

Legal Year in Review 2021: Developments in Maine Tort Law

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During the past year, there were not very many significant tort cases decided by the Maine Supreme Judicial Court sitting as the Law Court, nor by the District of Maine. However, of the handful of tort cases decided by the Law Court, *Meridian Medical Systems, LLC v. Epix Therapeutics, Inc.*, is the most significant as it recognizes, for the first time, that there can be aiding and abetting liability for tortious conduct under Maine law.

I have also included a few Superior Court decisions that provide some good reminders about the elements for some causes of action that the Law Court has not addressed recently.

Finally, during the past year the Legislature enacted some significant statutory changes relating to the statutes of limitations for several types of claims.

I. Negligence.

Toto v. Knowles, 2021 ME 51, --- A.3d ---.

This case involves the Law Court vacating a grant of summary judgment by the Superior Court in which the Superior Court held that there were not facts to support causation. The Law Court disagreed and reversed and remanded.

While stopped in traffic behind a minivan, the Plaintiff's vehicle was hit from behind by another vehicle, causing the Plaintiff's vehicle to collide with the minivan. After the collision, the Plaintiff complained of losing consciousness and extreme pain in the top of his head. The Plaintiff was transported to a hospital for evaluation. After the accident, the Plaintiff suffered headaches, balance issues, and impaired vision, none of which he suffered before the accident.

The Plaintiff filed suit, alleging that the Defendant operated the vehicle that struck the Plaintiff's vehicle and causing Plaintiff to suffer injuries. The Defendant moved in limine to exclude testimony from an expert designated by the Plaintiff, an optometrist, who would testify that the accident was the cause of "visual injuries" suffered by the Plaintiff. The Defendant argued the expert's testimony should not be admitted because the expert was not qualified to opine that the accident had caused the Plaintiff to suffer what the optometrist called a "visual midline shift." The Defendant also argued that "visual midline shift" is not a recognized diagnosis.

The Defendant, anticipating the court would grant her motion in limine, also moved for summary judgment. In the summary judgment motion, the Defendant argued that without expert testimony regarding complex medical facts, the Plaintiff could not prove that the accident caused the Plaintiff to suffer a "visual midline shift."

The Superior Court granted the motion in limine and excluded the anticipated expert testimony, determining that the optometrist was not qualified to opine on the cause of a "visual midline shift," but held that the optometrist could testify as to facts. The Superior Court denied the motion for summary judgment, finding that the Plaintiff had presented sufficient evidence that the Defendant's negligent operation of her vehicle caused him to suffer injuries. The Defendant moved for reconsideration of the order denying the motion for summary judgment, reiterating her argument that expert testimony was needed. The Superior Court granted the motion for reconsideration and granted summary judgment in favor of the Defendant, holding that without expert testimony the Plaintiff could not establish proximate causation of her injuries.

On appeal, the Law Court reversed and remanded for further proceedings. In doing so, the Law Court reviewed the elements of negligence: 1) a duty of care owed to the plaintiff; 2) a breach of that duty; 3) an injury; and 4) causation, that is, finding that the breach of the duty of care was a cause of the injury.

In identifying that the issue was proximate causation, the Law Court stated that proximate cause is an action occurring in a natural and continuous sequence, uninterrupted by an intervening cause, that produces an injury that would not have occurred but for the action. The Law Court held that a factfinder may draw reasonable inferences and determine issues of causation. The Law Court also held that the amount or type of evidence required to prove causation may turn on the complexity of the facts. Although expert testimony may be required if a party is asserting complex medical facts to establish causation, the Law Court also held that expert testimony is not required if “the negligence and harmful results are sufficiently obvious as to lie within common knowledge.” For example, the Law Court stated, where a plaintiff emerges from a sudden rear-end automobile accident with an injured neck, it is permissible for the jury to infer that the injury was caused by the defendant’s negligent driving where there was no evidence of a pre-existing neck injury.

Based on the factual record, the Law Court found that there was a genuine issue of material fact as to whether the accident caused the Plaintiff some injury. The Law Court held that using common knowledge and making reasonable influences, a factfinder could determine that the accident caused some injury to the plaintiff.

II. Premises Liability.

Boles v. White, 2021 ME 49, _____.

