

STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. KNO-25-534

H. PRESCOTT SMITH, et al.,	)
	)
Plaintiffs-Appellees	)
	)
v.	)
	)
PHILIP L. SMITH, II, et al.,	)
	)
Defendants-Appellants.	)

**SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLANTS
ON ENTRY OF JUDGMENT**

Pursuant to the Court’s July 30, 2026 Order Requiring Supplemental Briefing to Show Cause Why Appeal Should Not Be Dismissed, Defendants-Appellants Philip L. Smith, II, Stephen G. Smith, Heritage Builders, Inc. and Donald E. Meklin & Sons Excavating, Inc. (hereinafter collectively referred to as “Appellants”) submit this supplemental brief in support of their position that this appeal should proceed to oral argument and judgment. In the alternative, Appellants request that this matter be remanded to the Superior Court so that formal objections to the Referee’s Report may be filed.

Introduction and Procedural History

In its Order dated July 30, 2026, the Court ordered the parties to file supplemental briefs “addressing why their appeals should not be dismissed on the ground that by agreeing to the entry of judgment in accordance with the referee’s recommended decision, they have waived any right to challenge the final judgment.”

As the appellate record reflects, Appellees and Appellants did not agree to any outcome that rendered the Referee's Recommended Decision final and not subject to appeal. To the contrary, after the matter had been pending for a number of years with no prospect or likelihood of a timely hearing on the Civil Non-Jury Trial List in Knox County, they agreed to try this matter before a Referee pursuant to Rule 53 of the Maine Rules of Civil Procedure, reserving all rights of appeal.

The Order on Joint Motion to Appoint Referee dated April 23, 2024, provided as follows:

The Referee shall render his final decision, including all necessary findings of fact and conclusions of law, in writing and the Referee's Recommended Decision shall be endorsed by the Court. Except as provided in Rule 52 or 59, no party shall seek reconsideration or amendment to the Referee's recommended Decision. Any Rule 52 and Rule 59 Motions shall be presented to the Referee...All objections to the Referee's recommended Report will be waived after its submission to the Superior Court...Any Recommended Decision endorsed by the Superior Court may be appealed to the Law Court in accordance with the deadlines and rules set forth in the Maine Rules of Civil Procedure.

Following a four-day trial in December of 2024, the Referee transmitted his Findings of Fact, Conclusions of Law, and Decision to the Knox County Superior Court on or about April 8, 2025. A. 16-49. Pursuant to Rules 52 and 59 of the Maine Rules of Civil Procedure and the Superior Court's April 23, 2024 Order, the parties each challenged the Decision by seeking amended and/or additional findings and presented those motions to the Referee. By Order entered on June 18, 2025, the Referee entered partial amended findings. A. 84-86. On July 3, 2025, the parties filed a "Joint Motion to Enter Judgment in Accordance with Referee's Recommended Decision." A. 87-89. In that Joint Motion, the parties noted that the April 23, 2024 Order appointing the referee specifically "preserved the right to appeal to the Law Court any recommended decision endorsed by the Superior Court." *Id.* The parties further requested that the Referee's recommended decision, as amended, be docketed as a judgment "so that the parties have

a clear date of entry of Judgment from which the parties may calculate the deadline for filing a Notice of Appeal.” *Id.* The Superior Court entered the Judgment in response to this clear notice of intention to appeal. *Id.* This appeal ensued.

Legal Argument

I. The Parties and the Superior Court Specifically Agreed All Rights of Appeal Were Preserved.

Each of the parties and the Superior Court specifically agreed to the procedure which was followed below. The Superior Court’s April 23, 2024 Order on Joint Motion to Appoint Referee states as follows: “All objections to the Referee’s recommended Report will be waived after its submission to the Superior Court...[and] [a]ny Recommended Decision endorsed by the Superior Court may be appealed to the Law Court...” Therefore, the procedure to which all parties and the Superior Court agreed prior to referral to the Referee specifically removed Rule 53’s requirement for objections to the report to be submitted to the Superior Court prior to an appeal. Rather, the parties and the Superior Court agreed that the parties would submit motions for amended or additional findings to the Referee and then proceed to appeals.

In addition, although not formally entitled “objections”, the parties presented their objections through their respective motions for amended and/or additional findings to the Referee. In the Order on Joint Motion to Appoint Referee, the parties specifically agreed that they would not “seek reconsideration or amendment” of the Referee’s recommended Decision “[e]xcept as provided in Rule 52 or 59.” That is precisely what each of the parties did. Indeed, a review of the motions filed by Appellants and Appellees shows that the parties pursued amended and/or additional findings based on their objections to the Referee’s recommended decision. All the issues outlined in the parties’ respective motions which were not resolved through the Referee’s partial

amended findings were addressed by the Superior Court when it allowed the Motion to Enter Judgment to allow the parties to pursue those objections through this appeal.

