STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER and VIRGINIA S. ALMEDER, et al.,

Plaintiffs

v.

TOWN OF KENNEBUNKPORT AND ALL PERSONS WHO ARE UNASCERTAINED

Defendants

DEFENDANTS RICHARD J. DRIVER'S AND MARGARETE K.M. DRIVER'S OBJECTION TO PLAINTIFFS' MOTIONS TO DISMISS AND STRIKE

INTRODUCTION

Richard J. Driver, pro se and Margarete K. M. Driver, pro se, by way of answer to the motion of the Plaintiffs say:

Plaintiffs have filed a motion to strike Count I of our counterclaim and various affirmative defenses in our answer to the complaint. Count I is identical to the first count of the Town's counterclaim and the first count asserted in both the Harris and Lachiatto counterclaims. Apparently, the Plaintiffs have singled out our Count I to challenge and have not raised the issue in their motions to dismiss and strike against any of the other Defendants.

The underlying complaint names as defendants "all persons who are unascertained" and who have or could assert a claim to use any portion of the beach. Except for specifically naming the Town of Kennebunkport as a defendant, the Plaintiffs have chosen to name no one else and everyone at the same time. The Plaintiffs cannot now be heard to object to individual defendants raising issues and affirmative defenses that are an outgrowth of their claims to exclusive use of the beach, subject only to the ancient rights of fishing, fowling and navigation. As regards separate defenses, the Plaintiffs fail to recognize that a defense not raised is a defense that is waived. Is there a supportable defense of laches? Probably not, but failure to assert the defense precludes arguing laches if it raises its ugly head during discovery. In their answer to the Town's counterclaim, the Plaintiffs assert the defense of statute of limitations. Does Plaintiffs' counsel actually believe there is a statute of limitations argument? Probably not, but he is being prudent and covering all bases because he does not know in advance all the issues that will appear in discovery. Motions to strike separate defenses have the appearance of being burdensome, unnecessary and over lawyering.

DISCUSSION

COUNT I (FEE SIMPLE)

Plaintiffs claim we do not have standing to raise the issue of fee simple ownership. The first argument is that we have pleaded a claim that only the Town can pursue. The second argument appears to be the absurd notion that standing is nonexistent because our property is "several blocks away from the beach." The second argument is not entitled to the dignity of a response. As to the first argument, the Plaintiffs in their two count complaint do not distinguish in their prayers for relief

the Town, individual defendants or the general public; their claims and demands for relief are against God and the world. We, as individual defendants, are part of the general public, and Count I is pled to encompass our rights as members of the general public. In footnote 2, the Plaintiffs acknowledge that they are pursuing discovery with the Town on the fee simple issue. Any decision on Count I should abide the factual and legal discovery that the Plaintiffs say they are engaging in with the Town.

DEFENSE 2 (STANDING)

The Plaintiffs again appear to be focused on the fact that our property is "several blocks away from the beach." What legal significance there is to such an argument or assertion escapes us. The Plaintiffs ask the Court to dismiss the separate defense of lack of standing on counsel's assertion that he included copies of deeds in the original pleading. There are potential legal and factual questions regarding ownership and/or manufactured ownership of land in the intertidal zone. Hypothetically, if one or more of the Plaintiffs had an original deed that did not include a description to the mean low tide or some such equivalent language, and a subsequent deed miraculously expanded the property description, there would be a question of standing to assert a claim to ownership of the intertidal property.

The Court has not ruled on any of the outstanding motions in order to permit a settlement conference to go forward. Among the outstanding motions are a number related to the Plaintiffs giving proper notice to all potential defendants. Despite the fact that we do not know who and how many additional parties will be part of the suit, the Plaintiffs are doing piecemeal motions to paper the file.

DEFENSE 7 (PUBLIC TRUST DOCTRINE)

Bell v. Wells, 557 A.2d 168 (Me. 1989) is an anomaly. The Court begins by saying that "the intertidal land [is] subject to an easement, to be broadly construed, permitting public use only for fishing, fowling, and navigation (whether for recreation or business) and any other uses reasonably incidental or related thereto." *Id.* at 169. The Court then goes on to recite with approval a series of cases that interpret the public trust as encompassing the right, for recreation or business, to dig for worms; travel over frozen waters; pick up and discharge passengers; the right to walk to or from a boat; and digging for shellfish. *Id.* at 173. After acknowledging a series of recreational uses, the Court then applies a narrow interpretation of recreation related to the colonial ordinance. The colonial ordinance, or more accurately, the common law adaptation of the 1647 Ordinance, precluded beachfront property owners from posting their intertidal properties. The general public was permitted unfettered access to the intertidal zone for what was then considered common uses. Clearly, fishing, fowling and navigation can be more burdensome to a property than walking, jogging, sunbathing and swimming, especially if the fishing, fowling and navigation are commercial activities. A narrow majority of the Court diminished the breadth of the public trust.

