APPEAL

SUPREME JUDICIAL COURT
STATE OF MAINE

FRIENDS OF MERRYMEETING BAY,
KATHLEEN MCGEE, ED FRIEDMAN,
and COLLEEN MOORE,

Docket No. BCD-21-43
BCD Docket No. 20-36

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

BRIEF FOR APPELLANT

Bruce M. Merrill
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101 Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice*
David Lanser, *Pro Hac Vice*
Law Office of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

ATTORNEYS FOR PLAINTIFF

SUPREME JUDICIAL COURT
STATE OF MAINE

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE,

Plaintiffs,

v.

CENTRAL MAINE POWER COMPANY,

Defendant.

Docket No. BCD-21-43
BCD Docket No. 20-36

Appeal

NOW COME Appellants, Friends of Merrymeeting Bay, Kathleen McGee, Ed Friedman, and Colleen Moore, Plaintiffs in the Maine Business and Consumer Court case bearing the docket number BCD-CV-20-36, to file this appeal of the *Combined Order on the Environmental Health Trust's Motion for Leave to File* Amicus Curiae *Brief and Defendant's Motion to Dismiss* issued on January 15, 2021.

A. TABLE OF CONTENTS

SECTIONS

TABLE OF AUTHORITIES

Cases

Statutory Authority

Additional Authority

B. STATEMENT OF THE CASE

PROCEDURAL HISTORY

Plaintiffs are three residents living near Merrymeeting Bay and one non-profit organization formed to "preserve, protect and enhance the unique ecosystems of Merrymeeting Bay." Plaintiffs filed this lawsuit on July 21, 2020, seeking to hold Defendant Central Maine Power Company liable for the nuisance caused by its unnecessary tower lighting system at the Chops Passage . Defendants responded by filing a *Motion to Dismiss Plaintiffs' Complaint* on September 15, 2020. While the *Motion to Dismiss* was pending, the Environmental Health Trust filed a motion for leave to file an *amicus curiae* brief. The court denied both

motions in a combined order issued on January 15, 2021. This appeal was docketed in the Law Court on February 9, 2021, with Appellant's brief due May 4, 2021.

SUMMARY OF FACTS

For at least eight decades, there have been two 195-foot-tall powerline towers at the Chops Passage of the Kennebec River at Merrymeeting Bay, Maine. The towers were painted with alternating bands of red and white paint to make them more visible to air navigation.

In 2018, the Central Maine Power Company ("CMP") replaced and extended the towers by 23%, to a height of 240 feet. Around the same time, CMP removed the red and white paint, and added orange, white, and yellow marking balls to the powerline. It also attached ten lights to the towers that, when active, each flash sixty times a minute and are visible over an area of nearly four thousand square miles. These lights are forbidden by local zoning codes and CMP did not disclose the lights as required under the Maine Natural Resources Protection Act when obtaining permits. No public hearings were held prior to the light installation.

Plaintiffs have no objection to marking the towers with bands of red and white paint, or the orange, white, and yellow marking balls. But the flashing lights are more than a mere annoyance – Plaintiffs have had difficulty sleeping, their businesses have been adversely impacted, and the value and enjoyment of their property has decreased. Further, the flashing lights have negatively affected the

wildlife in the area which has undermined the purpose and value of the conservation easements owned by Plaintiff Friends of Merrymeeting Bay ("FOMB"). Plaintiffs proposed alternative, less impactful, sets of air safety measures: marking the towers with paint, marking the powerlines and towers with colored balls, issuing a Notice to Airmen, or alternatively keeping the lights and having them activated only by passive detection or pilot-controlled systems. CMP declined to adopt those alternative measures.

Prior to installing the lights, CMP contacted the Federal Aviation Administration ("FAA"), which issued a "No Hazard" determination regarding the towers. In that determination, the FAA recommended – but did not require – that CMP install lights on the towers. In fact, the towers do not meet the necessary criteria for mandatory lighting under FAA regulations. This was confirmed by CMP's expert, Clyde Pittman, Director of Engineering of Federal Airways & Airways in an opinion letter in which he agreed that "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport." App'x Ex. O at 2.

