

STATE OF MAINE  
SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT

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Law Court Docket No. BCD-25-296

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JOHN VENEZIANO,

Appellee

v.

ALISSA SAULNIER ET AL.,

Appellant

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ON APPEAL FROM THE BUSINESS AND CONSUMER COURT DOCKET  
NUMBER CIV-2025-20  
(CUMBERLAND)

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**BRIEF OF APPELLANT BERNARD SAULNIER**

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## **Summary of Case**

This is a matter in which the Business and Consumer Court (“Business Court”) denied Appellant’s Special Motion to Dismiss brought under 14 M.R.S. § 731 (2025), Maine’s Uniform Public Expression Protection Act (“UPEPA”).

On or about March 24, 2025, Appellee filed this civil action alleging fraud by Appellant and the other defendants based, in significant part, on Appellant’s deposition and in-court testimony. *See* Complaint ¶¶ 32-33, 37, 39, 43-47, 50-51, 56, 60-64, 66-76, 78, 81-83 and 106. (App. 13-20, 23). Appellee alleges that Appellant’s testimony at his deposition and during a disclosure hearing provide a basis for this civil action. However, pursuant to 14 M.R.S. § 733 (2)(A), (B) and (C) (2025), “communications in a … judicial … proceeding,” “communications on an issue under consideration in a … judicial proceeding” and “petitioning activity” may not be used as a basis for a cause of action in a civil suit.

Based on 14 M.R.S. §731, *et seq.*, Appellant filed a Special Motion to Dismiss.

The Business Court denied the Special Motion to Dismiss.

The denial of the Special Motion to Dismiss was error.

## **Statement of Issues Presented for Review**

1. Is Appellee’s Complaint, in whole or in part, based on Appellant’s communications in a judicial proceeding or based on Appellant’s communications

on an issue under consideration or review in a judicial proceeding, or based on petitioning activity, *and* does Appellee's Complaint establish a *prima facie* case as to each essential element for each cause of action?

### **Summary of the Argument**

Maine's Uniform Public Expression Protection Act provides that a cause of action in a civil proceeding against a person cannot be based on, *inter alia*:

- i) communications in a judicial proceeding;
- ii) communications on an issue under consideration or review in a judicial proceeding; and/or
- iii) petitioning activity.

14 M.R.S. § 733 (A), (B) and (C) (2025).

Appellee's Complaint against Appellant is based on Appellant's court communications (testimony). By express definition, Section 733(2)(A), (B) or (C) applies and, pursuant to 14 M.R.S. § 738 (1)(C), either the burden shifts to Appellee to establish a *prima facie* case as to each essential element of each cause of action alleged in the Complaint or Appellant must establish that the Complaint fails to state a cause of action upon which relief can be granted.

Appellee's Complaint against Appellant fails to state a cause of action upon which relief may be granted. Under the standards set forth in *America v. Sunspray Condo. Ass'n*, 2013 ME 19, ¶ 13, 61 A.3d 1249 and *Meridian Medical Sys.s, LLC v.*

*Epix Therapeutics, Inc.*, 2021 ME 24, ¶ 37, 250 A.3d 122 - "[t]he complaint must allege facts with sufficient particularity so that, if true, they give rise to a cause of action; merely reciting the elements of a claim is not enough.". Further, courts must disregard legal conclusions and conclusory allegations and only credit well pled allegations of fact. *Meridian*, 2021 ME 24, ¶ 37, 250 A.3d 122 ("more than conclusory allegations are required"). In addition, where fraud is alleged, as in Appellee's Complaint, Rule 9(a) requires pleading with particularity in addition to the requirements set forth in *Sunspray* and *Meridian*. See M.R. Civ. P. 9(a)

## **ARGUMENT**

This appeal arises under 14 M.R.S. § 731, *et seq.*, Maine's Uniform Public Expression Protection Act ("UPEPA"). The Law Court's review is *de novo*. See *Gaudette v. Davis*, 2017 ME 86, ¶ 18, n.8, 160 A.3d 1190 (*de novo* review under former 14 M.R.S. §556); see *Nader v. Me. Democratic Party*, 2013 ME 51, ¶ 12, 66 A.3d 571. (*de novo* review under former 14 M.R.S. §556):

