STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No.: Han-15-95

TERRANCE E. PINKHAM

Plaintiff – Appellant

v.

MAINE DEPARTMENT OF TRANSPORTATION

Defendant - Appellee

On Appeal from a Judgment of the Maine Superior Court, Hancock County

---

AMICI CURIAE REPY BRIEF OF DEFENDANT – APPELLEE MAINE DEPARTMENT OF TRANSPORTATION

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STATEMENT OF INVITATION TO FILE AMICUS CURIAE BRIEFS

By notice dated January 15, 2016 (corrected January 17, 2016), the Maine Supreme Judicial Court, sitting as the Law Court, invited *amicus curiae* briefs on "whether the language in 23 M.R.S.A. § 63(1)(A), providing that records in the possession of the MDOT relating to appraisals of property are 'confidential and may not be disclosed,' puts the appraisals of other properties outside the scope of discovery defined in M.R. Civ. P. 26(b) or otherwise prevents the production or disclosure of the information in discovery."

Amici curiae briefs were subsequently filed by the Maine Turnpike Authority ("MTA"), the Maine Trial Lawyers Association with the American Civil Liberties Union of Maine Foundation (collectively "MTLA"),[1] and the Maine Freedom of Information Coalition with the New England First Amendment Coalition (collectively "MFIC").

[1] The MTLA Amicus Brief fails to include the acknowledgement or certificate of service required by to M.R. App. P. 7(c)(1). The Rule provides that the "Clerk of the Law Court will not accept a brief for filing unless it is accompanied by an acknowledgement or certificate of service upon the other parties." In addition, the Amicus Invitation states that any amicus brief filed "must comply with M.R. App. P. 7(c). . . ."

ARGUMENT OF LAW

I. The Plain Language of Title 23 M.R.S.A. § 63 Provides that Appraisals of Other Properties Are Not Discoverable.

Contrary to the *Amici's* suggestion, MaineDOT contends that the plain language of the 23 M.R.S.A. § 63 renders appraisals of other properties immune to FOAA requests and not discoverable in litigation. In drafting Section 63, the Legislature employed one of several means of rendering materials not subject to discovery by stating the appraisals "may not be disclosed" without limitation. Additionally, MaineDOT contends that the legislative history of Section 63 lends support to the conclusion that the Legislature intended the phrase "may not be disclosed" to be a bar to discovery of these appraisals in litigation.

A. Legal Authority in Maine and Elsewhere Demonstrates that Protection from Discovery Exists in Different Forms.

In their Briefs, the *Amici* argue that, contrary to MaineDOT's contention, the plain language of 23 M.R.S.A. § 63 does not render the appraisal records of other properties undiscoverable in litigation because the talismanic phrase "not subject to discovery" or "subpoena" is absent. They contend that without this language, Section 63 must be interpreted to permit discovery of these appraisals. However, legal authority from Maine and other jurisdictions strongly suggests otherwise.

Title 23 M.R.S.A. § 63 provides that all records and correspondence relating to property appraisals must be kept confidential and may not be disclosed until nine months after the completion date of the project. To wit, the statute provides:

> 1. **Confidential records**. The following records in the possession of the department and the Maine Turnpike Authority are confidential and may not be disclosed, except as provided in this section:
>
> A. Records and correspondence relating to negotiations for and appraisals of property; and
>
> B. Records and data related to engineering estimates of costs on projects to be put out to bid.
>
> ...
>
> 3. **Records relating to negotiations and appraisals.** The records and correspondence relating to negotiations for and appraisals of property are public records beginning 9 months after the completion date of the project according to the record of the department or Maine Turnpike Authority, except that records of claims that have been appealed to the Superior Court are public records following the award of the court.

23 M.R.S.A. § 63. FOAA provides that "[e]xcept as otherwise provided by statute, a person has the right to inspect and copy any public records" as provided by law. 1 M.R.S.A. § 408-A (2015). However, FOAA exempts from public inspection those "[r]ecords that have been designated confidential by statute." 1 M.R.S.A. § 402(3)(A) (2015) (emphasis added). The plain language of Section 63 provides that the appraisals records are "confidential," therefore they are not subject to FOAA. No one disputes this.

