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)

REPLY BRIEF OF APPELLANT JOHN COSTIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

I. INTRODUCTION

Appellees Pat Doe[1] ("Doe") say nothing in their Red Brief, not a single word, about what Appellant John Costin ("Costin") has identified as the dispositive flaw in their case. (*See* Blue Br. 1-2, 29-35.) The flaw is that Doe declined to present any testimonial evidence at the District Court hearing on their motion to modify. None. Given the opportunity, Doe chose to call no witnesses and sought to admit no exhibits. Instead, Doe asked the District Court in their motion to modify to impose new restrictions on Costin's liberty, by checking Boxes E and F of a judicial branch protection order form, based only on the exact same evidence from trial that the District Court had before it when it declined to check Boxes E and F in its protection order issued on August 16, 2023 ("2023 Protection Order").

That flaw in Doe's case is so significant that Doe must necessarily lose this case on appeal. The Law Court has been crystal clear that a trial court cannot grant a motion to modify without hearing new testimonial evidence in support of modification. *Casale v. Casale*, 2012 ME 27, ¶ 13, 39 A.3d 44. Without new testimonial evidence to show some change in circumstances after the trial and that those "circumstances require" modification, Doe failed to meet their burden to obtain a modification, pursuant to 5 M.R.S. § 4655(2). The District Court's order granting that

[1] Although this Court has designated the appellees as "Pat Doe," singularly, the appellees are actually two daughters whose mother, an experienced attorney, filed the case individually and on their behalf. The District Court dismissed the mother's individual case. Consequently, for grammatical purposes, Costin treats the term "Doe" as referring to the two daughters and uses "they," "them" or possessively, "their."

motion, the protection order issued on February 14, 2024 ("2024 Protection Order"), must be vacated. Likewise, because the District Court's award of attorney fees hinged on its granting of the motion to modify, that order must also be vacated.

In the Red Brief, Doe makes two conflicting and irreconcilable arguments, neither of which overcomes the dispositive flaw in their case.

On one hand, Doe suggests that they did not need to present any new evidence in support of their motion to modify to show any change in circumstance after the 2023 Protection Order because the District Court could instead "take judicial notice of the findings and conclusions contained in any prior judgments or orders." (Red Br. 17 (quoting *In re Scott S.*, 2001 ME 114, ¶ 13, 775 A.2d 1144); *see* Red Br. 17-18 n.3.) Among its other flaws, that argument overlooks its own inherent and obvious problem that the District Court never issued any findings of facts or conclusions of law for its 2023 Protection Order. There was nothing to take judicial notice of. The only findings of fact and conclusions of law in this case were issued by the District Court on April 30, 2024, which was after the District Court had already granted the motion to modify and which pertain only to the 2024 Protection Order.

On the other hand, Doe argues that the 2023 Protection Order was a final judgment and that it is no longer subject to appellate review or post judgment motions. (Red Br. 13.) Doe meant that as an argument against Costin, but it cuts both ways. It would mean that the District Court could not reconsider its final judgment and could not reopen the trial evidence to reach a different result. The District Court

had clearly declined to check Boxes E and F in its 2023 Protection Order and could not belatedly reconsider that decision to reach a different result, pursuant to M.R. Civ. P. 59(e), because the deadline to do so had expired. Likewise, the District Court was barred pursuant to M.R. Civ. P. 52(a) from belatedly making any finding of fact or conclusions of law related to that 2023 Protection Order. The deadline to do so, even for the District Court acting *sua sponte*, had expired. *Id.*

The only way Doe could possibly win this appeal, logically, is if both of their arguments are wrong. That is, if the motion to modify could be used as a vehicle allowed by statute to re-open the evidence from trial for review and reconsideration, then perhaps the District Court could have reached a different conclusion than in its 2023 Protection Order. But that would also mean that Doe's filing of the motion to modify reopened the entire case, from start to finish and including that 2023 Protection Order, to appellate review.[2] Even then, this Court would likely need to overturn *Casale* to reach that result and to affirm the District Court's 2024 Protection Order and award of attorney fees to Doe.

