jabar)
  - Would have held SORNA unconstitutional as a Ex Post Facto law as applied to individuals sentenced prior to 1999
    - "What is at issue is whether, after a person's sentence has been imposed, and after that sentence has been served, the State may add to the sentence new and onerous burdens and restrictions that were not authorized when the offender was sentenced."
    - 2009 amendments reduced "physical burdens" of registration but not the level of State "supervision and control."
    - Registration and publication on the internet is punishment.
    - Concerns about "vigilantism"
    - Fails to provide the public with mitigating information
  - Contends that Ex Post Facto clause in Maine Constitution confers an affirmative right to the people, lowering the Does' burden

Fuhrmann v. Staples

2012 ME 135 | Decided: March 5, 2013

- Facts
  - Since 1995, Maine Human Rights Commission had interpreted Maine Human Rights Act as allowing supervisor liability
  - Staples employee attempted to sue four individual supervisors for employment discrimination under the MHRA and Whistleblower Protection Act
  - Lower court dismissed the claims
- Statutory Language
  - MHRA and WPA prohibit discrimination by an "employer"?
    - MHRA defines *employer* to include "any person acting in the interest of any employer, directly or indirectly."
    - WPA defines *employer* to include "an agent of an employer"

Fuhrmann v. Staples

2012 ME 135 | Decided: March 5, 2013

- Holding (Saufley, Alexander, Silver, Jabar)
  - Both definitions, "when read in light of [legislative] purposes and in the context of the statutory scheme, are meant to hold the principal/employer liable for act of its agents/employees."
  - MHRC's contrary interpretation unreasonable
- Dissent (Levy, Mead Gorman)
  - MHRA unambiguously defines *employer* to include individual supervisors
  - Cites 5 M.R.S. §4613(2)(B)(8)(i), which bars punitive damages in MHRA judgments "against an employee of a governmental entity."
  - Majority "plainly wrong" by failing to defer to the MHCR's interpretation of the MHRA
  - Individual supervisor liability furthers the anti-discrimination purposes of the MHRA

Barr v. Dyke

2012 ME 108 | Decided: August 14, 2012

- Are Disclaimer-of-Reliance Contract Provisions Legal?
- Facts
  - Minority shareholders (29%) of Bushmaster executed a settlement agreement selling back shares to company for $8MM
  - Shares were actually worth $27.5MM
  - Bushmaster allegedly concealed and affirmatively misrepresented information about share value during negotiations
- Contract Provision at issue:
  - "Seller **has not relied** on Purchaser or any of its directors, officers, shareholders, employees or agents with respect to any assessment of the value of Purchaser or the Shares being sold by such Seller hereunder…"

Barr v. Dyke

2012 ME 108 | Decided: August 14, 2012

- Are Disclaimer-of-Reliance Contract Provisions Legal?
  - Answer: It depends
  - Law Court established a six-part balancing test
    - Was the complaining party advised by counsel?
    - Were the terms negotiated or boilerplate?
    - Was the transaction arm's length?
    - Were the parties knowledgeable in business matters?
    - Was the language of the clause clear?
    - If the litigation is against a fiduciary, did the adversarial relationship of the parties demonstrate an absence of trust
  - Holding: Plaintiffs failed to raise genuine issues of material fact that would undermine enforceability of the provision.

Nader v. Maine Democratic Party

2013 ME 51 | Decided: May 23, 2013

- Facts
  - Nader alleged that the Maine Democratic Party conspired to try to keep his electors off the Maine ballot in 2004 by filing baseless challenges with the Secretary of State
  - MDP filed a special motion to dismiss pursuant to Maine's Anti-SLAPP (Strategic Lawsuit Against Public Participation) statute

- Two-step SLAPP analysis:
  - Movant must demonstrate claims are based on the exercise of the party's constitutional right to petition
  - Burden shifts to non-moving party to demonstrate that the petitioning activity was "devoid of any reasonable factual support or any arguable basis in law and caused actual injury to the non-moving party."

Nader v. Maine Democratic Party

2013 ME 51 | Decided: May 23, 2013

- Prior litigation determined that Nader's claims were based on MDP's petitioning activity
- Holding: Nader failed to present evidence that petitions were devoid of factual or legal support
  - First petition: Allegation on "information and belief" not prima facie evidence that MDP was behind the individual who filed the petition
  - Second petition: Correctly identified technical defect in Nader's paperwork; Secretary of State would have been within his discretion to have granted the petition
  - Appeals of those petitions: Court decisions themselves proved that the appeals had "some factual or legal basis"

Dep't of Professional and Financial Regulation v. MSEA

2013 ME 23 | Decided: February 28, 2013

- Facts
  - Bureau of Insurance examiner married an high-level executive at a regulated company
  - Examiner was terminated under a statute prohibiting employees from being "**connected with the management**" of a regulated insurer.
  - Arbitrator found against the Bureau and ordered compensation and reinstatement
  - Bureau appealed only reinstatement on the theory that the arbitrator exceeded his powers
- Holding
  - Statute was ambiguous. "Management" could mean "act of managing" or "people who manage"
  - An ambiguous statute does not create a public policy that is "affirmatively expressed or defined in the laws of Maine."