However, Section 63 also provides that these appraisal records "may not be disclosed." The *Amici* argue that Section 63 protects MaineDOT's appraisals only

from FOAA and does not render appraisals undiscoverable in civil litigation. They apparently believe that the phrase "may not be disclosed" constitutes a second reference to FOAA or, conversely has no independent meaning. Such a construction contradicts black letter Maine law which provides that "[n]othing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible." *Struck v. Hackett,* 668 A.2d 411, 417 (Me.1995); *Hickson v. Vescom Corp.*, 2014 ME 27, ¶ 15, 87 A.3d 704 ("[a]ll words in a statute are to be given meaning, and no words are to be treated as surplusage if they can be reasonably construed").

Contrary to the *Amici's* claims, many Maine statutes limit or prohibit discovery of information by employing the word "disclose," or a variant thereof, without using the phrase "not subject to discovery" or "subpoena."[2] For example, 10 M.R.S. § 975-A(3) (2015) prohibits the Finance Authority of Maine ("FAME")

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[2] MTLA points to several statutes cited in *Me. Health Care Ass'n Workers' Comp. Fund v. Super. of Ins.*, 2009 ME 5, 962 A.2d 968, or otherwise set forth in the Maine Revised Statutes, as proof of the Legislature's use of "not subject to discovery" or "subpoena" as the sole mechanism for rendering information undiscoverable. However, several of these statutes were model acts crafted by others adopted by the Legislature. *See* Summary to L.D. 1730 (120th Legis. 2001), enacted with amendment as P.L. 2011, c. 259, and codified, in part, as 24-A M.R.S. § 1420 (2001) (National Association of Insurance Commissioners Viatical Settlements Model Act); Summary to L.D. 1907 (121th Legis. 2004), enacted with amendments as P.L. 2003, c. 263, §§ 10, 18, and codified, in part, as 24-A M.R.S. §§ 6807 & 6818 (2003) (same); Summary to L.D. 1519 (126th Legis. 2013), enacted with amendments as P.L. 2013, c. 238, Pt. A, § 26, and codified, in part, as 24-A M.R.S. § 222(13-A)(B) (2013) (NAIC Model Act).

Additionally, these statutes indicate that the Legislature interpreted "confidential" to refer to FOAA requests and that subsequent language had separate meaning and significance. For instance, the MTLA points out that 5 M.R.S.A. § 200-H(6) provides that "the proceedings and records of the [Maine Elder Death Analysis Review Team] are confidential and are not subject to subpoena. . . ." (emphasis added). Yet, in this case, MTLA ignores and attributes no independent significance to the language in Section 63 that the appraisals are "confidential and may not be disclosed." (emphasis added).

from "knowingly divulge[ing] or disclos[ing] records declared confidential." Section 975 then provides that FAME may disclose, within its discretion, this confidential information "[p]ursuant to a subpoena, request for production of documents, warrant or other order by competent authority." *Id.* § 975(A)(3)(E). Maine law includes many statutes with similar general prohibitions to disclosure of information with express exceptions. *See also* 35-A M.R.S. § 10106(3)(F) (2015) (Efficiency Maine "may not knowingly divulge or disclose records designated as confidential" except for, among other reasons, "[p]ursuant to a subpoena, request for production of documents, warrant or other order").[3] This demonstrates that the Legislature is aware of and has utilized many different approaches to mark information undiscoverable.

Section 63 includes not only a reference to confidentiality under FOAA, but also a general prohibition against the disclosure of appraisals in all other circumstances. Unlike the statutes identified above and in Footnote 3, there is no