Plaintiff, Cecelia Boles, was a guest of tenants who rented a house from the Defendants Karen and Ronald White. The Plaintiff was injured at the house rented by her daughter and son-in-law, the Lytles, when she went down the staircase between the first and second floor and fell off the landing at the bottom of the staircase. The height of the landing step measured 11 inches, which is greater than the heights of the rest of the stairs of the staircase and did not comply with the applicable building codes. The Lytles had recently entered into a written agreement to rent the house from the Whites. The lease included the following paragraphs relevant to this case:

10. Access: Renters shall allow homeowner to access the property for purposes of repair and inspection. Renters shall keep the owners informed of any issues that arise with the property and/or appliances.

12. The renter is responsible for mowing the lawn and watering the plants. The renter is responsible for all snow removal, either snowblowing with the machine available; or arranging plowing. The renter is responsible for salting or sanding walkways if necessary to prevent personal injuries from slipping on ice.

The Plaintiff brought suit against the Defendants on the theory of premises liability for injuries she suffered as a result of the fall. The Defendants moved for summary judgment on all counts, contending that the Plaintiff could not establish that the Defendants owed the Plaintiff a duty of care. The Superior Court agreed. The Superior Court held that the tenants were in exclusive control of the premises, that the lease did not contain an express agreement requiring the Defendants to maintain the premises in good repair, and that the Defendants did not have a duty to otherwise maintain the premises. The Plaintiff appealed and the Law Court affirmed.

In considering the appeal, the Law Court recounted the law relating to when landlords could be liable for injuries suffered on their property. The Law Court noted that a landlord is not liable for injuries caused by dangerous conditions on the landlord's property that are under a tenant's exclusive control except when the landlord 1) fails to disclose the existence of a latent defect which he knows or should have known existed but which is unknown to the tenant nor discoverable by the tenant in the exercise of reasonable care; 2) gratuitously undertakes to make repairs and does so negligently; or 3) expressly agrees to maintain the premises in good repair. The Law Court noted that this rule and its exceptions apply to injuries sustained by a tenant's guests or others on the premises with the tenant's consent.

The Law Court first considered whether the tenants, here, had exclusive control of the premises. It noted that a landlord retains "control" over the premises, when the landlord reserves power over the premises pursuant to the terms of the lease or the tenancy, whether express or implied, and is not merely the incidental control that comes from being able to threaten tenants with non-renewal of the lease or eviction. The Law Court considered whether paragraph 10 of the lease created a genuine issue of fact as to whether the tenants had exclusive control over the premises, including the staircase. The Law Court concluded it did not. It held that the Defendants' general reservation of access for purposes of repair and inspection is distinct from a landlord exercising control over the premises, as found in other cases, where there was at least some evidence of shared control between the landlord and

the tenants. The Law Court noted that its conclusion was consistent with decisions in other jurisdictions that deemed a landlord's reservation of the right to enter and repair premises insufficient evidence of the landlord's control for purposes of liability. Because a lease is "equivalent to a conveyance for almost all purposes, and because there's no evidence showing that the Defendants had, in fact, retained or exercised any degree of control over any part of the premises after renting them, the Law Court concluded the tenants were in exclusive control of the premises.

Next, the Law Court considered whether there was an express agreement by the Defendants to maintain the premises. The Law Court looked at paragraphs 10 and 12. The Plaintiff argued that paragraph 10 was a written assurance by the defendants to repair the property. The Law Court disagreed and held that Paragraph 10 only reserved the right of access to the landlords in the event repairs are needed, but did not expressly require the landlord to undertake take any repairs.

Finally, the Law Court considered the Plaintiff's argument that the premises constituted an unreasonably dangerous condition that should have been fixed before being let to the tenants. Again, the Law Court disagreed. It found that the Defendants did not promise to repair the step, nor is the step the type of a concealed nuisance that would constitute an unreasonably dangerous condition.

III. Slander of Title and Invasion of Privacy.

Slager v. Bell, 2021 WL 3700679 (Me. B.C.D. July 15, 2021).

This Business Court decision related to a motion to dismiss several counterclaims, including ones for invasion of privacy and slander of title.