Doe cannot have it both ways. Either the 2023 Protection Order was out of reach for reconsideration by the District Court and out of reach for appellate review by this Court (which would mean that Doe necessarily loses on Costin's appeal of the

[2] Costin maintains that the evidence that Doe presented at trial failed to meet the statutory definition of harassment, pursuant to 5 M.R.S. § 4651(2). As Costin's arguments on this point are thoroughly addressed in his Blue Brief, he refers the Court to those arguments without repeating them herein. (*See* Blue Br. 18-25.)

2024 Protection Order and his appeal of the award of attorney fees for failing to present any evidence that would support granting their motion to modify), or the motion to modify reopened the evidence from trial for reconsideration by the District Court – but that would mean that this Court can now review the entire case on appeal and determine whether there was ever sufficient evidence at trial for the District Court to have made a finding of harassment against Costin in the first place in its 2023 Protection Order. Either way, Doe's arguments in the Red Brief lack merit.

II. ANALYSIS AND RESPONSES

A. Doe's failure to present new testimonial evidence on their motion to modify as required under Maine law must result in a reversal.

Doe's argument suggesting that they did not need to present any new testimonial evidence in support of their motion to modify to show any change in circumstance is wrong as a matter of law in Maine.

The statute relevant to motions to modify 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.A. § 4655(2). That statutory language for protection from harassment cases is identical to the statutory language for motions to modify in protection from abuse cases. *Compare* 5 M.R.S. § 4655(2) (protection from harassment) *with* 19-A M.R.S. § 4111(2) (formerly 19-A M.R.S. § 4007(2)) (protection from abuse).

The Law Court has construed that statutory language to impose certain, specific requirements on the movant and on the trial court assessing a motion to modify: "As with the filing of an initial complaint for protection from abuse, unless 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), i.e., that modification is 'require[d]' by the circumstances.'" *Casale*, 2012 ME 27, ¶ 12, 39 A.3d 44 (citing *Connolly v. Connolly*, 2006 ME 17, ¶¶ 7-8, 892 A.2d 465; *Rowland v. Kingman*, 1997 ME 80, ¶ 4, 692 A.2d 939); *see also Doe v. McLean*, 2020 ME 40, ¶ 7, 228 A.3d 1080 (positively citing *Casale* and *Connolly* for the same proposition).

In *Casale*, the Law Court was emphatic that there was no exception to their statutory construction that the hearing on a motion to modify must be a "testimonial hearing" and that the court considering a motion to modify is expressly prohibited from simply relying on the facts that it has already heard in a prior hearing. *Casale*, 2012 ME 27, ¶ 13, 39 A.3d 44. In that case, the trial court failed to conduct a testimonial hearing on a motion to modify a protection order and instead "deemed the evidence presented in the parties' divorce hearing sufficient to inform its analysis of the motion to modify the protection order." *Id.* Although the trial court addressed the parties who were present in the courtroom and told them it would review the facts from the prior hearing, it "did not, however, conduct an evidentiary hearing." *Id.* ¶ 8. The Law Court overturned the trial court's decision on ground that it could not grant a motion to modify without conducting a testimonial hearing:

> The court's decision not to conduct a testimonial hearing on [the movant's] motion was error. We have not recognized any exception to the requirement of a hearing for matters in which the court believes it already has a sufficient understanding of the case facts.

Id. ¶ 13. In so holding, the Law Court made crystal clear that it is not enough for the trial court to merely review the facts from a prior evidentiary hearing, it must hear new testimony on the motion to modify itself. *See id.* ¶¶ 8, 12-13

Here, just as in *Casale*, the District Court held a hearing in the courtroom with the parties present, and, just like *Casale,* it did not conduct a testimonial hearing. Just as the Law Court reversed the trial court's decision in *Casale* for that failure to conduct a testimonial hearing, this Court should now reverse the District Court's 2024 Protection Order for the exact same reason. In fact, when the District Court offered for Doe to call witnesses and present evidence in this case, Doe expressly declined through counsel to do so. (Transcript of Hearing on Motion to Modify from February 12, 2024 (hereinafter "III Tr.") 2-3.) Rather, the District Court heard only arguments from the attorneys, including from the undersigned counsel for Costin who argued that Doe had failed to present the requisite evidence necessary to grant a motion to modify. (III Tr. 2-9.) The burden rested squarely on Doe to present testimonial evidence that modification was "'require[d]' by the circumstances," but Doe instead waived their opportunity to even try to satisfy that burden. *Id.*

Although Costin also declined to call witnesses at the District Court hearing, Costin's litigation strategy in doing so as the defendant did not relieve Doe of their

burden of proof as movant plaintiffs or relieve the District Court of the mandatory requirement that it must hear new testimony on a motion to modify before such a modification could be granted. Costin's undersigned counsel even went so far as to indicate to the District Court that Doe's subpoenaed witness was present in the courtroom and available to testify. (III Tr. 3.) Still, Doe declined to call any witnesses.

