STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-82

PETER MASUCCI, et al.
Plaintiffs-Appellants

v.

JUDY'S MOODY, LLC, et al.
Defendants-Cross-appellants

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF PARTY IN INTEREST-CROSS-APPELLANT AARON M. FREY, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE

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INTRODUCTION

This appeal returns the Court to Maine's iconic 3,500-mile coastline along which intertidal land—land subject to the ebb and flow of the tides—buffers the upland from submerged land. Here, the fight over whether Maine's common law affords the public the right to walk such land rages on.

Maine's common law is a dynamic body of law that reflects the practical values of Maine people and the uniqueness of intertidal land. Although it allows private ownership of intertidal land, Maine's common law subjects ownership of intertidal land to public rights that change with the needs of society. These common-law public rights are often referred to as the public trust doctrine.

In *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 173-76 (Me. 1989), this Court held that the public trust right to intertidal lands was, at that time, limited to fishing, fowling and navigation. The Beachfront Owners would have *Bell II* freeze development of Maine's common-law public trust doctrine. That reading of *Bell II*—wielded by some against the public ever since—has spurred significant litigation over intertidal land in the decades following *Bell II*. Although *Ross v. Acadian Seaplants, Ltd.* "[did] not present [this Court] with the occasion to consider the vitality of *Bell II,*" 2019 ME 45, ¶ 33, 206 A.3d 283, this appeal does. It asks this Court to declare what the people of Maine know to be

true about our common law: In 2024, it affords us the right to walk, wander, and explore Maine's intertidal land – with or without our fishing poles, shotguns, and kayaks in hand.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The following recitation of facts consists of facts derived from the summary judgment record that are not genuinely in dispute. Moody Beach is an approximately 1.5-mile mostly sandy beach in Wells, Maine. (OA 2012's Opp. to Att'y General's (AG's) S.M.F. ¶¶ 1-2; Judy's Moody's Opp. to AG's S.M.F. ¶¶ 1-2; Ocean 503's Opp. to AG's S.M.F. ¶¶ 1-2.[2]) Listed south to north, the public may access Moody Beach from the Ogunquit parking lot, right of way 1, right of way 2 (ROW 2), and right of way 3 (ROW 3). (Beachfront Owners' Opp. SMF. ¶¶ 17-18; AG's Objection (Obj.) to OA 2012 Opp. S.M.F. ¶ 17.) OA 2012 Trust (OA 2012), Judy's Moody, LLC (Judy's Moody), and Ocean 503, LLC (Ocean 503) (collectively, Beachfront Owners) each own oceanfront property abutting a public access point to Moody Beach and each claim title to the low-water mark. (Beachfront Owners' Opp. S.M.F. ¶¶ 21-24, 27-29, 34-36.)

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[1] Because the appendix was not filed by the time this brief was sent to the printer, the citations in the Statements of Facts and Procedural History section of this brief are to the trial court record instead of to the appendix.

[2] In citations going forward, this brief collectively refers to the Beachfront Owners' Rule 56(h)(2) statements opposing the Attorney General's Rule 56(h)(1) statement of material facts as "(Beachfront Owners' Opp. S.M.F.)".

OA 2012's property is the first beachfront lot north of the Ogunquit parking lot. (Beachfront Owners' Opp. S.M.F. ¶¶ 34, 36.) OA 2012's predecessor in title is Jim Howe, who was a plaintiff in *Bell v. Town of Wells*. (AG's Opp. to OA 2012's S.M.F. ¶ 13.) Affixed to the seawall on OA 2012's property are two signs, one faces the ocean and the other, depicted below, faces the Ogunquit parking lot. (Beachfront Owners' Opp. S.M.F. ¶¶ 37-38.)

Judy's Moody's property abuts ROW 2. (Beachfront Owners' Opp. S.M.F. ¶ 29.) Sometimes affixed to the seawall at Judy's Moody's property are signs that read "PRIVATE BEACH," "No Trespassing," or "Private Beach No Trespassing." (Beachfront Owners' Opp. S.M.F. ¶¶ 30-32.) Judy's Moody also

uses large pieces of wood, cones, or raked seaweed to demarcate its shared boundary line with ROW 2. (Beachfront Owners' Opp. S.M.F. ¶ 33.)

Ocean 503's property abuts ROW 3. (Beachfront Owners' Opp. S.M.F. ¶ 24.) Affixed to the seawall on Ocean 503's property are two signs, one faces the ocean and the other, depicted below, faces ROW 3. (Beachfront Owners' Opp. S.M.F. ¶¶ 25-26.)

Peter Masucci, Kathy Masucci, and William Connerney live across the street from the Moody Beach; their properties are not oceanfront. (Beachfront Owners' Opp. S.M.F. ¶¶ 4-7.) They each walk the intertidal land at Moody Beach and do so for varying reasons: enjoyment, relaxation, stress relief, and physical health. (Beachfront Owners' Opp. S.M.F. ¶¶ 8-9, 11, 14, 16, 43, 46-47.) To access

Moody Beach, P. Masucci and K. Masucci (collectively, the Masuccis) typically use ROW 3, but they sometimes use ROW 2. (Beachfront Owners' Opp. S.M.F. S.M.F. ¶¶ 39-42.) Connerney typically uses ROW 2. (Beachfront Owners' Opp. S.M.F. ¶ 45.)