The interpretation of a statute is a question of law, which we review *de novo*. We will construe a statute based on its plain meaning in the context of the statutory scheme, and only if the statute is ambiguous will we look to extrinsic indicia of legislative intent such as relevant legislative history. In construing the plain meaning of the language, we seek to give effect to the legislative intent and construe the language to avoid absurd, illogical, or inconsistent results. All words in a statute are to be given meaning, and none are to be treated as surplusage if they can be reasonably construed.

*State v. Ray*, 2025 ME 29, 334 A.3d 663 (quoting *Strout v. Cent. Me. Med. Ctr.*, 2014 ME 77, ¶ 10, 94 A.3d 786; *State v. Santerre*, 2023 ME 63, ¶ 9, 301 A.3d 1244 (citation and quotation marks omitted)).

**a. THE APPELLEE'S COMPLAINT IS BASED, IN WHOLE OR IN PART, UPON DEFINED PUBLIC EXPRESSION**

**a. Maine's Uniform Public Expression Protection Act.**

Maine's Uniform Public Expression Protection Act provides that a cause of action in a civil proceeding against a person cannot be based on, *inter alia*:

- i) communications in a judicial proceeding;
- ii) communications on an issue under consideration or review in a judicial proceeding; and/or
- iii) petitioning activity.

14 M.R.S. § 733(2)(A), (B) and (C).

14 M.R.S. § 738(1) provides that in ruling on a motion under section 734, that the Court shall dismiss with prejudice a cause of action, or part of a cause of action, if:

- A. The moving party establishes under section 733, subsection 2, that this Act applies;
- B. The responding party fails to establish under section 733, subsection 3 that this Act does not apply; and
- C. Either:
  - (1) The responding party fails to establish a *prima facie* case as to each essential element of the cause of action; or

- (2) The moving party establishes that:
  - (a) The responding party failed to state a cause of action upon which relief can be granted; or
  - (b) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

The Court reviews a special motion to dismiss in three steps: (1) whether the movant shows that the cause of action facially falls within the scope of MUPEPA; (2) whether the cause of action falls within a statutory exemption; and (3) whether the cause of action is *prima facie* viable. *See* 14 M.R.S. § 738.

To meet the burden established in the first step, Appellant (moving party) must demonstrate a cause of action against the person is based, in whole or in part, on the person's communications in a judicial proceeding or communications on an issue under consideration or review in a judicial proceeding or on petitioning activity. Uniform Law Commission, *Uniform Public Expression Protection Act with Prefatory Note and Comments* (Oct. 2, 2020), at 17, cmt. 2. As evidenced by multiple paragraphs of the Complaint, Appellee's causes of action are based, on Appellant's deposition and in court testimony. By definition, the Complaint is based on judicial communications (testimony) which fall squarely within the definitions of 14 M.R.S. § 733(2)(A), (B) or (C).

## 2. TESTIMONY IS PROTECTED PUBLIC EXPRESSION

In 1851, the Law Court issued an opinion stating that when a witness is “called upon in the progress of a cause, and under the rules of the court, and confining himself to that which rightfully pertains to the case, he is not liable for the testimony he may give.” *Barnes v. McCrate*, 32 Me. 442, 446 (1851). To forgo precedent and rule as the Appellee argues will “tend to intimidate a witness and to deter from a disclosure of the whole truth.” *Id.* at 446-47.

It is rare that legal discourse is unequivocal and without exception. Common law witness immunity is, however, one such area in the law. The absolute nature of the applicable privilege has not changed. Common law witness immunity is “well established”, “without exception”, “absolute” and of “the highest legal policy”. *Dunbar v. Greenlaw*, 152 Me. 270, 271, 128 A.2d 218 (1956) (other citations omitted).

