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STATE OF MAINE  
CUMBERLAND, SS.

SUPERIOR COURT  
CIVIL ACTION  
DOCKET NO. RE-16-292

LESLIE FISSMER, )  
Individually and as Trustee of the )  
LESLIE S. FISSMER REVOCABLE )  
TRUST )

Plaintiff, )

ORDER ON PLAINTIFF'S  
MOTION FOR CONTEMPT  
AND DEFENDANTS' MOTION  
FOR SANCTIONS

v. )

DAVID D. SMITH and )  
CUNNER LANE, LLC )

Defendants. )

STATE OF MAINE  
Cumberland ss. Clerk's Office

OCT 04 2016

RECEIVED

Before the court is Plaintiff's (hereafter "Fissmer") motion for contempt, M.R. Civ. P. 66(d), and Defendants' motion for sanctions. M.R. Civ. P. 11. An evidentiary hearing on the motion for contempt was held on September 30, 2016. Plaintiff was present with her attorneys. Defendants did not appear, save through their attorneys. Based on the following, Fissmer's motion for contempt is granted and as a natural consequence, Defendants' motion for sanctions is denied.

**I. FACTS**

As a result of Plaintiff's contemporary filing of a motion for temporary restraining order with the initial pleadings in this case, the Court issued a Temporary Restraining Order on August 22, 2016 at 9:23 a.m. Relevant to the present motion for contempt, the Order stated that "Defendants are further restrained from removing any post that was placed by Plaintiff near the end of Cunner Lane, near Plaintiff's property." Fissmer testified that on August 26, 2016, she observed Defendant Smith in the presence of his attorney, remove a 4"x4" wooden post very near the end of her driveway. Fissmer's testimony was undisputed and further corroborated by photographs she took of the

incident which were admitted as Plaintiff's Exhibits 1-6. Fissmer testified that she feels intimidated by Defendant Smith and that she is concerned about what she perceives as his flagrant disregard of a lawful court order and what that might portend for her peace of mind as the present lawsuit progresses.

Defendants did not call any witnesses and did not offer any other evidence. ~~Attorney Atkins' argument, which took on a different form than that made in his~~ opposition to Fissmer's motion, is that the post in question is some 26 feet from Fissmer's property and therefore does not fall within the court's proscription that Defendant not remove any post placed by Plaintiff located *near* Plaintiff's property, insofar as 26 feet is not near enough to be considered near Plaintiff's property.

## II. DISCUSSION

### A. Motion for Contempt, Rule 66(d)

A motion for contempt pursuant to Rule 66(d) may be granted if the court finds by clear and convincing evidence that (1) the alleged contemnor has failed or refused to perform an act required or continues to do an act prohibited by a court order, and (2) it is within the alleged contemnor's power to perform the act required or cease performance of the act prohibited.

The court finds by clear and convincing evidence that Defendant Smith has violated the Order and that it was well within his power to comply with the Order. Therefore, Defendant Smith is in contempt of the Temporary Restraining Order.<sup>1</sup> The argument that 26 feet is not near enough to fall within the prohibition of the Order is hollow and was only made at the hearing for the first time. As a practical matter, parties

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<sup>1</sup> Fissmer stated at the hearing that the post has been restored to its original position.

subject to a Temporary Restraining Order may reasonably be expected to conduct themselves more cautiously than to cavalierly act in a way that violates it under the auspices that the conduct falls just outside the prohibition. Second, the alleged conduct was performed by Mr. Smith while in the presence of his attorney of record in the present case, somewhat undermining the Defendant's original argument that he thought the post was on his property and therefore, he believed that he could remove it. On its face the Order does not admit to such a tortured interpretation. In fact the Order speaks of removal of a post near Plaintiff's property, which by definition would include posts on other people's property. Finally, there was no other post with which the Order's prohibition could reasonably have been confused. The post in question sits a couple of paces adjacent to Fissmer's driveway. The fortuity that the ownership of that land may be in dispute somewhat misses the point of a Temporary Restraining Order generally and this one in particular, which is to maintain the status quo while the underlying dispute is resolved in an orderly manner through the course of litigation.

As an alternative to coercive sanctions that are available under the Rule, the Court imposes the following remedial sanctions: attorney's fees and costs incurred by Fissmer arising out of or connected to the removal of the post, attempted communication between attorneys for the parties regarding the same, time expended on the motion for contempt and motion for sanctions, along with time to prepare for and attend the hearing on the motion for contempt.

### III. CONCLUSION


Based on the foregoing, Plaintiff's motion for contempt is granted.

Defendants' motion for sanctions is denied.<sup>2</sup>

The Clerk is directed to enter this Order on the civil docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Date: October 3, 2016

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Lance E. Walker  
Justice, Superior Court

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<sup>2</sup> Defendants' motion for sanctions is grounded upon the argument that the motion for contempt is frivolous. Because the motion for contempt is granted, Defendants' motion for sanctions is necessarily denied.