Because the lights are unnecessary; not mandated by the FAA; and cause harm, Plaintiffs brought this lawsuit for nuisance.

C. ISSUES PRESENTED FOR REVIEW; ARGUMENT SUMMARIES AND STANDARD OF REVIEW

1) Whether Plaintiffs' nuisance claim is preempted by the Federal Aviation Act.

The trial court determined that the FAA's regulatory framework preempted Plaintiffs' state law claims because the FAA has exclusive regulatory authority over airspace and that the agency's recommendations carry the same effect as an order.

Respectfully, the trial court's Order erred in a number of ways. For instance, courts have repeatedly held that the FAA recommendations on which the preemption argument hinges have "no enforceable legal effect." The Order also overstates the FAA's authority, finding that it controls *all* airspace, when federal law specifies the specific types of airspace over which the FAA has authority. The Order is also internally inconsistent, finding both that the claims are subject to field preemption and also that a party can seek a state law remedy for non-compliance with FAA recommendations, which could not both be possible if field preemption applied. And although the Order held that a party can seek a state law remedy for non-compliance with FAA recommendations, the order wrongfully dismissed Plaintiffs' claims based on CMP's non-compliance. Finally, the order relies in part on an "intuition" not supported by logic: just because the towers are *not* a hazard

with the lighting system does not mean that removing the lighting system would cause them to be a hazard.[1]

Standard of Review: De Novo.

D. ARGUMENT

I. The Law of Federal Preemption

In any federal preemption case, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (internal quotation marks omitted). Although the Supremacy Clause of the United States Constitution creates a clear rule that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the Contrary notwithstanding," such power is limited by the central constitutional concept of federalism, which ensures that both federal and state governments can operate with sovereignty. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). Sovereign governments will inevitably be in conflict, however, and so courts have developed three circumstances where federal law will preempt state law: express preemption, field preemption, and conflict preemption. *See, e.g., Crosby v. National Foreign*

[1] Plaintiffs' complaint also challenged CMP's choice to equip the towers with an active radar system that blankets the area in microwave radiation, rather than a passive detection system. Compl. at ¶ 54-57. The trial court held that objections to the radar system are preempted by the Federal Communications Act. Plaintiffs do not concede that the unnecessary radar system is not a problem, but have chosen not to raise that issue on appeal.

Trade Council, 530 U.S. 363, 372 (2000). However, the three categories "are not rigidly distinct." *Id.* at, 372, n. 6.

Here, neither the Federal Aviation Act (49 U.S.C. §§ 1301-1542) nor any other federal law relevant to this lawsuit includes a clause expressly preempting state law. And so, the Maine state laws at issue will only be preempted if such preemption is "implicitly contained in the [Act's] structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). That "implicit" preemption could take the form of field or conflict preemption.

Field preemption applies only when "federal law so thoroughly occupies a legislative field 'as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Cipollone v. Liggett Group, Inc*., 505 U.S. 504, 516 (1992), quoting *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). In other words, in order to preempt state law, the federal law must "provide a **full** set of standards" that not only impose their own obligations under federal law, "but also confer a federal right to be free from any other" obligations. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1481, 200 L.Ed.2d 854 (2018) (emphasis added).

Conflict preemption is when "(1) 'it is impossible for a private party to comply with both state and federal requirements,' or (2) 'where state law stands as an obstacle to the accomplishment and execution of the full purposes and

objectives of Congress.'" *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). The First Circuit uses a "functional approach" which considers "the effect which the challenged enactment will have on the federal plan." *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 2 (1st Cir. 1989). However, Congressional intent, as determined by the "structure and purpose of the statute as a whole" is the "ultimate touchstone" for preemption. *Medtronic, Inc., v. Lohr*, 518 U.S. 470, 485 (1996).

II. The trial court erred in ruling that FAA recommendations – which have "no enforceable legal effect" – preempt Plaintiffs' state law claims.

