STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. YOR-24-226

Pat Doe,

Appellees,

v.

John Costin,

Appellant.

On Appeal from District Court (Biddeford)

BRIEF OF APPELLANT JOHN COSTIN

Scott D. Dolan, Esq. – Bar No. 6334
PETRUCCELLI, MARTIN & HADDOW, LLP
P. O. Box 17555
Portland, Maine 04112-8555
207-775-0200
sdolan@pmhlegal.com

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I. INTRODUCTION

This is an appeal by John Costin ("Costin") from several orders erroneously issued by the District Court (Jannelle, A.R.J.) in a protection from harassment case in which Costin was the defendant.

First, the District Court erred by issuing an order for protection from harassment on August 16, 2023 ("the 2023 Protection Order"), (A. 10-11), against Costin though the evidence presented at trial in 2023 failed to meet the statutory criteria necessary under 5 M.R.S. § 4651(2) for granting the order requested by Plaintiff-Appellee Pat Doe[1] ("Doe").

Second, the District Court erred by granting Doe's subsequent motion to modify that 2023 Protection Order by issuing a new protection order on February 14, 2024 ("the 2024 Protection Order"), (A. 12-13). Doe's motion to modify sought to add new restrictions against Costin though Doe alleged no new evidence or circumstance – none – that would have warranted an amended order. In fact, Doe waived the opportunity to present new testimony or evidence at a hearing on the motion to modify. (*See* Transcript of Hearing on Motion to Modify from February 12, 2024 (hereinafter "III Tr."), 2-3.) All the evidence before the District Court on that

[1] Although this Court has designated the appellees as "Pat Doe," singularly, the appellees are actually two people, sisters, who were minors when this case started in 2023 and who are now both adults and have graduated from high school. Their mother (a prominent family law attorney based in York County) filed the case on their behalf. Costin follows the Court's lead herein by referring to the appellees collectively in the singular, rather than plural form, as Doe, though Costin alternately refers to the appellees as the Doe sisters, "Does," "they," "them" or possessively, "their."

motion to modify was the exact same evidence that was before the court from the 2023 trial. There was nothing new. The key evidence cited by Doe in the motion was from an exhibit that the parties had jointly admitted by stipulation at the 2023 trial that showed a temporary no trespass notice issued by the school department was set to expire on November 13, 2023. The District Court already had that exhibit in evidence at trial. (A. 16.) Doe's motion to modify was essentially an untimely motion for reconsideration, asking the District Court to impose more restrictions against Costin than it had in the 2023 Protection Order. The motion to modify should have been denied as baseless and time-barred, and Costin should have been awarded attorney fees for having to defend against such a frivolous motion, pursuant to 5 M.R.S. § 4655(1-A).

Third, the District Court doubled down on its erroneous ruling on the motion to modify and erred again by granting Doe's subsequent motion for attorney fees filed after the motion to modify. (A. 21.)

That third order, (A. 17-21), was issued as part of a broader order by the District Court that addressed both Doe's motion for fees and Costin's motion, pursuant to M.R. Civ. P. 52(a), for findings of fact and conclusions of law seeking answers on why the court would issue a new, more restrictive protection order without any new evidence or legal basis. The District Court's findings show that, exactly as Costin contended, there was no new evidence to support granting the motion to modify. Rather, the District Court relied entirely on its faulty recollection of

old evidence from the 2023 trial as the basis for granting the motion. Furthermore, those findings were riddled with errors that were unsupported by evidence from the 2023 trial or from the 2024 hearing on the motion to modify. Some of it was pure fiction. The District Court's findings were so unsupported by the evidence that it makes clear that the court never had a legal basis under 5 M.R.S. § 4651(2) for granting the 2023 Protection Order in the first place.

Although the protection orders expired on June 15, 2024, the issues on appeal remain in live, justiciable controversy because Costin's challenge to the award of attorney fees has not expired and remains interwoven with his contention that the District Court erroneously granted the two protection orders without sufficient legal basis to do so. Costin also refers the Court to his arguments in his separate filing in this appeal opposing Doe's Motion to Dismiss Appeal and hereby incorporates those arguments here. (*See* Costin's Opp'n to Mot. Dismiss Appeal, dated Aug. 2, 2024.)

II. STATEMENT OF FACTS

A. Residents on Dane Street in Kennebunk are concerned about speeding traffic.

Costin did not know Doe before this case. (Trial Transcript from Aug. 9, 2023 (hereinafter "II Tr."), 71-72, 76.) He had never seen their mother, who filed this case against him on their behalf, until she appeared in court for trial. (II Tr. 71-72.) He also had never seen the Doe sisters before they sped down his street in their car on two occasions in April and May of 2023. (II Tr. 76.) Likewise, neither the Doe sisters nor their mother knew Costin. (Trial Transcript from Aug. 7, 2023 (hereinafter "I Tr."),

47-48, 71; II Tr. 39.) They were strangers. Costin only encountered them because the Doe sisters used the street where Costin lives in Kennebunk, Dane Street, as a shortcut while driving through town to bypass the traffic lights and congestion at the intersection of Summer Street and Main Street. (II Tr. 76.)

At the trial, held on August 7 and August 9, 2023, several people testified about how speeding traffic on Dane Street is a safety concern to those who live there. (I Tr. 11-17, 21-27; II Tr. 66-70.)

Lelia Carroll, who lives on Dane Street, testified that drivers use Dane Street as a cut through and that speeding traffic is a particular concern to her because she has a young son and dogs. (I Tr. 11.) Carroll said that she often signals to speeding drivers with a hand gesture to slow down. (I Tr. 16-17.) As she testified, she simulated from the witness stand by using her hand from a high position and then lowering it repeatedly. (I Tr. 16-17.) She said she and Costin have both made that same hand-motioning gesture when they were outside together on the street to slow down speeding traffic. (I Tr. 17.) Regarding that hand gesture, Carroll said: "It's – it's easy to go fast. I get it. It's just a – just a general just way to get someone's attention, and be, like, hey, can you slow down? We've got kids, dogs. Just slow down." (I Tr. 17.)

Michael Cleary, another of Costin's neighbors from Dane Street, testified that he worries about the safety of his two young children because of the traffic from drivers using the street as a cut through. (I. Tr. 21-26). He testified that drivers accelerate "aggressively" to try to beat the traffic light at the intersection of Dane and

Main streets. (I Tr. 26-27.) He said he sometimes uses his hand to flag drivers to slow down. (I Tr. 27.)

Costin too testified about how speeding on his street poses a safety concern. (II Tr. 68.) Like the others, he testified that he sees drivers use Dane Street as a cut through by turning from Park Street, driving the roughly 1,000-foot stretch of Dane Street to the traffic light at the four-way intersection of Dane, Main, and Fletcher streets. (II Tr. 66-68.) Costin said he and his wife have posted yard signs in their yard supplied by the Town of Kennebunk with the words, "slow down Kennebunk," and posted a bright green plastic figure with a red cap and flag to urge speeders to slow down. (II Tr. 68-70; Def.'s Ex. 6 (photo of plastic figure)). When he is in front of his house and sees speeders, he will usually make a hand gesture that he described as his "hand moving from an upper position to a lower position, which I understand to be kind of a universal sign for please slow down." (II Tr. 69.)