II. The Superior Court Must Adopt the Referee's Findings "Unless Clearly Erroneous."

If either of the parties had filed objections, Maine Rule of Civil Procedure 53 narrows the Superior Court's scope of review significantly. Maine Rule of Civil Procedure 53(e)(2) states: "The court shall adopt the referee's findings of fact unless clearly erroneous." "Clearly erroneous" is a "highly deferential" legal standard. *Dunning v. Dunning*, 495 A.2d 821, 823 (Me. 1985). In *Hennessy v. Fairley*, this Court noted that

Rule 53 has not changed the well-established principle that the referee's finding is final if supported by credible evidence and not otherwise erroneous as a matter of law. The scope of review of a report is "limited," that is, "[t]he Superior Court is required to accept the referee's factual findings on these issues unless they are clearly erroneous."

2002 ME 76, ¶ 17 (internal and external citations omitted). Therefore, the parties and the Superior Court below specifically agreed to bypass this step because it would have accomplished little but further delay in this matter. *Contrast id.*, ¶ 4, n. 2 (parties were silent on how objections to report were to be handled). Rule 53(e) directs that Judgment shall be entered forthwith on waiver of objections. It does not, however, direct that a right of appeal is waived or lost. *See* Me.R.Civ.P. 53(e); *see also* Advisory Committee Notes, Me.R.Civ.P., July 21, 1977 (noting that intent of changes to Rule 53(e) is to clarify objection procedure but silent on right of appeal).

III. This Matter Should Be Remanded to the Superior Court for Objections to be Filed and Considered.

If this Court determines that the parties and the Superior Court were not permitted to bypass the objection aspect of Rule 53, Appellants respectfully request that the Court remand this matter so the parties can present their objections to the Superior Court. This is not a situation where the

parties agreed to this procedure on their own. The Superior Court signed onto and specifically sanctioned the Order on Joint Motion to Appoint Referee dated April 23, 2024. That Order set out a process where no objections would be submitted to the Superior Court; rather, any issues with the Referee's Recommended Decision would be dealt with through Rule 52 or Rule 59 motions, and "[a]ny Recommended Decision endorsed by the Superior Court would be appealed to this Court." The Superior Court sanctioned this process, and it was followed by the parties and the Superior Court.

In *Gorman v. Gorman*, the Law Court cautioned that after that decision, a remand would not be granted in these circumstances. 2010 ME 123, ¶ 10, 10 A.3d 703. In this matter, the parties acting with the Superior Court, attempted to move the matter to trial while still providing the parties the procedural protections of an appeal. The public policy reasons for a remand that existed for the *Gorman* remand abide in this matter. *See id.* If this Court is inclined to dismiss this Appeal, then consistent with those public policy intentions, a remand should be ordered.

Conclusion

For the foregoing reasons, this matter should proceed to oral argument and judgment or, in the alternative, remanded to the Superior Court so the parties' objections may be filed and considered.

Dated this 14th day of August, 2026.

Appellants,

By their attorney,

/s/ Judy A. S. Metcalf

Judy A. S. Metcalf
Maine Bar Number 7429
Attorney for Appellants

Judy Metcalf Law
76 Union Street
Brunswick, Maine 04011
207-721-2200
judy@judymetcalflaw.com

CERTIFICATE OF SERVICE

I, Judy A. S. Metcalf, hereby certify that the Supplemental Brief of Appellants, Philip L. Smith, II, Stephen G. Smith, Heritage Builders, Inc, and Donald E. Meklin and Sons Excavating, LLC, was electronically served upon counsel of record at the addresses set forth below by email on August 14, 2026:

James G. Monteleone, Esq. Bernstein Shur 100 Middle Street P.O. Box 9729 Portland, Maine 04014 jmonteleone@bernsteinshur.com for Appellees	Martha C. Gaythwaite, Esq. Verrill One Portland Square Portland, Maine 04101-4054 mgaythwaite@verrill-law.com for Philip L. Smith II
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/s/ Judy A.S. Metcalf
Judy A.S. Metcalf, Bar. No. 7429
Judy Metcalf Law
76 Union Street
Brunswick, Maine 04011
judy@judymetcalflaw.com
(207) 721-2200