The trial court decided that the FAA Notice of No Hazard Determination preempts Plaintiffs' state law claims. That decision was in error, in that it misapprehends the legal force of the FAA's Notice.

It is not disputed that that the federal government has sovereignty over the airspace throughout the United States (49 U.S.C. § 40103) or that the Secretary of Transportation is authorized to review "structures interfering with air commerce." 49 U.S.C. § 44718. It is further agreed that CMP was required to provide notice of the towers to the FAA, which in turn must determine whether the structures "may result in an obstruction of the navigable airspace" and potentially "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment." 49 U.S.C. § 44718(b)(1). The issue is not whether the FAA could take those steps but, rather, the scope and

effect of the FAA's recommendations once that process has been completed and the FAA has determined a structure is *not* an obstruction of navigable airspace.

Here, the FAA received notice of the expansion of the towers and conducted an aeronautical study. It ultimately determined that the towers did not interfere with navigable airspace and would not be a hazard, provided they adhere to the FAA lighting guidelines. App'x Exs J, L. This was reflected in a document called a "Notice of No Hazard Determination." *Id.* The FAA further found – and this is not disputed – that the towers were not an "obstruction to air navigation" due to their height, location, and lack of any other relevant factor (such as being near an airport). *Id.*; *see also* 11 CFR § 77.17. In their initial application to the FAA, CMP suggested a package of air hazard mitigation efforts (colored balls and lights), and the FAA endorsed those suggestions. App'x at Ex. N.

But at no point did the FAA say each of those air hazard mitigation items were necessary or mandatory. As explained in the Complaint, an exceptionally low number of aircraft use the area and the towers do not interfere with the few aircraft which do. Compl. at ¶ 29-36. It is precisely for these reasons that Plaintiffs approached CMP with a list of alternatives to the lighting system which would still adhere to the FAA lighting guidelines but alleviate the nuisance -- but each of those alternatives was rejected by CMP. Compl. at ¶ 12, 52-65.

This context is critical when considering the actual requirements under FAA regulations as well as the legal effect of recommendations. The trial court – and CMP – concede that "the FAA does not claim enforcement authority for its 'no hazard' determinations" but still finds that the no hazard determinations have the same practical effect as orders because "a party could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations." Order at 11 (emphasis in original). But this contradicts the FAA's own stance, which is that "lighting and marking requirements are recommendations, not requirements" (August 17, 2018, FAA Obstructions, Marking and Lighting Advisory Circular) and that no hazard determinations are "of an advisory nature." FAA Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2.

Indeed, the no hazard determination even states that the recommendation "does not relieve the sponsor of compliance responsibilities relating to any law, ordinance, or regulation of any Federal, **State**, or local government body." App'x Exs J, L (emphasis added). This position is consistent with other federal and state precedent which has found that no hazard determinations "have '**no enforceable legal effect**'" and therefore preemption does not apply. *Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011) (emphasis added), citing *BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002); *see also*, *Davidson County Broadcast.*

v. Rowan County, 649 S.E.2d 904, 911, 186 N.C.App. 81 (N.C. App. 2007); *Carroll Airport Comm'n v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019) ("we decline to hold the FAA no-hazard determination preempted enforcement of local zoning requirements"); *Michigan Chrome and Chemical Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) ("The hazard/no hazard determination by the FAA encourages voluntary cooperation with the regulatory framework and is legally unenforceable") *citing Flowers Mills Assoc. v. United States*, 23 Cl. Ct. 182, 188-89 (1991). Reinforcing this position is the fact that the FAA rejected plaintiffs' request for environmental review because marking and lighting recommendations are only "advisory in nature." App'x Ex. E at 4; FAA Order No. 1050.1, *Environmental Impacts: Policies and Procedures* (July 16, 2015) at § 2-1.2.

Thus, the trial court erred in finding federal preemption based on an FAA document that makes recommendations with "no enforceable legal effect" and which explicitly states that it does not relieve CMP of the obligation to comply with state or local laws.

III. The trial court erred in holding that the FAA "has authority over all airspace," when the statute limits its authority to particular kinds of airspace.

