MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Cum-24-82

Peter Masucci et al.
Plaintiffs/Appellants/Cross-Appellees

v.

Judy's Moody, LLC et al.
Defendants/Appellees/Cross-Appellants

On appeal from the Cumberland County Superior Court

Reply Brief of Appellants, Peter Masucci et al.

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I. Introduction and Argument

Appellees cite *Bell* early and often as monumental and immovable authority, while painting as dangerous and outlandish any suggestion otherwise. But concede they must that the jurisprudential foundation of *Bell* is weakened. (Judy's Moody Red Br. 13 "[T]he project of the *Bell II* dissent has gained steam in recent years"). Appellees spill more ink emphasizing precedent and *stare decisis* than defending *Bell*'s merits, which is telling. *Gamble v. United States*, 587 U.S. 678, 724-25 (2019) ("[P]roponents of *stare decisis* tend to invoke it most fervently when the precedent at issue is least defensible.").

According to Appellees, Plaintiffs are the wrong parties, blindly and frivolously challenging long-settled law. Their tone varies from dismissive to incredulous. But the proposition that is truly "out there" is that in a case[1] decided 193 years ago, a court seemingly without realizing the implications purported to waive a title claim belonging to the State without involving that indispensable party, freezing Maine common law to a moment in time over 180 years before statehood, and setting in constitutional stone, beyond the authority of the Legislature to modify, private and public rights in the intertidal zone forever. *Bell* has seemingly assumed a status equivalent to a

[1] *Lapish v. President of Bangor Bank*, 8 Me. 85 (1831).

constitutional amendment without any political or social process and without any evidence whatsoever that this was expressly contemplated much less intended by the Founders of the State of Maine. Appellants cannot be the only ones disturbed by that.

II. Title vested in the State in 1820 and has not been alienated.

Appellants' core title argument is that Defendants do not own the intertidal land that Plaintiffs use because, for among other reasons, title to intertidal land vested in the State of Maine upon statehood as a matter of federal constitutional law. Appellants posed the question, *when did title vest in upland owners*? (Blue Br. 30). No appellee has taken a firm position. Instead, because the case law is hazy, they offer a range of theories that the State's title claim was alienated (1) by Massachusetts before statehood; (2) at statehood by operation of the Act of Separation and Maine Constitution; or (3) by this Court in 1831 in *Lapish v. Bangor Bank*. Yet to maintain fealty to *Bell*, Appellees must ultimately argue with conviction the second theory, that upland owners in Maine acquired title at statehood.

Three problems arise: First, that would mean Massachusetts functionally alienated Maine's title despite the uniform line of U.S. Supreme Court cases that have held such pre-statehood conveyances of title would work an unconstitutional interference with state sovereignty, contrary to Equal Footing

doctrine and federal constitutional law principles. Second, that assumes Maine's Founders knowingly and intentionally ceded the State's title based on nothing more than implication upon implication—that the Colonial Ordinance was a grant of title[2] *and* that the Founders must have been mindful of *Storer v. Freeman* in crafting the Act of Statehood and Maine Constitution to relinquish any title claims by the State, despite no express language and not a scintilla of historical evidence to support such an interpretation of Article X. Third, *Bell* was the first Maine case that construed the Maine Constitution in a manner that purported to harmonize the dissonance between *Lapish* and the assumption of state ownership via Equal Footing. None of the 19th century decisions of this Court mention or even contemplate state ownership of intertidal land and none of those cases included the State as a party.

Appellees offer no authority for how a court, in the absence of the State as a party, could purport to waive or alienate a title claim belonging to a non-party—the state government. The Maine state courts can declare what the law is, but in no other known context are judges authorized to unilaterally waive or extinguish title claims belonging to state government.

[2] Contrary to Appellee Ocean 503's arguments (Ocean 503 Red Br. n.15), the argument that the Colonial Ordinance did not convey title (Blue Br. 26-33) was pled and asserted below (A. 134), and is thus preserved, not waived, in this appeal.

A. Maine took title to intertidal land via Equal Footing and the Supreme Court has never held otherwise.

A state automatically receives title to all intertidal lands upon statehood by operation of the federal constitution, i.e. Equal Footing doctrine. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012). Appellees cannot cite a single U.S. Supreme Court decision that endorses the theory that Maine could (or did) "opt out" at statehood because Massachusetts was the parent state. The U.S. Supreme Court has never squarely considered the disposition of title by Maine, or Massachusetts. It cannot be emphasized enough that *Bell II*, and now Appellees, are misinterpreting dicta[3] in the seminal case of *Shively v. Bowlby*:

> The rule or principle of the Massachusetts ordinance has been adopted and practised on in Plymouth, *Maine*, Nantucket and Martha's Vineyard, since their union with the Massachusetts Colony under the Massachusetts Province Charter of 1692.

152 U.S. 1, 19 (1892) (emphasis added). The *Bell II* Court mistakenly took that general reference to Maine to be the Supreme Court's endorsement of the Colonial Ordinance for the State of Maine, *Bell v. Wells* ("*Bell II*"), 557 A.2d 168, 172 n.11 (Me. 1989), but *Shively* was clearly referring to *the pre-statehood territory* of Maine vis à vis *Storer v. Freeman*, a Massachusetts case involving

[3] Appellees concede the statement is dicta. (Judy's Moody Red Br. 38.)

title to intertidal flats in Cape Elizabeth decided a decade before statehood. *Storer v. Freeman*, 6 Mass. 435 (1810). *Phillips Petroleum* referenced *Shively* in stating "many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago," but notably made no mention of Maine. *Phillips Petroleum Co.*, 484 U.S. at 483.

Appellees' title arguments conflate a state's assumption of title with a state's definition and development of public trust law. Although the Supreme Court has said that states may define public trust law, Appellees skip a step. Title and public trust often go hand in hand, but are distinct legal concepts. Equal footing is a federal law concept governed by the U.S. Constitution that governs the grant of title at statehood up to the ordinary high-water mark, while public trust law is a matter of state property law. *See PPL Mont., LLC*, 565 U.S. at 603 ("Unlike the equal-footing doctrine, however, . . . the public trust doctrine remains a matter of state law.") And for all the references to a state's authority to define public trust law, there is no support for the idea that this is exclusively a judicial branch function, as it has become in Maine.