Additionally, the arguments made by Doe's counsel at the hearing made clear that they would have had no new evidence to present beyond what they had already presented at the prior trial on the original Complaint. That is, there had been no change in circumstance, which is a threshold requirement for a modification to be granted. The District Court erred by granting the motion.

The key piece of evidence from the trial that Doe referenced in their motion to modify was a trial exhibit that had been admitted by joint stipulation of the parties as Defense Exhibit 3. (*See* A. 16.) That exhibit was a notice issued to Costin by the Kennebunk Police Department on behalf of Regional School Unit 21 on May 15, 2023, stating that he was not to trespass on RSU 21 property from the date of issuance until November 16, 2023, when the no-trespass provision expired. The District Court had that exhibit before it as admitted evidence when it issued the 2023 Protection Order, in which it declined to check boxes E and F of the order form. That is, the District Court already knew at the time of trial from the jointly admitted exhibit that the no-trespass notice would expire on November 16, 2023. The fact that the notice did expire on the expiration date exactly as expected is not a change in

circumstances. Those were the same circumstances that were before the District Court when it declined to check Boxes E and F. As Costin noted in his opposition to the motion to modify, the District Court's decision not to check Boxes E and F was critical to his initial decision not to appeal the 2023 Protection Order. (*See* A. 35.) It was fundamentally unfair and a denial of due process for the District Court to then reconsider the evidence after the deadlines for appeal and post judgment motions had expired, fail to conduct a testimonial hearing on the motion to modify, and impose a new protection order based on the exact same evidence as before and yet impose new, more stringent restrictions on Mr. Costin's liberty. It is for exactly those reasons why the Law Court, in cases like *Casale*, made the due process requirements so clear, that a motion to modify a protection order simply cannot be granted without first conducting a testimonial hearing on the basis for that motion. The District Court's decision granting Doe's motion to modify was therefore clearly erroneous.

Additionally, because Doe's motion to modify was so lacking on its face and because Doe willfully declined to present any new testimonial evidence in support of its motion when given the opportunity, the motion had no legal basis such that it should be deemed "frivolous," pursuant to 5 M.R.S. § 4655(1-A).

B. <u>The appeal is not moot because Costin's challenge to the award of attorney fees to Doe remains a live justiciable controversy.</u>

Doe's argument that this appeal is "moot" because the 2024 Protection Order expired on June 15, 2024, (Red Br. 1, 18-19), is wrong as a matter of law because this

appeal also challenges the award of attorney fees to Doe. *Gauthier v. Gauthier*, 2007 ME 136, ¶ 8, 931 A.2d 1087. Doe has not relinquished their demand for attorney fees. Because Costin's challenge to the award of attorney fees remains a live controversy, regardless of whether the protection order has expired, his appeal cannot be moot. *Id.*

"An issue is deemed to be 'moot' when there is no 'real and substantial controversy, admitting of specific relief through a judgment of conclusive character.'" *Smith v. Hannaford Bros. Co.*, 2008 ME 8, ¶6, 940 A.2d 1079, 1081 (quoting *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶16, 738 A.2d 1239, 1243). The Law Court has specifically stated that an appeal challenging an award of attorney fees in a protection from abuse case is "not moot" even after the protection order has expired. *Gauthier*, 2007 ME 136, ¶ 8, 931 A.2d 1087. The same logic applies to protection from harassment cases.

Here, like the appellant in *Gauthier*, Costin continues to challenge the award of attorney fees to Doe even after the underlying protection order has expired. The Law Court has said that that is enough to make the appeal "not moot." *Id.* Costin maintains that the District Court's award of attorney fees was unwarranted, especially given that it had no evidentiary basis for granting Doe's motion to modify.