Costin testified that he "frequently" raised his concerns about speeding traffic on Dane Street to Kennebunk town officials and police. (II Tr. 68.) Costin is familiar with Kennebunk officials, as he has held both elected and appointed positions in town government. (II Tr. 63.) In addition to serving on the town's Economic Development Committee, Charter Review Commission, Budget Board, and other civic positions, he also served as a trained community advisor for Kennebunk High's Civil Rights Team. (II Tr. 63-64.) Additionally, his wife served on the School Board of Regional School Unit 21, which includes Kennebunk's schools. (II Tr. 64.)

B. Costin recalled encountering the Doe sisters only two times on Dane Street.

Costin testified that he first became aware of the Doe sisters on the morning of April 28, 2023, or thereabout, as he was in his driveway about to get into his vehicle for his commute to work. (II Tr. 74.) He saw a gray Mazda turn the corner from Park Street onto Dane Street and "begin accelerating rapidly." (II Tr. 74.) He "stood at the edge of his property and made the slowdown hand motion," and the gray Mazda slowed and stopped in front of him. (II Tr. 74.) One of the sisters was driving and the other was in the passenger seat. He said that he saw the passenger become animated and heard her yell: "don't stop, don't stop. The man is crazy. Keep going. Keep going. Don't stop." (II Tr. 75.) Costin testified that he responded, "the man is not crazy. The man just lives on a street where the speed limit is 25." (II Tr. 75.) And then the driver "sped off towards Main Street," he said. (II Tr. 75.) Costin testified that he had never seen either of the Doe sisters before that day and did not know who they were. (II Tr. 76.) Costin then got in his vehicle and drove to work as usual. (II Tr. 75.)

The Doe sisters' testimony about the April 28th incident differed in some ways from Costin's testimony. Both Doe sisters testified that they were upset after Costin asked them to slow down. (I Tr. 61; II Tr. 43.) The Doe sister who was the passenger, testified that Costin came into the roadway beside their vehicle, not in front of the vehicle. (I Tr. 71.) The Doe sister who was the driver testified differently from her sister and said that Costin went "in front of my vehicle." (II Tr. 39.) The sister who was the driver also gave some contradictory testimony, saying on direct examination

that Costin was carrying a box of files in one arm and waving with the other, and then saying on cross that he was "flailing" both of his arms. (II Tr. 23, 39-40.) Costin testified that he was carrying a box of files in one arm and motioned Doe to slow down with his free hand. (II Tr. 75.)

Costin testified that he next encountered the Doe sisters again on the morning of May 4, 2023. (II Tr. 79-86.) Costin was loading a box into his vehicle as he prepared to go to work when he saw what appeared to be the same Mazda come around the corner of Park Street onto Dane Street again "at a high rate of speed." (II Tr. 79.) Costin was already in or getting in his vehicle when the Mazda went by, and he did not make a slowdown gesture or interact with the occupants of the Mazda while on Dane Street that day. (II Tr. 79.) He said he decided to report the vehicle to the police as a repeated speeder but was uncertain whether it was the same driver as the preceding week. (II Tr. 79.) Costin also said that the allegation made in the Complaint that he was waiting in his driveway for the Mazda to go by was false and that he could not possibly have known that the same Mazda would go by again on that exact day at that exact time. (II Tr. 82-83.)

Costin testified that he assumed the Mazda was headed toward Kennebunk High School, based on the age of the occupants who he saw the previous week. (II Tr. 79, 82-83.) He was headed in that direction to go to work and decided to follow to confirm that the occupants were the same people he had seen speeding the previous week and to get the license plate of the vehicle to provide to police. (II Tr. 79-85.)

Costin testified that he followed the Mazda at a safe distance to the high school parking lot, where he saw the car park in the school parking lot. (II Tr. 83.) He then parked his vehicle nearby to take a picture of the license plate. (II Tr. 83.) Costin testified that he did not get out of his vehicle, left the engine running, and had his seatbelt on. (II Tr. 83.) As he did so, he said, one of the Doe sisters asked him a question and he responded. (II Tr. 85.) The exchange was partially captured in a video snippet taken by one of the Doe sisters, which shows Costin's vehicle to be about a car length's distance from the parked Mazda. (II Tr. 83-84; Pl.'s Ex. 1.)

Costin testified that at no point did he raise his voice or get out of his vehicle. (II Tr. 86.) The video recording, which was admitted as Plaintiff's Exhibit 1 and played in court during the trial, confirms that Costin remained in his vehicle and was not yelling. (Pl.'s Ex. 1.) Costin testified that one of the Doe sisters asked him what he was doing. (II Tr. 85.) He said he responded by saying that he asked them not to speed on his street and that he was going to report it to the police. (II Tr. 85.) He testified that one of the sisters said, "we're teenagers." (II Tr. 86.) Costin said he responded that teenagers can kill people with cars, too. (II Tr. 86.) He testified that the conversation ended with both him and Doe saying they were going to contact the police. (II Tr. 86.) Costin then drove away, out of the school parking lot and to Cummings' Market, from where he called the Kennebunk Police Department at 7:47 a.m. (II Tr. 87.) He gave the police operator his name, contact information, described the speeding incidents and provided the Mazda's license plate number. (II Tr. 87.)

Costin testified that he asked the police to contact the Doe sisters' parents about the speeding incidents. (II Tr. 87.)

The Doe sisters' testimony about the May 4th incident differed from Costin's testimony in some ways. Whereas Costin testified that he was just getting into his vehicle as the Mazda approached on Dane Street, the Doe sisters testified that he was already preparing to back out of the driveway with his vehicle turned on when they approached. (I. Tr. 62; II Tr. 48.) Whereas Costin's testimony and Plaintiff's Exhibit 1 (the video snippet) show that Costin parked about a vehicle's length away from the Mazda in the school parking lot, the Doe sisters testified that he parked only "a couple" or "a few" feet away. (I Tr. 60; II Tr. 51.) The Doe sister who was the driver testified that the incident made her "angry" and "upset." (II Tr. 52.) The Doe sister who was the passenger said the incident made her "very upset." (I Tr. 90.)

C. <u>The Does testified about two other incidents of which Costin was unaware.</u>

In total, members of the Doe family described four separate incidents that they allege involved Costin. In addition to the two that Costin knew about, the Does also described two other incidents that they allege occurred before the April 28 incident.

In the first chronological incident, Doe alleges as follows in the Complaint:

> Previously, Mr. Costin pulled in front of my vehicle abruptly and went about 10 mph when I was traveling on Dane Street. I was not speeding. He made hand gestures out the window at us. The kids were in the car and we all remember it as something that was very unusual.

(A. 25.) Doe called three witnesses to testify about that incident, their mother and the two sisters themselves. None of the witnesses could recall the exact date of when the alleged incident took place, but each testified that someone they thought was Costin was driving a vehicle, pulled out of his driveway on Dane Street, and then drove slowly. (I Tr. 48, 69; II Tr. 38.) One of the sisters, however, testified that they never actually saw the driver of the vehicle that pulled out but only recognized the vehicle. (II Tr. 38.) Each of the witnesses testified that they did not believe that Costin targeted them when he pulled out of his driveway and drove slowly. (I Tr. 48, 69-70; II Tr. 38-39.) Each of the witnesses testified that they did not know Costin. (I Tr. 47-48, 71; II Tr. 39.) And each of the witnesses testified that they did not believe that Costin knew them. (I Tr. 47-48, 71; II Tr. 38-39.) Doe's mother testified that Costin "hand-gestured out his window," but did not specify what that hand gesture was. (I Tr. 31.) There was no testimonial basis for the District Court's finding of fact that Costin made "obscene gestures" at them and other motorists. (A. 19.) Costin testified that he had no recollection of that first incident. (II Tr. 73.) He testified that other people often drive his vehicle, which is a minivan, it could very well have been his wife driving their family minivan that day, not him. (II Tr. 72.)