B. Early cases did not even contemplate the State's title interest; *Bell* was the first to invoke the Maine constitution.

The early Maine cases considered upland owner title ownership to be a foregone conclusion; none considered state ownership or construed the Maine

constitution as expressly endorsing the Colonial Ordinance title rule. Instead, they viewed Maine as necessarily bound by Massachusetts law that preceded statehood. *See, e.g.*, *Lapish*, 8 Me. at 93 ("Ever since [*Storer v. Freeman*], as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question."); *Barrows v. McDermott*, 73 Me. 441, 448 (1882) ("[W]e could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State until it shall have been changed by the proper law making power . . . ."). The cases were all decided prior to *Shively v. Bowlby*, where the U.S. Supreme Court made crystal clear that new states entered the union and acquired title. 152 U.S. at 26.

With the benefit of *Shively*, and perhaps with *Phillips Petroleum* looming, the *Bell II* court construed the Maine Constitution to allow this result.[4] *Bell II*, 557 A.2d at 171-73. *Bell II*'s analysis did not derive from *Lapish* and the subsequent 19th century Maine cases, but was a new post-hoc rationalization necessary to make sense of them in response to Equal Footing. But none of the 19th century cases discussed the State's title claim and in no case was the State

[4] Appellees mount no response to Appellants' arguments regarding the *Bell II* Court's error in interpreting Article X (Blue Br. 22) and thus any arguments have been waived.

a party.[5] Appellees concede that this title rule developed in discrete title disputes involving the parties to the litigation. (PLNS[6] Red Br. 11 "[T]he Court's public trust cases are examples of core judicial activity, namely the adjudication of concrete property rights disputes between parties to litigation based on the interpretation of case law, statute, and constitution.").

C. The rule is a tool to adjudicate a property dispute that is at best a cognizable claim of title, <u>not</u> present title in fact.

Even taking the title rule at face value, in context, *Lapish* and cases thereafter did not alienate or convey anything, but merely applied a tool of interpretation to decide disputes as between those parties. (Blue Br. 31-33.) Upland ownership does not equal intertidal ownership, unless (1) the upland owner has a deed with a call to water, and (2) the grantor from whom they received title had good title to convey the intertidal. *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 38, 217 A.3d 1111.[7] Those are not minor

[5] *State v. Wilson*, 42 Me. 9, 26 (1856) was a criminal case concerning whether the Defendant's wharf unlawfully interfered with public passage on the Penobscot. That case contains the oft-truncated quote: "*Subject to this public right*, his title to the shore was as ample as to the upland." *Id.* at 28 (emphasis added). Two of the four appellees omit the rather material qualification "[s]ubject to this public right" which displays, in full view, the upland owner's regard for public rights. (Judy's Moody Red Br. 6, 7; OA 2012 Red Br. 8.)

[6] All references herein to Appellee Page, Li, Newby, and Seeley will be by abbreviation "PLNS."

[7] Contrary to Appellee Judy's Moody's argument (Judy's Moody Red Br. 8 n.4), *Almeder* does apply because if Count V is reached, Plaintiffs will show that Judy's Moody and other Defendants have deeds that merely added language referencing the water later, which is inadequate as a matter of law to generate the presumption. *Almeder*, 2019 ME 151, ¶ 38, 217 A.3d 1111.

qualifications. At best, an upland owner has a *cognizable*[8] claim of title, not title-in-fact. Setting aside for a moment that the factual record in this appeal is that these upland owners do not own the intertidal here (A. 139-40), this Court should view Appellees' passioned arguments about disrupting settled titles through the lens of what the rule actually means and does not mean.

D. The State cannot abdicate public trust authority.

The State cannot abdicate public trust authority and any grant of title to public trust lands to private parties is conditional and subject to caveats. Appellees misinterpret arguments based on *Illinois Central* and do not address the *Boston Waterfront* case at all. (Blue Br. 12-15.) Appellants do not contend that intertidal land can never be privately owned (Judy's Moody Red Br. 39); the argument is that even if conveyed, the State exercises a far higher degree of control over intertidal lands than Appellees appear willing to acknowledge, qualifying private property owners' protests of an unconstitutional taking.

Appellee Ocean 503 tries to distinguish *Illinois Central* on two grounds: First, that the case involved a grant to a single private party, rather than a grant to many private parties as apparently occurred in Maine. (Ocean 503 Red Br. 39.) There is nothing in *Illinois Central* or subsequent cases suggesting that the

[8] *Tomasino v. Town of Casco*, 2020 ME 96, ¶ 23, 237 A.3d 175 (defining "cognizable" as "[c]apable of being known or recognized" (Connors, J., dissenting) (quoting Black's Law Dictionary)).

corporate structure or motives of the private owner drove the decision or that a more diverse pool of owners would have changed the analysis or result.

Second, Ocean 503 argues that unlike Maine, the Illinois grant of title purported to surrender all state control over Lake Michigan. (Ocean 503 Red Br. 40.) Following *Bell* and Appellees' theory, all 3,400 miles of intertidal lands were conveyed to private property owners at statehood, which is the type of blanket grant that *Illinois Central* deemed void. *Illinois Central* says a state can only alienate public trust lands "without substantial impairment of the interest of the public in the waters." *Illinois Central R. Co. v. Illinois*, 146 U.S. 387, 435 (1892). Two years later, the Supreme Court reiterated emphatically that waters and lands granted to the States via Equal Footing "*shall not* be disposed of piecemeal to individuals as private property, but *shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State*." *Shively*, 152 U.S. at 49-50 (emphasis added).

Although not as extreme an abdication as in Illinois, *Bell* and the Colonial Ordinance framework significantly hampers if not neutralizes Maine's police power authority to regulate the public trust consistent with the public interest and benefit. The rule wrongly elevates private ownership rights as forever superior to public rights, thereby disabling the State from acting without charges of "taking." This is the ultimate tail wagging the dog.

E. The Legislature has reserved title to land conveyed by operation of law; intertidal land would be treated like submerged land.