Furthermore, Costin should not be denied an opportunity to appeal the District Court's ruling on Doe's motion to modify simply because it took the District Court so long to rule on the motion and issue its findings and conclusions (seven and a half

months) that the underlying protection order nearly expired by the time the District Court acted. That would be an unfair denial of due process.

C. The Trial Court erred in awarding attorney fees to Doe both as relates to the motion to modify and to the pre-trial and trial litigation.

The District Court erred in awarding attorney fees to Doe for two reasons. First, as discussed in Section II(A) above, the District Court erred in granting Doe's motion to modify and thus any award of attorney fees as relates to litigation stemming from that wrongfully granted motion should be reversed. Second, Doe's request for attorney fees was untimely pursuant to either M.R. Civ. P. 54(b)(2)-(3) or M.R. Civ. P. 59(e) as relates to trial from August 7 and August 9, 2023, and the pretrial litigation.

Rule 54(b)(2)-(3) requires applications for attorney fees to be made within 60 days after entry of judgment. Doe filed their motion for attorney fees on February 23, 2024, which was 191 days after the District Court issued its 2023 Protection Order on August 16, 2023. Consequently, Doe filed their motion 131 days too late, and it was thus time barred as relates to the pretrial and trial litigation that led to the 2023 Protection Order. Likewise, Rule 59(e) required that any motion to amend the 2023 Protection Order, including an amendment to include attorney fees, would have had to have been filed within 14 days after that order was docketed. Therefore, the motion was filed 177 days too late to seek any amendment of the 2023 Protection Order to include attorney fees.

Although the District Court's order granting attorney fees does not specify whether it was awarding attorney fees related to the 2023 Protection Order or the 2024 Protection Order, (*see* A. 21), Doe's motion for attorney fees made it expressly clear that they were seeking attorney fees stemming from the pretrial litigation and trial litigation leading up to the 2023 Protection Order. (A. 56-57.)

Because Doe's motion for attorney fees and supporting affidavit is a combined request that intermingles the amount being requested for both the 2023 Protection Order (which request is time barred) and the 2024 Protection Order, the entire motion should have been promptly denied as untimely under the Maine Rules of Procedure. Therefore, the District Court erred in granting it.

D. The Red Brief's "Statement of the Case" section is replete with unreliable assertions unsupported by the evidence in this case.

Costin urges this Court to not be persuaded by Doe's many false and misleading assertions in the "Statement of the Case" section of their Red Brief because many of those assertions are so unsupported by the trial testimony and exhibits admitted at trial that the entire section should be disregarded as unreliable. (*See* Red Br. 2-11.) One of the key problems with Doe's assertions is that Doe relies heavily on the District Court's erroneous finding of facts from its Orders and Findings, dated April 30, 2024. (*See* A. 17-21 (Orders and Findings).) Doe has now had the additional insight from having reviewed the actual trial transcripts, something the District Court did not have the opportunity to do when it issued its findings. Yet,

nonetheless, Doe ignores what was said in the actual sworn testimony laid bare in those transcripts and instead cites to the District Court's erroneous findings, even though Costin has already pointed out in his Blue Brief numerous examples of those findings by the District Court that were clearly erroneous because they were either unsupported by or contradicted by the actual trial testimony. (*See* Blue Br. 23-25.)

For example, Doe makes the following assertion: "Mr. Costin repeatedly targets motorists that he believes drive too fast on Dane Street by setting out 'little plastic men with flags,' stepping into the road, gesturing at drivers, screaming at vehicles and making obscene gestures. (A. 19.)" (Red Br. 2.)

Doe makes that assertion with the clear knowledge that there was not a single utterance by any witness during any of the trial testimony to support the assertion that Costin made "obscene gestures." Doe relies solely on the District Court's Orders and Findings through a single appendix citation and makes no citation to the transcripts. Doe makes that misleading citation only to the District Court's findings intentionally because Doe now knows that there is nothing anywhere in the transcript to support this. As Costin pointed out in his Blue Brief, that is "pure fiction and significant in its error." (Blue Br. 23.) Costin never made obscene gestures. Doe knows that, yet Doe made the false assertion anyway. This is alarming appellate advocacy.