In the second chronological incident, one of the Doe sisters testified that she was driving alone in her car on Dane Street on an unknown date. (I Tr. 59-60, 70-73.) Though she did not know the exact date, she testified that it likely occurred in early spring of 2023. (I Tr. 73.) This alleged incident was not referenced in the Complaint.

She alleged that Costin stepped into the opposite lane of travel, close to her vehicle, and used a hand gesture to signal to her to slow down. (I Tr. 71.) Specifically, she said: "I think he was, like, doing a – gesturing with his hand and – and, like, like, the slow down motion, gesturing of his hand." (I Tr. 60.) After that, she testified, she slowed down. (I Tr. 72.) When asked on cross examination whether she thought Costin was targeting her individually, she said: "No. I think he has a pattern of doing this to anyone who drives past his house." (I Tr. 70.) Costin testified that he had no recollection of that incident and that he would never have stood close to a moving vehicle in the roadway. (II Tr. 73.) He also testified that he did not know either Doe sister at that time and would not have recognized either of them. (II Tr. 76.)

D. School officials and police had Costin served with no trespass notice.

After the incident in the high school parking lot on May 4, 2023, the Doe sisters spoke with Principal Jeremie Sirois.[2] Sirois testified that as a result of that conversation, he contacted the school resource officer, Kennebunk Police Officer Jason Champlin. (I Tr. 100-101.) Sirois also testified, over Costin's standing hearsay objection, about a video that he claimed he watched of the incident in the school parking lot. (I Tr. 99, 101.) The District Court quashed Costin's subpoena for production of that video, prevented Costin from seeing that video, and prevented that

[2] Costin objected to the Doe's subpoena for Sirois' testimony on ground that the District Court had quashed Costin's witness subpoena for Assistant Superintendent Anita Bernhardt to testify and that allowing Sirois to testify was inherently unfair to Costin. (I Tr. 95-98.) As part of Bernhardt duties as assistant superintendent, she was the one who fully investigated the incident and was the only school official who interviewed Costin. (II Tr. 98.)

video from being played at trial. (A. 3-5.) Sirois testified that he was unaware that counsel for the Kennebunk Police Department told Costin that no such video of the parking lot existed. (I Tr. 103.) Sirois testified that as a result of his conversation with the Doe sisters and having watched the alleged video, he requested that the school resource officer issue a no trespass notice against Costin. (I Tr. 101.)

Kennebunk Police Officer Benjamin Murphy testified at trial that he joined Officer Champlin in the investigation. (I Tr. 110-111.) Champlin and Murphy did not interview Costin as part of their investigation, neither to gather information about Costin's complaint about speeding nor to get his side of the story regarding the school parking lot incident. (I Tr. 121-123.) Officer Murphy testified that he and Officer Champlin went to Costin's house on May 5, 2023, to serve him with a cease harassment/no trespass warning. (I Tr. 125.)

The initial no trespass notice prohibited Costin from entering any of any of Kennebunk's public schools. RSU 21 later revised its no trespass notice against Costin to allow him full access to all Kennebunk public schools, except the high school. (A. 16.) That revised no-trespass notice was admitted in evidence at trial by joint stipulation of the parties as Defendant's Exhibit 3.[3] (A. 16.) The revised no trespass notice states that it was issued May 16, 2023, and expired November 16, 2023. (A. 16.)

[3] The actual language of the stipulation admitting Defendant's Exhibit 3 that the undersigned read into the record at trial does not appear in the trial transcripts, suggesting that the trial recording device was switched off at the time. (*See* II Tr. 6 (where recording resumes with witness answering an unrecorded question on cross examination).) Elsewhere in the transcript, however, Doe's trial counsel makes clear reference to the

Officer Murphy testified at trial that he did not consider Costin threatening and that he and his fellow officers determined that Costin had not committed any crime. (I Tr. 128; II Tr. 17.)

E. Procedural history

Doe filed the Complaint in this matter on May 5, 2023. (A. 1, 22-26.) The District Court issued a temporary harassment order that same day. (A. 1.) On May 9, 2023, Doe filed two motions, one to have to have the case sealed and the other to have the Doe sisters referred to by their initials or as "Pat Doe." (A. 2.) On May 15, the District Court issued two orders, one granting the motion to seal and the other denying the motion to have the Doe sisters referred to by their initials or as "Pat Doe." (A. 2.) Between May 31, 2023, and August 2, 2023, the District Court issued orders quashing all Costin's subpoenas to the Kennebunk Police Department and Regional School Unit 21 ("RSU 21")[4] for both production of documents and to require witness testimony at trial. (A. 4-5.) Although the District Court quashed all Costin's subpoenas, it allowed all of Doe's subpoenas, including one that Costin sought to quash. (I Tr. 95-98.)

The District Court held a two-day trial on August 7 and August 9, 2023. (A. 5.)

stipulation admitting the revised no trespass notice, and there is no dispute that the exhibit was properly admitted. (II Tr. 98-99.)

[4] Kennebunk's public schools, including the high school, are part of RSU 21.

On August 16, 2023, the District Court issued its first Order for Protection from Harassment against Costin ("2023 Protection Order"). (A. 5-6, 10-11.) Notably, the District Court checked only Boxes A and D of the order, not Boxes E and F, meaning that while Costin was restrained from harassing and following Doe, he was not restrained from being at the high school even when Doe was there. (A. 10-11.)

After the District Court issued its 2023 Protection Order, neither party moved for findings and conclusions within 7 days thereafter, pursuant to M.R. Civ. P. 52. (*See* A. 1-9.) Neither party moved to modify, alter, amend, or for reconsideration within the 14 days thereafter pursuant to M.R. Civ. P. 59. (*See* A. 1-9.) Neither party appealed within 21 days, and the order became a final judgment. (*See* A. 1-9.)

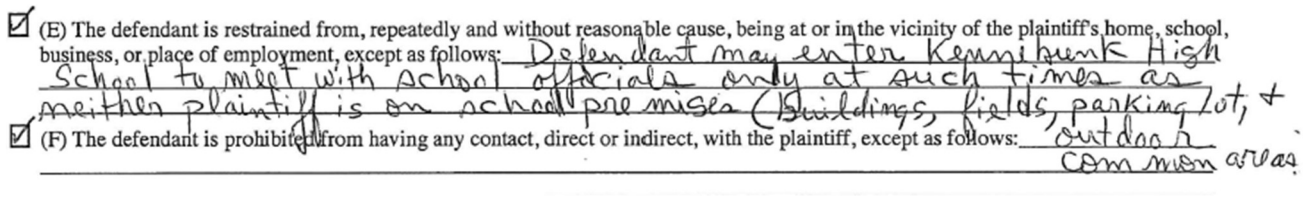
On September 12, 2023, which was 27 days after the 2023 Protection Order was issued, Doe filed a motion to modify seeking a new order for protection from harassment that would impose new conditions and restrictions against Costin, namely adding additional checks to Boxes E and F. (A. 27-29.) Costin timely opposed that Motion to Modify, arguing that the Motion raised no new material evidence and was essentially an untimely and frivolous motion for reconsideration; Costin requested attorney fees. (A. 7, 30-39.) In the motion, Doe argued that the new restrictions were necessary because Costin had spoken to the assistant superintendent of RSU 21 and asked that RSU 21's no trespass notice against Costin be terminated earlier than the set expiration date of November 16, 2023. (A. 29.)