The relevant facts were that the Defendants alleged that they had, on multiple occasions, observed an electronic camera positioned on the house on the Plaintiff's property pointed directly at the Defendants' house, including, at least on one occasion, the area of the house including the Defendants' teenage daughter's bedroom. The Defendants also alleged a slander of title claim based on the Plaintiff filing a notice of lis pendens in the York County Registry of Deeds regarding litigation that did not concern title to their property. The Defendant alleged that because title was not at issue in the litigation for which the lis pendens was filed, the Plaintiff's statement was false and disparaged the Defendants' title to the property. By filing the

lis pendens the Defendants alleged that the Plaintiff acted with an ulterior motive by using legal process in a manner that was improper and the regular conduct of litigation.

The Plaintiff moved to dismiss the counterclaims. With regards to the invasion of privacy claim, the Business Court noted that the tort of protects several interests from being invaded. Intrusion upon the plaintiff's physical and mental solitude or seclusion is one way in which a defendant can commit the tort of invasion of privacy. The Business Court noted that a plaintiff must allege facts regarding four elements to avoid a motion to dismiss: 1) an intentional 2) physical intrusion 3) upon premises occupied privately by a plaintiff for purposes of seclusion, and 4) the intrusion must be highly offensive to a reasonable person. Additionally, the plaintiff must allege that the defendant intended as the result of his conduct that there be an intrusion upon another's solitude or seclusion. Here, the Plaintiff moved to dismiss contending that the counterclaim did not contain adequate allegations as to intent or physical intrusion.

As to the intent element, the Business Court held that intent could be reasonably inferred from the allegation that the camera had been pointed directly at the Defendants' daughter's bedroom as well as the allegations that the camera had captured images of the Defendants, their family members, and their invitees.

As to the physical intrusion element, The Business Court noted that the Law Court has explained that an intrusion upon seclusion must involve an actual invasion of something secret, secluded, or private pertaining to the plaintiff. The Business Court also noted that the Restatement section upon which the tort is based notes that an intrusion upon seclusion "may also be by the use of the defendant's senses, with or without mechanical aids, to oversee or overhear the plaintiff's private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wires." The Business Court held that by alleging that the Plaintiff had pointed the camera at least once at the Defendants' daughter's bedroom and had captured images with the camera, the Defendants had sufficiently alleged an invasion into the physical space of the Defendants' seclusion and privacy in their home. This was enough to survive the motion to dismiss.

With regard to the slander of title counterclaim, the Business Court reviewed the elements: 1) there was a publication of a slanderous statement disparaging claimant's title; 2) the statement was false; 3) the statement

was made with malice or with reckless disregard of its falsity; and 4) the statement caused actual or special damages.

The plaintiff argued the claim should be dismissed on the basis that the filing of a lis pendens is afforded absolute privilege.

The Business Court considered whether the filing of lis pendens could support a slander of title claim. The Business Court noted that the absolute privilege permits a “party to a private litigation ... to publish slanderous material concerning the title of another in the institution ... of a judicial proceeding in which he participates, if the matter has some relation to the proceeding. The privilege is absolute and protects a party to private litigation ... from liability ... irrespective of his purpose in publishing the defamatory matter, of his belief and its truth or even his knowledge of his falsity.” The Business Court also noted that the District of Maine had previously held that “This privilege attaches to otherwise defamatory third-party communications preliminary to or during litigation only as long as the ‘remarks are pertinent to the judicial proceeding’ and not ‘unnecessary or unreasonable.’”

Based on the cited caselaw, the Business Court held that there may be specific facts bearing on whether the privilege applies because the alleged slanderous material must bear “some relation to the proceeding” and not be “unnecessary or unreasonable.” Because the Defendant had alleged that the litigation did not concern title to the property, the Business Court held that it generated an inference the filing was “unnecessary.” For these reasons, the Business Court denied the motion to dismiss as it pertained to these claims.

IV. Slander of Title.

Stevens v. Thornton, 2021 WL 3359350 (Me. Super. Feb. 23, 2021).

This is a Superior Court case, involving a motion to dismiss the Defendant’s counterclaim for slander of title.

The slander of title claim was based on the recording of a certificate of lis pendens in the Cumberland County Registry of Deeds with the Defendant alleging that the lis pendens contains false statements made with malice or with reckless disregard of their falsity, causing damage to the Defendant.

The Plaintiff moved to dismiss arguing that a certificate of lis pendens is privileged and cannot give rise to a cause of action.