Budge v. Town of Millinocket

2012 ME 122 | Decided: October 25, 2012

- Facts
  - Town enacted a 1991 personnel policy stating that retired town workers would receive the same health benefits as current town employees
  - The policy stated it was subject to change, except for employees hired before 1991
  - In 2009, the policy was changed for employees hired before 1991
- Holdings:
  - Law Court reaffirmed its rejection of the "California Rule"; in Maine, a legislative enactment must say "this is a contract" to be binding.
  - Law Court rejected promissory estoppel argument based on Town's compliance through 2009 and various promises by town officials:
    - "Only a principle can ratify [a promise], and when a principal is a government, the government can only ratify through a legally operative action."

Budge v. Town of Millinocket

2012 ME 122 | Decided: October 25, 2012

- Justice Jabar's Dissent:
  - Agrees that the 1991 policy did not create a contract
  - Would have allowed the case to go to trial on promissory estoppel
  - "Retirement benefits are more than gratuities"
  - Two aspects: (1) what has been promised? (2) was there reasonable reliance?
    - Promise: 1991 policy was itself a promise, which was ratified by the maintenance of the benefit until 2009
    - Reliance: Enough evidence submitted by employees to create an issue of fact to be determined at trial

State Farm v. Estate of Carey

2012 ME 121 | Decided: October 25, 2012

- Facts
  - Owner of vehicle gave co-worker permission to drive the vehicle home and back; co-worker got drunk, drove all over Central Maine, and had an accident that killed Carey
  - Owner's insurer claimed that it was not liable to the estate
- Existing Law: "Minor Deviation" Rule
  - "minor deviations" from scope of consent allowed if vehicle used primarily for the purpose for which permission was given
- Held: Minor Deviation Rule modified but not abandoned
  - "if the party seeking coverage establishes initial permission to use the vehicle, the minor deviation rule then shifts the burden to the insurance carrier to establish that there were explicit limitations placed on the borrower's use of the insured's vehicle to preclude coverage"
- Concurrence (Silver, Jabar):
  - Would adopt "Initial Permission Rule"

Michalowski v. Bd. of Licensure in Med.

2012 ME 134 | Decided: December 6, 2012

- Revocation of a doctor's medical license for violations relating to prescription drug abuse
- Key issue: Can the Board revoke a medical license on its own?
- Conflicting statutes
  - 10 M.R.S. § 8003(5)(A-1)(2-A): any licensing board may—"**unless expressly precluded by language of denial in its own governing law**"—"[r]evoke a license."
  - 32 M.R.S. § 3282-A: "If the Board concludes that suspension or revocation of the license is in order, the board **shall** file a complaint in the District Court."
- Holding
  - §3282-A does not "expressly preclude" revocation because it is a "mandate that the Board affirmatively act"; at most, it is an "implicit," not express, preclusion of the power to revoke a license.

Michalowski v. Bd. of Licensure in Med.

2012 ME 134 | Decided: December 6, 2012

- In this case, specific statute does not trump the general
  - Canon only applies "where two discordant statutes are like two ships passing in the dark of night, completely oblivious to the possible presence of the other."
  - Where the more general statute indicates a "full awareness" of the more specific statute, but not vice-versa, "mechanical" application of the canon is inappropriate.
  - "Akin to following the ship that is oblivious to the presence of the other, rather than following the ship that is alert to the possible existence of the first vessel."
  - Legislative history also showed an intent to give the Board power to revoke licenses.

Charette v. Charette

2013 ME 4 | Decided: January 8, 2013

- Appeal of divorce judgment
- Claims of judicial bias at the trial-court level
- Law Court brief did not directly assert bias against the trial judge but contains statements such as:
  - "Why was the court so protective of Diane?"
  - "Maybe the court already 'assumed' other facts not contained in the record to fashion its decision"
- Law Court characterized these statements as "improper and beneath the dignity of the bar."
- Bias allegations "must…be made clearly and forthrightly so that the appellate court may fully consider it."

Hebron Academy Inc. v. Town of Hebron

2013 ME 15 | Decided: February 5, 2013

- Is Hebron Academy exempt from property tax as a "literary and scientific institution."
  - Facts
    - Hebron Academy is a prep school that earns about 1% of its revenue through short-term rentals of its facilities
  - Requirements for exemption
    - Must be a "literary and scientific institution"
    - Property must be "occupied or used solely for [the institution's] own purposes"

Hebron Academy Inc. v. Town of Hebron

2013 ME 15 | Decided: February 5, 2013

- Is Hebron Academy exempt from property tax as a "literary and scientific institution."
  - Answer: Yes
  - Analysis
    - "literary and scientific" means "literary *or* scientific"
    - Traces legislative history of the exemption since 1819
    - Literary and Scientific Institution "includes an organization that has as its primary purpose the engagement of students in the academic pursuit of literary or scientific knowledge through the provision of an accredited course of high school education."
    - Requirement that the property be "occupied or used solely for [the institution's] own purposes" does not preclude "incidental" use for other purposes
    - 1% of revenue, where there is no interference with use of property for Hebron Academy's own purposes, is sufficiently incidental.