In its Order, the trial court concluded that the "FAA has authority over all airspace, not just navigable airspace," citing 49 U.S.C. § 40103. Order at 10. But that statute does not stand for that proposition. Section 40103(a)(1) notes that the

"United States Government has exclusive sovereignty of airspace of the United States." But although the U.S. has sovereignty over all airspace, the FAA only has authority over three kinds of airspace: "navigable airspace" (40103(b)(1)), "airspace necessary to ensure the safety of aircraft" (*id*.), and "areas in the airspace . . . necessary in the interest of national defense" (40103(b)(3)).

Here, there is no indication that the towers fall in any of those areas of airspace. The towers do not fall within navigable airspace.[2] And they are not obstructions to air navigation.[3] Moreover, there has been no suggestion that they intersect air necessary for the national defense.

Instead, the trial court found – and CMP argues – that the FAA nevertheless maintains control because "it appears that the regulations presume that structures existing below navigable airspace could be a hazard to air navigation and establish a process for determining whether they are and providing safety standards." Order

[2] Under federal law, "[n]avigable airspace means airspace at and above minimum flight altitudes … including airspace needed for safe takeoff and landing." 49 U.S. Code § 40102. As described in the Complaint, the FAA's determination falls in line with the definition of navigable airspace as the minimum safe altitude for aircraft over a city, town, or settlement is 1,000 feet above the highest obstacle within a horizontal radius of 2,000 and, over open water, no aircraft may be operated closer than 500 feet to any person, vessel, vehicle, or structure, prohibiting air travel in the Chops Passage which is only 790' wide. 49 U.S. Code § 91.119. The FAA determined as much in a May 18, 2016, Traffic Pattern Report which classified the area as "No Traverseway." Complaint at Exhibit 8.

[3] 14 CFR § 77.17 specifies that an object is "an obstruction to air navigation" if it meets certain criteria. Objects under 499 feet AGL (like the towers at issue here) are only presumptively obstructions if within a certain distance of qualifying airports, within certain obstacle clearance areas, or the "surface of a takeoff and landing area of an airport or any imaginary surface established under § 77.19, 77.21, or 77.23." The towers do not, however, fall within surface of a takeoff and landing area of an airport or any imaginary surface defined by the regulations.

at 11. That may be true, and that process is what occurred here – notice was provided to the FAA (14 CFR § 77.9) and the FAA conducted a study. 14 C.F.R. § 77.25(b). But after such a process was followed, the FAA issued a finding of no-hazard to air traffic, which included recommendations with "no enforceable legal effect." App'x. Exs. J, L; *see also Town of Barnstable Mass. v. FAA*, 659 F.3d 28, 31 (D.C. Cir. 2011), citing *BFI Waste Sys. v. FAA*, 293 F.3d 527, 530 (D.C. Cir. 2002). It is at that point that the FAA's regulatory authority ceased beyond a continuing requirement to be noticed and potential conditional determinations. 14 C.F.R. § 77.31 (d)(I).

It would be different, however, if the towers were much closer to an airport. If they were, the lighting would become mandatory. But as CMP's expert agreed, "the Chop Point towers do not meet the requirements of 14 CFR Part 77 to automatically require lighting/marking because the towers are not located within the mandated distance from an airport." App'x. Ex. O at 2.

The trial court's assertion that the FAA has authority over literally all airspace goes far beyond the statute, and would absurdly result in granting the FAA authority over *all* air, including air one-foot off the ground. That conclusion, paired with the trial court's finding of field preemption, would eliminate Maine's law of nuisance in its entirety – except, perhaps, for nuisances that lie below the ground.

IV. The trial court incorrectly stated that federal law on FAA preemption "consistently" finds in favor of preemption.

In its Order, the trial court found that "[c]ase law at the federal level has consistently held that the Act preempts the field of airspace safety" and cites a handful of cases to that effect. Order at 8. But federal precedent is not nearly as settled as the trial court suggests.