The Superior Court recited the elements for a slander of title claim: 1) publication of a slanderous statement disparaging the claimant's title; 2) the statement was false; 3) the statement was made with malice or with reckless disregard of its falsity; and 4) the statement caused actual or special damages.

The Superior Court considered the Plaintiff's argument that the *lis pendens* was privileged and held that a party to private litigation is privileged to publish slanderous material concerning the title of another in the institution of a judicial proceeding in which the party participates, if the matter has some relation to that proceeding. The Court also noted that the Law Court has not specifically addressed whether this absolute privilege applies to a certificate of *lis pendens*. However, the Superior Court had previously determined that if the filing of a *lis pendens* is related to an underlying judicial proceedings, then it could not serve as the factual basis for a slander of title action.

The Superior Court rejected the Defendants' argument that the privilege does not apply because filings in the registry of deeds are outside the scope of the judicial proceedings. The Superior Court did so because of prior precedent holding that a publication need only bear "some" relation to the proceeding for the privilege to apply. Because the *lis pendens* related to the proceeding, the Superior Court dismissed the claim on the ground that the *lis pendens* was privileged and could not support a claim for slander of title.

V. Aiding and Abetting Liability.

Meridian Medical Sys., LLC v. EPIX Therapeutics, Inc., 2021 ME 24, 250 A.3d 122.

In this case, the Law Court recognized for the first time that aiding and abetting could provide a basis for liability for tortious conduct of another. The case reached the Law Court after the Business Court dismissed the Plaintiff's complaint for failure to state a claim.

The Plaintiff was a Maine LLC founded by Kenneth Carr, to develop microwave technologies. Carr was Plaintiff's chairman and CEO until he was removed from those positions in 2013 by the Plaintiff's co-managers. MMS filed for bankruptcy protection and when it liquidated under Chapter 7 in 2014, Carr purchased certain of the Plaintiff's claims from the bankruptcy

estate. The claims asserted in this lawsuit did not include any claim asserted by Carr personally, nor any claim by the Plaintiff against its co-managers. Rather, the Plaintiff's claims were asserted against three defendants: Epix Therapeutics, f/k/a Advanced Cardiac Therapeutics, Inc. (ACT); New Enterprise Associates, Inc. (NEA); and Medtronic Inc. ACT licensed technology from Plaintiff around 2013. NEA became a controlling shareholder of ACT in 2014. Medtronic acquired ACT in 2019. The only relationship any defendant had with the Plaintiff was the licensing agreement between it and ACT.

The gist of the claims is that the value of the Plaintiff's technology was not maximized due to its co-managers' conduct, which ACT and NEA encouraged. The Plaintiff asserted three claims: aiding and abetting breaches of fiduciary duty; tortious interference; and conspiracy.

The Law Court quickly disposed of the conspiracy claim on the ground that Maine law does not recognize a tort for conspiracy.

The Court then considered the claim for aiding and abetting breaches of fiduciary duty. First, the Law Court noted the elements of a claim for breach of fiduciary duty: 1) the existence of a fiduciary relationship between the plaintiff and another person; 2) a breach of the other person's fiduciary duty toward the plaintiff; and 3) damages incurred by the plaintiff proximately caused by the breach.

Next, the Court considered whether Maine law recognizes aiding and abetting liability for torts in general. After considering whether it had recognized aiding and abetting liability in the past, the Law Court concluded that civil liability could attach for aiding and abetting another's tortious conduct, albeit with two important caveats.

First, the aider and abettor must have actual – and not merely constructive – knowledge that the principal tortfeasor is engaged in tortious conduct. The Law Court held this scienter requirement is necessary to avoid “casting too wide a net, bringing under it parties involved in nothing more than routine business transactions.” The Law Court quoted from the 5th Circuit on the matter:

The nature of wrongdoing alleged in this case also supports a requirement that a party actually know that a breach of fiduciary duty is intended and consummated. Transactions which may appear reasonable at the time they are entered into may, upon

more considered and deliberate reflection, prove to be objectively unreasonable. However, to impose affirmative liability on a purchaser in a commercial transaction without concrete evidence of both its knowledge of the self-interest or bad faith of the seller and its unavoidable awareness of the transaction's substantive unfairness or lack of business purpose would disrupt commercial activity in a manner wholly inconsistent with the purposes of aider and abettor liability.