A holding that the State of Maine assumed title by operation of Equal Footing would fall within 1 M.R.S. § 5 (reserving state ownership of "any area" by "any other provision or rule of law"). Except for parties with a valid conveyance from the State dated March 15, 1820 forward, title would be in the State. Intertidal land would be governed the same as submerged land,[9] which would allow, for example, upland owners to obtain leases for uses and improvements, if required prospectively by the State.

F. Maine has plenary authority to define the contours of public trust law, by modifying either title or use rules.

Even if Maine courts have authority to alienate intertidal lands, there is no support for the proposition that said authority is exclusive and that the common law cannot be modified by the Legislature. This Court contemplated repeal of the common law rule more than a century before *Bell*: "[W]e could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State until it shall have been changed by the proper law making power . . . ." *Barrows*, 73 Me. at 448. Only Ocean 503 openly concedes the Legislature has the power to change the rule (Ocean 503

[9] 01-669 CMR ch. 53 (2014) (submerged lands rules).

Red Br. 44), with the caveat that the State pay compensation. But if the State had no opportunity to assert title before that claim was given away by decisional law of the courts, why should the State (and taxpaying public) pay for what was already theirs?

III. The State's definition of public trust rights is not unconstitutional.

Only Appellee Judy's Moody meaningfully engages the argument that *Bell II*'s takings conclusion should be overruled and that recreational uses would not work an unconstitutional taking. (Judy Moody Red Br. 24-34.) There is no "taking" without a "having." Appellants maintain that property owners never had an unqualified right to exclude and that recreational uses are consistent with Maine common law. In any event, the Legislature has the authority to define, regulate, and broaden public trust rights.

Indeed, Appellees elsewhere concede that states can define public trust as matters of state property law. (Ocean 503 Red Br. 36; PLNS Red Br. 8-9.) "[I]t has been long established that the individual states have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *See Phillips Petroleum Co.*, 484 U.S. at 475. The Supreme Court's articulation of broad state powers to define public trust and private rights cannot be reconciled with Appellees' arguments that the very exercise of state authority constitutes a taking. Did Maine have only one opportunity to

define the law, after which any broadening of public rights would be unconstitutional? (Appellees likely would not object to a narrowing or a wholesale repeal of public trust.)

Appellees cite *not a single Supreme Court case* for the proposition that a shift in recognized public trust uses by the state effectuates a taking. The takings cases discussed are easily distinguishable as involving owners that had, and lost through government appropriation, fee simple absolute title with an unqualified right to exclude and no applicable background state property principle. Intertidal land is different.

Appellees concede that *PruneYard* is the most applicable precedent, but contend that the Supreme Court has "marginalized" the case "repeatedly." (Judy's Moody Red Br. 31.) Yet *PruneYard* remains good law. Most recently in *Cedar Point* the Court reiterated that the "per se" physical invasion rule only applies where the property is closed to the public, citing *PruneYard*. In *Cedar Point*, the business was not open to the public, and thus a state law that mandated employers allow union organizers access to their property was deemed a "regulation[] granting a right to invade property closed to the public" that implicated the *per se* rule. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 157 (2021).

Cedar Point also made clear that a physical invasion consistent with principles of state property law is constitutional. *Cedar Point*, 594 U.S. at 160 ("[M]any government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights."). "[T]he government does not take a property interest when it merely asserts a pre-existing limitation upon the land owner's title." *Id.* (citation and quotation marks omitted).

A claimed taking on public trust land open to the public and regulated by the State as trustee is precisely such a "background restriction" of state property law that burdens title and does not rise to a taking. State action over public trust uses "arise[] from some public program adjusting the benefits and burdens of economic life to promote the common good" *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), that easily passes constitutional muster. (Blue Br. 56-57.)

IV. Plaintiffs are engaged in lawful public trust uses.

Plaintiffs have established a factual record[10] of their recreational uses (A. 836-848) and Appellees concede that there are no material fact disputes.

[10] Ocean 503's argument that Plaintiffs failed to develop the factual record regarding uses sufficiently is at direct odds with the argument Plaintiffs' statements of facts were not "short and concise" warranting sanction. (Ocean 503 Red Br. 54-55, 59.) If Appellee is unclear about the when, where or how, the remedy was to obtain that information in discovery (which they did). The burden of showing an unreasonable interference with private rights is on owners, not public trust users.

(Judy's Moody Red Br. 4 n.3.) The fundamental debate regarding use concerns whether the fishing, fowling, and navigating triumvirate is illustrative of broad public uses or narrowly proscriptive of those uses expressly enumerated. In Appellees' telling, the scope of public trust rights was defined in the 1640s and any change would work an unconstitutional taking. That argument is not only wrong, but not even supported by *Bell*.

Prior to *Bell II*, this Court had upheld virtually every challenged public use of the intertidal,[11] holding otherwise only where the activity deposited waste, stored personal property, or took terrestrial resources clearly not within the ocean resources of the *jus publicum*,[12] and which therefore unreasonably interfered with or appropriated the *jus privatum*. *See Marshall v. Walker*, 93 Me. 532, 536-37, 45 A. 497, 498 (1900). Prior to *Bell*, the march of Maine common law was undeniably liberal regarding the scope of public rights, consistently rejecting owners' efforts to curtail access and use.

Andrews v. King was the last case before *Bell* to consider public rights for some sixty years. 124 Me. 361, 129 A. 298 (1925). In *Andrews*, the Court

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[11] *See, e.g.*, *State v. Lemar*, 147 Me. 405, 87 A.2d 886 (1952); *State v. Leavitt*, 105 Me. 76, 72 A. 875 (1909); *Smart v. Aroostook Lumber Co.*, 103 Me. 37, 68 A. 527 (1907); *Moulton v. Libbey*, 37 Me. 472 (1854); *Deering v. Proprietors of Long Wharf*, 25 Me. 51 (1845); *French v. Camp*, 18 Me. 433 (1841).