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[3] *See e.g.*, 24-A M.R.S.A. § 4224 (1) (2015) (information on the health of an enrollee "must be held in confidence and may not be disclosed to any person except," among other reasons, "pursuant to statute or court order for the production of documents or the discovery of evidence"); 37-B M.R.S.A. § 11(1)(B) (2015) (information concerning service member dependents "is confidential and may not be disclosed" except for, among other reasons, "by court order"); 12 M.R.S.A. § 6173(1) (2015) (fisheries information "is confidential and may not be disclosed" except for, among other reasons, "by court order"); 22 M.R.S.A. § 4018(4) (2015) (identifying information provided by person delivering a child to a safe haven "is confidential and may not be disclosed" except for, among other reasons, "by court order"); 29-A M.R.S.A. § 251(4) (2015) (e-mail address of applicant "is confidential and may not be disclosed to anyone . . . except for law enforcement officers or for purposes of court proceedings"); 22 M.R.S.A. § 2425(8)(c) (2015) (list of persons issued medical marijuana registry cards "are confidential, exempt from the freedom of access laws, Title 1, chapter 13, and not subject to disclosure except" as provided); 38 M.R.S.A. § 580-B(11)(B) (2015) (identifying cap-and-trade information that is "confidential and may not be disclosed except pursuant to a court order").

exception for the rule of nondisclosure in Section 63 for civil discovery, nor should the Law Court read such an exception into the statute. *Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 10, 17 A.3d 667 (Court "will not read additional language into a statute"); *Adoption of M.A.*, 2007 ME 123, ¶ 9, 930 A.2d 1088 (Court does not "read exceptions, limitations, or conditions into an otherwise clear and unambiguous statute"). Had the Legislature intended to provide anything other than a complete prohibition against disclosure, it could have easily done so shown by the language in 10 M.R.S. § 975-A(3) and 35-A M.R.S. § 10106(3)(F). *See DaimlerChrysler Corp. v. Me. Revenue Serv.*, 2007 ME 62, ¶ 17, 922 A.2d 465. The plain language of Section 63 provides that the appraisals of other properties are confidential, thus not subject to FOAA, **and** "may not be disclosed" without limitation, thus rendering these documents undiscoverable.[4]

The following cases (one outside the eminent domain sphere, one within) support the conclusion that the plain language of Section 63 without the *Amici's* preferred nomenclature renders the appraisals undiscoverable. First, in *Baldrige v. Shapiro*, 455 U.S. 345, 354 (1981), the United States Supreme Court considered two sections of the Census Act that provided that certain census information may

[4] In Footnote 4 of its Brief, the MTLA suggests that a 1975 Maine Opinion of the Attorney General's Office supports its claim that Section 63 requires disclosure in litigation. Public Availability of Appraisal Reports, Op. Me. Att'y Gen., 1975 Me. AG LEXIS 56 at 2 (March 11, 1975). However, the issue on which the Attorney General opined is different than the one *sub judice*. It was asked to opine whether an appraisal in the possession of Bureau of Parks and Recreation was subject to FOAA given that Section 63 did not apply to that agency. No analysis of the substantive text of Section 63 was undertaken by the Attorney General's Office. Nor was the issue of discovery of appraisals in litigation against MaineDOT raised.

not be "disclose[d]." The statutes included no references to civil litigation, discovery or subpoenas. *Id.* The Court was asked to consider whether the census information was subject to disclosure under either the Freedom of Information Act ("FOIA") or in civil litigation discovery. The Court considered the legislative history of the Census Act, which emphasized Congress' desire to keep the information confidential, even though there was no reference to civil litigation or discovery. *Id.* at 356-60. After first concluding that the information was not subject to FOIA requests, the Court likewise concluded that the information was not discoverable in litigation. *Id.* In doing so, the Court noted that "[d]isclosure by civil litigation would undermine the very purpose of the confidentiality." *Id.* at 361

Second, the case of *State ex rel. W.Va. DOT v. Reed*, 724 S.E.2d 320 (W.Va. 2012) is instructive. There, the West Virginia Supreme Court considered whether appraisals of other properties conducted as part of a strip taking were discoverable by those without legally cognizable possessory interests. *Id.* at 323. Given that the project was, as is the case here, partially funded by federal funds, the Court concluded that the standards of the Uniform Relocation Assistance and Real Property Acquisitions Policies Act, 42 U.S.C. § 4601 *et seq.* applied. The Court then noted that the federal regulations created under the Act provide:

> (b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

Id. at 326. The Court interpreted that language as rendering the appraisals of other properties immune from freedom of access requests and undiscoverable despite its lacks of reference to litigation, subpoenas or discovery. *Id.* at 328-29. *See also United States v. 8.345 Acres of Land*, 2006 U.S. Dist. LEXIS 100799 at * 13 n. 2 (M.D. La. 2006) ("pre-litigation appraisals the United States Commissioned are, in effect, internal memorandum that are not general discoverable.").