Second, the defendant must commit acts constituting "substantial" assistance in the commission of the underlying tort. The factors that are relevant to determining whether the substantial assistance element has been met are: the nature of the act encouraged; the amount of assistance given; the defendant's absence or presence at the time of the tort; the defendant's relation to the tortious actor; and the defendant's state of mind. The Law Court held that the substantiality of the aider and abettors' assistance must be able to be reasonably inferred from the aider and abettor's alleged concrete actions.

Next, the Law Court considered whether there is anything distinct about the tort of breach of fiduciary duty to reject imposing aiding and abetting liability for it. It concluded that there was no reason why breaches of fiduciary duty should be excluded from those torts for which liability might be imposed for aiding and abetting another's tortious conduct. However, it held that allegations upon which liability is being sought against the purported aider and abettor must be pleaded with specificity, *i.e.*, that the defendant had actual knowledge that the principal tortfeasor was committing a breach of fiduciary duty and that the defendant performed substantial acts in order to assist in the commission of that tort.

The Law Court then went through six different alleged situations and concluded none of them could support a claim for aiding and abetting a breach of fiduciary duty. Thus, although the Law Court recognized the possibility of asserting a claim for aiding and abetting a breach of fiduciary duty under Maine law, it rejected the Plaintiff's attempts in this case.

VI. Statutory Changes.

14 M.R.S. § 753.

The section previously provided that “Actions for assault and battery, and for false imprisonment, slander and libel shall be commenced within 2 years after the cause of action accrues.”

The Legislature amended it to the following: “Actions for slander and libel must be commenced within 2 years after the cause of action accrues.”

As a result of the amendment, actions for assault and battery and for false imprisonment are now subject to the 6-year statute of limitations. This amendment took effect on June 15, 2021.

14 M.R.S. § 752-C: Limitation of Actions for Sexual acts towards minors.

This section provides the limitations period for actions based upon sexual acts toward minors.

Prior to 1999, this section provided that actions based upon sexual acts towards minors must be commenced within 12 years after the cause of action accrues, or within 6 years of the time the person discovered or reasonably should have discovered the harm, whichever occurred later. 1993 c. 639, § 1. In 1999, the section was amended to provide that actions based upon sexual acts towards minors could be commenced at any time. However, subsequent caselaw held that the Legislature, in amending the statute, did not revive claims that were already barred by the previous statute of limitations in force before the 1999 amendment, because the Legislature did not intend to do that. *Guptill v. Martin*, 228 F.R.D. 62, 66 (D. Me. 2005).

In 2021, the Legislature amended the section to provide that “This section applies to all actions based upon sexual acts toward minors regardless of the date of the sexual act and regardless of whether the statute of limitations on such actions expired prior to the effective date of this subsection.” See 2021, c. 301, § 1. The Governor approved the amendment on June 21, 2021, and it sent into effect on October 18, 2021. See 14 M.R.S. § 752-C(3).

By its terms, § 752-C now allows actions based upon sexual acts towards minors to be brought regardless of when the sexual act occurred and regardless of whether the statute of limitations for such actions had already expired. In other words, it retroactively eliminates the statute of limitations for any actions based upon sexual acts toward minors.

14 M.R.S. § 752-F: Limitation of Actions for Perfluoroalkyl and Polyfluoroalkyl substances

This section was enacted to provide the following:

A cause of action arising out of any harm or injury caused by a perfluoroalkyl or polyfluoroalkyl substance accrues on the date the plaintiff discovers or reasonably should have discovered such harm or injury. For the purposes of this section, "perfluoroalkyl or polyfluoroalkyl substance" means any member of the class of fluorinated organic chemicals containing at least one fully fluorinated carbon atom. This section does not affect application of notice requirements for filing under section 8107 or the limitation on actions against a government entity under section 8110.

This section went into effect on October 18, 2021.

This section relates to PFAS chemicals which, according to the United States Centers for Disease Control and Prevention, are a group of chemicals used to make fluoropolymer coatings and products that resist heat, oil, stains, grease, and water.¹

¹ See https://www.cdc.gov/biomonitoring/PFOA_FactSheet.html.