Rather, many jurisdictions have found that local and state ordinances are not preempted simply because they affect aviation. *See, e.g., Faux-Burhans v. Cty. Comm'rs of Frederick County*, 674 F.Supp. 1172, 1174 (1987), aff'd, 859 F.2d 149 (4th Cir.1988) (finding no preemption of ordinances regulating the "size, scope, and manner of operations at a private airport"); *Gustafson v. City of Lake Angelus*, 76 F.3d 778, 789-90 (6th Cir. 1996) (FAA authority "does not of necessity lead to the conclusion that localities are no longer free to regulate the use of land within their borders, even where land use regulations may have some tangential impact on the use of airspace"); *Aeronautics Comm'n v. State ex rel. Emmis Broad. Corp.*, 440 N.E.2d 700, 704 (Ind.App. 1982) (holding that ordinances regulating the height of structures near airports were not preempted); *Hoagland v. Town of Clear Lake*, 415 F.3d 693 (7th Cir. 2005) (finding no preemption of local land use regulations of a helipad); *Davidson County Broadcast. v. Rowan County*, 649 S.E.2d 904, 911, 186 N.C.App. 81 (N.C. App. 2007) ("a majority of courts in the United States which have considered the issue have held that federal aviation law

does not preempt all local or state land use regulation which may affect aviation"); *Sikkelee v. Precision Airmotive Corp*., 822 F.3d 680 (3rd Cir. 2016). Successful federal preemption claims have generally been limited to those cases where attempts have been made to actually halt air commerce via such constraints as curfews or noise complaints. *See, e.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). The instant case attempts no such impingement on air traffic.

The trial court ignores a significant portion of federal precedent when it simply stated "[t]he FAA has been granted exclusive regulatory authority over the airspace of the United States." Order at 9. Clearly, there are limits to that authority and the trial court's failure to address whether this case falls outside of those limits resulted in error.

V. The trial court erred in that its Order was internally inconsistent with regard to field preemption and state-law remedies.

As the trial court noted, field preemption occurs where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." Order at 6, *quoting Arizona v. United States*, 567 U.S. 387, 399 (2012).

Here, the trial court found that because of the federal government's interest in regulating air safety, claims about the operation of the Chops Point Towers were

subject to "both field and conflict preemption." Order at 8. But the trial court also found that a party "could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations." Order at 11 (emphasis in original).

These two propositions – that claims about the Chops Point Towers are subject to field preemption, but that there could also be a common law remedy for noncompliance with FAA recommendations – cannot both be true. *Arizona, supra,* at 399 (field preemption means "no room" for state law enforcement). The trial court's acknowledgement of common law remedies in state court related to the operation of the tower's lights is a tacit admission that the FAA regulations and recommendations do not preclude state-law analysis of the subject.

VI. The trial court erred when it held that a party can sue for noncompliance with FAA recommendations – but then dismissed Plaintiffs' claim about noncompliance with FAA recommendations.

As described above, the trial court found that a party can "seek a common law remedy in state court" for a defendant's noncompliance with FAA regulations and recommendations. Order at 11 (emphasis in original).

But here, noncompliance with FAA recommendations is one of Plaintiffs' claims against CMP. The Complaint explains that according to the FAA, the "optimal flash rate for the brighter lights to flash simultaneously was determined to be between 27 and 33 flashes per minute." Compl. at ¶ 43, *quoting* James W.

Patterson, Jr., *Evaluation of New Obstruction Lighting Techniques to Reduce Avian Fatalities*, DOT/FAA/TC-TN12/9. U.S. Department of Transportation, Federal Aviation Administration Technical Note. (May 2012).[4] But Plaintiffs' complaint points out that CMP's lights flash at 60 flashes per minute – nearly double what the FAA has recommended as the upper end of what is appropriate. Compl. at ¶ 43. That excessive rate is one of Plaintiffs' core problems with the lights. *Id*. at ¶¶ 6, 9, 43.

But the trial court dismissed Plaintiffs' claims in their "entirety" (Order at 15), even though Plaintiffs were, in part, seeking a remedy for Defendant's *noncompliance* with FAA regulations and recommendations. Compl. at ¶¶ 45, 162-179. Because Plaintiffs are pursuing, in part, a claim that the trial court said is viable, the trial court's order should be reversed.