Arguably, we can traverse the intertidal zone with a shotgun for fowling, even though we cannot discharge the weapon because of the proximity to homes. We can take our fishing poles and beach chairs and sit in the intertidal zone and fish. Since we can navigate for "pleasure," we can launch a kayak from the intertidal area, and surfers can surf away from and to the intertidal zone. Assuming we had the proper license, we could ferry tourists from Portland or Oqunquit, or wherever to Goose Rocks Beach, even if they might not be permitted to recreate at the beach.

The dissent in Bell argues that the public had rights to the intertidal zone in common law prior to the 1647 Ordinance. *Id.* at 180. According to the dissent, the "common law rights were not displaced by the Ordinance and are broad enough to permit the activities described in the Public Trust in Intertidal Land Act." The dissent goes further and argues that there is no legislative act adopting the Ordinance in Maine, and its applicability arises out of "public acceptance and usage" and reliance on the two elements of "custom," namely, "long-continuing usage and tacit consent or general agreement." *Id.* at 183, 184. The now Chief Justice in a concurring opinion in Eaton v. Town of Wells, 760 A.2d 232 (Me. 2000) clearly argued for the reversal of Bell.

In seeking to strike the public trust doctrine as a defense, the Plaintiffs appear to be arguing that a Supreme Court decision is never and should never be revisited. That is a legally naïve argument at best. The heart of this case is the right of the public to use the intertidal zone and the dry sand for recreation. A defense to the declaratory judgment and quiet title counts of Plaintiffs' complaint is the existence of and the breadth of a public trust.

DEFENSE 9 (CUSTOM)

Paragraph 49 of the complaint reads "This claim is brought . . . to remove other claims by the general public and persons unknown for use of the property by grant, prescription, *custom*, or in any other way." (Emphasis added.) The majority in Bell leaves open the question of acquisition by custom, the dissent talks positively about custom, and the Public Trust in Intertidal land Act makes reference to acquisition by custom. Raising custom as an affirmative defense is legally

justifiable, especially considering that the Plaintiffs have raised the issue in their claim to quiet title.

DEFENSE 15 (LACK OF CONSIDERATION)

We agree to withdraw the defense of lack of consideration.

DEFENSE 16 (FAILURE TO PAY TAXES

The tax assessment records of the Town of Kennebunkport show that all, or nearly all, of the Plaintiffs are not assessed for the land between the breakwater or sand dunes and the mean low tide mark, and thus are not paying taxes for the intertidal area or the dry sand area of the beach. The upland properties where their homes are located are the entirety of their assessed properties. In many instances, the land that is assessed is a small fraction of an acre. One indicium of ownership and control of property is the paying of property taxes. An indication of the Town's recognition of ownership and control is assessment of property. There are issues of prescription, custom, easement, acquiescence and others that make the fact that the Plaintiffs are not assessed for and are not paying taxes on the property in dispute a relevant fact for the Court to consider.

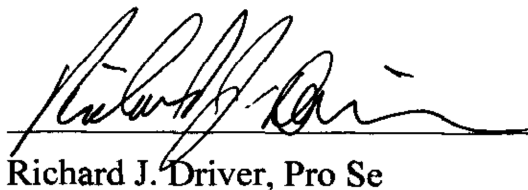
ATTORNEYS' FEES

The award of attorneys' fees is discretionary with the Court in the event a party abuses the litigation process.

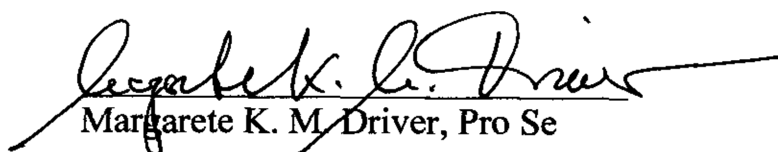
CONCLUSION

For all of the reasons set forth above, the Plaintiffs' motion to dismiss and strike should be denied.

Dated March 22, 2010



Richard J. Driver, Pro Se



Margarete K. M. Driver, Pro Se

We certify that on this 22nd day of March, 2010 a copy of the foregoing answer was forwarded to all counsel of record.

Richard & Margarete Driver
6 Marshview Circle
Kennebunkport, ME 04046
(207) 967-3580