The Masuccis and Connerney have seen the signs and side boundary demarcations on OA 2012's, Judy's Moody's, and Ocean 503's properties. (Beachfront Owners' Opp. S.M.F. ¶¶ 48, 58, 64, 77, 86, 93, 98, 109-11, 116.) The signs and boundary demarcations convey the following message: You are not welcome here. (Beachfront Owners' Opp. S.M.F. ¶¶ 49, 58, 71, 73, 77, 88, 99, 113, 120; AG's Obj. to Ocean 503's Opp. S.M.F. ¶ 49.) Seeing the signs and side boundary demarcations makes them feel intimidated, uncomfortable, angry, and sad. (Beachfront Owners' Opp. S.M.F. ¶¶ 52, 64, 72, 74-75, 94, 119, 121.) They have also seen the police at Moody Beach and have heard anecdotal stories of people being asked to leave the intertidal land at Judy's Moody's and Ocean 503's properties. (Beachfront Owners' Opp. S.M.F. ¶¶ 53, 68, 83-85, 106-08; AG's Obj. to Ocean 503's Opp. S.M.F. ¶ 53.) They have not received permission to walk the intertidal land at OA 2012's, Judy's Moody's, and Ocean 503's properties. (Beachfront Owners' Opp. S.M.F. ¶¶ 57, 62, 67, 82, 92, 97, 105, 115, 118.) They worry that they may be asked to leave or move along by the

landowners or the police. (Beachfront Owners' Opp. S.M.F. ¶¶ 54, 59, 70, 73, 78, 89, 94, 102, 120.) All of this detracts from their walks. (Beachfront Owners' Opp. S.M.F. ¶¶ 55, 60, 65, 74, 76, 90, 95, 103, 112, 122; AG's Obj. to Ocean 503's Opp. S.M.F. ¶¶ 55, 65; AG's Obj. to OA 2012's Opp. S.M.F. ¶ 65.) P. Masucci no longer stops to gaze at the water when walking across the intertidal land at OA 2012's, Judy's Moody's, and Ocean 503's properties, and Connerney avoids or limits his use of the Ocean 503 intertidal land. (Beachfront Owners' Opp. S.M.F. ¶¶ 50, 101; AG's Obj. to OA 2012's Opp. S.M.F. ¶ 50.)

In 2021, the Masuccis, Connerney, and others who use intertidal land in Maine for recreational, commercial, and research purposes, including seaweed harvesting, filed a complaint against the Beachfront Owners and seven coastal landowners (the Coastal Owners), six of whom have asked law enforcement to remove seaweed harvesters from intertidal land to which they claim title, and one of whom maintains websites informing landowners that they may deny permission to harvest rockweed from their land.[3] (Pls.' Compl. ¶¶ 1-36.) The complaint pleads five counts: declaratory judgment (Count I); the alienation of all intertidal land in Maine violates the equal footing doctrine embedded in article IV, sections 1-3 of the United States Constitution (Count II); the

[3] The Coastal Owners, as compared to the Beachfront Owners, own property along the rockier sections of Maine's coastline where rockweed grows. (Pls.' Compl. ¶¶ 25-31.)

alienation of all intertidal land in Maine violates article III, sections 1-2 of the Maine Constitution (Count III); Maine's common-law public trust doctrine extends beyond fishing, fowling, and navigation (Count IV); and the Beachfront Owners and Coastal Owners do not hold title to the intertidal land adjacent to their waterfront property (Count V). (Pls.' Compl. ¶¶ 91-111.) The complaint names the Attorney General as a party-in-interest. (Pls.' Compl. ¶ 37.)

The Coastal Owners, except Jeffrey Parent and Margaret Parent (who were initially pro se), moved to dismiss the complaint pursuant to 14 M.R.S. § 556 (special motion to dismiss) and M.R. Civ. P. 12(b)(6). The Beachfront Owners each moved to dismiss the complaint pursuant to M.R. Civ. P. 12(b)(6). In its order docketed April 19, 2022 (Apr. 2022 Order), the Superior Court (Cumberland County, *O'Neil, J.*) dismissed plaintiffs Charles Radis, Sandra Radis, and Bonnie Tobey because they lacked standing; granted the Coastal Owners' special motion to dismiss and dismissed as moot their Rule 12(b)(6) motion; and granted in part and denied in part the Beachfront Owners' respective Rule 12(b)(6) motions. (Apr. 2022 Order 26.) More specifically, the court dismissed Counts II, III, and V against the Beachfront Owners for failure to state a claim.[4]

[4] The trial court did not address Count I beyond concluding that it "does not raise any legally cognizable claim and, instead notice pleads the form of equitable relief requested." (April 2022 Order 20 n.6.)

(*Id.* 20-24.) Count IV survived because, according to the Superior Court, this Court "has maintained a flexible approach to determining what public uses are allowed" on intertidal land, and "it is conceivable that movement related . . . activity may be an acceptable use." (*Id.* 24-25.)

The Parents later retained counsel and moved to dismiss the complaint pursuant to M.R. Civ. P. 12(b)(6). In its order docketed August 5, 2022 (Aug. 2022 Order), the trial court granted their motion in part and denied it in part such that, as with the Beachfront Owners, only Count IV survived against the Parents. (Aug. 2022 Order 2-5.)

All remaining parties moved pursuant to M.R. Civ. P. 56 for summary judgment on Count IV. (Trial Court Docket Record (Docket) 38-39.) The Attorney General's motion for summary judgment was supported by a statement of material facts, with each fact supported by a record citation. (AG's Supp.'g S.M.F. ¶¶ 1-129.) There are multiple parties in this case relevant to the Attorney General's motion: three Beachfront Owners and three plaintiffs. (*E.g.*, AG's Mot. Summ. J. 1-2.) To establish the existence of a justiciable controversy, the Attorney General's Rule 56(h) Statement (AG's Rule 56(h) Statement) provided the court with facts that placed each of P. Masucci, K. Masucci, and Connerney on each of the three Beachfront Owner's properties and demonstrated the effects of each Beachfront Owner's actions (e.g., signage and

other barriers) on P. Masucci, K. Masucci, and Connerney and their use of that intertidal land for walking. (AG's Supp.'g S.M.F. ¶¶ 8-9, 40-43, 45-60, 63-65, 71-80, 84-90, 93-95, 98-103, 106, 108-13, 116-22.) The court resolved the cross-motions for summary judgment in four separate orders docketed February 9, 2024. (Docket 48-49.)