VII. The trial court erred in relying on its "intuition" to reach a conclusion unsupported by authority or logic.

The trial court noted that the FAA issued a determination that the towers were not hazardous on the condition that they were marked and lighted. Order at 9, referencing Compl. ¶ 46 ("As a condition to this Determination, the structure is to be marked/lighted"). "Marking" refers to the way the towers and powerline are

[4] This is confirmed in the FAA Advisory referenced in the Marking and Lighting Recommendation ("This dual lighting system includes red lights (L-864) for nighttime and medium intensity, flashing white lights (L-865) for daytime and twilight use"; FAA Advisory Circular 70/7460-1, L Change 2 , Obstruction Marking and Lighting, a med-dual system - Chapters 4,8(M-Dual),&12) and the corresponding flash rate (Table on page 1-1 https://www.faa.gov/documentLibrary/media/Advisory_Circular/150-5345-43J.pdf).

made more visible through use of paint, flags, and spherical devices on wires. FAA Advisory Circular 70/7460-1 at Ch. 2.7.2 – 3.5.2.[5] "Lighting" refers to the use of flashing or steady-burning lights. *Id*. at Ch. 4.

The "marking/lighting" proposal did not originate with the FAA; it was a proposal offered by CMP. Compl. ¶ 47. The FAA assessed that proposal and concluded that the towers would not be a hazard with the CMP-proffered system of marking and lighting. *Id*. at ¶¶ 45-48. And, indeed, it is not.

But the trial court went a step further and concluded that "[i]ntuitively, one would read the no-hazard determination's conditional language to mean that, absent lights meeting the FAA standard, the towers could qualify as a hazard to air navigation." Order at 9.

That is not, however, a logical or intuitive conclusion from the premise. The FAA assessed that the towers would *not* be a hazard with the proposed multi-element package. It does not follow that the towers *would* be a hazard without one element of that package.

For example, imagine that CMP had proposed equipping the towers with marking and lighting – and a hot-pink blimp tied to the towers. And suppose that the FAA, like here, determined that the towers would not be a hazard with those three elements. Would that mean the FAA had determined that the blimp was

[5]Available online at www.faa.gov/documentLibrary/media/Advisory_Circular/Advisory_Circular_70_7460_1M.pdf

essential, such that the towers would be a hazard with marking and lighting alone? It would not mean that. So, too, here. The FAA's determination that the towers are not a hazard with marking and lighting does not mean they *would* be a hazard with marking alone. The trial court did not cite any authority for its conclusion, and relied on intuition alone. Because that intuition is contrary to logic, the trial court's order should be reversed.

E. CONCLUSION

For the reasons stated herein, the trial court's order regarding FAA preemption should be reversed.

Respectfully Submitted,

/s/Bruce M. Merrill
Bruce M. Merrill
Law Offices of Bruce M. Merrill
225 Commercial Street, Suite 501
Portland, ME 04101 Phone : (207) 775-3333
Fax : (207) 775-2166
E-mail: mainelaw@maine.rr.com

William Most, *Pro Hac Vice*
David Lanser, *Pro Hac Vice*
Law Office of William Most
201 St. Charles Avenue
New Orleans, LA 70170
Phone:(504)509-5023
E-mail: williammost@gmail.com

ATTORNEYS FOR PLAINTIFF

CERTIFICATE OF SIGNATURE

Pursuant to Rule 7A(g)(1)(B), I, Bruce M. Merrill, have participated in preparing this brief and the brief, together with all associated documents, is filed in good faith and conforms to the page and word count limits.

/s/Bruce M. Merrill
Bruce M. Merrill
Law Offices of Bruce M. Merrill

CERTIFICATE OF SERVICE

Pursuant to Rule 7A(i)(1), I, David Lanser, certify that two printed copies of this brief have been served on Defendant.

/s/ *David Lanser*
David Lanser
Law Office of William Most