



opinions and in some cases, is clearly unsupported by the decision itself. Plaintiffs agree with the State that this Court *can* look to *McGarvey*'s 3-3 concurring opinions to provide guidance in making its ultimate decision. Unfortunately, *McGarvey* will not ultimately offer any substantive guidance to the court in determining the ultimate question before it: whether the Plaintiffs hold title to the beach in front of their homes and if so, what rights the public has to use Plaintiffs' beach and intertidal property.

### ARGUMENT

The State's entire motion is premised on the argument that "*McGarvey* effectively abandoned the decision of the majority in *Bell v. Town of Wells* . . . upon which plaintiffs so heavily rely." State's Motion for Leave at 1. The State interprets both Chief Justice Saufley's concurring opinion and Justice Levy's concurring opinion to support this position. Thus, the State is taking the position that the Law Court has overturned its holdings in *Bell II*.

The State's interpretation and characterization of the *McGarvey* opinions fly in the face of Justice Levy's clear and unequivocal concurring opinion that "we should remain true to the doctrine of *stare decisis* and not effectively overrule our decision in *Bell II*." *McGarvey*, 2011 ME 97, ¶ 67 (emphasis added). Therefore, the Plaintiffs object to the State's supplemental memorandum and its characterization of *McGarvey*. The Plaintiffs argue that a full line by line rebuttal of the State's motion or supplemental memorandum is unnecessary. Instead, Plaintiffs simply urge the court to read the concurring opinions of *McGarvey* in forming its own conclusion as to its applicability to this case.

In doing so, Plaintiffs argue that there is no majority rationale in the *McGarvey* decision. The United States Supreme Court offers guidance for determining the binding effect of multiple concurring opinions with no clear majority: "[w]hen a fragmented Court decides a case and no


single rationale explaining the result enjoys the assent of [the majority of] Justices, the holding of the Court may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds . . .” *Marks v. United States*, 430 U.S. 188, 193 (1976) (internal quotations omitted) (citations omitted). Clearly, Justice Levy’s rationale provides the narrowest grounds in reaching the unanimous judgment in *McGarvey*, for its analysis—true to the doctrine of *stare decisis*—is consistent with the binding precedent of *Bell II*. Thus, to the extent the State relies on Chief Justice Saufley’s opinion, that opinion is non-binding case law.

### CONCLUSION

*Bell II* is still the law of the land. Specifically, Justice Levy’s opinion clearly reaffirmed *Bell II*’s holding that “[t]he terms fishing, fowling, and navigation . . . delimit the public’s right to use this privately owned land.” *McGarvey*, 2011 ME 97, ¶ 59 (quoting *Bell II*) (internal quotations omitted). Furthermore, no Law Court majority has ever agreed with the State’s position that the public rights to the intertidal zone are “public trust rights”.

Therefore, Plaintiffs respectfully request this Court deny the State’s Motion for Leave to File a Supplemental Memorandum in Support of [its] Motion for Summary Judgment.

DATED: November 14, 2011

  
\_\_\_\_\_  
Sidney St. F. Thaxter, Bar No. 1301  
Benjamin M. Leoni, Bar No. 4870  
CURTIS THAXTER LLC  
One Canal Plaza / P.O. Box 7320  
Portland, Maine 04112-7320  
(207) 774-9000  
Attorneys for Plaintiffs