On January 18, 2024, Costin filed a letter dated January 18, 2024, to the District Court stating that the basis for Doe's Motion to Modify was now moot, that the no trespass notice issued by RSU 21 had expired on November 16, 2023, on its own scheduled accord, and Costin thus renewed his request to be awarded attorney fees for having to defend against the frivolous and now moot motion. (A. 7, 14-16.) In that letter, Costin attached Defendant's Exhibit 3 from trial, which was a copy of the RSU 21 no trespass notice that expired on November 16, 2023, and which was admitted by joint stipulation by the parties. (A. 16.)

On February 12, 2024, the District Court held a hearing on the motion to modify. At that hearing, Doe waived their opportunity to call any witnesses or present any new evidence. (III Tr. 2-3.) Rather, counsel for the parties made offers of proof and orally argued their positions. (III Tr. 2-9.) At that hearing, Costin maintained that the evidence before the District Court for the motion to modify was the same evidence that was before the court at the 2023 trial, after which the District Court declined to issue the conditions and restrictions contained in Boxes E and F against Costin. (III Tr. 5-8.) Specifically, Costin argued that the District Court had already known from Defendant's Exhibit 3 that the RSU 21 no trespass notice was set to expire on November 16, 2023, and that that was not new evidence. (A. 14-16, 31-32; III Tr. 5-6.)

On February 14, 2024, the District Court issued a new Protection from Harassment Order against Costin ("2024 Protection Order"), consisting only of a pre-

generated form with checked boxes and handwritten notes on blank lines that imposed new restrictions and conditions against Costin. (A. 8, 12-13.) Here is a screenshot of the section of the order with new restrictions/conditions:


☑ (E) The defendant is restrained from, repeatedly and without reasonable cause, being at or in the vicinity of the plaintiff's home, school, business, or place of employment, except as follows: Defendant may enter Kennebunk High School to meet with school officials only at such times as neither plaintiff is on school premises (Buildings, fields, parking lot, + outdoor common areas.

☑ (F) The defendant is prohibited from having any contact, direct or indirect, with the plaintiff, except as follows:

The 2024 Protection Order, like the prior 2023 Protection Order, provided no findings of fact or conclusions of law; rather it consisted of check marks and handwritten notes on a pre-generated court form. (A. 12-13.)

On February 16, 2024, Costin timely filed a motion for findings of fact and conclusions of law pertaining to the 2024 Protection Order against him. (A. 9, 40-43.) That motion was fully briefed by both sides. (A. 8-9, 44-55.)

Doe subsequently filed a motion for attorney fees dated February 23, 2024, seeking an award for the litigation that occurred not only following the Motion to Modify but also an untimely request for fees from litigation that occurred in 2023. (A. 9, 56-59) Costin timely opposed. (A. 9, 63-65.)

On April 22, 2024, the District Court issued Orders and Findings in response to Costin's Motion for Findings of Fact and Conclusions of Law and to Doe's Motion for Attorney Fees. (A. 9, 17-21.) The order was entered on the docket on April 30, 2024. (A. 9, 21.) As reasoning for granting the motion for attorney fees, the District

Court said only: "The court has reviewed counsel's fee affidavit along with supporting materials and Defendant's opposition." (A. 21.)

On May 13, 2024, Costin timely appealed. (A. 9.) The notice was filed 21 days after the District Court issued its order and 13 days after the order was entered on the docket, making it timely pursuant to M.R. App. P. 2B(c)(1), 2B(c)(2)(B).

III. STATEMENT OF ISSUES PRESENTED

1. Was there sufficient evidence presented at the 2023 trial, pursuant to 5 M.R.S. § 4651(2), for the District Court to issue its Order for Protection from Harassment, dated August 16, 2023?
2. Did the District Court err in granting Doe's motion to modify and issuing its subsequent Order for Protection from Harassment, dated February 14, 2024, though Doe presented no new evidence to support granting a new order, pursuant to 5 M.R.S. § 4651(2) and 5 M.R.S. § 4655(2)?
3. Did the District Court err in issuing its order granting attorney fees to Doe, dated April 22, 2024?
4. Was Doe's motion to modify "frivolous," within the statutory meaning of the word, pursuant to 5 M.R.S. § 4655(1-A)?

IV. ARGUMENT

The standard of review for each issue is de novo, as each is based on whether the statutory requirements were met for 5 M.R.S. §§ 4651(2), 4655(1-A), and 4655(2), respectively. *See Casale v. Casale*, 2012 ME 27, ¶ 10, 39 A.3d 44.

A. The District Court erred in granting the 2023 Protection Order because Doe failed to meet their burden pursuant to 5 M.R.S. § 4651(2).

Doe failed to establish at trial that Costin had committed three or more separate acts that could be considered "acts of … confrontation … that [were] made with the intention of causing fear, intimidation or damage to personal property," to constitute harassment as defined under 5 M.R.S. § 4651(2)(A). Although there is a second prong of the harassment definition, under 5 M.R.S. § 4651(2)(C), which a "single act or course of conduct constituting a violation of" listed criminal statutes, that is not applicable here. The police did not consider any of Costin's conduct in this case to rise to the level of criminal behavior, (I Tr. 128), and likewise the District Court made no factual or legal finding that Costin had committed a crime, (A. 17-21).

Although the protection from harassment statute does not define "intention," the legislature has defined "intentional" in other contexts as meaning that it was the person's "conscious object to cause," 17-A M.R.S. § 35(1)(A); *see Anctil v. Cassese*, 2020 ME 59, ¶ 12, 232 A.3d 245 (applying that definition of "intentional" in a protection from harassment case).

Even though Doe may have technically alleged three or more incidents, generally, Doe failed to prove that three of those incidents were "confrontation[s]" and that in three of them that it was Costin's "conscious object to cause" "fear, intimidation or damage to personal property" to Doe. At best, Doe established only one such incident, the one that occurred on May 4, 2023.

Analyzing each of the alleged incidents in greater detail based on the actual testimony of each witness further supports that the District Court erred in its harassment finding.

First chronological incident – unknown date, involving mother and both sisters

For the first chronological incident, the testimony at trial established only that someone driving Costin's vehicle that he shares with his family pulled out of Costin's driveway on an unknown date and drove slowly in front of Doe's vehicle as they approached Costin's vehicle from behind. One of the Doe sisters testified that they could not see the driver, only the vehicle, and could not say with certainty that Costin was even driving the vehicle. Testimony also established that no one in the Doe family knew Costin and that Costin did not know anyone in the Doe family at that time.