Rule 3.3 of the Maine Rules of Professional Conduct codifies the common law duty of candor that a lawyer owes to the tribunal, including this Court. The relevant portion of the rule provides: "A lawyer shall not knowingly … make a false statement

of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." M.R. Prof. Conduct 3.3(a)(1). "Attorneys are bound by the contents of the briefs they sign." *State v. Williams*, 2020 ME 17, ¶ 1, 225 A.3d 751 (citing M.R. Prof. Conduct 3.3, cmt. 3).

Likewise, Costin had already pointed out in his Blue Brief that the District Court's finding that Costin "set out little plastic men," plural, was inaccurate and misleading. (Blue Br. 24.) The trial testimony is clear that Costin and his wife placed in their driveway only one brightly colored plastic figurine with a red hat and flag, commonly used to caution motorists to slow down. (Trial Transcript from August 9, 2023 (hereinafter "II Tr."), 69-70.) Doe now knows that the District Court's finding on that point was inaccurate, yet Doe knowingly repeated the inaccurate statement to this Court without any disclaimer. Why?

These are not one-off mistakes in Doe's Red Brief. Doe repeats so many erroneous statements from the District Court's findings that Doe establishes an intentional pattern of assertions to this Court that are unsupported by the evidence.

As another example, Doe asserts: "He 'repeatedly yelled and screamed at them, he made visual contact with the minors, he gestured at them, he walked into the street to block their passage, he backed his own vehicle onto Dane Street to block their passage.' (A. 19.)" (Red Br. 2.)

Doe makes that assertion though Doe now knows from the trial transcripts that the Doe sisters' own testimony contradicted several of those details. There was

no testimony by anyone to support the District Court's finding that Costin "screams at motorists." (A. 19.) In fact, one of the Doe sisters specifically testified that Costin "wasn't screaming." (Trial Transcript from August 7, 2023 (hereinafter "I Tr."), 94.) Likewise, one of the Doe sisters testified that Costin did not block their passage on Dane Street. (I Tr. 71.) That is corroborated by Costin's own testimony. (II Tr. 74.) Doe knows from the Blue Brief that Costin has already pointed out that those findings by the District Court were erroneous and unsupported by the trial transcripts, yet Doe repeats the false assertions anyway.

As a further example, Doe inaccurately asserts that Costin "tailgated" the Doe sisters' car and cites to the District Court's Orders and Findings as their sole basis. (Red Br. 3 (citing A. 20).) As Costin pointed out in his Blue Brief, (Blue Br. 24), the District Court made that erroneous finding that Costin "tailgated" the Doe sisters' vehicle, though neither sister testified that Costin followed them closely. (*See* I Tr. 62-63; II Tr. 25-26.) Costin's testimony that he followed at a safe distance was uncontested by any other testimony or evidence at trial. (II Tr. 83.) Doe, nonetheless, intentionally repeated the District Court's false finding on this point, using the exact same word, "tailgated," twice knowing that that is unsupported by the evidence.

As a last example, Doe makes the following false assertion: "Mr. Costin did not contact the police with that information [license plate number] after following the minors to school." (Red Br. 6.) That is directly contradicted by both the testimony of Kennebunk Police Officer Ben Murphy, who confirmed police log records of Costin's

report to police just minutes after the incident, and by Costin's testimony. (I Tr. 120-121; II Tr. 87-88.) Both Officer Murphy and Costin testified that Costin had provided police with his name, address, phone number, description of the repeated speeding incidents, including a description of Doe's vehicle and the license plate number. *Id.*

These are but several examples of the many false, inaccurate, and misleading statements that Doe made in their "Statement of the Case," but hopefully enough to demonstrate the pattern and stay within the page limits set by M.R. App. P. 7A(f)(1).

III. CONCLUSION

In the Red Brief, Doe presents an array of misunderstandings of Maine law, from baffling argument about mootness in the face of a live controversy over an award of attorney fees to a flatly wrong argument that the District Court could take judicial notice of non-existent findings of fact and conclusions of law to sidestep their failure to present any testimonial evidence in support of their motion to modify.

For those reasons and others stated above and in the Blue Brief, Costin respectfully asks 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,

October 22, 2024
Date

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CERTIFICATE OF SERVICE

I, Scott D. Dolan, Esq., hereby certify that on this 22nd day of October 2024, two copies of the Reply 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:

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