In its order on justiciability (Justiciability Order), the trial court held that the Masuccis, Connerney, and Professor Orlando Delogu have standing to pursue Count IV against the Beachfront Owners because the Masuccis, Connerney, and Professor Delogu evidenced use of the intertidal land claimed by each Beachfront Owner "and specified the ways in which the private property signs and boundary markers located thereon have chilled their recreational use and enjoyment of that land."[5] (Justiciability Order 7-10.) The court ruled that the other remaining plaintiffs lack standing to pursue Count IV against the Beachfront Owners. (*Id.* 7-8, 10.) The court also held that none of the remaining plaintiffs have standing to pursue Count IV against the Parents and dismissed as moot the Parents' motion for summary judgment. (*Id.* 7-10.)

[5] Consistent with the Attorney General's participation in the trial court (*e.g.*, AG's Mot. Summ. J. 1-2), this blue brief focuses on the claims by plaintiffs Peter Masucci, Kathy Masucci, and William Connerney.

In its consolidated order on the Beachfront Owners' respective motions for summary judgment (Consolidated Order), the trial court dismissed Count IV against OA 2012 as barred by the claim preclusion branch of res judicata.[6] (Consolidated Order 5-9.) The trial court entered summary judgment in favor of Judy's Moody and Ocean 503 on Count IV. (*Id.* 8-9.) The court determined that there were no genuine disputes of material fact and that *Bell II* precludes a holding that the Masuccis and Connerney have the right to engage in general recreational activity, including walking, on the intertidal land to which Judy's Moody and Ocean 503 claim ownership. (*Id.*) Accordingly, the trial court noted that the Attorney General's claim that the public trust doctrine includes walking also fails. (*Id.* 9 n.3.)

The court summarily denied the Masuccis', Connerney's, and other plaintiffs' (consolidated) motion for summary judgment because the court regarded their 220-paragraph statement of material facts as, among other things, too long, repetitive, and unorganized. (Order on Pls.' Mot. Summ. J. 3-4.) The court also summarily denied the Attorney General's motion for summary judgment because the court regarded the Attorney General's 129-paragraph

[6] OA 2012's motion for summary judgment requested that the Court enter judgment in its favor on Count IV or, in the alternative, dismiss Count IV with prejudice. (OA 2012's Mot. Summ. J. 16.) It appears the trial court treated OA 2012's alternative request for relief as a motion to dismiss, granted that motion to dismiss, and dismissed as moot OA 2012's motion for summary judgment. (Consolidated Order 1, 9.)

statement of material facts as, among other things, too long, repetitive, and unorganized. (Order on Att'y General's Mot. Summ. J. 3-4.)

All plaintiffs except Sandra Radis, Charles Radis, and Professor Delogu appealed. Professor Delogu, the Attorney General, the Beachfront Owners, and the Coastal Owners, aside from the Parents, cross-appealed.[7] (Docket 50-53.)

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Maine's common-law public trust doctrine includes walking.

II. Whether claim preclusion bars Count IV against OA 2012.

III. Whether the court erred by summarily denying the Attorney General's motion for summary judgment on Count IV.

SUMMARY OF THE ARGUMENT

Maine's common law, including its public trust doctrine, is dynamic. *Bell II* declared the scope of Maine's public trust doctrine in 1989. It did not freeze development of the public trust doctrine, and it did not declare what is now the scope of the public trust doctrine. Following *Bell II*, both this Court's public trust jurisprudence and Maine's common law have evolved. The former has evolved by not strictly using the *Bell II* triumvirate (fishing, fowling, and navigation) to determine whether the public trust doctrine includes a particular use of intertidal land. And the latter has evolved such that, as of 2024, Maine's

[7] Although the Attorney General is a cross-appellant, he is filing a blue brief pursuant to this Court's Order Modifying Briefing Rules, dated May 15, 2024.

public trust doctrine includes walking. Ignoring this Court's post-*Bell II* jurisprudence, the trial court erred by concluding that *Bell II* foreclosed it from considering whether Maine's public trust doctrine has evolved by 2024 to include walking, which, using the analysis of either three-justice concurring opinion in *McGarvey*, it does.

Because Maine's common-law public trust doctrine is dynamic, and society and customs have changed since 1989, *Bell II* could not have adjudicated the scope of the public trust doctrine in 2024. *Bell II* determined the particular public uses comprising the scope of the public trust doctrine in 1989; it did not determine which public uses of intertidal land comprise the public trust doctrine in 2024. Thus, claim preclusion does not bar Count IV against OA 2012 even though OA 2012's predecessor-in-title was a party in *Bell II*.

Finally, where, as here, the Attorney General's motion for summary judgment presented issues of significant public importance, and the record revealed no genuine issue as to any material fact, the trial court has less discretion to summarily deny a summary judgment motion based on the court's view of the Attorney General's presentation of facts, especially where justiciability is being challenged. Consequently, where the AG's Rule 56(h) Statement was organized and fit within the requirements of Rule 56(h)(1),

especially given the number of parties in this case, the trial court abused its discretion by denying the Attorney General's motion for summary judgment.

