STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-82

PETER and KATHY MASUCCI, ET AL.,
Appellants/Cross-Appellees,

v.

JUDY'S MOODY, LLC, ET AL.,
Appellees/Cross-Appellants

On Appeal from the Cumberland County Superior Court
Docket No. RE-2021-00035

REPLY BRIEF FOR APPELLEE/ CROSS-APPELLANT OA 2012 TRUST

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I. INTRODUCTION

On OA 2012 Trust's cross appeal, OA Trust 2012 submits its reply to the responding briefs of appellants Masucci, et al. ("Appellants") and State of Maine, Office of the Attorney General ("State"). While the Appellants use the phrase "public trust" to describe the rights reserved to the public under the Colonial Ordinance, the State concedes that the Court has always viewed that those rights as in the nature of an easement. State Gray Br. at 4.

II. ARGUMENT

In responding to OA 2012 Trust's contention that the Superior Court erred in holding that Appellants Orlando Delogu, William Connerney, and Peter and Kathy Masucci had standing, Appellants misstate who has the burden to show standing. Appellants Gray Br. at 22 ("But no Appellee, individually or collectively, has shown that each and every Plaintiff has no standing as to each Defendant."). But Appellants have the burden to show standing. "[P]laintiffs bear the burden of establishing standing, which is determined based on the circumstances that existed when the complaint was filed." *Clardy v. Jackson*, 2024 ME 61, ¶ 12, --A.3d -- (quotations and citation omitted). This Court reviews standing de novo. *Id.* ¶ 11.

Despite the opportunity, Appellants offer no argument on how Appellants Orlando Delogu, William Connerney and Peter and Kathy Masucci present any real and substantial controversy specific to them, as opposed to the general public,

and have not articulated *any* injury that they have allegedly suffered, much less the requisite showing of "particularized injury" fairly traceable to the conduct of the OA 2012 Trust or any other beach defendant.[1]

The State with no claims of its own in this case asserts that Orlando Delogu, William Connerney and Peter and Kathy Masucci have standing because they have been affected by signs (State Gray Br. at 9-10), but the facts show that those signs have not in any way ever limited or stopped these four Appellants from walking, unfettered or not, whenever they want to, over any of the three intertidal properties.

The State does not dispute that the signs it points to, as creating an apprehension of "injury," are in substance the same signs that were in place and were the subject of the testimony in the *Bell* case 40 years ago, a case in which the State was a party. (A.0440, 0442, 0445-0446 (OA 2012 SMF 21, 34(f)))

Speculative apprehensions are not sufficient to confer standing, given that the speculation has not resulted in any instance where the Appellants have not walked, at will, on and over the wet sand of the OA 2012 Trust or the other two beach defendants. The State does not point to any instance where any of the four above named Appellants have been told to not walk, or been prevented from

[1] Appellants assert that Appellant Judith Delogu has "made use of the intertidal zone at Moody Beach." Appellants Gray Br. at 22. Although she made that assertion in her answers to interrogatories, at her deposition she corrected her answer and testified: "I have never been to Moody Beach." *See* Defendant Ocean 503 LLC's Reply In Support Of Request For Attorney's Fees and Costs (June 5, 2023) and exhibit A thereto (deposition transcript of Judy Delogu (Jan. 12, 2023) at 13, lines 15-16) (A.0044).

walking, on or over the wet sand at Moody Beach by the OA 2012 Trust or any of the beach defendants. The undisputed material facts show that OA 2012 Trust (as well as the other two beach defendants) has never asked, objected to, or prevented anyone from engaging in any recreational activity such as walking, running, bird watching, swimming, surfing and building sandcastles, on, over or across its tidal property. (A.0439, 0445 (OA 2012 SMF 19, 20)). Actions speak louder than words it is said, and the Appellants' actions here take the air out of the State's argument that the signs can be deemed to create a controversy so as to not render the State's request as one for an advisory ruling.

As such, relative to the relief the State seeks for the four Appellants, these Appellants do not provide standing for the State to seek declaratory judgment in their favor (again different in kind from the declaratory judgment that these four Appellants actually seek) that they have the right to unfettered walking over OA 2012 Trust's intertidal property and that of the other two beach defendants. Appellants in their Blue Brief at 47 and 48 concede that three defendants who own property at Moody Beach (OA 2012 Trust, Judy's Moody, LLC and Ocean 503 LLC) have never objected to the members of the public engaging in walking, running, bird watching, surfing and building sandcastles in the intertidal zone.

Given the absence of their standing, the Superior Court erred in not dismissing the claims for declaratory relief of Appellants Orlando Delogu, William

Connerney and Peter and Kathy Masucci. *See Dinan v. Alpha Networks Inc.,* 2013 ME 22, ¶ 16, 60 A.3d 792 ("The prohibition on issuing advisory opinions is consistent with our defined judicial power."). As the State conceded, if these Appellants lack standing there is no basis for the court to issue the declaratory relief that the State seeks in their favor. State Blue Br. at 29.