The only exception to the common law rule establishing that sworn testimony carries absolute immunity from suit is Maine’s civil perjury statute. See 14 M.R.S. § 870 (2025). The plain language of the civil perjury statute is inapplicable to Appellee’s Complaint.

With this background in mind, this Court must address what MUPEPA protects. By its express terms, MUPEPA protects (1) communication in a judicial proceeding, (2) communication on an issue under consideration or review in a

judicial proceeding, and (3) petitioning activity. 14 M.R.S. § 733(2)(A), (B), and (C). Under the Act, the term “Communication” is to be “construed broadly—consistent with holdings of the Supreme Court of the United States—to include any expressive conduct that likewise implicates the First Amendment.” Uniform Law Commission, *Uniform Public Expression Protection Act with Prefatory Note and Comments* (Oct. 2, 2020), at 7, cmt. 6. Deposition and in court testimony falls squarely under subsection A, B, or C of section 733(2). In brief, UPEPA protects persons from being sued over their judicial testimony.

Testimony during a judicial proceeding is the *clearest* example of communication protected by the UPEPA. Prior to the UPEPA, testimony during a judicial proceeding was protected under former law 14 M.R.S. § 556 (1995) *repealed* by P.L. 2023, ch. 626, §1 (effective Jan. 1, 2025). *Klein v. Demers-Klein*, No. CV-18-377, 2019 Me. Super. LEXIS 66, at \*10 (April 17, 2019). Testimony during a judicial proceeding is also absolutely privileged under common law and has been immune from all forms of suit in Maine for over 100 years. *Barnes v. McCrate*, 32 Me. 442, 446 (1851); *Garing v. Fraiser*, 76 Me. 37, 42 (Me 1884) (...public policy requires that witnesses shall not be restrained by the fear of being vexed by actions at the instance of those who are dissatisfied with their testimony..."); *Dunbar v. Greenlaw*, 152 Me. 270, 128 A. 2d 218 (1956) ("The doctrine of the privilege of protection from tort liability to witnesses for pertinent recitals in judicial proceedings

is well established . . . It is an absolute privilege and thereby different from the qualified privilege..."); *Dineen v. Daughan*, 381 A.2d 663, 664 (Me 1978) (quoting *Garing* and extending the absolute privilege to communications made by attorneys during judicial proceedings.) The only exception to the common law rule making testimony absolutely immune from suit is Maine's civil perjury statute, 14 M.R.S. § 870, which by its express language does not apply to the allegations in Appellee's Complaint.

The argument advanced by Appellee in Plaintiff's Opposition to Appellant's Special Motion to Dismiss, ("Plaintiff's Opposition") (App. 42 - 51), that responses to questions posed under oath do not constitute protected First Amendment speech is incorrect. *Cf Lane v. Franks*, 573 U.S. 228, 238 (2014). First, all testimony always consists of responses to questions posed under oath. Second, the Supreme Court of the United States said that "[s]worn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Id.* While the Supreme Court went on to apply this principle to government employees, it is beyond dispute that the principal applies equally to all witnesses who testify under oath. The obligation to tell the truth applies to all witnesses, regardless of their employment status. It follows then that Appellant's testimony is

a “communication” as defined by the United States Supreme Court and by 14 M.R.S. § 733(A), (B) and (C).

**a. Matters of Public Concern**

To the extent Appellant’s speech falls under sub-section (C) of §733(2), Appellant’s statements must be on a matter of public concern. The answer here is clearly in the affirmative. Courts are, by their very nature, forums of public concern. Far from being private or secluded mechanisms, courts operate publicly, promoting the rule of law, ensuring the transparent articulation of legal principles, creating precedent and facilitating the public resolution of citizen disputes. See *Craig v. Harney*, 331 U.S. 367, 374 (1947) (stating that “[a] trial is a public event. What transpires in the courtroom is public property.”). Judicial decisions extend beyond the interests of just the immediate parties to the dispute. Judicial decisions have broad public implications.