ARGUMENT

First, the Attorney General presents a brief introduction to intertidal land. Intertidal land is that "land between the mean high-water mark and the mean low-water mark up to 100 rods." *Ross*, 2019 ME 45, ¶ 12, 206 A.3d 283 (quoting 12 M.R.S. § 572 (2018)). Intertidal land is dynamic, capable of many uses, and infused with unique public values. *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981); Rachel Carson, *The Edge of the Sea* 1 (1955) ("For no two successive days is the shoreline precisely the same."). Although intertidal land in Maine may be privately owned, it is incapable of regular fee ownership. *See Ross*, 2019 ME 45, ¶¶ 10-12, 206 A.3d 283; *Bell II*, 557 A.2d at 189 (Wathen, Roberts, and Clifford, JJ., dissenting) ("Such a public resource is not, and has never been, the subject of exclusive ownership."); *Opinion of the Justices*, 437 A.2d at 604, 607. Instead, intertidal land is subject to the public's rights to use such land for purposes determined by Maine's common law. *Ross*, 2019 ME 45, ¶¶ 12-13, 206 A.3d 283; *Opinion of the Justices*, 437 A.2d at 607. This branch of Maine's common law has its historical origins in the *jus publicum* and is referred to as

the public trust doctrine.[8] *Ross*, 2019 ME 45, ¶¶ 9-11, 206 A.3d 283. The scope of the public trust doctrine remains a subject of "debate, litigation, and judicial writing." *Id.* ¶ 13.

I. The trial court erred by concluding that Maine's common law public trust doctrine does not include walking intertidal land.

This Court "review[s] a ruling on cross-motions for summary judgment de novo, reviewing the trial court's decision for errors of law and considering the evidence in the light most favorable to the party against whom judgment has been granted in order to determine whether there is a genuine issue of material fact." *Atkins v. Adam*, 2023 ME 59, ¶ 11, 301 A.3d 802 (quotation marks omitted). Whether Maine's common-law public trust doctrine affords the public the right to walk intertidal land is a question of law. *E.g., Ross*, 2019 ME 45, ¶¶ 13-14, 33, 206 A.3d 283.

In its order on the Beachfront Owners' motions for summary judgment, the trial court erred by concluding that, pursuant to *Bell II*, Maine's public trust doctrine does not afford the public the right to walk intertidal land. (Consolidated Order 8-9 & n.3.) This error occurred because the court did not, as exemplified by *Ross*, use each analytical framework espoused in *McGarvey v.*

[8] Although submerged land is also subject to the public trust doctrine, *Harding v. Comm'r of Marine Res.*, 510 A.2d 533, 537 (Me. 1986), the focus of this appeal is the public trust doctrine as it applies to intertidal land.

Whittredge, 2011 ME 97, ¶¶ 49, 71, 28 A.3d 620, to determine whether walking is a public trust right. *Ross*, 2019 ME 45, ¶ 14, 206 A.3d 283. Had the court done so, it would have reached the correct holding on Count IV: Maine's public trust doctrine affords the public the right to walk intertidal land.

A. The trial court erred by not using each *McGarvey* analysis to determine whether the public trust doctrine includes walking.

In its order denying the Beachfront Owners' motions to dismiss Count IV, the trial court correctly observed that this Court "has maintained a flexible approach to determining what public uses are allowed" on intertidal land, and that "it is conceivable that movement related . . . activity may be an acceptable use." (Apr. 2022 Order 24-25.) The court later changed course and held that *Bell II* foreclosed the possibility that the public trust doctrine encompasses walking. (Consolidated Order 8-9.) This is error: *Bell II* declared the scope of the public trust doctrine in 1989, not in 2024; that 1989 opinion does not forever cement the *Bell II* triumvirate as the analytical framework for determining whether the public trust doctrine includes a particular use of intertidal land.

1. Bell II's triumvirate is confined to 1989.

From 1925 to the mid-1980s, this Court enjoyed a reprieve from disputes over the scope of the public trust doctrine. *See Bell II*, 557 A.2d at 187 (Wathen,

Roberts, and Clifford, JJ., dissenting). This reprieve ended in the 1980s when beachfront owners at Moody Beach sought a declaration limiting the scope of the public trust doctrine to only fishing, fowling, and navigation. *Id.* at 169. The town contended that the public trust doctrine includes a general recreational easement, but in 1989 this Court disagreed. *Id.* at 173. Over a three-justice dissent, the majority concluded that "[t]he terms 'fishing,' 'fowling,' and 'navigation,' liberally interpreted, delimit the public's right to use this privately owned land."[9] *Id.*, *compare with id*. at 189 (Wathen, Roberts, and Clifford, JJ., dissenting) ("The rights of the public are, at a minimum, broad enough to include such recreational activities as bathing, sunbathing and walking."). The Beachfront Owners seek to interpret *Bell II* as forever limiting the public trust doctrine to the triumvirate. (E.g. Judy's Moody's Mot. Summ. J. 10-12.) But such a reading of *Bell II* is unpersuasive and does not reflect the fluid nature of the common law. *Bell II* reflects a moment in time; it does not stand the test of time.

The public trust doctrine is part of Maine's common law. *Ross*, 2019 ME 45, ¶¶ 9-11, 206 A.3d 283; 12 M.R.S. § 571 (2024). The essence of the common law is growth because society and customs change. *E.g., State v. Bradbury*, 9

[9] Consequently, the Court in *Bell II* then declared the Public Trust in Intertidal Land Act (the Act), 12 M.R.S. §§ 571-573 (2024), an unconstitutional taking of private property. *Bell II*, 557 A.2d at 176-77. The Act, enacted by P.L. 1985, ch. 782, specifies that "[t]he public trust rights in intertidal land include . . . [t]he right to use intertidal land for recreation." 12 M.R.S. § 573(1)(B) (2024). Pointedly, the Legislature has not repealed the Act in response to *Bell II*.