Based on that collective testimony, even if Costin was the driver, which is questionable, no reasonable person could find that pulling out of one's driveway and driving slowly in front of an approaching stranger's car meets the statutory definition of harassment. It certainly is not an "act of intimidation, confrontation, physical force or the threat of physical force." None of the Doe family members testified that the incident caused them to feel "fear" or "intimidation," and no one expressed concern about damage to their vehicle. The only testimony about Costin's possible intention was by Doe's mother, who was driving. She said: "I don't think it was directed at me." (I Tr. 48.)

In sum, for that first alleged incident, Doe failed to prove any of the elements of harassment. They failed to prove it was Costin. They failed to prove that it is an act of confrontation, etc. They failed to prove intent. And they failed to prove harm.

Second chronological incident—unknown date, involving only one sister

For the second chronological incident, the testimony at trial established only one Doe sister was driving alone on Dane Street on an unknown date in early spring of 2023, that Costin flagged her to slow down, and that she then slowed down. Costin had no recollection of that incident, did not know that Doe sister, and had never seen her before.

When questioned on these allegations, the Doe sister admitted that she did not believe that Costin targeted her and that Costin did not know her. Given that admission, the District Court's sweeping finding that Costin "targeted" the Doe sisters in each of these incidents, (A. 19), is unsupported by the evidence and is wrong. Furthermore, no reasonable person would find that the "conscious object" of a person signaling to a speeder with their hand to slow down is "to cause" the speeder "fear, intimidation or damage to personal property." The obvious reason why Costin would have signaled the speeding driver to slow down is that he wanted to get her to drive more slowly and safely. That is not harassment in the common sense of the word and fails to meet the statutory elements of the legal definition.

From the analysis above of the first two chronological incidents, the Court could stop its analysis and reach the conclusion that with only two more alleged

incidents to go, neither Doe sister could establish the "three or more acts" required under 5 M.R.S.A. § 4651(2)(A).

Third chronological incident – on or about April 28, involving both sisters

For the third chronological incident, the collective testimony at trial established that Costin became aware of the Doe sisters for the first time on April 28, 2023, when he saw them driving onto Dane Street and "begin accelerating rapidly" and made a "slowdown hand motion" to them. Testimony conflicted on whether Costin was on the side of the road when he signaled to Doe to slow down or standing in the roadway. The self-contradicting testimony of the Doe sister who was driving the car – who said on direct examination that Costin was carrying a box of files in one arm and "waving" with the free arm, and then said on cross that Costin was "flailing" both arms after he "ran" in front of her moving car – should obviously be disregarded as unreliable. Regardless of where he was in the roadway, the evidence was clear that Costin communicated to the Doe sisters that they were driving too fast and to slow down. His obvious primary intent was for them to slow down. After the exchange, he simply went to work as usual. Put another way, Costin acted with "conscious object to cause" the Doe sisters to stop speeding. That is not harassment. There is no evidence that Costin intended to cause the sisters to be fearful or intimidated.

Fourth chronological incident – on May 4, involving both sisters

For the fourth chronological incident, the collective testimony at trial established that on the morning of May 4, 2023, Costin did not initially interact with

the Doe sisters as they drove down Dane Street at what he described as "a high rate of speed." He then backed out of his driveway and followed their vehicle to the high school parking lot, where he stopped behind their vehicle and took a picture of the license plate. There was conflicting testimony about how close Costin parked to the Does' vehicle, but the video snippet recorded by one of the Doe sisters shows him to be parked about a car's length away. Costin and the Doe sisters then exchanged words in which he told them not to speed on his road and they denied speeding, and both parties ended the exchange by saying they would contact the authorities. Costin then drove away and called the police; the Doe sisters went into the school and spoke to their principal.

Of all the four incidents, this is the only one that could fairly be described as meeting the definition of one of the "three or more acts" required under 5 M.R.S.A. § 4651(2)(A). Although Costin testified that he was there only to get the Doe sisters' license plate and confirm their identity and that he was not trying to scare them, it is plausible that a reasonable person could find that following them to the school parking lot to do so was perhaps confrontational and could cause them to be afraid or intimidated. Even if this incident did reach the meet the definition of one of the "three or more acts" required under § 4651(2)(A), that, however, is not enough to establish liability for harassment under the statute.

From the analysis of the four alleged incidents, the evidence presented at trial fell significantly short of satisfying the statutory requirements of harassment as

defined under 5 M.R.S.A. § 4651(2)(A). One such occurrence is not enough to satisfy the "three or more" requirement, and there is no real contention by the parties or finding by the District Court that the testimony supported a finding of harassment of the alternate theory of harassment under § 4651(2)(C), as police determined that Costin's conduct was not criminal behavior.

Furthermore, the District Court's findings in its Order and Findings, (A. 17-21), is replete with statements by court that were unsupported by the evidence, suggesting that this Court should owe the District Court little or no deference in its assessment of the evidence. Some of the details were minor, but nonetheless indicative of the District Court's general inaccuracy. Other details were significant to the outcome. Here are some examples:

- The District Court found that Costin "makes obscene gestures at motorists," (A. 19), though there was not one shred of evidence to support this. This is pure fiction and significant in its error, as it goes to the heart of one of the elements of 5 M.R.S.A. § 4651(2)(A) on whether Costin's conduct could be seen as "confrontation[al]." As the District Court's finding on this point is wholly unsupported by the evidence, this Court should afford it no deference and should question the District Court's conclusions.

- The District Court found that Costin "tailgated" the Doe sisters, (A. 19), though neither sister testified that Costin followed closely. (See I Tr. 62-63; II Tr. 25-26.) Costin's testimony that he followed at a safe distance was uncontested at trial. (II Tr. 83.) The District Court's wrongful finding on this point is significant, as it goes to the heart of one of the elements of 5 M.R.S.A. § 4651(2)(A) on whether Costin's conduct could be seen as intended to cause fear or intimidation. As the District Court's finding on this point is unsupported by the evidence, this Court should afford it no deference.
- The District Court found that Costin "has taken it upon himself" to slow down speeding motorists on Dane Street, (A. 19), though multiple witnesses testified that they too wave to motorists to slow them down, not just Costin. (I Tr. 16-17, 27.) It is perhaps a minor detail, but it is wrong.
- The District Court found that Costin "set out little plastic men," plural, (A. 19), though the testimony is clear that Costin set out only one brightly plastic figurine with a red hat and flag, commonly used to caution drivers to slow down. It is perhaps a minor detail, but it is wrong.
- The District Court found that Costin "stepped in front of moving motor vehicles to get motorists to stop," (A. 19), though that is contradicted by Costin's testimony and that of one of the Doe sisters. (I Tr. 71; II Tr. 74.) It

also makes no sense that Costin would step in front of moving vehicles, especially when he testified that he is "very concerned about vehicle safety." (II Tr. 74.) The District Court's wrongful finding on this point is significant, as it goes to the heart of one of the elements of 5 M.R.S.A. § 4651(2)(A) on whether Costin's conduct could be seen as "confrontation[al]." As the District Court's finding on this point is unsupported by the evidence, this Court should afford it no deference.

- The District Court found that Costin "screams at motorist," (A. 19), though no one at trial testified that Costin did so. In fact, one of the Doe sisters specifically testified that Costin "wasn't screaming." (I Tr. 94.) This error is of moderate significance as it could be a factor in one of the elements of 5 M.R.S.A. § 4651(2)(A) on whether Costin's conduct could be seen as "confrontation[al]."

