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SUPREME JUDICIAL COURT OF MAINE HOLDS THAT EVIDENCE FROM A SMALL
CLAIMS MEDIATION IS ADMISSIBLE IN A SUBSEQUENT CRIMINAL TRIAL

By
Jamie L. Augustinsky*

I. INTRODUCTION

In *State v. Tracy*, the Supreme Judicial Court of Maine affirmed the admission of statements and conduct from a small claims mediation in a subsequent criminal forgery trial.¹ The court held that Maine Rule of Evidence 408(a) did not preclude the admission of the evidence from the mediation.² This evidence was not being offered into a subsequent dispute between the original parties and did not pertain to the substantive issue from the mediation.³ Instead, the evidence was offered into a separate criminal proceeding between a participant to the mediation and a third-party.⁴

II. BACKGROUND

In May 2006, Deane Tracy, Appellant, and his wife Sarah Tracy agreed to purchase a 1992 Mercedes Benz from Ken and Melissa Curtis for \$3,500.⁵ Sarah Tracy prepared a bill of sale and presented it to Melissa Curtis, who made three copies of the bill.⁶ Melissa subsequently signed one copy and gave it to Sarah, took one copy home, and filed a copy at work.⁷ The bill stated that the car was sold “To Deane and Sarah Tracy for \$3,500.00 cash.”⁸

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¹ *State v. Tracy*, 991 A.2d 821 (Me. 2010).

² *Id.* at 829.

³ *Id.*

⁴ *Id.* at 828.

⁵ *Id.* at 823.

⁶ *Tracy*, 991 A.2d at 823.

⁷ *Id.*

⁸ *Id.*

By early 2007, the Tracys had only paid the Curtises \$1,000.⁹ The Curtises subsequently brought a small claims action seeking the \$2,500 balance owed on the car.¹⁰ Both couples attended a small claims mediation in March, 2007.¹¹ At the mediation, Sarah Tracy stated that she paid an additional \$500 to the Curtises.¹² The Curtises subsequently offered to settle for \$2,000 if Sarah Tracy could provide documentation showing the \$500 payment, but the Tracys provided no such documentation.¹³ Trial on the small claims complaint went forward against only Deane Tracy because Sarah Tracy had not been properly served.¹⁴ During the small claims trial, the Curtises offered the bill of sale for the car into evidence.¹⁵ Deane Tracy, however, offered a bill of sale into evidence that differed in one significant way from the bill presented by the Curtises. Deane Tracy's bill contained a statement that the car had been paid for in full.¹⁶ The line that read "Paid in full" on the bill Deane Tracy presented was higher on the line than the words preceding it, and the signature of Deane Tracy and his wife on this bill were different from their corresponding signatures on the other bill of sale that Melissa Curtis presented.¹⁷ When Melissa Curtis observed the bill presented by Deane Tracy, she claimed that it was fraudulent.¹⁸

Both Deane Tracy and his wife were subsequently charged with forgery related to the altered bill of sale.¹⁹ The State moved *in limine* for the admission of the testimony about the small claims mediation session, and the court considered

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Tracy*, 991 A.2d at 823.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Tracy*, 991 A.2d at 823.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 824.

the testimony of the mediator from the small claims mediation session *in limine*.²⁰ During Deane Tracy's criminal forgery trial, the court admitted evidence concerning the small claims mediation.²¹ The trial court found Deane Tracy guilty of forgery and sentenced him to nine months in jail.²² Deane Tracy filed a timely appeal of his conviction.²³

Deane Tracy argued that the court should not have admitted any evidence related to the small claims mediation in his criminal forgery trial.²⁴ In particular, Deane Tracy contended that three specific pieces of evidence should have been excluded from his criminal trial: (1) the representation by Sarah Tracy that she had paid \$500 more towards the car than the Curtises alleged, (2) the Curtises' offer to accept only \$2,000 if Sarah Tracy could document her alleged payment of \$500, and (3) Deane Tracy's failure to notify the Curtises that he had a bill stating that the car was "Paid in full."²⁵ Deane Tracy based his argument on Maine Rule of Evidence 408(a), which at the time of his criminal trial read:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromise or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations or in mediation is also not admissible on any substantive issue in dispute between the parties.²⁶

²⁰ *Id.*

²¹ *Tracy*, 991 A.2d at 824.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 826.

²⁵ *Id.*

²⁶ *Tracy*, 991 A.2d at 826 (citing M. R. Evid. 408).

III. COURT'S ANALYSIS

The court analyzed the three concepts within the Maine Rules of Evidence that generate confusion regarding the use of mediation-related evidence at trial: confidentiality,²⁷ privilege,²⁸ and admissibility.²⁹

The court first discussed confidentiality and privilege as set forth in the Maine Rules of Evidence. The court defined confidential communication as “made in the context of a special relationship with the intent that it not be disclosed to *any* third parties except in strictly limited circumstances.”³⁰ The Maine Rules of Evidence establish specific privileges to protect certain types of confidential communication, including attorney/client privilege,³¹ health professional/patient privilege,³² husband/wife privilege,³³ and religious privilege.³⁴ The court observed, however, that at the time of Deane Tracy’s criminal trial, the Maine Rules of Evidence did not provide that statements made during mediation were confidential communication, nor did the Rules subject these statements to any specific privilege.³⁵ Accordingly, the court reasoned that the statements and conduct of the parties during the mediation were not confidential communication and were not protected by any privilege.³⁶

The court continued its analysis by discussing whether the statements and conduct during the mediation were admissible under the Maine Rules of Evidence even though they did not qualify as confidential and were not protected by any

²⁷ *Id.* at 826 (citing M.R. Evid. 502(a)(5)).