Accordingly, MaineDOT contends that the Law Court should conclude that, when the relevant text is given plain, reasonable and separate meaning, Section 63 unambiguously renders appraisal reports of other properties undiscoverable.

B. The Legislative History of Title 23 M.R.S.A. § 63 Supports a Finding that Appraisals of Other Properties Are Not Discoverable.

The *Amici* contend that the legislative history of Section 63 does not support any inference that the Legislature intended to render third party appraisals undiscoverable. MaineDOT disagrees. To the contrary, the legislative history of Section 63 suggests a conclusion that the Legislature knowingly made changes to Section 63 that can be inferred to create a shield against the discovery of third party appraisals.

As noted by the *Amici*, Section 63 was originally codified in 1959, when the Legislature enacted R.S. ch. 223, § 27-A. At that time, Section 27-A read in part:

> The records and correspondence of the right-of-way division of the State Highway Commission relating to negotiations for the appraisals of property . . . shall be confidential, and shall not be open for public inspection . . . .

R.S. ch. 223, § 27-A (Supp. 1959). In 2011, after more than 50 years of the Section undergoing relatively minor changes, the Legislature repealed and replaced Section 63 entirely. P.L. 2011, c. 524, § 5. Section 63 was restructured and a provision was added regarding engineering estimates. 23 M.R.S. § 63(2) (2011). Importantly, rather than include the "may not be open for public inspection" language utilized for over 50 years through several revisions, the Legislature amended Section 63 to include a blanket prohibition against "disclosure" without the qualifications seen in other statutes as discussed *supra*. *See* 23 M.R.S. § 63(1)(A) (2011). Specifically, the Legislature now required that all "[r]ecords and correspondence relating to negotiations for and appraisals of property," which were "in the possession of the [D]epartment [of Transportation]" were to be deemed "confidential and may not be disclosed." 23 M.R.S. § 63(1)(A) (2011) (emphasis added).

The timing of the change to Section 63 may be significant as well. In 2009, the Law Court concluded that Section 403(15) of Maine's Workers' Compensation Act, 39-A M.R.S. §§ 101 *et. seq.*, did not preclude "discovery requests between private litigants." *Id.* There, the confidentiality provision stated as follows:

> **Confidentiality of information.** All written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained . . . that a self-insurer is required to file with or make available to the superintendent under this section, section 404 or rules adopted pursuant to it are confidential and are not public records.

39-A M.R.S. § 403(15). In reviewing its plain language, the Court concluded that the statute shielded the information from FOAA but not from discovery. *Me. Health Care*, 2009 ME 5, ¶ 11, 962 A.2d 968. Following *Me. Health Care*, the "Right to Know Advisory Committee" noted the ruling, stating "[t]he statute (39-A MRSA § 403, sub-§15) protects the records from requests made pursuant to the Freedom of Access laws, but does not provide guidance with regard to discovery requests between private litigants"). *See* FOURTH ANNUAL REPORT OF THE RIGHT TO KNOW ADVISORY COMMITTEE, January 2010, at 3-4 (available at http://maine.gov/legis/opla/rtk2010rpt.pdf). In the wake of the Court's decision, the Legislature considered changing dozens of provisions within the Maine Revised Statutes. *Id.* at 6-14. L.D. 1804 (125th Legis. 2012), and, in part, incorporated the recommended changes of the Advisory Committee, presumably including the addition of the "may not be disclosed" language to Section 63.

Taken as a whole, this activity suggests that the Legislature knowingly chose to replace the previous language of Section 63 with a more direct, broad prohibition against disclosure. 23 M.R.S. § 63(1)(A). In making this change, the Court should infer that the Legislature intended to reinforce or possibly broaden the protections of Section 63 to make third party appraisals undiscoverable in

litigation.[5] *Searle v. Town of Bucksport*, 2010 ME 89, ¶ 8, 3 A.3d 390 (statutes to be interpreted in manner that gives "plain and natural meaning"); *see also* 1 M.R.S. § 72(3) (2015).