This cumulative list of errors demonstrates the District Court misperceived the facts of the case so consistently on both minor and significant details, that even this Court's assessment of factual details should be de novo.

B. The District Court erred by granting Doe's motion to modify.

Doe's motion to modify should have been denied for multiple reasons. (1) It is essentially a motion for reconsideration that is time barred pursuant to M.R. Civ. P. 59(e). (2) Doe failed to meet the statutory burden pursuant to 5 M.R.S. § 4655(2) that modification is "require[d]" by the circumstances. (3) Doe's motion unlawfully sought

to use the judicial process to infringe Costin's fundamental free speech, free assembly, and due process rights in the administrative case within the RSU 21 school district.

In the motion to modify, Doe asked the District Court to impose new restrictions against Costin beyond what the court had previously imposed in its 2023 Protection Order against Costin. Specifically, Doe requested that the court "that boxes E. and F. be checked in the Order for Protection from Harassment." (A. 29 ¶ 1.) Doe was referring to boxes E and F of Judicial Branch Form PA-011, Rev. 9/21, which provides the District Court with a ready-made Order for Protection from Harassment template with multiple boxes for a judge to check depending on the order entered. Boxes E and F, which were NOT checked in the District Court's first order in this case, state as follows:

> □ (E) The defendant is restrained from, repeatedly and without reasonable cause, being at or in the vicinity of the plaintiff's home, school, business, or place of employment, except as follows:
> _____
> _____
> _____
>
> □ (F) The defendant is prohibited from having any contact, direct or indirect, with plaintiff, except as follows:
> _____
> _____
> _____

As grounds for that request, Doe argued that Costin should be punished for making a request in a separate administrative case before RSU 21's administration regarding its notice of no trespassing. (A. 29 ¶¶ 5-9.) Specifically, Doe stated:

> Since the issuance of the Order for Protection from Harassment with findings, the Defendant has brought the Order to the Superintendent's office indicating that the Court declined to limit Mr. Costin's access to the high school and, therefore, he suggests, RSU 21 should vacate the no trespassing order.

(App. 29 ¶ 5.)

To be clear, the "no trespassing order" that Doe was referring to there was the no trespass notice shown in Defendant's Exhibit 3 from trial, (A. 16), which was admitted in evidence by joint stipulation of the parties, and which plainly indicates that the notice would expire of its own accord on November 16, 2023.

Because Doe waived their opportunity to have witnesses testify at the hearing on the motion to modify or waived their opportunity to otherwise admit new evidence, the only evidence before the District Court for its consideration of the motion was evidence already presented at the 2023 trial.

1. Doe's motion to modify was time barred, pursuant to M.R. Civ. P. 59(e).

Doe filed the motion to modify 13 days after the deadline to file a motion for reconsideration had expired. Because the motion asked the District Court only to reconsider evidence that was already before the court at the time of the 2023 trial, it was time barred pursuant to M.R. Civ. P. 59(e).

The District Court already knew from testimony at the 2023 trial that Costin had spoken once with Kennebunk High Principal Sirois and met another time with the assistant superintendent of RSU 21, Anita Bernhardt, to request that the administrative no trespass notice issued against Costin on behalf of the school district

be rescinded. (I. Tr. 106; II Tr. 98.) Additionally, the Court already knew from evidence admitted at trial, (A. 16; Defendant's Exhibit 3), that the administrative no trespass notice against Costin was due to expire on November 16, 2023. With that knowledge, the District Court made an informed decision in its 2023 Protection Order to check only boxes A and D, and to not check boxes E and F.

The only new facts that Doe alleged in the motion to modify were that Costin met again with the assistant superintendent after the District Court issued its 2023 Protection Order and reiterated his request that the no trespass notice be rescinded on ground that the District Court declined to issue a no trespass order. But Doe presented no testimony and no other admissible evidence to support this allegation. It is merely an inadmissible allegation. Even if Doe had presented admissible evidence to support the allegation, the District Court was already aware from Costin's testimony at trial about why he wants to be allowed access to the high school – to attend municipal and school district meetings and events, in part because of his and his wife's extensive history of civic involvement in Kennebunk and its schools. (II Tr. 63-65, 99-100.) Even if Costin had not met with Assistant Superintendent Bernhardt a second time, the administrative no trespass notice would have expired on November 16, 2023. None of this is new. The District Court was fully aware from Defendant's Exhibit 3 from the trial that the no trespass notice would have expired on November 16, 2023. Because the Court already had these facts in evidence from the trial,

Plaintiffs' motion to modify should be treated as an untimely request for reconsideration based on those same facts that were before the District Court at trial.

Rule 59(e) of the Maine Rules of Civil Procedure states:

> A motion to alter or amend the judgment shall be filed not later than 14 days after entry of the judgment. A motion for reconsideration of the judgment shall be treated as a motion to alter or amend the judgment.

M.R. Civ. P. 59(e) (emphasis added). It is settled law that a trial court does not have the power to extend the deadline to file a Rule 59(e) motion. *See* 3 Harvey & Merritt, *Maine Civil Practice* § 59:3 at 287 (3d, 2021-2022 ed. 2021) (citing *de la Torre v. Continental Ins. Co.*, 15 F.3d 12, 14 (1st Cir. 1994)).

Here, the Court issued its 2023 Protection Order on August 16, 2023. Neither party moved to modify, alter, amend, or for reconsideration within the 14 days thereafter. Consequently, any motion filed to modify, alter, amend, or for reconsideration after designated time period was time barred. Because Plaintiffs filed their Motion to Modify on September 12, 2023, which was 27 days after the judgment was entered. It was untimely, 13 days too late, and should have been dismissed.

2. Doe failed to meet the statutory burden, pursuant to 5 M.R.S. § 4655(2).

Doe failed to present evidence at the hearing on the motion to modify to demonstrate sufficient cause, as required by 5 M.R.S. § 4655(2), that modification is "require[d]" by the circumstances.[5]

[5] The subsection of the statute states in full: "Upon motion by either party, for sufficient cause, the court may modify the order or agreement from time to time as circumstances require." 5 M.R.S. § 4655(2).

There is only one Law Court case that addresses that specific statutory standard and provides courts with limited guidance on how to apply it, *Waltz v. Waltz*, 2013 ME 1, 58 A.3d 1127. There are, however, other cases involving motions to modify in the protection from abuse context that provide more guidance, though they technically fall under a different statute. *See, e.g. Casale*, 2012 ME 27, 39 A.3d 44.

The facts in *Waltz* are far from on point with the facts in this case, but it nonetheless provides a useful example of when factual circumstances do require modification. *Waltz* was a post-divorce case in which the ex-husband challenged a judgment holding him in civil contempt for failing to comply with the terms of a property settlement that had been incorporated into the divorce judgment. *Waltz*, 2013 ME 1, ¶ 1, 58 A.3d 1127. Specifically, the ex-husband contended that he could not give his ex-wife paperwork related to a truck because a conflicting protection from harassment order against him prevented him from having any contact with her. *Id.* ¶ 4. The Law Court partially vacated the contempt judgment against the ex-husband "insofar as [the trial court] determined that the PFH order prevented compliance with the divorce judgment." *Id.* ¶ 10. In so holding, the Court reasoned:

> A no-contact provision in a PFH order, standing in isolation, does not prevent compliance with a divorce judgment involving the same parties because, as a matter of statutory right, a party may request that the court modify the PFH order to permit compliance with the divorce judgment. *See* 5 M.R.S. § 4655(2) (2012) (permitting modification of a PFH order upon the motion of a party). PFH orders, which are intended primarily to protect plaintiffs from harassment, should generally not operate to relieve defendants from important obligations under preexisting court judgments.