[12] *See, e.g.*, *McFadden v. Haynes & De Witt Ice Co.*, 86 Me. 319, 324, 29 A. 1068, 1068 (1894) (depositing ice scrapings); *Littlefield v. Maxwell*, 31 Me. 134, 139 (1850) (storing wood); *Moore v. Griffin*, 22 Me. 350, 352 (1843) (taking mussel bed manure not within public trust rights).

concluded that navigation allowed the landing of passengers on the flats, noting authority for mooring boats and loading and unloading cargo. Unlike the 17th century context of the Colonial Ordinance, when surviving was the primary if only contemplated public endeavor, by the 20th century, general recreation was coming into popularity, with leisure and vacation no longer reserved for the affluent. It makes sense then that *Andrews* felt the need to state explicitly that public trust uses were appropriate not only for business, but also for pleasure purposes. *Id.* at 364.

Before *Bell II*, this Court had not been directly confronted with a case about general recreation. The Court acknowledged that this presented a matter of first impression, with no clear positive or negative authority. *Bell II*, 557 A.2d at 174 ("The absence of direct Maine authority [for a public right to general recreation] is, at best for the Town, a neutral factor in our decision."). The 4-3 split represented competing interpretations of what the murky 19th century case law stood for; aside from the text of the Colonial Ordinance, which had never before restrained the court's recognition of public *access* rights, there was no compelling evidence or binding authority that the public's rights were limited to the fishing, fowling, and navigating triumvirate.

It is no exaggeration to say that upholding the use paradigm of *Bell* will mark the true beginning of the end of public trust in Maine. Upland owners

assert and advocate for an exclusive private beach. (A. 526, 531, 529.) An unbending rule, combined with current and future economic and environmental shifts will eventually make that a reality. Maine has a rich hunting tradition, but rare indeed would be a waterfowl hunter competing with other intertidal recreators given the practical and regulatory limitations. "Fowling" is not much of a right at all. "Fishing" will last only as long as there are living marine organisms to harvest. Given that the Gulf of Maine is one of the fastest warming water bodies on the planet, the prospect of a commercial fisheries collapse may be closer in our future than anyone would want to contemplate. Lastly, "navigating" in the traditional sense is primarily a submerged lands activity. That would leave few, if any, public uses to occur on the flats.

Justice Wathen lamented this reality in dissent. *Bell II*, 557 A.2d at 188-89 ("When the necessities of the 17th Century disappear and the emphasis moves from those historic activities to other uses no more burdensome, the common law rights of the public should remain vital. The citizens of Maine are still in need of sustenance, albeit, in a different form."). Will this Court restore common law public trust rights or allow them to wither?

V. Plaintiffs clearly have standing.

Standing in this case is a red herring of blue whale proportions. Appellees[13] make broad scatter-shot arguments that there is no standing or justiciable controversy. But no Appellee, individually or collectively, has shown that each and every Plaintiff has no standing as to each Defendant. So, while it may well be true that Plaintiff Peter Masucci is not seeking to harvest seaweed from the PLNS Defendants' property, that does not entitle Appellees to a dismissal as to other Plaintiffs, like Leroy Gilbert.[14] Appellants need only a single party with standing to advance the five counts in the complaint and that is amply established on this record even applying the unlawfully restrictive tests proposed by Appellees.

To the extent that Appellees contend Plaintiffs are unknown strangers, the summary judgment record establishes that Peter Masucci, Kathy Masucci, William Connerney, Orlando Delogu, Judith Delogu have all made use of the intertidal zone at Moody Beach, some generally along the length of the beach and others specifically identified Defendants and their signage. (A. 526, 529, 531, 838-848.) Appellants maintain that Plaintiffs William Griffith, Sheila Jones, Brian Beal, Susan Domizi, Amanda Moeser, Greg Tobey, Chad Coffin, Leroy

[13] The PLNS Appellees do not challenge standing; only the Moody Beach Defendants argued lack of standing and persist with those arguments on appeal.

[14] He clearly has standing, assuming the Court agrees that the trial court erred in granting Defendants' anti-SLAPP motions and thus bringing Defendant Newby back into the case.

Gilbert, John Grotton, Dan Harrington, Jake Wilson, George Seaver, and Robert Morse all have standing via their direct economic interest in the intertidal for work or research, or because their livelihoods depend upon public access and availability to intertidal resources, including seaweed.[15] (A. 845-46, 849-859.)

Appellees misconstrue the general rule that a claimant has standing only where "that person suffers injury or harm that is in fact distinct from the harm experienced by the public at large" *Nergaard v. Town of Westport Island*, 2009 ME 56, ¶ 18, 973 A.2d 735, to mean that Plaintiffs are no different from the public at large and therefore lack standing because other parties have rights in the intertidal zone.[16] This Court must reject Appellees' perversion of the standing rules, which, if credited, would close the courthouse doors to aggrieved parties seeking proper judicial relief.

Appellees elsewhere correctly concede that a member of the public's standing to adjudicate intertidal uses is a matter of first impression. (Ocean 503 Red Br. 21.) Cases in analogous contexts (*Fitzgerald, Black*) where individual members of the public that are users of publicly accessible land have

[15] Appellee OA 2012's argument (Red Br. 1 n.1) that not all Plaintiffs appealed is baseless. (A. 50.)

[16] Appellee OA 2012's invocation of *Almeder* (OA Trust Red Br. 21-23) is inapplicable to general standing because that analysis involved Rule 24 intervention where parties already in the litigation represented the same interests. Rule 24 is not at issue here. Additionally, *Almeder* involved a trial court record where the Court made findings regarding usage and signage that cannot be applied here, on a summary judgment record, which the Court must construe in Plaintiffs' favor.

standing establish Appellants' standing. Indeed, the same arguments made by Appellees were heard and rejected in *Black Bureau of Parks & Lands*, 2022 ME 58, ¶ 28, 288 A.3d 346 (rejecting CMP's argument that Plaintiffs had not alleged any use of the land or aggrievement warranting judicial intervention). This Court has long been unpersuaded by a textbook strategy to oppose environmental and land lawsuits that have broad public interest implications on standing grounds. *See Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 196 (Me. 1978) (distinguishing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). Appellants agree with and adopt those arguments of the Attorney General that *Black* and *Fitzgerald* cannot be read to narrowly apply only to instances where the AG is disabled from representing the public interest due to a conflict. (Ocean 503 Red Br. 22-24.) Neither case says or can be fairly read for that proposition. Ordinary standing rules apply and Plaintiffs meet them.