A.2d 657, 658, 136 Me. 347 (1939) (explaining that Maine's common law "continually expand[s] with the progress of society" and "gives expression to the changing customs and sentiments of people."); *Funk v. United States*, 290 U.S. 371, 382-83 (1933) (extolling the flexible nature of the common law). As a part of Maine's common law then, Maine's public trust doctrine is necessarily imbued with the capacity for growth. *Bell II*, 557 A.2d at 188-89 (Wathen, Roberts, and Clifford, JJ., dissenting). Other states have likewise recognized that the public trust doctrine adapts over time. *E.g., Chernaik v. Brown*, 475 P.3d 68, 78 (Or. 2020) (public trust doctrine is adaptive); *Gunderson v. Indiana Dept. of Nat. Res.*, 90 N.E.3d 1171, 1188 (Ind. 2018) (same); *State of Vermont v. Cent. Vermont Ry., Inc.*, 571 A.2d 1128, 1130 (Vt. 1989) (same); *Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 355, 365 (N.J. 1984) (same).

Although the common law is declared by the Court, it is developed and extended by the people. *See Conant v. Jordan*, 107 Me. 227, 77 A. 938, 939 (1910) (explaining that, in declaring the common law, this Court adopted that which had been "extended by the public itself"). Anchoring Maine's public trust doctrine to the *Bell II* triumvirate would prevent this Court from acknowledging expansion of the public trust doctrine to include uses that cannot fairly be characterized as fishing, fowling, or navigation. *Bell II*, 557 A.2d at 188-89 (Wathen, Roberts, and Clifford, JJ., dissenting). Effectively, this Court would be

preventing the public from developing their common law.[10] Such a shackled result cannot obtain without this Court vitiating its relationship to the common law. *Moulton v. Moulton*, 309 A.2d 224, 228 (Me. 1973) ("[T]he judicial branch of government has the prerogative, often enlarged into the responsibility, of responding to new conditions of the present free of the constraints of instrumentalities carrying over from the past and which prevent the efficient and equitable fulfillment of modern needs."); *see King Res. Co. v. Env't Improvement Comm'n*, 270 A.2d 863, 871 (Me. 1970) (remarking that the Supreme Judicial Court, which is still the Supreme Judicial Court when sitting as the Law Court, is a common law court).

"The common law is . . . not a monolith admitting of no variation," nor is it "the proverbial legal fly frozen in amber." *Iowa Citizens for Cmty. Improvement v. State of Iowa,* 962 N.W.2d 780, 802 (Iowa 2021) (Appel, J. dissenting); *State of California ex rel. State Lands Comm'n v. Superior Court*, 900 P.2d 648, 663 (Cal. 1995). It instead is "the perfection of human reason," and reason does not abhor

[10] Not even the Legislature can so readily freeze growth of the public trust doctrine. A statute that foreclosed the public's ability to adapt the public trust doctrine to societal changes and needs would arguably curtail public trust rights. Such legislation would be strictly construed and subject to a "particularly demanding standard of reasonableness." *See Batchelder v. Realty Res. Hosp., LLC*, 2007 ME 17, ¶ 23, 914 A.2d 1116; *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981). Such action by the Legislature is not a current concern, however. The Legislature expressly recognizes the evolving nature of Maine's public trust doctrine. 12 M.R.S. §§ 571, 573(1)(C) (2024), *declared unconstitutional by Bell II*.

growth. *Pendexter v. Pendexter*, 363 A.2d 743, 749 (Me. 1976) (Dufresne, C.J., concurring) (quotation marks omitted).

The majority opinion in *Bell II* is best understood as capturing a particular moment in time—in 1989, Maine's public trust doctrine encompassed only the triumvirate—and not as forever anchoring Maine's public trust doctrine to the *Bell II* triumvirate. To conclude otherwise is inconsistent with the nature of Maine's common law. Indeed, as shown below, this Court's public trust jurisprudence has retreated from using the *Bell II* triumvirate to adjudicate the scope of the public trust doctrine.

2. Since Bell II, this Court has retreated from using the triumvirate to determine whether the public trust doctrine includes a particular use of intertidal land.

In *McGarvey*, this Court held that "as a matter of Maine common law, the public has the right to walk across intertidal lands to reach the ocean for purposes of scuba diving." 2011 ME 97, ¶ 1, 28 A.3d 620. The panel of six justices concurred in the judgment, but not the analysis. *Id.* Three justices used *Bell II's* triumvirate, broadly construed, as the analytical framework. *Id.* ¶¶ 71, 72 (Levy, Alexander, and Gorman, JJ., concurring). The other three justices, cognizant that this Court "had not, until *Bell II*, restricted" the public trust doctrine to the triumvirate, used an analysis that honors the dynamism of Maine's common law. *Id.* ¶¶ 37-39, 49-53 (Saufley, C.J., Mead, J., and Jabar, J.,

concurring). That analysis is two-fold: Is the activity in question readily fishing, fowling, or navigation? If not, does the activity "represent[] 'a reasonable balance' between the private and public rights to the intertidal zone"? *Ross*, 2019 ME 45, ¶¶ 15, 17, 206 A.3d 283 (*citing McGarvey*, 2011 ME 97, ¶¶ 37, 39, 49-50, 53, 56-58, 28 A.3d 620).

