

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Kno-25-534

Appellants/Defendants

**APPELLEES’
SUPPLEMENTAL BRIEF**

Appellees, through their undersigned counsel, submit the following as their supplemental brief pursuant to the Court’s Order to Show Cause dated July 30, 2026. Appellees’ abstention from filing their objections to the referee’s decision before the Superior Court did not constitute a waiver of Appellees’ cross-appeals because the Superior Court’s order appointing the referee precluded the parties from filing such objections.

The Superior Court entered its Order on [the] Joint Motion to Appoint Referee on April 23, 2024, based upon the parties' submission of a joint motion and proposed order reflecting the parties' mutual agreement on terms governing the referee's appointment. A true and correct copy of the referee appointment order is enclosed herewith as **Exhibit A** (the "Appointment Order"). The Appointment Order provided that the parties' opportunity to respond to the referee's recommended

decision was limited to the filing of Rule 52 motions or Rule 59 motions with the referee, and not the Superior Court. *See* Appointment Order ¶ 9. Additionally, the Appointment Order provided that the Superior Court would not hear objections to the referee’s recommended decision, providing “[a]ll objections to the Referee’s recommended Report will be waived after its submission to the Superior Court.” *Id.* ¶ 10. Instead, the Appointment Order provided that “[a]ny recommended Decision endorsed by the Superior Court may be appealed to the Law Court ...” *Id.* ¶ 11.

Following the referee’s preliminary report of decision, both parties filed motions for the referee to make additional findings. The referee subsequently submitted to the Superior Court his final order adopting some of the requested additional findings, while rejecting others. The parties then requested the Superior Court’s endorsement in light of the Appointment Order, and this appeal and cross-appeal timely followed.

In *Gorman v. Gorman*, 2010 ME 123, 10 A.3d 703, this Court held that parties’ mutual agreement “to avoid having the District Court address any challenges to the referees’ report” constituted a waiver by both parties of any right of appeal because the parties were without “the authority to bypass the court and appeal to [the Law Court] simply by agreeing to that process.” *Gorman* ¶ 8.

The present case is distinguishable from *Gorman* because the “bypass” of the Superior Court’s independent review at issue here occurred subject to the Superior

Court's Appointment Order. Although the Appointment Order had effectively incorporated the parties' underlying agreement to spare the Superior Court from review of objections, the Court's endorsement of the agreed procedure provided the requisite authority that the *Gorman* parties lacked.

Accordingly, Appellees' abstention from filing objections to the referee's decision with the Superior Court should not be deemed a waiver of their right to seek appellate review of the trial court's decision.

Dated at Portland, Maine, this 14th day of August, 2026.

/s/ James G. Monteleone

James G. Monteleone, Bar No. 5827

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STATE OF MAINE
KNOX, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-21-10

H. PRESCOTT SMITH, ANDREW S.)
LOVE, and BRUCE C. ROBERTSON,)
)
Plaintiffs)

v.)

PHILIP L. SMITH II, STEPHEN)
G. SMITH, DONALD E. MEKLIN)
AND SONS EXCAVATING, LLC,)
HERITAGE BUILDERS, INC., and)
STEVEN LORENTZEN d/b/a/)
CONCRETE SERVICES, INC.,)
)
Defendants)

ORDER ON JOINT MOTION
TO APPOINT REFEREE

Upon review of The Parties' Joint Motion for Appointment of Referee pursuant to Me.R.Civ.P. 53, the Motion is hereby GRANTED, and the scope and authority of reference are as follows:

1. Attorney Timothy H. Norton, Kelly, Rimmel & Zimmerman, 53 Exchange Street, Portland, Maine 04101 is hereby appointed as Referee in the above matter.
2. He shall be compensated at his customary hourly rate of \$375 per hour, such fee to be shared equally between the plaintiffs (50%) and the defendants (50%).
3. He shall promptly schedule a Case Management Conference with all parties' counsel to be conducted by Zoom. At the conference, the parties shall confer and agree to a scheduling order to be endorsed by the Referee setting deadlines for amendment of pleadings and joinder of parties and the Referee shall have authority to modify those

EXHIBIT

A

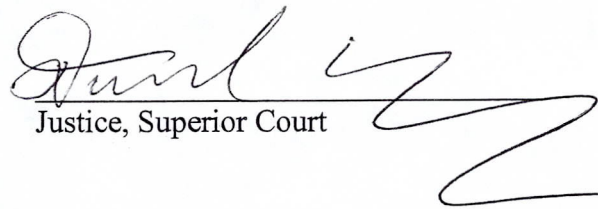
deadlines for good cause; discovery; number and schedule for depositions; deadline for dispositive motions; exchange of witness lists and exhibits, and schedule of trial.

4. The Referee has full authority to address and resolve any discovery disputes which may arise and the parties shall abide by the terms of Rule 26(g) of the Maine Rules of Civil Procedure in anticipation of such conferences. The Referee shall have the authority and power to enforce discovery matters as provided in Rule 26 and 37.
5. The Referee shall have the power to review, hear, and decide any dispositive motions. In so doing, the standards of review and filing requirements of Rules 12 and 56 shall apply.
6. On trial in this matter, the Rules of Evidence and Rules of Civil Procedure shall govern and are not waived. The Referee has the power during trial to consider and rule on all evidentiary objections.
7. The parties shall work with the Referee to assure that this matter is fully tried, if not resolved sooner, by June 15, 2024. The Referee shall have discretion to enlarge scheduling deadlines as necessary.
8. The Referee shall make a record of all evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 103 of the Maine Rules of Evidence for a court sitting without a jury.
9. 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.

10. All objections to the Referee's recommended Report will be waived after its submission to the Superior Court.
11. 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.
12. Pursuant to Me.R.Civ.P. 79(a), this Order shall be entered on the docket in this matter.

Dated: _____

4-23-2024


Justice, Superior Court