MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. Mem 18-54
Docket No. Pen-17-374

DONALD F. MACLEOD

v.

EASTERN MAINE HEALTHCARE SYSTEMS

Argued June 14, 2018
Decided June 21, 2018

Panel: SAUFLEY, C.J., and ALEXANDER, MEAD, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.

MEMORANDUM OF DECISION

Donald F. MacLeod appeals from a judgment entered by the Superior Court (Penobscot County, *A. Murray, J.*) following a jury verdict in favor of Eastern Maine Healthcare Systems on MacLeod's complaint alleging age discrimination and whistleblower retaliation.

Contrary to MacLeod's contentions, the court acted well within its discretion in excluding, pursuant to M.R. Evid. 403, certain medical evidence relating to MacLeod and his wife because of the danger of unfair prejudice and jury confusion. *See Camp Takajo, Inc. v. SimplexGrinnell, L.P.*, 2008 ME 153, ¶ 16, 957 A.2d 68 (abuse of discretion standard of review).

Additionally, because MacLeod failed to object to the court's instruction on the definition of "protected activity," we find no obvious error in the court's later reinstruction utilizing the same language. *See Morey v. Stratton*, 2000 ME 147, ¶ 10, 756 A.2d 496 (obvious error standard of review); *see also Caruso v. Jackson Lab.*, 2014 ME 101, ¶ 12, 98 A.3d 221 (stating that jury instructions are reviewed in the entirety for whether the instructions "fail to

inform the jury correctly and fairly in all necessary respects of the governing law").

The court did not clearly err or abuse its discretion by admitting in evidence two records created by MacLeod's supervisor pursuant to the business records exception to hearsay, M.R. Evid. 803(6). *See Am. Express Bank FSB v. Deering*, 2016 ME 117, ¶ 12, 145 A.3d 551 (reviewing a court's foundational findings for clear error and the ultimate admissibility determination for an abuse of discretion). As to the admissibility of the third record challenged on appeal, although the court erred in admitting that record in evidence where the witness's testimony failed to satisfy the foundational requirements of M.R. Evid. 803(6), because that record was cumulative of that witness's own testimony, any resulting error in the admission of that record was harmless. *See* M.R. Civ. P. 61 (harmless error); *Northeast Bank & Trust Co. v. Soley*, 481 A.2d 1123, 1128 (Me. 1984) ("The probative effect of [admitting the record] was merely cumulative, and its admission did not affect the substantial rights of the [party].").

Finally, the court did not abuse its discretion by declining to waive any or all of the awarded costs. *See Poland v. Webb*, 1998 ME 104, ¶ 12, 711 A.2d 1278 (reviewing an award of costs for an abuse of discretion); *see also McLeod v. Macul*, 2016 ME 76, ¶ 6, 139 A.3d 920 (providing the abuse of discretion standard of review). The court correctly declined to apply the statute exempting certain property from attachment and execution, 14 M.R.S. § 4422 (2017), because it is inapplicable to a court's award of costs. *See* 14 M.R.S. §§ 1502-B through 1502-D (2017); M.R. Civ. P. 54(d)-(g); *Caruso*, 2014 ME 101, ¶ 12, 98 A.3d 221 (the interpretation of a statute is reviewed de novo).

The entry is:

Judgment affirmed.

Arthur J. Greif, Esq. (orally), Gilbert & Greif, P.A., Bangor, for appellant Donald F. MacLeod

Frank T. McGuire, Esq. (orally), Rudman Winchell, Bangor, for appellee Eastern Maine Healthcare Systems

Penobscot County Superior Court docket number CV-2015-142
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