Next, in *Ross*, this Court concluded that the public trust doctrine does not include harvesting rockweed. 2019 ME 45, ¶¶ 1-2, 14, 33, 206 A.3d 283. To reach that conclusion, the Court did not strictly follow the *Bell II* triumvirate. Instead, the Court reached its conclusion by reference to each *McGarvey* analysis, while acknowledging that "'fishing,' 'fowling,' and 'navigation' . . . may . . . too narrowly describe the public trust doctrine." *Id.* ¶¶ 14, 16, 21-32.

In short, *Bell II* declared the scope of the public trust doctrine as of 1989, not as of 2024. As such, and because *Ross* is the most recent installment of this Court's public trust jurisprudence, the trial court erred by not mirroring *Ross* and analyzing walking using each *McGarvey* analysis.[11]

[11] Going forward, this Court should clarify that the governing analytical framework for determining whether the public trust doctrine includes a particular use of intertidal land is the more expansive common law approach urged by the *Ross* concurrence (Saufley, C.J., Mead, J., and Gorman, J.), the *McGarvey* concurrence (Saufley, C.J., Mead, J., and Jabar, J.), and the *Bell II* dissent (Wathen, Roberts, and Clifford, JJ.), and which *Ross* modeled. Making such a clarification is within this Court's authority and does not require this Court to overturn *Bell II's* holding that as of 1989 the public trust doctrine was limited to fishing, fowling, and navigation. *See Tuttle v. Raymond*, 494 A.2d 1353, 1360-63 (Me. 1985) (substantially modifying Maine's common law doctrine of punitive damages); *State of Wisconsin v. Picotte,*

B. Applying each *McGarvey* analysis yields the same result: The public trust doctrine includes walking.

Had the trial court followed the *Ross* framework, it would have concluded that the public trust doctrine includes walking under either *McGarvey* analysis.

1. In 2024, navigation, broadly construed, includes walking.

Following *Ross*, the first *McGarvey* analysis asks whether navigation, broadly construed, includes walking. *Ross*, 2019 ME 45, ¶¶ 20-21, 206 A.3d 283. The answer to that question is yes.

In the public trust context, this Court has interpreted navigation "to involve some mode of transportation, whether traveling over frozen intertidal water, passing on intertidal land to get to and from land or houses, or mooring vessels and loading or unloading cargo." *Id.* ¶ 22 (internal citations omitted). In each recognized example, "the primary activity is crossing the intertidal water or land itself." *Id*. Using that rubric, navigation includes walking: the primary activity of walking is crossing the intertidal land itself.

Additionally, because common law reflects societal development, in deciding whether navigation includes walking, it is instructive to consult a dictionary and the views of the parties to this appeal. Although navigation historically invoked ships and later aircraft, navigation—the act or practice of

661 N.W.2d 381, 387 (Wis. 2003) ("[B]y definition, common law is law subject to continuing judicial development.").

navigating—is now expansive enough to include walking, especially when broadly construed. *Navigate*, *Navigation*, American Heritage Dictionary of the English Language 1206 (3d ed. 1992) (defining navigate informally as "to walk"). K. Massuci, W. Connerney, Judy's Moody, and Ocean 503 tend to agree. (Beachfront Owners' Opp. S.M.F. ¶¶ 123-24, 126, 128 (remarking that navigation may include walking); AG's Obj. to OA 2012's Opp. S.M.F. ¶ 124.)

2. In 2024, walking represents a reasonable balance between private and public rights.

The second *McGarvey* analysis first asks whether navigation readily construed (as opposed to broadly construed) includes walking. *Ross*, 2019 ME 45, ¶ 28, 206 A.3d 283. Even assuming it does not, *but see Navigate*, *Navigation*, American Heritage Dictionary of the English Language 1206 (3d ed. 1992), the second *McGarvey* analysis then asks whether walking strikes "a reasonable balance between the private landowner's interests and the rights held by the State in trust for the public[]." *Ross*, 2019 ME 45, ¶ 28, 2019 ME 45 (quotation marks omitted). To reach the answer to that question—which is yes—the Court "considers contemporary notions of usage and public acceptance" and "avoid[s]

placing additional burden upon the shoreowner." *Ross*, 2019 ME 45, ¶ 30, 206 A.3d 283 (quoting *Bell II* dissent, 557 A.2d at 188-89).

Intertidal land is a unique place because of its proximity to the ocean. *Opinion of the Justices*, 437 A.2d at 607 ("[I]ntertidal lands are not fungible with lands in the interior."). When there, the sounds, smells, and views have the power to calm the mind and entrance new generations. Rachel Carson, *The Edge of the* Sea 2, 4 (1955).

Anyone who has watched a child arrive at the beach and bolt to the edge of the sea to explore bears witness to the majesty and allure of intertidal land. For those who enjoy the ocean, walking intertidal land is a simple pleasure that can be enjoyed by people of varying ages, abilities, and backgrounds. (Beachfront Owners' Opp. S.M.F. ¶ 10.) It is an antidote in these digital, anxious, and stratified times. (Beachfront Owners' Opp. S.M.F. ¶¶ 14, 16.)