MaineDOT contends that this legislative history supports the conclusion that the Legislature intended the phrase "may not be disclosed" in Section 63 to be a bar to discovery of unrelated third party appraisals in litigation.

II. The *Me. Sugar* Test Mandates that Appraisals of Other Properties Are Not Discoverable Under Title 23 M.R.S.A. § 63.

If the Law Court concludes that the plain language of Section 63 does not unambiguously render other property appraisals undiscoverable, it likewise cannot find that the language clearly renders the appraisals discoverable. *See supra.* At best, Section 63 is ambiguous, requiring application of the balancing test set forth in *Me. Sugar Indus., Inc. v. Me. Indus. Bldg. Auth.*, 264 A.2d 1 (Me. 1970). Although not addressed by the *Amici*, the *Me. Sugar* balancing test strongly supports a conclusion by this Court that that these appraisals should not be discoverable.

In *Me. Sugar*, the Law Court held that, when considering whether an ambiguous statute renders information undiscoverable, the Court must "balance the public interest in protecting the confidentiality of the information as against the

[5] Black's definition for "disclose" includes a reference to "Discovery." Black's Law Dictionary 464 (6th ed. 1990). Discovery "generally refers to disclosure by defendant of facts, deeds, documents or other things which are in his exclusive knowledge or possession and which are necessary to party seeking discovery as a part of a cause of action." Black's Law Dictionary 466 (6th ed. 1990).

public interest in providing a fair and just trial." *Id.* at 5. Employing the guidance provided in Wigmore on Evidence, 3rd Ed., Vol. VIII, Sec. 2285, the Court stated that, in order to find information undiscoverable:

> the *injury* that would inure to the relation by disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

Id. at 6. As applied to Section 63, the relevant case law, as well as public policy, demonstrates that the injury to MaineDOT and other property owners far exceeds any benefit to the litigation from the disclosure of appraisals for other properties.

As noted in MaineDOT's Appellee Brief, the Law Court already has conducted an analysis of the policy considerations of Section 63 in *Davric Corp. v. Me. Dept. of Transp.*, 606 A.2d 201, 203 (Me. 1992). The *Davric* Court concluded that Section 63 exempted appraisals of other properties from FOAA, noting that significant public policy considerations supporting the statute:

> The legislature addressed confidentiality of highway commission records on a project wide basis . . . . The language . . . evidences an intent to protect the Department's bargaining position during its negotiations with property owners.

Id. at 203. The Court noted that it is clear "that the negotiations for and acquisition price of one property in a project affects, or at least has great potential to affect, negotiations for property in the entire project." *Id.* It noted that construing the statute "to require disclosure of . . . records of acquisition prior to the completion of the project would defeat the very purpose of" Section 63. *Id.*

Contrary to the *Amici's* contention, the public policy of protecting MaineDOT's bargaining position applies prior to filing suit or thereafter. Compromise negotiations do not stop when an action is filed with the State Claims Commission or the Superior Court. In point of fact, a finding by the Court that appraisals of other properties are discoverable would undercut MaineDOT's ability to settle eminent domain claims with anyone. Rather than encourage pre-suit resolution, it will incentivize land owners to reject MaineDOT's settlement overtures in favor of filing a State Claims Commission or Superior Court action so that they may be able to learn the appraised value of every other land owner, despite the fact that the information is not relevant. *See Baldrige*, 455 U.S. at 361 (making information unavailable under FOAA, available by civil litigation, would "undermine [its] very purpose"). State Claims Commissions hearings and Superior Court trials would devolve into wasteful, confusing "trials within the trials" over the relative attributes of every property, every condemnation, every appraisal.

Furthermore, there is the potential for significant invasion of privacy given that the attributes and values of every property on the project would be subject to discovery. Other property owners could be front and center at trial no matter how dissimilar or remote their properties or the rights taken. Information concerning these other properties, including site information, improvements, uses, encumbrances, valuation and recent sales would be publically available.