The Superior Court clearly has subject matter jurisdiction over this controversy concerning use and title to real estate. 4 M.R.S. § 105. Appellee's other justiciability arguments are contradicted by their vigorous—at times incredulous—arguments and positions in this case. Allegations of a manufactured controversy are belied by extensive briefing demonstrating the parties have very different perspectives of their legal rights. Appellees naturally would like to claim maximum rights without having to prove and

justify their claims in court. But to argue that absent arrest and prosecution (OA 2012 Red Br. 26), there is no justiciable controversy is wrong on the law, would be terrible policy if it were, and is patently absurd.[17] The Moody Beach Defendants,[18] through their unambiguous signs, claim and would like to continue to claim ownership of a private beach to the low water mark. In Appellants' view, Defendants' signage (A. 526, 531, 529) overstates their rights, even under *Bell*, and even assuming these upland owners benefit from the ownership presumption through their deeds (they do not). That is a classic controversy warranting court intervention; nothing manufactured here. This Court must view the record in the light most favorable to Plaintiffs; thus, Appellees proffered interpretations of the facts regarding the signage (OA 2012 Red Br. 23-24) is not consistent with Rule 56 and the applicable standard of review.

Appellee's arguments that Appellants lack standing to obtain a declaratory judgment regarding title depends entirely upon characterizing the claims as quiet title—which is not what was pled, and which this Court cannot

[17] Although unneighborly, litigants can sue their neighbor preemptively regarding the scope of an easement without ever having met them or discerned their position on the matter. The courts routinely hear and decide controversies before the police are called or someone breaks out a chainsaw, *Kinderhaus N. LLC v. Nicolas*, 2024 ME 34, ¶ 9, 314 A.3d 300, and that is in some situations a good thing.

[18] Judy's Moody, Ocean 503, and OA 2012 Trust.

accept given the applicable Rule 12(b)(6) standard. It is generally true that a declaratory judgment claim is not a vehicle to create a cause of action that does not exist, but that rule generally applies to disguised untimely Rule 80(b) appeals. *See, e.g.*, *Paul v. Town of Liberty*, 2016 ME 173, ¶ 14, 151 A.3d 924.

Appellees cite not a single case or authority for the proposition that a party with an interest in property (e.g. an easement) lacks standing to obtain a negative declaration that because the Defendant does not own the property, they must cease exercising dominion and interfering with Plaintiff's use and enjoyment of the property.

VI. This Court must overrule *Ross* in light of the applicable statutes.

A. Rockweed was characterized as a plant in *Ross*.

The PLNS Appellees first argue that there was no express stipulation that rockweed was a plant in *Ross* (PLNS Red Br. 15), which is odd because the opinion, citing stipulations of fact, states explicitly that "[r]ockweed is a plant." *Ross v. Acadian Seaplants Ltd.*, 2019 ME 45, ¶ 4, 206 A.3d 283. As a matter of law and science, that stipulation was wrong. This erroneous fact became legally significant when the Court, applying the Colonial Ordinance, concluded that "[h]arvesting rockweed—which the parties stipulated is a *plant*—is not a form of 'fishing.'" *Id.* ¶ 24. Buttressing that conclusion, the Court cited an oral argument concession that taking rockweed was no different from taking

terrestrial plants growing in the soil. *Id.* ¶ 27. Contrary to the PLNS Appellees' arguments, Appellants generated a record establishing that rockweed is *not* a plant (A. 855-56, 1240) and that is the record before this Court here, unlike *Ross*.[19]

B. Appellees offer no response to the assertion that the Law Court's common law analysis was incomplete.

Appellees do not respond to arguments that the Law Court's common law analysis was materially incomplete without a clearly applicable 1820 statute, R.S. ch. III, § 5 (June 14, 1820), or reconciling seemingly conflicting seaweed case law that is capable of harmonizing by simply distinguishing live seaweed from dead. (Blue Br. 60-61.) Any responsive argument is now waived.

C. This Court must consider 1 M.R.S. § 2(2-A) and 12 M.R.S. § 6001 in this appeal, with the result being different.

The PLNS Appellees postulate that because this Court heard arguments based on 1 M.R.S. § 2(2-A) and 12 M.R.S. § 6001 in *Ross* that were not adopted,

[19] Although the PLNS Appellees challenge Plaintiff George Seaver's affidavit (PLNS Red Br. 18), the trial court did not exclude the affidavit as inadmissible. His testimony was admissible for summary judgment purposes because this is a statement of fact, not an expert opinion, M.R. Evid. 701, and in any event, he would be qualified to provide such an opinion because he has worked in the seaweed industry for 44 years. *See* M.R. Evid. 702; (A. 855-56.) As to the PLNS Appellees' second argument, the DMR Management Plan *was* submitted to the trial court as a summary judgment exhibit and no expert affidavit is required for judicial notice. M.R. Evid. 201; (A. 1240; Ex. DD.) The PLNS Appellees do not meaningfully dispute the fact that rockweed is not a plant—instead they strangely deny that they ever stipulated to that fact, which would seem to admit rockweed is not a plant. (PLNS Appellees Red Br. 14-16.)

those arguments "need not be revisited here." (PLNS Red Br. 20.) This Court did not address the statutes but deemed those arguments waived and thus "not preserved for appellate consideration." *Ross*, 2019 ME 45, ¶ 5 n.2, 206 A.3d 283. Rejecting an argument on waiver grounds is far from any substantive determination that the statute did not control. Speculation about what the waiver conclusion implies is unsupported and inappropriate.

At least since 1975, the Legislature has identified intertidal seaweed including rockweed as a living marine resource that is *owned* and regulated by the State. 1 M.R.S. § 2(2-A); 12 M.R.S. § 6001(26)-(27). Relevant to the conclusion taking rockweed is not "fishing," Title 12 specifically defines "fish, the verb," as taking a "marine organism," which is defined as "any animal, plant or other life that inhabits waters below head of tide." 12 M.R.S. § 6001(17), (26). With the benefit of compelling authority—the 1820 statute, reconciling the cases, statutes showing the Legislature had spoken on and controlled the issue for nearly 45 years before *Ross*—this Court must overrule *Ross*.