²⁸ *Id.* (citing M.R. Evid. 501).

²⁹ *Id.* (citing M.R. Evid. 402).

³⁰ *Id.* (emphasis added).

³¹ *Tracy*, 991 A.2d at 826 (citing M. R. Evid. 502(b), (d)).

³² *Id.* (citing M. R. Evid. 503 (b), (e)).

³³ *Id.* (citing M. R. Evid. 504 (b), (d)).

³⁴ *Id.* (citing M. R. Evid. 505 (b)).

³⁵ *Id.* at 827.

³⁶ *Tracy*, 991 A.2d at 827.

specific privileges. Deane Tracy argued that, pursuant to Maine Rule of Evidence 408(a), evidence from the small claims mediation was inadmissible in his criminal forgery trial.³⁷ The court noted that the underlying purpose behind Rule 408(a) is to encourage settlement discussions.³⁸ Under this rule, parties can each speak freely during the mediation without fear that the statements made during mediation can be used against them if the mediation fails and the case goes to trial.³⁹ The court explicitly distinguished this purpose of the rule from the application of the rule Deane Tracy was seeking. Deane Tracy was not attempting to exclude the evidence from a trial dealing with the substantive issue in dispute between the Curtises and himself, but instead sought to exclude the evidence in his own subsequent criminal trial on the issue of forgery.⁴⁰

Rule 408(a) specifically prohibits the admission of statements made during mediation as evidence in any litigation pertaining to the subject matter of the dispute between the two parties to the mediation.⁴¹ When evidence has instead been offered in a separate litigation between an outside party and a party to the mediation, however, the court noted that the evidence has consistently been held admissible.⁴² In these circumstances, because the statements made in mediation were not offered as evidence to establish liability on the mediated claim or to establish an issue in dispute between the parties to the mediation, the evidence was admissible under Rule 408.⁴³

The court noted that this was the first time it was called to decide whether Rule 408(a) as it existed before the January 2010 amendment precluded the admission of evidence from mediation in a subsequent criminal case.⁴⁴ To decide the issue, the court applied the same reasoning it used to decide whether the

³⁷ *Id.* at 826.

³⁸ *Id.* at 828.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Tracy*, 991 A.2d at 828.

⁴² *Id.*

⁴³ *Id.* at 829.

⁴⁴ *Id.*

evidence was admissible in subsequent civil trials. The court reasoned that in this case, the State did not offer the evidence from mediation to establish liability from the small claims action or in a dispute between the parties to the mediation.⁴⁵ Instead, the State offered the evidence in Deane Tracy's criminal trial to establish that he committed the crime of forgery.⁴⁶ Accordingly, the court held that the evidence in question was admissible in Deane Tracy's criminal trial for the purpose of establishing Tracy's commission of the crime of forgery.⁴⁷

The court proceeded to explain that even under the amended Rules of Evidence, the evidence in question would most likely still be admissible.⁴⁸ Maine Rule of Evidence 514, effective on January 1, 2010, establishes a limited privilege that mediators can claim.⁴⁹ However, the court noted that this privilege only extends to the mediator himself and not to the participants to the mediation.⁵⁰ Accordingly, even if the mediator asserted a privilege against testifying, the evidence of the statements made during the mediation would still be admissible under amended Rule 408 as long as it was offered through the mediation participants and not the mediator.⁵¹ The State would have been able to present testimony from the Curtises concerning Tracey's conduct and statements during the mediation as evidence in his criminal forgery trial.⁵²

IV. SIGNIFICANCE

The holding in *Tracy* is significant because it illustrates the binding effects that statements and conduct occurring during a mediation proceeding could

⁴⁵ *Id.*

⁴⁶ *Tracy*, 991 A.2d at 829.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Tracy*, 991 A.2d at 829.

⁵² *Id.*

potentially have on a party. Though the purpose of Maine Rule of Evidence 408 is to encourage free discussion between the parties during mediation so the mediation could lead to a settlement of a particular dispute, parties will not be shielded from their statements in the mediation when it comes to other potential suits in which the parties may become involved. The mediation process is meant to encourage resolution of disputes between parties who are disputing a substantive issue, but the process is serious enough that statements or conduct during it can be used against a party in a subsequent criminal trial. Accordingly, parties to a mediation must not haphazardly conduct themselves in the mediation solely to help themselves receive a favorable outcome in that particular dispute.

The court's holding in the instant case could potentially lead to more honest mediation sessions and better resolution of disputes. The parties to a mediation session will be aware that if they are dishonest in the mediation, their dishonesty could end up prejudicing them in future litigations. In accordance with this holding, parties could still discuss freely with each other concerning their disputes, but would need to be honest in their conduct and statements. This honest and open discussion between the parties to a mediation would hopefully yield the best and fairest results for the parties and would also ensure that neither party could be criminally prosecuted in a subsequent action for dishonestly in the mediation.