Furthermore, owners could become subjected to depositions or trials as witnesses in eminent domain actions as non-parties even when they settled with MaineDOT.

While opening up the appraisals of other properties to discovery would result in significant injury to both MaineDOT and unrelated land owners, it would have little to no benefit for the "correct disposal of litigation." Quite the opposite. *See United States v. 25.02 Acres of Land*, 495 F.2d 1398, 1401-03 (10th Cir. 1974) (in condemnation proceeding, court did not err in barring discovery of third party appraisals because injury to non-party land owners' privacy outweighed impeachment value). Discovery and admission of the appraisals of other properties would carry a significant risk of wasted time and confusion of the issues as the parties are needlessly subjected to protracted comparisons of each and every appraised property and disparate property right affected by the project. M.R. Evid. 401-403. As noted in MaineDOT's Appellee Brief, there is significant legal support for the proposition that the value of other properties is not relevant to the determination of just compensation.[6] Each property has unique attributes that undercut the value of such comparisons. In the final analysis, Pinkham was given

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[6] *See, e.g., Gwinnett County v. Howington*, 634 S.E.2d 157, 159 (Ga.App. 2006) (" sales of land to condemning authorities are inadmissible as evidence in condemnation proceedings on the issue of the value of the land sought to be condemned"); *Harrington v. Vermont Agency of Transp.*, 971 A.2d 658, 660-61 (Vt. 2009) ("vast majority" of courts have concluded that settlement of other condemnation claims are inadmissible) (Vt. 2009); *State v. Cooper*, 420 So.2d 771, 771-72 (Ala. 1982) (acquisition value of other property is not admissible to show how the appraiser arrived at the value of the property in question" because it "complicates the record, confuses the issue and is misleading").

all the information required by M.R. Civ. P. 26(b)(4) and necessary to cross-examine MaineDOT's expert.[7]

Accordingly, MaineDOT contends that even if the Law Court were to conclude that Section 63 is ambiguous, it must be construed as rendering appraisals of other properties undiscoverable in light of the test set forth in *Me. Sugar*.[8]

III. M.R. Civ. P. 26(b)(4) Limits the Scope of Expert Testimony Discovery.

Although seemingly beyond the scope of the Amicus Invitation, the MTLA contends that, pursuant to M.R. Civ. P. 26, the Superior Court should have mandated that MaineDOT disclose the other properties appraisals in light of the Rule's general provision that "[p]arties may obtain discovery regarding *any matter, not privileged, which is relevant to the subject matter involved in the pending action*." M.R. Civ. P. 26(b)(1). This argument turns a blind eye to the many restrictions to civil discovery under Maine law. *See* M.R. Civ. P. 26(b)(3)-(6). Specific to this appeal, this argument overlooks the limits of discovery concerning expert witnesses set forth in M.R. Civ. P. 26(b)(4).

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[7] Included in Moniz's appraisal report for the Pinkham property was general information on Hancock County, the City of Ellsworth, the real estate market, an explanation of appraisal approach, information specific to the Pinkham's property, the purpose and scope of the appraisal, a highest and best use analysis, analysis of comparative sales, etc.

[8] Further undermining the relevance of the appraisals of other properties is the fact that it is quite common for MaineDOT to retain several different appraisers on a project. Such was the case with the reconstruction of U.S. Route 1A. No argument can be made that appraisals conducted by other appraisers would be discoverable, relevant or admissible.

M.R. Civ. P. 26(b)(4) by its terms limits expert discovery to "facts known and opinions held by experts" that are otherwise discoverable, and which were "acquired or developed in anticipation of litigation or for trial." *See* M.R. Civ. P. 26 advisory committee's note to 1999 amend. ("[A] party is required to identify information and exhibits used by the expert to form or support opinions, and to set forth the qualifications, compensation, and publications of the expert."). By comparison, Rule 26(b)(4)'s discovery requirements applies a more restrictive discovery standard than the general rule. *Compare* M.R. Civ. P. 26(b)(1).