D. Appellees mount implausible arguments to preserve *Ross*.

That considering the statutes compel a different result should be made clear by the implausible statutory arguments marshaled to avoid it. The PLNS Appellees argue that the Court should interpret "coastline" in 1 M.R.S. § 2(2-A) to mean from the low water mark seaward. (PLNS Red Br. 21.) That

interpretation violates multiple cardinal rules of statutory construction and would, as a practical matter, invalidate longstanding regulatory management of marine resources by the State as public trustee in the intertidal zone. *Corinth Pellets, LLC v. Arch Specialty Ins. Co.*, 2021 ME 10, ¶ 26, 246 A.3d 586 (reciting rules including that courts must avoid interpretations that would read language out of the statute or produce "illogical or absurd" results).

First, although undefined, interpreting "coastline" to exclude the intertidal is unsupported by the plain language to regulate the harvesting of "living resources of the seas" and would undermine the Legislature's clear intent by excluding a whole swath of marine life regulated in Maine's fisheries.

Second, such an interpretation directly conflicts with multiple material provisions of state law and would require reading those provisions out of legal existence. "Coastal waters" are defined as "all waters of the State within the rise and fall of the tide." 12 M.R.S. § 6001(6). "Marine resources" are "all renewable marine organisms," and "marine organisms" are "any animal, plant or other life that inhabits waters below head of tide." *Id.* § 6001(26)-(27). "Head of tide" extends even further than the coastal ocean intertidal zone, including "the inland or upstream limit of water affected by the tide." 36 M.R.S. § 1132(5); *cf. id.* § 1132(6) (defining intertidal). It would be beyond absurd for the Legislature to clearly delineate the far-reaching regulatory control over all

living resources within tidal limits, while intending that "coastline" in Section 2(2-A) applies only to areas from the low water mark seaward.

Third, even if there were any ambiguity (there is not), this Court must defer to DMR's longstanding and reasonable interpretation that the agency's regulatory oversight, licensing jurisdiction, and rulemaking authority applies to resources in the intertidal zone, which "is the only place rockweed grows" (PLNS Red Br. 23). *See Doe v. Bd. of Osteopathic Licensure*, 2020 ME 134, ¶ 10, 242 A.3d 182; 13-188 CMR ch. 29 (2009) (seaweed and rockweed).

The remaining arguments based on federal and state jurisdiction require little response. There is no indication that the Maine Legislature, in delineating the boundary for federal waters jurisdiction, thereby contemplated limiting DMR's regulatory authority. All indications above show otherwise. Federal law therefore has no bearing upon the question of the State's ownership and regulation of marine resources pursuant to 1 M.R.S. § 2(2-A).

E. There is no "taking" by restoring the designation of rockweed as a marine organism owned by the State.

Finally, overruling *Ross* would not effectuate an unconstitutional taking. There is no taking without a "having," and until 2019, Maine common law and statutory law held that seaweed was a public resource owned by the State. As noted above, property owners are always subject to background restrictions

imposed by state law and the police power, so state assertion of ownership of a public resource on public trust land is not a taking as a matter of law.

VII. The Trial Court erred in granting the Anti-SLAPP motion.

The PLNS Appellees argue that the trial court correctly granted their special motion to dismiss pursuant to 14 M.R.S. § 556. (PLNS Red Br. 25.) To be clear, Appellants have appealed the dismissal as to the Pages, Li, and Newby ("PLN") (Blue Br. 3-4, 66-69); the dismissal of Robin Seeley is not challenged in this appeal. Appellee's arguments specific to her are not addressed.

A. The claims are not "based on" the petitioning activity.

The sole question for this Court is whether phone calls to Marine Patrol about disputed property rights means that any lawsuit seeking a declaratory judgment concerning those disputed property rights are claims "based on" the calls, and subject to dismissal pursuant to 14 M.R.S. § 556. This Court should hold that the trial court erred in dismissing the claims on the basis they were based "at least in part" on phone calls to Marine Patrol about seaweed harvesting. The court's acknowledgment, consistent with a constitutional reading of the statute, requires this Court to vacate the dismissal because the claims are not entirely or even mostly "based on" the petitioning activity.

Appellants do not challenge that phone calls to law enforcement generally constitute "petitioning activity," or that the trial court erred in

applying the second step of the analysis. This appeal solely concerns the first step—whether the claims are "based on" the petitioning activity. If not, the statute does not apply, and thus the court necessarily erred in granting the special motion to dismiss.

This Court must avoid an unconstitutional interpretation of the statute and "when there is a reasonable interpretation of a statute that will satisfy constitutional requirements, [the Court] adopt[s] that interpretation." *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551 (citations omitted). Consistent with that rule, to establish that the threshold "based on" requirement is met, "the moving party must show that the claims at issue are based on the petitioning activities *alone* and have no substantial basis *other than or in addition to* the petitioning activities." *Town of Madawaska v. Cayer*, 2014 ME 121, ¶ 12, 103 A.3d 547 (citations omitted) (emphasis added). "This limitation on the applicability of the anti-SLAPP law has been discussed mainly in the context of the statute's constitutional implications, which require balancing of the moving party's right to petition with the nonmoving party's right of access to the courts." *Id.* A claim is "based on" petitioning activity when the content of the speech generates the alleged liability. *See Desjardins v. Reynolds*, 2017 ME 99, ¶ 11 & n.3, 162 A.3d 228 (defamation claim asserted by

public official alleging reports of intoxicated behavior to law enforcement were false and defamatory).

The trial court concluded that Plaintiffs' decision to sue the PLNS Defendants and not other landowners suggested that the claims were motivated "at least in part" by their calls to Marine Patrol. (A. 65.) That finding was not based on the factual record generated by the anti-SLAPP pleadings, but was simply the trial judge's commentary on Plaintiffs' choice of defendants. Even if supported by a factual record, claims even partially *related to* petitioning activity do not meet the test that the claims are *based on* "petitioning activities alone," without a "substantial basis other than or in addition to petition activities." *Cayer*, 2014 ME 121, ¶ 12, 103 A.3d 547.