Id. ¶ 9.

Put another way, while *Waltz* did not address an actual motion to modify that had been filed, it suggests that circumstances "require" modification of a protection order, pursuant to § 4655(2), when two orders issued by the District Court conflict with one another.

Although the authority for motions to modify filed in the context of protection from abuse cases fall under 19-A M.R.S. § 4111(2) (formerly 19-A M.R.S. § 4007(2)), the language of that statute is identical to the portion of 5 M.R.S. § 4655(2) that states: "Upon motion by either party, for sufficient cause, the court may modify the order or agreement from time to time as circumstances require." 5 M.R.S. § 4655(2), 19-A M.R.S. § 4111(2).

In *Casale*, 2012 ME 27, ¶ 12, 39 A.3d 44, the Law Court stated that the requirements for granting a motion to modify are just as stringent as if the plaintiff had filed a new complaint for protection from abuse. "[U]nless the parties agree to the modification, the court must conduct a hearing to determine whether the moving party has met the burden established by section 4007(2)[6], i.e., that modification is 'require[d]' by the circumstances." *Id.* (citing *Connolly v. Connolly*, 2006 ME 17, ¶¶ 7-8,

[6] 19-A M.R.S. § 4007(2) was subsequently repealed and replaced by 19-A M.R.S. § 4111(2), which has identical language.

892 A.2d 465 (motion to modify PFA order); *Rowland v. Kingman*, 1997 ME 80, ¶ 4, 692 A.2d 939 (motion to modify divorce judgment)).

In *Casale*, the trial judge had neglected to conduct a hearing on the ex-husband's motion to modify a PFA order that had been entered into by agreement and instead relied upon evidence presented at a hearing on his and his ex-wife's divorce case in granting the motion. *Id.* ¶ 13. In that case, like *Waltz*, the protection order between the parties conflicted with their divorce judgment. The protection ordered barred the ex-husband from having contact with his ex-wife, but the divorce judgment required contact to coordinate shared parental rights as to their children. *Id.* ¶¶ 7-8. The Law Court held that that was "[t]he [trial] court's decision not to conduct a testimonial hearing on [the ex-husband's] motion was an error" and therefore vacated the amended protection order and remanded the case to determine whether he had met his burden to obtain modification. *Id.* ¶¶ 13, 15.

Taken together, *Waltz* and *Casale* establish the following rules of law:

1. As with the filing of an initial complaint for protection from harassment, unless the parties agree to a modification, a motion to modify pursuant to 5 M.R.S. § 4655(2) requires the court to conduct an evidentiary hearing to determine whether the moving party has met its burden. *Casale*, 2012 ME 27, ¶ 12, 39 A.3d 44.
2. The burden is placed on the moving party in a motion to modify to establish by a preponderance of the evidence that since the prior protection

order there has been new evidence and/or a significant change in circumstance that requires modification. *Id.* (citing *Rowland*, 1997 ME 80, ¶ 4, 692 A.2d 939).

3. For example, circumstances "require" modification of a protection order, pursuant to 5 M.R.S. § 4655(2), when two orders issued by the District Court conflict with one another, and that conflict needs to be resolved for a party or parties to fully comply with both orders. *Waltz*, 2013 ME 1, ¶ 9, 58 A.3d 1127; see *Casale*, 2012 ME 27, ¶ 12, 39 A.3d 44.

Here, with those principles in mind for this case, Doe's waiver of its opportunity to introduce new testimony or evidence at the hearing on the motion meant that Doe necessarily failed to meet their burden. Doe presented no new evidence and presented no substantial change in circumstances. Rather, the circumstances were exactly as they were after trial when the District Court declined to check Boxes E and F in the 2023 Protection Order.

There is nothing in the record to indicate why the District Court initially declined to check Boxes E and F in its first order. Even when the District Court ultimately issued its findings of fact and conclusions of law regarding why it granted the motion to modify in its 2024 Protection Order, it never addressed why it did not do so in the 2023 Protection Order.

To be clear, the District Court issued its 2023 Protection Order without making any findings of fact or any conclusions of law. The District Court's order

consists only of check marks on a pre-generated court form with dates added and the judge's signature added on the form's provided blank lines. The order provides no explanation for why the Court entered into the order as it did. Plaintiffs cannot know why the Court did not check boxes E and F.

The District Court could have explained its reasoning in its Order and Findings on why it initially declined to check Boxes E and F, but it instead remained silent in that matter. (*See* A. 17-21, providing no such reasoning.) As the record remains silent, the only conclusion to be drawn from the District Court's 2023 Protection Order is that it did not check boxes E and F of the form because it intentionally elected not to do so based on the evidence before the District Court at close of trial.

The only new facts that Doe alleged in their motion to modify beyond those presented at trial were that Costin met again with Assistant Superintendent Bernhardt to reiterate his request in the RSU 21 administrative proceeding for the school district to terminate the no trespass notice against him early. Ultimately, Costin's meeting with Bernhardt made no difference, as RSU 21 instead let its no trespass notice against Costin expire on November 16, 2023, exactly as it was set to do under the evidence presented at trial. That is, even based on the offers of proof made by the parties at the hearing on the motion to modify, there was no change in circumstance. None. The circumstances remained exactly as they were. Consequently, those facts alone were not enough for Doe to meet their burden under 5 M.R.S. § 4655(2) that modification is "require[d]" by the circumstances.

By the time the District Court held the hearing on the motion to modify on February 12, 2024, the RSU 21 no trespass notice had already been expired for three months. Doe's alleged factual basis for the motion, that Costin had sought to have the notice terminated early, had become moot. Therefore, their motion to modify should have been denied on the merits, including that it was moot.

3. Plaintiffs' motion would unlawfully infringe Costin's fundamental rights.

Doe's motion to modify sought to unlawfully use the judicial process to infringe Costin's fundamental rights in the administrative case within the RSU 21 school district. Costin's rights of free speech, free assembly, and due process afforded to him by the First and Fourteenth Amendments of the federal Constitution and Sections 4, 6, and 6-A of Article 1 of the Maine Constitution apply to him in full force in the administrative case.

The only new argument against him in Doe's motion is that he exercised those constitutional rights in the administrative case by meeting with Assistant Superintendent Bernhardt a second time to reiterate his request that the no trespass notice be rescinded. Doe argued, in essence, that because Costin sought through appropriate due process channels within the school district to have his liberties restored that the District Court should have consequently deprived Costin of those same liberties through this case. The District Court then drew on that argument at Doe's urging and used its state authority to punish Costin for exercising his

constitutional rights of free speech, free assembly, and due process by imposing conditions against Costin in the 2024 Protection Order that restricted Costin's liberty.