For example, in *In re Air Crash Disaster at Stapleton Int'l Airport*, a federal court in construing the parameters of Fed. R. Civ. P. 26(b)(4),[9] scope of discovery, explained that, although the "Rule does not limit discovery to documents which *support* an expert's opinion," or materials and documents which "an expert reviews and then disregards," these "principles do not provide for unlimited discovery in regards to experts." 720 F. Supp. 1442, 1444 (D. Co. 1988). *See also Crawford v. BioLife Plasma Servs. LP*, 2011 U.S. Dist. LEXIS 60690 at *12 (N.D. Ind. June 3, 2011) ("[t]he scope of expert discovery has been described as being limited to materials possessed by an expert and related to the case at hand"). Thus, Maine's federal rule counterpart has been described as being "designed to prevent

[9] *Bacon v. Penney*, 418 A.2d 1136, 1139 (Me. 1980) (appropriate to consider federal jurisprudence construing rule when similar to Maine counterpart).

abusive, costly 'fishing expeditions' into the background of a testifying expert," and inconsequential materials, such as copies of "all of a deponent's past testimony as an expert . . . is simply overbroad and beyond the [rules] scope." *Id.* Similarly, in *Stella v. Spaulding*, the Vermont Supreme Court explained that its expert discovery provision "limits the bounds of [expert] disclosure to a specific list of items," and a party may not circumvent that limitation through other discovery mechanisms to "obtain all of the details [it] might ultimately want to know." 2013 VT 8, ¶ 19, 67 A.3d 247; *see also In re Fuller*, 2013 U.S. Dist. LEXIS 133925 at *5 (D. Me. Sep. 18, 2013) (well-settled that a party cannot use the broader reaches of a *subpoena duces tecum* to conduct expert discovery). The Vermont Court went on to explain that if such broad reaches where intended by Rule 26(b)(4), then the rule would expressly say so. *See Stella*, 2013 VT 8, ¶ 19, 67 A.3d 247.

In the underlying action, Moniz was designated as the MaineDOT's expert, and his expert disclosure was fully compliant with Rule 26(b)(4)'s requirements. To that end, in addition to providing Pinkham with a complete designation, the MDOT provided him with a complete copy of Moniz's appraisal report. This report contained an explanation of appraisal approach, as well as information specific to Pinkham's property and the comparable properties utilized. *See* M.R. Civ. P. 26(b)(4). It included the purpose and scope of the appraisal, the general assumptions, the limiting conditions, a highest and best use analysis, and a

summary of the comparative sales methodology used to determine the value of the acquired property. *See* M.R. Civ. P. 26(b)(4); (A. 231-291).

Contrary to what *Amici* contends, Rule 26(b)(4) makes clear that expert discovery in Maine is not "unfettered," nor unrestricted in scope. S*ee* M.R. Civ. P. 26(b)(4); *In re Air Crash*, 2013 VT 8, ¶ 19, 67 A.3d 247. Because Pinkham was provided with all the materials required for expert discovery, *Amici's* claim that the broad reaches of Rule 26's should have permitted discovery is misplaced.

IV. The MTLA's Brief Exceeds the Limits of the Amicus Invitation and Must be Disregarded.

In its *Amicus Curiae* Brief, the MTLA argues that the Law Court must conclude that the Superior Court erred in interpreting 23 M.R.S.A. § 63 as rendering the appraisals of other properties undiscoverable. It posits that the Superior Court erred as matter of law in not applying M.R. Evid. 508(c)[10] to prohibit MaineDOT's expert witness from testifying at trial, requiring that the verdict be overturned. Simply put, the Law Court must reject and ignore this portion of the Brief as it far exceeds the Court's Amicus Invitation.