Lougee Conservancy v. Citimortgage

2012 ME 4 | Decided: August 2, 2012

- Facts
  - Citimortgage sent its agents to "secure and winterize" an abandoned house that was in foreclosure.
  - The agents entered and "secured" the wrong house, and allegedly did damage to the house in the process.
  - The owners sued for trespass, invasion of privacy, conversion, intentional infliction of emotional distress, punitive damages, and negligence
  - Trial court granted summary judgment to Citi on everything but trespass
- Holdings
  - Invasion of privacy: not occupying the property was not fatal but lack of intent was
  - Conversion: "brief and ultimately harmless withholding" of property insufficient
  - Emotional Distress: incursion not so "unbearably severe" as to constitute IIED
  - Punitive damages: No "deliberate and outrageous, rather than reckless" conduct
  - Negligence: Prima facie case established at summary judgment

Fortin v. Titcomb

2013 ME 14 | Decided: Jaunary 29, 2013

- Facts
  - Federal jury found a Wells police officer liable for negligence and awarded the plaintiff $125,000.
  - On motion, the Court reduced the award to $10,000 based on 14 M.R.S. § 8104-D
  - The First Circuit certified a question to the Law Court asking, in effect, if the District Court correctly applied the statute
- § 8104-D provides:
  - "Except as otherwise expressly provided [by law], the personal liability of an employee of a governmental entity for negligent acts or omissions within the course and scope of employment shall be subject to a limit of $10,000 for any such claims arising out of a single occurrence **and the employee is not liable for any amount in excess of that limit on any such claims**"

Fortin v. Titcomb

2013 ME 14 | Decided: Jaunary 29, 2013

- Other relevant statutes
  - $400,000 liability limit "against either a governmental entity or its employees, or both, may not exceed $400,00." § 8105(1)
  - If the government holds an insurance policy in excess of $400,000, the policy limit replaces the $400,000 limit. § 8116
- Majority
  - Harmonizes the statutes by reading §8104-D as the limit on liability for a single government employee, while § 8105(1) is a limit on liability for the government as a whole (i.e., all entities and employees) for a single incident. § 8116 can only effect the $400K total cap
- Justice Jabar's Dissent
  - Argues that the $10,000 cap is intended as a cap on personal liability, not damages
  - Questions whether the defendant was acting within the scope of his employment, given that the jury found him not entitled to immunity

In re J.R. Jr.

2013 ME 58 | Decided: June 18, 2013

- Facts
  - Parental rights terminated by the trial court
  - Father appealed, among other things, the Court's refusal to grant his attorney's motion to withdraw
    - Father had filed a bar complaint against his attorney in the middle of trial for "being defiant"
  - Court denied the motion to withdraw on the basis that the bar complaint was a ruse to delay trial
- Law Court held that, under the circumstances, forcing the attorney to continue to represent the father was not an abuse of discretion

OTHER NOTABLE LEGAL HOLDINGS

- *Antler's Inn & Restaurant v. Dep't of Pub. Safety*, 2012 ME 143
  - "Harmless error" analysis applies to an APA notice of hearing that was allegedly deficient
  - Petitioners in Rule 80C appeals under the APA cannot bring "independent claims" for constitutional violations, including §1983 claims.

- *Dyer v. Superintendent of Insurance*, 2013 ME 61 ¶ 23
  - In reviewing penalties imposed against a licensee, the Law Court asks whether the penalty decision is "willful and unreasoning and without consideration of facts or circumstances." It will not review for "consistency among an agency's decisions."

OTHER NOTABLE LEGAL HOLDINGS

- *Quirion v. Veilleux*, 2013 ME 50.
  - Parties cannot end-run the final judgment rule by voluntarily dismissing their case with prejudice
- *Vitorino America v. Sunspray Condominium Association*, 2013 ME 19
  - There is no right in Maine to bring a derivative action on behalf of an association or nonprofit company
- *Estate of Stanley Pinkham v. Cargill*, 2012 ME 85
  - Adopts the "reasonable expectation test" over the "foreign-natural doctrine" to assess product liability claims involving defective food

OTHER NOTABLE LEGAL HOLDINGS

- *Savage v. Maine Pretrial Services, Inc.*, 2013 ME 9
  - Maine Medical Use of Marijuana Act does not protect individuals applying for a license to dispense marijuana from discrimination
- *Bank of America v. Cloutier*, 2013 ME 17
  - Interprets Maine's foreclosure statutes as permitting a mortgage servicer to bring a foreclosure action