Although this case is a private action between private parties, both the Law Court and U.S. Supreme Court have made explicitly clear that a private party's conduct may constitute state action when that party uses statutory or common law means to involve the court to "adjudicate such disputes and to enforce its own orders constitutes state involvement in a way that clearly implicates [the other party's] fundamental liberty interests." *Rideout v. Riendeau*, 2000 ME 198, ¶ 21 & n. 13, 761 A.2d 291 (citing *Connecticut v. Doehr*, 501 U.S. 1, 10-11 (1991); *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 85 (1988); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 941 (1982)). In *Lugar*, the U.S. Supreme Court held that a private person's conduct constitutes state action if that person has "acted together with or has obtained significant aid from state officials, or because [that person's] conduct is otherwise chargeable to the State." *Id.* at 937.

Although *Rideout*, above, involved infringement of parental rights by Maine's Grandparents Visitation Act, courts have broadly applied this concept of private parties triggering constitutional infringements through court action in many other settings. In eviction cases, for example, since the landmark decision in *Edwards v. Habib*, 397 F.2d 687 (D.C. Cir. 1968), cert. den., 393 U.S. 1016 (1969), courts have recognized that even a private landlord can be deemed to have violated a tenant's constitutional rights if the landlord uses a court process to try to evict a tenant for

complaining about violations of health, safety or housing laws. Restatement (Second) of Property: Landlord & Tenant, § 14.8 reporter's note 4 (Am. L. Inst. 1977); *see Edward*, 397 F.2d at 694 ("[W]hile the landlord may evict for any legal reason or for no reason at all, he is not, we hold, free to evict in retaliation for his tenant's report of housing code violations to the authorities.") Likewise, private parties may also trigger constitutional infringements through court action even where a court is enforcing only privately negotiated contracts. *Shelley v. Kraemer*, 334 U.S. 1, 18-23 (1948). In *Shelley*, the U.S. Supreme Court ruled that that judicial enforcement of private agreements containing restrictive covenants against selling to black people violated the Fourteenth Amendment's equal protection guarantee. *Id.* at 20-21.

Just as the *Rideout*, *Edwards*, and *Shelley* courts found that private parties using court action constituted state action in a way that implicated the opposing parties' fundamental liberty interests, Doe's actions here, through their motion to modify, constitute a state action by leveraging 5 M.R.S. § 4655(2) to force the District Court's involvement in their effort to infringe Costin's constitutional rights of free speech, free assembly, and due process in the separate RSU 21 administrative case. The District Court's issuance of the 2024 Protection Order, checking boxes E and F and imposing new restrictions to Costin's liberty as Doe requested, based only on Costin's exercise of his fundamental rights in the administrative case, that would infringe those rights through state action.

For those constitutional reasons, too, Doe's motion should have been denied.

C. The District Court erred by granting Doe's attorney fees motion.

For the above stated reasons in Section IV(A)-(B), because there was insufficient evidence for the District Court's finding of harassment and because the District Court should have denied Doe's motion to modify, it should also have denied Doe's Motion for Attorney Fees (A. 56-59). (*See also* A. 60-62 (Costin's Opposition to [Doe]'s Motion for Attorney Fees).)

Additionally, any request for fees related to the 2023 trial or pretrial litigation was untimely, pursuant to M.R. Civ. P. 54(b)(2)-(3), which requires applications for attorney fees to be made within 60 days after entry of judgment.

D. Doe's motion to modify was "frivolous," pursuant to § 4655(1-A).

Because Doe's presented no new evidence and/or substantial change in circumstance in support of its motion to modify, and because Doe persisted in pursuing the motion after its stated grounds were moot, this Court should find that the motion was "frivolous," pursuant to 5 M.R.S. § 4655(1-A), and remand this case for assessment of court costs, reasonable attorney's fees or both against Doe.

The statute states: "If a judgment is entered against the plaintiff and the court finds that the complaint is frivolous, the court may order the plaintiff to pay court costs, reasonable attorney's fees or both." 5 M.R.S. § 4655(1-A). Although the statute does not define "frivolous," the Law Court addressed the statute in *Nadeau v. Frydrych*,

2014 ME 154, ¶ 9, 108 A.3d 1254, where it equated the word "frivolous" in the statute as to being "without legal basis."

As stated elsewhere in this brief, the critical piece of evidence to Doe's motion to modify was Defendant's Exhibit 3, admitted by joint stipulation of the parties at trial. (A. 16.) It is a no trespass notice issued by the police on behalf of RSU 21 that expired on November 16, 2023. Doe argued that they needed modification because that notice was going to expire. But the District Court already knew from the admitted evidence at trial when it issued its 2023 Protection Order that the notice was set to expire before the protection order. That was not new evidence and not a change of circumstances. Then, when Costin pointed out in his letter to the District Court dated January 18, 2024, (A. 14-16), that the basis of Doe's motion to modify was now moot, Doe persisted in pursuing the motion.

That is, Doe had "no legal basis" for pursuing their motion to modify, and therefore it should be deemed "frivolous" pursuant to 5 M.R.S. § 4655(1-A).

VI. CONCLUSION

Doe's motion to modify re-opened the door to this litigation after it would otherwise have been closed following the 2023 Protection Order.[7] As the District Court could not issue its 2024 Protection Order without having a sound legal basis

[7] Similarly, in the context of parental rights and responsibilities cases, motions to modify often backfire against the movant and result in the court reducing the movant's rights and responsibilities. *See, e.g., Hamlin v. Cavagnaro*, 2016 ME 8, ¶¶ 14-15, 131 A.3d 365.

pursuant to both pursuant to 5 M.R.S. § 4651(2) and 5 M.R.S. § 4655(2), and as it had never made findings of fact and conclusions of law in 2023, this whole case is now open from beginning to end. Because Doe failed to present any new testimony or admissible evidence in support of the motion to modify, it should have been denied. Because it re-opened the case, the 2023 Protection Order should now be vacated too.

Specifically, Costin is asking this Court to (1) vacate the District Court Order for Protection from Harassment, dated August 16, 2023; (2) vacate the District Court Order for Protection from Harassment, dated February 14, 2024; (3) vacate the order granting attorney fees to Doe, dated April 30, 2024; (4) find that Doe's motion to modify was "frivolous," pursuant to 5 M.R.S. § 4655(1-A), and (5) remand the case to the District Court for determination of reasonable attorney fees and costs owed to Costin pursuant to 5 M.R.S. § 4655(1-A).

Respectfully Submitted,

August 13, 2024
Date

Scott D. Dolan, Esq. – Bar No. 6334
Attorneys for Appellant John Costin

PETRUCCELLI MARTIN & HADDOW, LLP
P.O. Box 17555
Portland, Maine 04112-8555
207-775-0200
sdolan@pmhlegal.com

CERTIFICATE OF SERVICE

I, Scott D. Dolan, Esq., hereby certify that on this 13th day of August 2024, two copies of the Brief of Appellant John Costin were served by depositing same in United States Mail, postage prepaid, addressed as follows, and, as set forth below, by electronic mail:

Brittany Sawyer, Esq.
Holmes Legal Group, LLC
PO Box 1647
Wells, ME 04090
Brittany@holmeslegalgroup.com

August 13, 2024
Date

Scott D. Dolan, Esq. – Bar No. 6334
Attorney for Appellant John Costin

PETRUCCELLI MARTIN & HADDOW, LLP
P.O. Box 17555
Portland, Maine 04112-8555
207-775-0200
sdolan@pmhlegal.com