"The privilege to be heard as an *amicus curiae*, as well as the manner and extent of participation, rests with the discretion of the court." *Turnbull v. Fink*, 644 A.2d 1322, 1323 (Del. 1994). "Leave to appear as an *amicus curiae* does not

[10] The MTLA suggests that the parties to this appeal cite to M.R. Evid. 508(c) in error and that the proper citation is to M.R. Evid. 508(b) since that Rule was restyled in November 2014. However, as noted in the preamble to the Maine Rules of Evidence, the restyling of said rules became effective January 1, 2015. The Pinkham trial took place in early November 2014.

confer the status of a party." *Id.*; *Hamlin v. Perticuler Baptist Meeting House*, 103 Me. 343, 352, 69 A. 315 (1907) (intervention by *amicus curiae* is not a right but a privilege limited to the invitation of the court that does not confer standing). Such participation is "limited to those issues which the Court allows the *amicus* to address." *Stewart-Warner Corp. v. United States,* 4 CIT 141, 142 (1982).

As noted above, the Law Court January 2016 Amicus Invitation afforded all *amici curiae* the opportunity to comment on one single discrete issue, to wit:

> [W]hether the language in 23 M.R.S. § 63(1)(A), providing that records in the possession of the MDOT relating to appraisals of property are "confidential and may not be disclosed," puts the appraisals of other properties outside the scope of discovery as defined in M.R. Civ. P. 26(b) or otherwise prevents the production or disclosure of the information in discovery.

However, the MTLA fails to limits its Amicus Brief to issue of the statutory construction as set forth by the Law Court. Rather, it engages in an abstract discussion[11] of the Superior Court's perceived duties under M.R. Evid. 508(c), a rule of evidence never expressly cited (not "rarely" cited as claimed by the MTLA) in Maine. The Amicus Invitation's narrow focus on the statutory construction of Section 63 does not depend on or implicate M.R. Evid. 508(c), the parties'

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[11] In discussing M.R. Evid. 508(c), the MTLA rejects without authority in a single sentence the substantial case law cited by MaineDOT that Pinkham has not been deprived of any relevant, material evidence. Also, it suggests that M.R. Evid. 508(c) should have prohibited Moniz from testifying because, in part, Pinkham was not provided with "all comparable sales relied upon by Moniz." Yet, there is no dispute that Pinkham was provided with the complete appraisal for his property, including all of the comparable properties relied upon by Moniz for that appraisal.

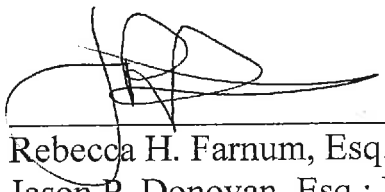
arguments concerning it, or the Superior Court's ruling thereon.[12] Simply put, the Court must reject Section III of the MTLA's Amicus Brief for lack of standing.

CONCLUSION

For the foregoing reasons and for those set forth in the Appellee's Brief, Appellee Maine Department of Transportation respectfully requests that this Honorable Court deny the appeal of Appellant Terrence E. Pinkham and affirm the jury's verdict and the Amended Judgment thereon.

Dated at Portland, Maine, this 4th day of March, 2016.

Respectfully Submitted:



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[12] The Law Court need look no further than the standards of review for the two issues to recognize that the M.R. Evid. 508(c) discussion is well outside the Amicus Invitation. The Court reviews issues of law, including the statutory construction of Section 63 *de novo*. *Tolliver v. Dept. of Transp.*, 2008 ME 83, ¶ 11, 948 A.2d 1223. The Superior court's pretrial discovery order concerning M.R. Evid. 508(c) is reviewed by the Law Court for an abuse of discretion contrary to the MTLA's suggestion otherwise. *Pattershall v. Jenness*, 485 A.2d 980, 985 (Me. 1984).

CERTIFICATE OF SERVICE

I, Jason P. Donovan, Esq. of Thompson & Bowie, LLP, hereby certify that I have caused two (2) copies of the foregoing "Amici Curiae Reply Brief of Appellee Maine Department of Transportation" to be served this day upon counsel for Appellant Terrence E. Pinkham by depositing them in the United States Mail, postage prepaid, addressed as follows:

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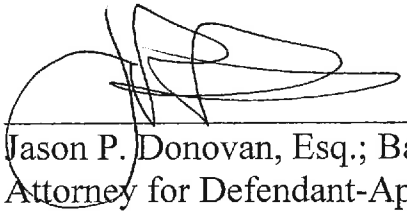
Dated at Portland, Maine, this 4th day of March, 2016.



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