The claim seeks a declaratory judgment about whether Plaintiffs can harvest seaweed and has a substantial basis irrespective of what Defendants said to Marine Patrol. The content of the petitioning activity speech—the reports—has no bearing on whether Plaintiffs or Defendants are correct in their legal dispute over harvesting seaweed in the intertidal zone. *Cf. Desjardins*, 2017 ME 99, ¶ 11 & n.3, 162 A.3d 228. The objective evidence and law, not the content of parties' subjective beliefs and advocacy positions expressed to third parties, control the adjudication of the claim for a

declaratory judgment that Plaintiffs may harvest rockweed in the intertidal zone that the PLNS[20] Appellees claim to own (they do not).

Additionally, Appellees misconstrue the Appellants' reliance upon *Hearts With Haiti*. (PLNS Red Br. 29-30.) That case is not factually analogous. Instead, that case stands for the proposition that even if a portion of the claim is based on petitioning activity, the statute does not apply. *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, ¶ 14, 202 A.3d 1189. There, the content of the speech *was* in part material to the defamation claims asserted. Even then, the statute did not apply where the claims were only *partially* based on petitioning activity. The trial court's concession here that the suit was seemingly "in part" based on petitioning activity, read together with *Hearts With Haiti*, and the constitutional right to access the courts, leaves only one conclusion: the trial court erred.

B. Appellees confuse "meritless" with a dispute on the merits.

Appellees' other arguments conflate "meritless" (i.e., frivolous) with "unmeritorious." (PLNS Red Br. 32.) The parties clearly disagree on the legal merits and the implications of *Ross* for their current dispute, but that does not place Plaintiffs in the category of claimants that "do not intend to win their suits" and file claims "solely for delay and distraction." *Thurlow v. Nelson*, 2021

[20] Minus Robin Seeley.

ME 58, ¶ 8, 2021 ME 58, ¶ 8, 263 A.3d 494. Far from it. Our seaweed harvesters and business owners believe, with ample legal authority, that *Ross* was wrongly decided and seek court redress to right the wrong.

VIII. The Indispensable Parties argument is a non-issue.

Only Appellee OA 2012 argues Plaintiffs failed to join indispensable parties. (OA 2012 Red Brief 27.) OA 2012 argues that all Moody Beach upland owners, and even all upland owners across Maine's 3,400 miles of intertidal coastline, were required to be joined. They fail to explain, how, if their articulation of the rule is correct, they obtained a judgment in *Bell* without joining every intertidal landowner in Maine. The court's adjudication of this case, despite potential statewide implications, directly affects only the current parties, and any other non-parties would not be bound by a judgment here. To accept Appellees' arguments would mean that in any case implicating a legal rule of general applicability, every potentially affected party would be indispensable. In any case where a point of landlord-tenant or employment law were at issue, every employer or landlord in the state would need to be joined. Besides creating an impractical rule that would be the antithesis of "the just, speedy and inexpensive determination of every action," M.R. Civ. P. 1, the argument is wrong on the law.

Rule 19 controls indispensable parties and joinder. M.R. Civ. P. 19. OA 2012 Trust does not apply Rule 19(a) or 19(b), instead jumping from the contention that because these non-parties own property that may be affected, they are *ipso facto* indispensable, and dismissal was required.[21] For the trial court to have dismissed based on Rule 19 would have required the court to (1) find those non-parties indispensable; and (2) conclude dismissal was appropriate because the action could not "in equity and good conscience" proceed without them. M.R. Civ. P. 19(b). The trial court correctly did not dismiss on indispensable party grounds.

If there ever were an indispensable party, it would have been the State of Maine in *Lapish*, where a court apparently alienated the State's title to intertidal land without the one party with a clear, direct interest in the same real estate by operation of Equal Footing doctrine.

IX. The court erred in denying Plaintiffs' summary judgment motion.

In defending the trial court's denial of Plaintiffs' motion for summary judgment on the basis they abused Rule 56, Appellees merely restate the trial

[21] Rather than apply Rule 19, which governs indispensable parties, OA 2012 cites a single case that is easily distinguished. *See Boothbay Harbor Condos., Inc. v. Dep't of Transp.*, 382 A.2d 848, 853 (Me. 1978). In that case, the Plaintiff asserted exclusive fishing and flowage rights to an area of Boothbay Harbor in which other property owners would or may also have fishing and flowage rights, which competing rights implicated the indispensable party rule. Title and use of the intertidal zone in this case is limited to the intertidal zone adjacent to Defendants' property, in which no party alleges any indispensable absent party has an interest.

court's order. (Ocean 503 Red Br. 59-60; OA 2012 Red Br. 47-50.) Neither the trial court (A. 115, 119) nor Defendants identified a single specific paragraph in the statements of fact that asserted a legal conclusion, opinion, hearsay, irrelevant, or repetitive facts, so it is difficult to formulate a response. The facts speak for themselves and neither the number nor their content warranted application of the rule stated in *Stanley* and *First Tracks*. The trial court abused its discretion.

X. Plaintiffs have standing to assert Count V.

Only Appellee Ocean 503 (Ocean 503 Red Br. 17) directly addresses the trial court's dismissal of Count V, which asserts that even if upland owners may own intertidal land, these upland owners do not. Because the claim was dismissed on a Rule 12(b)(6) motion, for purposes of this appeal and the standard of review, the factual record establishes that Appellees do not own the intertidal land at issue. This is a notice pleading jurisdiction, which merely requires factual allegations sufficient to state a valid claim. *Johnston v. Me. Energy Recovery Co., Ltd. P'ship*, 2010 ME 52, ¶ 16, 997 A.2d 741. The trial court must view the complaint in the light most favorable to the Plaintiff, *id.* ¶ 10, which means the court cannot construe or recast Plaintiff's claims to fit a Defendant's dismissal argument. That is what the trial court here did, despite acknowledging that quiet title was not what Plaintiffs pled. (A. 76.) Appellee

Ocean 503 holds the line, maintaining that a declaratory judgment action cannot adjudicate title issues in declaring parties' rights, but instead may only be decided in a quiet title action. (Ocean 503 Red Br. 17-20.) Assuming that the claim must be construed as quiet title, Ocean 503 argues that Plaintiffs lack standing to quiet title in a third party.[22] (Id.)