Under the doctrine of *stare decisis*, the public is bound by precedent, which “enables the public to place reasonable reliance on judicial decisions affecting important matters.” *McGarvey v. Whittredge*, 2011 ME 97, ¶ 63, 28 A.3d 620. There exists a “societ[al] interest” in being able to rely on established precedent. *Id.* at ¶ 64. Given the significant public interest in court decisions, Appellant’s testimony meets the element of “public concern.” 14 M.R.S. § 733(2)(C).

**b. Appellee’s Civil Claim is Premised Upon Appellant’s Protected Speech**

Appellee indisputably filed his Complaint based on Appellant’s deposition and in-court testimony. *See* Complaint ¶¶ 32-33, 37, 39, 43-47, 50-51, 56, 60-64, 66-76, 78, 81-83 (App. 13 - 20). In Section I of Plaintiff’s Opposition to Defendant’s Motion to Dismiss, Appellee states that Appellant provided testimony at a deposition and at a hearing, and that “[Appellant] gave extensive testimony that evidence[d] the fraudulent scheme . . . to prevent Mr. Veneziano from collecting on the Judgment.” (App. 43). Immediately following Appellee’s allegation that Appellant’s sworn testimony evidenced a “fraudulent scheme”, Appellee stated that he “*subsequently* filed a civil action”. *Id.*

The sequence of events presented in Section I of Plaintiff’s Opposition clearly evidences Appellee’s use of Appellant’s judicial communications as the basis for Appellee’s Complaint against the Appellant and, further, contradicts any argument that the causes of action in the Complaint are “not based on”, at least in part, Appellant’s judicial communications.

**c. *Prima Facia* Case as to Each Essential Element**

14 M.R.S. §738(1) provides that in ruling on a motion under section 734, that the court shall dismiss with prejudice a cause of action, or part of a cause of action, if:

- A. The moving party establishes under section 733, subsection 2, that this Act applies;

- B. The responding party fails to establish under section 733, subsection 3 that this Act does not apply; and
- C. Either:
  - (1) The responding party fails to establish a *prima facie* case as to each essential element of the cause of action; or
  - (2) The moving party establishes that:
    - (a) The responding party failed to state a cause of action upon which relief can be granted; or
    - (b) There is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

Together with and incorporated into the Special Motion to Dismiss, Appellant filed a M.R. Civ. P. 9(b) and 12(b)(6) Motion to dismiss each count of Appellee's Complaint. As demonstrated below, Appellee's Complaint fails to state a cause of action for which relief can be granted.

### **3. STANDARD OF REVIEW**

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." M.R. Civ. P. 8(a). To state a claim, "[t]he complaint must allege facts with sufficient particularity so that, if true, they give rise to a cause of action; merely reciting the elements of a claim is not enough." *Sunspray*, 2013 ME 19, ¶ 13, 61 A.3d 1249. Courts disregard legal conclusions and conclusory allegations contained in a complaint and only credit well pled allegations of fact. *Meridian*, 2021 ME 24, ¶ 37, 250 A.3d 122 ("more than conclusory allegations are required"); *Larrabee v. Penobscot Frozen Foods*, 486 A.2d 97, 98

(Me.1984) ("for the purposes of a Rule 12(b)(6) motion to dismiss" the court is not bound to accept any allegation that is "a legal conclusion rather than a factual pleading"); *Beckett v. Roderick*, 251 A.2d 427, 430 (Me.1969) ("The plaintiffs' statement... is a conclusion of law and not an allegation of fact and thus is not admitted by the filing of the motion to dismiss."). "Although Maine's notice pleading requirements are forgiving, conclusory statements, even if factually true, are legally deficient to ward off dismissal if a plaintiff fails to allege sufficient facts." *Bathe v. Keybank N.A.*, No. BCD-CIV-2021-00043, 2021 WL 6125321, at \*1 (Me. B.C.D. Nov. 23, 2021).