Walking does not overburden the landowner. It is a transitory activity. It is an inherent part of already recognized public trust activities like loading and unloading cargo, clamming, reaching the ocean to scuba dive, and passage to reach houses. *See Ross*, 2019 ME 45, ¶ 22, 206 A.3d 283 (citations omitted); *Gunderson*, 90 N.E.3d at 1188; *Glass v. Goeckel*, 703 N.W.2d 58, 73-74 (Mich. 2005). It is not extractive. *Cf. Ross*, 2019 ME 45, ¶ 30, 206 A.3d (recognizing that removing something from intertidal land may place an "additional burden

upon the shoreowner") (quoting *Bell II* dissent, 557 A.2d at 188-89). Walking is an activity that can occur without disturbing any privately owned structures that may be located on intertidal land. *See McGarvey*, 2011 ME 97, ¶¶ 33, 35, 28 A.3d 620 (Saufley, C.J., Mead, J., and Jabar, J., concurring) (public may not interfere with wharves and piers on intertidal land). It is an activity that leaves behind nothing but footsteps that will be erased by the incoming tide. And it is already occurring on Moody Beach. (*E.g.*, Beachfront Owners' Opp. S.M.F. ¶ 9; Def. Judy's Moody's Mot. More Definite Statement 3.)

Declaring a public right to walk intertidal land "would not infringe on the property rights of adjacent riparian landowners." *Gunderson*, 90 N.E.3d at 1188; *see Ross*, 2019 ME 45, ¶¶ 40-41, 206 A.3d 283 (Saufley, C.J., Mead, J., and Gorman, J., concurring). Such a ruling would restore balance between the public and those fortunate enough to own oceanfront property, align this Court's public trust jurisprudence with Maine's common law as the public understands it, and hopefully quiet the significant and expensive litigation that *Bell II* catalyzed. *See Ross*, 2019 ME 45, ¶¶ 37, 40-41, 206 A.3d 283 (Saufley, C.J., Mead, J., and Gorman, J., concurring).

II. The trial court erred by concluding that claim preclusion bars Count IV against OA 2012.

This Court "review[s] a ruling on cross-motions for summary judgment de novo, reviewing the trial court's decision for errors of law and considering the evidence in the light most favorable to the party against whom judgment has been granted in order to determine whether there is a genuine issue of material fact." *Atkins*, 2023 ME 59, ¶ 11, 301 A.3d 802 (quotation marks omitted). This Court reviews de novo the trial court's conclusion that claim preclusion bars Count IV against OA 2012. *Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 7, 940 A.2d 1097.

"Claim preclusion prevents relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." *Id.* ¶ 8 (quotation marks omitted). At issue is here is the third element of claim preclusion.[12]

This Court evaluates the third element of claim preclusion by "examin[ing] whether the same cause of action was before the court in the prior case." *Wilmington Trust Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 8, 81 A.3d 371 (quotation marks omitted). "What factual grouping constitutes a transaction is

[12] The Attorney General does not contest the trial court's conclusion that OA 2012 satisfied the first two elements of claim preclusion.

to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, and motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Id.* (quotation marks omitted) (alteration omitted). Here, the trial court erred by concluding that Count IV was effectively presented in *Bell II*.

Causes of action that may appear similar at first blush are not necessarily the same. In *Wozneak v. Town of Hudson*, 665 A.2d 676, 677-78 (Me. 1995), this Court held that claim preclusion did not bar Wozneak's complaint for judicial review of the town's denial of his application for a 1992 junkyard permit because that claim was "separate and distinct" from Wozneak's prior complaint for judicial review of the town's denial of his application for a 1991 junkyard permit: "The 1992 denial could not have been the subject of judicial review in 1991 because it had not yet occurred." *Blance v. Alley*, 1997 ME 125, ¶ 6, 697 A.2d 828 (distinguishing *Wozneak*).

So, too, here. Count IV seeks a declaration as to the scope of the public trust doctrine in 2024. In contrast, *Bell II* adjudicated OA 2012's title to intertidal land and the scope of the public trust doctrine in 1989. As a result of *Bell II*, OA 2012's predecessor, Jim Howe, obtained a judgment declaring that he held title to the intertidal land abutting what is now OA 2012's property, that

such title is subject to the public's trust rights to that intertidal land, and that as of 1989 the public's trust rights were limited to fishing, fowling, and navigation. In contrast to *Bell II*, Count IV asks whether as of 2024 the public trust doctrine includes walking. *Bell II* did not and could not have adjudicated Count IV because, in 1989, the next thirty-five years of development of the public trust doctrine had not yet occurred. And courts cannot know, decades in advance, whether and how the public will develop their common law. *See McDonald v. McDonald*, 412 A.2d 71, 74 (Me. 1980) (stating truism that judges act on the matters before them); *Conant,* 77 A. at 939 (public extends common law); *Funk*, 290 U.S. at 383 ("[B]y its own principles[,] [the common law] adapts itself to varying conditions."). Consequently, Count IV is separate and distinct from the public trust claims adjudicated in 1989 in *Bell II.* Further, claim preclusion cannot forever freeze continued development of the common law, nor can it insulate OA 2012's intertidal property from such continued development: A declaration that the public trust doctrine includes walking will apply statewide. *E.g., Ross*, 2019 ME 45, ¶ 33, 206 A.3d 283.

For claim preclusion to bar Count IV against OA 2012, all three elements of the doctrine must be satisfied. *Wilmington Trust Co.,* 2013 ME 94, ¶ 7, 81 A.3d 371. Because OA 2012 did not satisfy the third element of claim preclusion, the trial court erred by dismissing Count IV against OA 2012.

Even if OA 2012 had satisfied all three elements of claim preclusion, claim preclusion still would not bar Count IV against OA 2012 because claim preclusion does not apply under the circumstances presented here. Claim preclusion "serves the critical policies of judicial economy, the stability of final judgments, and fairness to litigants." *Blance v. Alley*, 1997 ME 125, ¶ 4, 697 A.2d 828 (quotation marks omitted). *Bell II* has furthered none of those policies. Instead, it failed to produce a fair and workable resolution and—as predicted—it "has generated significant and expensive litigation" ever since. *Ross*, 2019 ME 45, ¶ 37, 206 A.3d 283 (Saufley, C.J., Mead, J., and Gorman, J., concurring). In such unusual situations, claim preclusion does not serve as a bar. *See* Restatement 2d Judgments § 26(f) & cmt. i. (Westlaw June 2024 Update).