Moreover, a sign that says "No Loitering, No Dogs allowed" cannot plausibly be read as the State suggests to say "No Walking." The signs at OA 2012 Trust's property, and the other two beach defendants' properties, do not say "No Walking." And a sign at OA 2012 Trust's property that says Moody Beach is private property, so as to distinguish it from the immediately abutting Town of Ogunquit public beach (established after that town took the beach by eminent domain) (A.0438, 0444 (OA 2012 SMF 9), cannot create a controversy given the undisputed fact that OA 2012 Trust's predecessor in title obtained a quiet title judgment that its portion of the beach is private property. The Superior Court erred in concluding Appellants Orlando Delogu, William Connerney and Peter and Kathy Masucci have standing. *Almeder v. Town of Kennebunkport,* 2014 ME 139, ¶ 17, 106 A.3d 1099 (backlot owners lacked standing to seek declaratory relief as their interest was no different than the interest of any member of the public).[2]

[2] In *Almeder*, as here, the State did not bring any claim but advocated on behalf of the back lot owners' counterclaims. Contrary to the State's assertion (State Gray Br. at 8 n.4), those claims did include a claim seeking declaratory relief regarding the scope of rights reserved to the public

In responding to OA 2012 Trust's contention that the Superior Court erred in not dismissing Appellants' complaint against OA 2012 Trust for failure to join indispensable parties, Appellants and the State totally ignore and do not address the existence of the quiet title judgments of record for the prevailing parties in *Bell II.* The judgments are of record. (A.1408-1414) Appellants and the State fail to explain how the other prevailing twenty-seven lot owners or their successors in title are not indispensable parties, given that the relief they seek will nullify quiet title judgments of record to those twenty-seven properties.

In responding to OA 2012 Trust's contention that the Superior Court erred in not dismissing Appellants' complaint in toto against OA 2012 Trust as barred by *res judicata*, the State with no claims of its own asserts it can raise arguments on behalf of the Appellants that the Appellants never raised, and arguments that the State never raised below. And while not raised below, the State asserts that equity allows this Court to create whenever it wants to an exception to *res judicata.* The State fails to cite any example where any court in the land has recognized an untethered equity exception to allow claims barred by *res judicata* to be relitigated. Many unsatisfied litigants would eagerly embrace such an exception but as discussed in OA 2012 Trust's Red Brief dated August 2, 2024, at 10-11 and 42-44,

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under the Colonial Ordinance. *Almeder v. Town of Kennebunkport,* 2014 ME 139, ¶ 36, 106 A.3d 1099.

recognized exceptions are very limited to when someone is confined against their will or in domestic relations.

The State cites *Almeder v. Town of Kennebunkport,* 106 A.3d 1115 (Me. 2014), but that case did not involve *res judicata*. Instead, the issue in *Almeder* was whether on remand the town could request that the trial court determine the existence of a public easement on a parcel by parcel basis after the town clearly and consistently adopted and advanced the contrary view (even on appeal) that such proof was not required. This Court allowed the town to assert the inconsistent position, stating:

> *In this singular case*, *in which those representatives chose a litigation strategy that had a substantial gap*, equity demands that the matter should be remanded to allow the [Town] to present evidence as to the location of each Beachfront Owner's specific parcel, and to give the court an opportunity to consider the factual record of public use already developed, so that the court can determine whether the Town established —as to each of those specific parcels of property—the elements necessary to support a declaration of a public prescriptive easement.

Id. at 1121 (emphasis added). Leaving aside *res judicata* was not implicated in *Almeder*, as no final judgment had been entered, the State here makes no attempt to identify or articulate any "litigation strategy that had a substantial gap" in this case to warrant equity. That is because there is no gap. *Almeder* provides no support for the *res judicata* exception that the State seeks. *Res judicata* bars not only the Appellants' claims against OA 2012 Trust but also the State's efforts to seek a

judgment on their behalf on Count IV of the complaint, different in kind than that sought by the Appellants themselves.

III. CONCLUSION

For the reasons set forth above, and in OA 2012 Trust's Red Brief dated August 2, 2024, on OA 2012 Trust's cross appeal, this Court should vacate that portion of the Superior Court's Order on Justiciability (Jan. 26, 2024) holding that Appellants have standing, and remand for dismissal of the Plaintiffs' Complaint in its entirety for lack of standing and justiciable controversy or, in the alternative, for failure to include necessary parties and/or barred by *res judicata*. Appellant Judy's Moody, LLC joins in this brief.

Dated: September 13, 2024

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CERTIFICATE OF SERVICE

The undersigned certifies that on September 13, 2024, I caused two copies of the foregoing REPLY BRIEF OF APPELLEE/CROSS APPELLANT OA 2012 TRUST to be served on counsel for the parties listed below, pursuant to Rule 7A(i)(1) of the Maine Rules of Appellate Procedure via U.S. Mail, and an electronic copy, addressed as follows:

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