"[E]ven ordinary notice pleading requires sufficient specificity to show why conduct is actionable." *Meridian*, 2021 ME 24, ¶ 47, 250 A.3d 122. Reasonable inferences may be drawn only when they logically flow from the established facts. *See Hersum v. Kennebec Water Dist.*, 151 Me. 256, 263, 117 A.2d 334, 338 (1955). If there are two or more equally probable inferences, then the evidence is speculative and a court may not select from them as to do so rests upon mere surmise and conjecture. *Id.* at 263; *See also Toto v. Knowles*, 2021 ME 51, ¶ 10, 261 A.3d 233; *Cyr v. Adamar Assocs.*, 2000 ME 110, ¶ 8, 752 A.2d 603.

M.R.Civ.P. 9(b) imposes heightened pleading requirements when a complaint pleads fraud, mistake and conditions of the mind. In all averments of fraud, mistake and conditions of the mind, the circumstances of each must be stated with

"particularity" M.R. Civ.P. 9(b); *Bean v. Cummings*, 2008 ME 18, ¶ 8, 939 A.2d 676. Because each of the Appellee's causes of action are based on theories of fraudulent conduct or concealment, each cause of action fails because an analysis of each cause of action reveals that one or more essential element is missing and that each cause of action is based on surmise or mere conclusory statements.

**a. Count I of Appellee's Complaint Fails to State a Claim for Avoidance or Recovery of Transfers against Appellant.**

i. **Alleged Income**

Appellee's Complaint purports to allege that Appellant has fraudulently transferred income. Appellee's allegations are not based on evidence but, instead, on hypothesis, theories and surmise. Theorizing or hypothesizing does not meet the required heightened pleading requirements. Hypothesizing that Appellant has an "interest in compensation" does not state a claim under Rule 9(b) and/or the Uniform Fraudulent Transfer Act ("UFA"), 14 M.R.S. § 3571, *et seq* (2025).

14 M.R.S.A. § 3572 defines an "asset" as "property of a debtor." *Id.* 14 M.R.S.A. § 3572 defines "property" as "anything that may be the subject of ownership." To be an "asset" or "property transferred" the item must be actual, realized and owned. 14 M.R.S. § 3577(4).

Omitted from the Complaint is any allegation of actual earned, owed and owned income, nor an employment agreement, nor an amount of salary, nor a rate of pay, nor the number of hours worked, nor anything else creating or evidencing an

actual earned enforceable entitlement to income and an obligation on the part of someone else to pay that income. Absent these essential elements of actual, earned, owed and owned income, Appellee's Complaint is nothing more than theorizing or hypothesizing and thus fails to state a claim sufficient to withstand. M.R.Civ.P. 9(b) and 12(b)(6).

## **ii. Pick-up Truck**

Appellee's Complaint alleges Appellant fraudulently transferred title to a 2022 GMC pick-up truck. (Complaint, ¶¶ 118, 119 and 120; App. 25). Nowhere in the Complaint is there an allegation that the truck had any equity or value and, if so, the amount. As pled in the Complaint, the Appellee conducted a disclosure hearing at which Appellant testified that the truck had no equity and was burdened with a \$1000 a month payment. (Complaint Exhibit C, Disclosure Hearing Transcript 15:2-4) App. 60. Under the UFTA, in order for a transfer of the pick-up truck to be actionable, the Complaint must allege, as an essential element, the value of the truck transferred without the debtor receiving in exchange a reasonably equivalent value. 14 M.R.S. § 3576(1).

Appellee's Complaint fails to plead each required essential elements to state a claim as to the truck because the Appellee did not (and cannot) allege that the truck had a value, nor the amount of that value, nor if the truck was transferred without receiving in exchange a reasonably equivalent value.

**ii. Residence at 24 North Avenue, Saco, Maine.**

Appellee's Complaint alleges that Appellant fraudulently transferred title to his home located at 24 North Avenue, Saco, Maine. As pled by Appellee himself, this claim completely fails:

[b]y instrument dated July 7, 2021, Edmond J. Ford, in his capacity as Chapter 7 Trustee of the Bankruptcy Estate of Appellant, Bankruptcy Case No. 20-20257-PGC, conveyed via Trustee Deed to Sherman Holdings, LLC, real property located at 24 North Avenue in Saco, which parcel includes the home in which the Saulnier's reside. *See* York County Registry, Bk. 18729, Pg. 20.