Per *Bell II*, OA 2012 owns the intertidal land abutting its oceanfront property subject to the public's rights to use that property pursuant to the public trust doctrine, whatever that may consist of at any given point in time.

III. The trial court erred by summarily denying the Attorney General's motion for summary judgment on Count IV.

This Court "review[s] a ruling on cross-motions for summary judgment de novo, reviewing the trial court's decision for errors of law and considering the evidence in the light most favorable to the party against whom judgment has been granted in order to determine whether there is a genuine issue of

material fact." *Atkins*, 2023 ME 59, ¶ 11, 301 A.3d 802 (quotation marks omitted). This Court reviews for abuse of discretion the trial court's decision to deny summary judgment based on the presentation of a party's statement of material facts. *First Tracks Invest., LLC v. Murray, Plumb & Murray*, 2015 ME 104, ¶ 3, 121 A.3d 1279. Where, as here, significant policy issues are at stake, this Court's review for abuse of discretion should be "minimally deferential." *See* Hon. Andrew M. Mead, *Abuse of Discretion: Maine's Application of a Malleable Appellate Standard*, 57 Me. L. Rev. 519, 539 (2005).

By the time all remaining parties moved for summary judgment, it was understood that each Beachfront Owner would argue that no justiciable controversy exists between them and P. Masucci, K. Masucci, or Connerney.[13] (*E.g.*, Defs.' Judy's Moody's & OA 2012's Reply in Support of Mot. Dismiss 2, 4; Def. Judy's Moody's Mot. More Definite Statement 3, 4; Defs.' Combined Reply in Support of Mot. Reconsideration 2.) The absence of a justiciable controversy would preclude the court from entering a judgment as to the scope of the public trust doctrine. That outcome would not be in the public interest. *See Superintendent of Ins. v. Att'y Gen.*, 558 A.2d 1197, 1199-2000 (Me. 1989)

[13] Prior to summary judgment, Judy's Moody and Ocean 503 also sought more specificity regarding plaintiffs' use of the Judy's Moody intertidal land and the Ocean 503 intertidal land and how their actions prevented plaintiffs' use of such intertidal land. (Def. Judy's Moody's Mot. More Definite Statement 4; Def. Ocean 503 Mot. More Definite Statement 2.)

(acknowledging that the Attorney General has broad discretion to determine what is in the public interest). Therefore, to ensure that there were sufficient undisputed material facts in the record to establish the existence of a justiciable controversy, the AG's Rule 56(h) Statement contains facts that place each of P. Masucci, K. Masucci, and Connerney on each Beachfront Owner's property and demonstrate the effects of each Beachfront Owner's actions (e.g., signage and other barriers) on P. Masucci, K. Masucci, and Connerney and their use of that intertidal land for walking.

Moreover, the 129 separate statements of fact in the AG's Rule 56(h) Statement are organized, including with headings. (AG's Supp.'g S.M.F. 1, 3-4, 7, 9, 11-12, 15, 18, 21.) The AG's Rule 56(h) Statement also includes orienting facts "to present in a meaningful fashion the 'story' revealed by the material facts." *First Tracks Investments, LLC*, 2015 ME 104, ¶ 2, 121 A.3d 1279 (quoting *Stanley v. Hancock Cty. Comm'rs*, 2004 ME 157, ¶¶ 28-29, 864 A.2d 169). (Att'y General's Supp.'g S.M.F. ¶¶ 1-20.) In addition, each fact in the AG's Rule 56(h) Statement is properly supported by a record citation. (AG's Supp.'g S.M.F. ¶¶ 1-129.) The AG's Rule 56(h) Statement is not long, repetitive, or convoluted, as in *First Tracks Investments*. Under the circumstances of this case, a well-organized Rule 56(h) statement containing 129 separate statements of material fact fits comfortably within the requirements of Rule 56(h)(1). To wit, the Beachfront

Owner's respective statements of material fact when combined total 125 separate statements. (OA 2012's Supp.'g S.M.F. ¶¶ 1-34; Judy's Moody's Supp.'g S.M.F. ¶¶ 1-47; Ocean 503's Supp.'g S.M.F. ¶¶ 1-44.)

Despite the Beachfront Owner's qualifications and denials of and objections to the AG's Rule 56(h) Statement, and the Attorney General's response to same, the Beachfront Owners' respective opposing statements of material facts did not generate a genuine issue as to any material fact. Moreover, unlike in *First Tracks Investments*, the trial court would not have needed to make "herculean efforts" to review the AG's Rule 56(h) Statement and decide the Attorney's General's motion for summary judgment on the merits. As such, and because the legal issue presented in the Attorney General's motion for summary judgment—whether the public trust doctrine includes walking—is a significant policy issue, the trial court should have decided the Attorney General's summary judgment motion and, as per section I, *supra*, concluded that the public trust doctrine includes walking. Instead, the court abused its discretion by summarily denying the Attorney General's motion for summary judgment.

CONCLUSION

On Count IV, this Court should conclude that the public trust doctrine includes walking, vacate the judgment of the trial court, and direct the court to

enter judgment in favor of P. Masucci, K. Masucci, and Connerney and against OA 2012, Judy's Moody, and Ocean 503.

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Respectfully submitted,

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