This Court interprets the Declaratory Judgments Act liberally to allow claimants to seek court declarations that bear upon their rights.[23] *Parker v. Dep't of Inland Fisheries & Wildlife*, 2024 ME 22, ¶ 12, 314 A.3d 208 ("A declaratory judgment may be either affirmative or negative in form and effect, and courts may issue them whether or not further relief is or could be claimed.") Regarding title, Plaintiffs have sought a negative declaratory judgment that Defendants do not own the intertidal land at issue. *See* 14 M.R.S. § 5953. The remedy is not to quiet title, but to confirm Plaintiffs are free to use the intertidal land without interference by Defendants, including by posting of signage. Defendants' absence of title bears a sufficient relationship and effect on Plaintiffs' rights for the court to enter a declaration; the fact that the underlying reason is that title resides in the State of Maine is one of several legal

[22] Ocean 503 cites *Oakes v. Town of Richmond*, 2023 ME 65, 303 A.3d 650 (Ocean 503 Red Br. 17), but that case stands for the proposition that a plaintiff *can* obtain a declaratory judgment that another party owns property at issue if ownership bears upon the declaration sought and plaintiff's rights. *Id.* ¶ 32.

[23] Provided that the claimant has standing and the claim is justiciable, which both are met in this case for the reasons discussed above and in Appellants' principal brief.

theories advanced in the complaint that Plaintiffs' use of the intertidal land is lawful. *Cf. Ross*, 2019 ME 45, ¶ 27 n.10, 206 A.3d 283 (stating that a quiet title action is not an action appropriate to adjudicate public ownership and public rights in intertidal).

The trial court erred in construing Count V as a quiet title claim and granting the motion to dismiss on that basis.

XI. The trial court erred in applying res judicata.

Appellants join the arguments of the Attorney General (AG Blue Br. 25-28) that the trial court erred in concluding that claim preclusion barred claims against OA 2012. Appellants agree that the policies underlying res judicata would not be served by a strict application of the doctrine in the public trust context, where common law and the state, public, and private interests change over time. Furthermore, Appellants were not parties to *Bell*, nor were their interests represented by the State or appointed Guardian Ad Litem in that case.

XII. Only the PLNS Appellees have a valid cross-appeal.

Lastly, the Court should dismiss the cross appeals of all parties except for the PLNS Appellees challenging the trial court's denial of their request for attorney fees.

"A cross-appeal must meet the same justiciability requirements as an initial appeal." *Tominsky v. Town of Ogunquit*, 2023 ME 30, ¶ 17, 294 A.3d 142.

A cross appeal is only necessary in cases where the appellee "seeks any change in the judgment." M.R. App. P. 2C(a)(1). "A cross appeal is generally not proper to challenge a subsidiary finding or conclusion when the ultimate judgment is favorable to the party cross-appealing." *Nat'l Union Fire Ins. Co. v. West Lake Acad.*, 548 F.3d 8, 23 (1st Cir. 2008).

In this case, the final disposition of all counts in Plaintiffs' complaint was judgment for Defendants. (A. 79-80, 101.) Defendants asserted no separate claims and thus the result was uniformly favorable to them; unsurprisingly, they do not request a change in that judgment. Appellees appear to assert that they should have received judgment sooner, or on different grounds, which is not a cognizable basis for a cross-appeal. The PLNS Appellees' cross appeal is different because they requested and were denied attorney fees. To preserve that issue on appeal, they were required to cross-appeal. *Town of Mount Desert v. Smith*, 2000 ME 88, ¶ 7, 751 A.2d 445 (party for whom judgment entered still required to cross-appeal to preserve argument trial court erred in not awarding attorney fees). Although that cross-appeal is properly before the Court, the trial court acted well within the bounds of discretion in denying fees.

This Court has interpreted the anti-SLAPP statute to confer discretion on the trial court in entertaining motions and relief. *See Bradbury v. City of Eastport*, 2013 ME 72, ¶ 18, 72 A.3d 512. "If the court grants a special motion

to dismiss, the court *may* award the moving party costs and reasonable attorney's fees . . . ." 14 M.R.S. § 556 (emphasis added). The use of "may" in the statute means an award of fees is discretionary, not mandatory. *Forest Ecology Network v. Land Use Regulation Comm'n*, 2012 ME 36, ¶ 33, 39 A.3d 74. Moreover, a trial court's decision on attorney fees is reviewed under the deferential abuse of discretion standard. *See, e.g.*, *Sulikowski v. Sulikowski*, 2019 ME 143, ¶ 22, 216 A.3d 893 (affirming denial of attorney fee request); *Fortney & Weygandt, Inc. v. Lewiston DMEP IX, LLC*, 2022 ME 5, ¶ 15, 267 A.3d 1094 ("[T]he trial court is in the best position to observe the unique nature and tenor of the litigation as it relates to a request for attorney fees.") A denial of fees is rarely, if ever, vacated. Instead, an abuse of discretion occurs where the trial court awarded fees without legal authority. *See, e.g.*, *Indorf v. Keep*, 2023 ME 11, ¶ 18, 288 A.3d 1214; *Sebra v. Wentworth*, 2010 ME 21, ¶ 18, 990 A.2d 538.

The trial court did not abuse its discretion in denying fees pursuant to the anti-SLAPP statute. The other cross-appeals should be dismissed.

XIII. Conclusion

For the foregoing reasons, the trial court erred. Appellants respectfully request that this Court vacate the judgment, and grant relief as set forth in Appellants' principal brief. (Blue Br. 78-79.)

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XIV. Certificate of Service

I hereby certify that on the date indicated below, I caused two copies of the Brief for Appellants to be served upon the following counsel of record via regular U.S. Mail and one electronic copy by email:

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XV. Certificate of Conformance

I hereby certify that although this brief exceeds 30 pages, the word count, excluding those portions of the brief excluded pursuant to Rule 7A(f)(3), does not exceed 9000 words.

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