Complaint at Par. 91, App. 21.

The Bankruptcy Trustee's sale of 24 North Avenue to the buyer, Sherman Holdings, LLC, cannot possibly be a "fraudulent transfer." The asset was owned and sold by Appellant's Bankruptcy Estate. It was sold by the Bankruptcy Trustee with the approval of the United States Bankruptcy Court after the filing of a motion to approve the sale. Motion to Sell 24 North Avenue and Order approving (Bankr. D. Me. Case No. 20-20257-PGC)<sup>1</sup>.

As pled in his Complaint, the Appellee was a creditor and *party* in that Bankruptcy action (Complaint, at 29) App. 12-13. As a creditor and party to that

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<sup>1</sup> Although a court generally cannot consider documents outside the complaint when reviewing a motion to dismiss, an exception exists when the items are matter of public record, which may be judicially noticed in a motion to dismiss. *Moody v. State Liquor & Lottery Comm'n*. 2004 ME 20, ¶ 10, 843 A.2d 43.

Bankruptcy, the Appellee received ECF notice of the Trustee's motion for approval and thus the opportunity to object or to submit a competing bid, and the opportunity to appeal the Bankruptcy Court's approval of that sale, if he so chose.

According to the ECF docket, the Appellee did not object to the Trustee's motion or appeal the Bankruptcy Court's Order approving of the Trustee's motion. Accordingly, the Appellee is judicially estopped and bound by the decision of the United States Bankruptcy Court and he cannot collaterally attack it with his state court Complaint. Based on principles of waiver, estoppel, issue preclusion, res judicata and federal bankruptcy preemption, Appellee's allegations of a fraudulent transfer of the home fail to state a claim for which relief can be granted.

**b. Count II of Appellee's Complaint Fails to State a Claim for Common-Law Fraudulent Concealment**

Fraudulent concealment is a form of the tort of misrepresentation, and it applies when someone fails to disclose material facts **to a person to whom an affirmative duty to disclose those facts is owed.** *FDIC v. S. Prawer & Co.*, 829 F. Supp 453, at 457 (D. Me. 1993); *Broussard v. Caci, Inc.-Federal*, 780 F. 2d. 162, 164 (1st. Cir. 1986); *Atwood v. Chapman*, 68 Me. 38, 40 (1877). "The tort does not deal with physical concealment." *S. Prawer*, 829 F. Supp at 457. In order to state a claim for fraudulent nondisclosure, a plaintiff must allege either affirmative active concealment of a known material fact related to a transaction or a special or confidential (fiduciary) relationship imposing a duty of affirmative disclosure of a

known material fact. *Id.* at 445-447 (citing *H.E.P Dev. Group, Inc. v. Nelson*, 606 A.2d 774, 775 (Me. 1992).

Here, no special, confidential or fiduciary relationship between Appellee and Appellant is alleged in the Complaint. Thus, the only basis for a claim of fraudulent concealment is if Appellant actively concealed a known material fact **to a transaction under consideration between Appellee and Appellant**. Again, no transaction between Appellee and Appellant is alleged in the Complaint. And, as aforesaid, active concealment of physical assets is not actionable as "fraudulent concealment." *S. Prawer*, 829 F. Supp at 457.

Appellee alleges that Appellant "actively concealed" three categories of assets: (1) his alleged "interest in compensation;" (2) title to a truck; and (3) the transfer of title to 24 North Avenue in Saco, Maine. Each of these purported causes of action fail as a matter of law because the tort of fraudulent concealment is simply inapplicable to the three situations pled in the Complaint.

First, and as explained, *supra* at pp. 20-21, Appellee failed to plead with the required Rule 9(b) specificity that Appellant acquired an enforceable interest in actual earned income. 14 M.R.S. § 3577 (4) (2025). Second, Appellant's alleged transfers of title for a pick-up truck and for his home cannot possibly be "active concealment" because transfers of titles for trucks and real estate are of physical assets, *S. Prawer*, 829 F. Supp at 457, and are also matters of public records.

To transfer vehicle title in Maine, a transferee completes a title application and files it with the Bureau of Motor Vehicles of the Maine Department of the Secretary of State, which is searchable through the state's title record search database. Transferring title through a public data base that is available online and accessible and searchable to the public and is the antithesis of "active concealment."

Likewise, the sale of 24 North Avenue was a completely open and public process initiated and approved in the United States Bankruptcy Court, **to which the Appellee was a party**. Not only are all documents a matter of public record in the Bankruptcy Court, but they are a matter of public record in the York County Registry of Deeds. *See., eg.,* Complaint, ¶¶ 91-100 (citing each and every instrument associated with the home and recorded in the York County Registry of Deeds). Importantly, Appellee, as a creditor and party to Appellant's Bankruptcy case, received actual ECF notice of the Bankruptcy Trustee's motion for approval of the sale, and the Bankruptcy Court's Order granting approval of the sale, and he did not object, nor submit a competing bid, nor appeal. Transfer of title to the home was an open transparent Bankruptcy Court and Registry of Deeds process, and, like with the truck, it's a physical asset and there is simply no basis for a claim of "active concealment."

Further, "Concealment does not include mere silence; it occurs only when the defendant takes an affirmative action to prevent the plaintiff from learning a

material fact." *Lockwood v. Mack*, RE-24-29, 2025 Me. Super. LEXIS 38, at \*6 (April 3, 2025) (quoting *Alrig USA Acquisitions, LLC*, 2025 ME 11, ¶ 21, 331 A.3d 372). Without either active concealment or a special relationship, "even an intentional failure to disclose will not engender liability for fraud." *Id.* (quoting Horton & McGehee, *Maine Civil Remedies* § 21-4(a)(1) at 399 (4<sup>th</sup> ed. 2004)). Again, the Complaint omits any allegations that Appellant took an affirmative action to prevent the Appellee from learning a material fact. The Complaint omits multiple required elements to state a viable cause of action for fraudulent concealment.

**b. Count III of Appellee's Complaint Fails to State a Claim for Fraudulent Misrepresentation against Appellant.**

To prevail on a claim of fraudulent misrepresentation, Appellee must plead with Rule 9(b) particularity that: (1) Appellant made a false representation; (2) of a material fact; (3) with knowledge of its falsity or in reckless disregard of whether it is true or false; (4) for the purpose of inducing Appellee to act in reliance upon it; and (5) Appellee justifiably *relied upon the representation as true and acted upon it to [his] damage.*<sup>2</sup> *Diversified Foods, Inc. v. First Nat'l Bank*, 605 A.2d 609, 615

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<sup>2</sup> Emphasis supplied

(Me. 1992); *Me. Eye Care Assocs., P.A. v. Gorman*, 2008 ME 36, ¶ 12, 942 A.2d 707 (internal citations omitted).

Count III of Appellee's Complaint nowhere alleges the required elements of how Appellee justifiably relied upon a representation made by Appellant and acted upon it to [his] detriment. Appellee, as with his other causes of action, fails to plead with the required rule 9(b) specificity. There are no allegations in the Complaint that Appellant represented falsely a material fact that caused the Appellee to justifiably rely and detrimentally change his position.

**c. Count IV of Appellee's Complaint Fails to State a Claim for Aiding and Abetting Fraud against Appellant.**

While aiding and abetting is an "ancient criminal law doctrine," the application of the doctrine "has been at best uncertain" in the civil context. *Meridian*, 2021 ME 24, 250 A.3d 122 (quoting *FDIC v. S. Prawer & Co.*, 829 F. Supp. 453, 457 (D. Me. 1993) ("It is clear . . . that aiding and abetting liability [for certain tortious conduct] did not exist under the common law [in Maine] but was entirely a creature of statute.")). In Maine, the tort of aiding and abetting a tortious action is drawn from the *Restatement (Second) of Torts* § 876 (Am Law Inst. 1977). *See Barnes v. McGough*, 623 A.2d 144, 145 (Me. 1993). For there to be aiding and abetting liability, there must be a sufficiently pled independent underlying tort by another person before aiding and abetting liability can attach. *S. Prawer*, 829 F. Supp. at 457 (holding that the FDIC failed to sufficiently allege an actionable

independent tort to which the aiding and abetting liability could attach). Notably, a claim under Maine's Uniform Fraudulent Transfer Act is not a tort and therefore does not provide a basis for aiding and abetting liability. *Id.* at 455-458.

Appellee's barebones allegation of aiding and abetting liability against Appellant fails because Appellee has not successfully pled the required element of a viable independent underlying tort to which the aiding and abetting liability can attach. Absent a viable independent underlying tort claim, the Appellee's Complaint fails to state a claim for aiding and abetting.

**d. Count V of Appellee's Complaint Fails to State a Claim for Unjust Enrichment against Appellant.**

The elements of Unjust Enrichment are: (1) a benefit conferred by the plaintiff on the defendant; (2) an appreciation or knowledge by the defendant of the benefit conferred by the plaintiff; and (3) the acceptance or retention by the defendant of the benefit conferred by the plaintiff under circumstances making it inequitable for the defendant to keep the benefit. *Estate of White*, 521 A. 2d 1180, 1183; (Me. 1987); accord *Leighton v. Fleet Bank of Maine*, 634 Me. 453, 458 (Me. 1993); *George C. Hall & Sons, Inc. v. Taylor*, 628 A.2d 1037, 1038 (Me. 1993).

Here, the essential element of a claim of unjust enrichment is a benefit conferred on the Appellant by the Appellee. Appellee's Complaint fails to allege any benefit conferred by him on Appellant. The Complaint alleges that other people have allegedly provided "benefits" to Appellant. While living in one's spouses' home and

driving her car, or driving one's son's truck, are arguably "benefits" (and under the circumstances pled in the Complaint, gifts)<sup>3</sup>, they are not benefits conferred by the Appellee. As such, the Appellee lacks standing and has failed to plead the essential element of standing to assert a claim of unjust enrichment. *Chase v. Eastman*, 563 A.2d 1099, 1103 (Me. 1989) (in order to have standing, a person must have a personal stake in the claim).

The foregoing aside, Maine law requires spouses to provide support and housing to each other. 22 M.R.S. § 4319 (2025) states, "...a spouse living in or owning property in the State shall support their ... husband in proportion to their respective ability." 19-A M.R.S. § 1652 (2025) states that a spouse residing in Maine may petition the District Court or Probate Court to order a non-supporting spouse to contribute to the support of the non-supporting person's spouse. Legally required support cannot support a claim of Unjust Enrichment because the so-called "enrichment" in that context cannot be said to be "unjust."

Appellee has not in the Complaint alleged a benefit conferred by him on Appellant. Further, and as described in the Complaint, any alleged "benefits" Appellant received from his family or friends were "gifts" or legally required

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<sup>3</sup> Gifts are not subject to claims of Unjust Enrichment because to state a claim there must be a legal duty to restore the item or its value to the person who conferred it. See *Estate of White*, 521 A.2d 1180, 1183 (Me. 1987)

“support.” Nothing pled in the Complaint provides a basis for a claim of Unjust Enrichment.

## **CONCLUSION**

Because Section 733 applies to Appellant’s deposition and in-court testimony and because, in accordance with 14 M.R.S. § 738, Appellee’s Complaint (in whole or in part) fails to state a cause of action for which relief can be granted, the Business Court erred in denying the Appellant’s Special Motion to Dismiss.

DATED in Portland, Maine on the \_\_\_\_<sup>th</sup> day of September 2025,

Respectfully Submitted,  
Bernard Saulnier,  
By counsel,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on September \_\_\_, 2025 I served true copies of the above Appellant’s Brief and Appendix, by providing electronic copies and paper copies to Appellant’s Counsel:

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Jeffrey Bennett, Esq., #7223