

No. 127511

IN THE
SUPREME COURT OF ILLINOIS

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| Adam Holm, Daniel Holm, Loretta Holm, and Nick Holm, |) | On Petition for Leave to Appeal |
| |) | From the Appellate Court of |
| <i>Petitioners,</i> |) | Illinois, Third Judicial District |
| |) | No. 03-20-0164 |
| v. |) | There on Appeal from the |
| |) | Circuit Court of the 13 th Judicial |
| Peter Kodat, James Benson |) | Circuit, Grundy County, Illinois |
| Benson Marian Family Trust, |) | No. 18 CH 90 |
| Mark A. Norton, Wilfred K. |) | The Honorable |
| Robinson, and John Heath, |) | Eugene P. Daugherty |
| <i>Respondents.</i> |) | Judge Presiding |

BRIEF OF PETITIONERS-APPELLANTS

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E-FILED
12/8/2021 3:44 PM
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ORAL ARGUMENT REQUESTED

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NATURE OF THE ACTION

This case arose out of a dispute over whether Petitioners have the right to kayak over a portion of the Mazon River located on Respondents' properties. Petitioners and Respondents are all riparian landowners on the Mazon River. A riparian owner is one that owns land that either "includes part of the bed of a watercourse or lake" or owns "[l]and that borders on a public watercourse or public lake whose bed is owned by the public." *Black's Law Dictionary* (10th edition 2014).

The trial court originally ruled in favor of Petitioners, holding that *Beacham v. Lake Zurich Property Association*, 123 Ill. 2d 227 (1988), granted them the right to access the entire surface of the Mazon River for navigation purposes. C361. The trial court then reversed itself and applied common law principals on riparian rights to hold Respondents have an ultimate right to bar anyone from accessing the portion of the Mazon River on their property. C543. Petitioners filed a timely notice of appeal. C544.

In its published decision, the appellate court affirmed the trial court's grant of summary judgment to Respondents, holding that Respondents' riparian rights allowed them to bar access to portions of the Mazon River within their easily accessible property lines to any person, including other riparian owners. *Holm v. Kodat*, 2021 IL App (3d) 200164 ¶ 31.

This Court granted Respondent's Petition for Leave to Appeal.

There are no questions raised on the pleadings.

ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court erred when it failed to apply the civil law rule adopted in *Beacham* to this case.
2. Whether the appellate court erred when it failed to hold that Illinois common law allows a riparian owner to use the entire surface of a nonnavigable river for reasonable navigation purposes.

STATEMENT OF JURISDICTION

Jurisdiction lies under Illinois Supreme Court Rule 315. This Court allowed Petitioner's petition for leave to appeal on September 29, 2021.

STATEMENT OF FACTS

A. Party Information and the Mazon River.

Petitioners own two parcels of property on the Mazon River in Grundy County, Illinois. C11. The first parcel is landlocked, unimproved property on the Mazon River ("Landlocked Property"). C11. The second parcel is accessible from Oxbow Road and contains a portion of the Mazon River ("Access Property"). C12. Respondents own parcels of property downstream from the Access and Landlocked Properties on both sides of the Mazon River. C13-14. Downstream from both Petitioners' and Respondents' properties, Grundy County owns and maintains a public right of way and easement on both sides of the Pine Bluff Road Bridge where it crosses over the Mazon River. C14.

The Mazon River is 28 miles in length and is a tributary of the Illinois River. C10. The lower portions of the Mazon River contain significant exposed portions of Francis Creek Shale with large fossil deposits. C11. The Francis Creek Shale portion of the Mazon River fossil bed includes well preserved fossils from the Pennsylvanian period of the Paleozoic era. C11. The Mazon River fossil bed is a world famous Lagerstätten site (a sedimentary deposit that exhibits extraordinary fossils with exceptional preservation). C11. A portion of the Mazon River was declared a National Historic Landmark in 1997. C11.

Petitioners hunt for valuable and unique fossils on both the Landlocked Property and the Access Property. C14. The Landlocked Property, due to it being landlocked and not readily accessible, contains a large cache of quality fossils. C14. Petitioners access the Landlocked Property by putting kayaks into the Mazon River at the Access Property and kayaking downstream to the Landlocked Property. C14. At the Landlocked Property, Petitioners load fossils onto their kayaks. C14. From the Landlocked Property, Petitioners kayak over portions of the Mazon River located on Respondents' property to reach the Pine Bluff Road Bridge. C13-14. Once at the Bridge, Petitioners beach their kayaks on the public right of way and remove the collected fossils. C15.

On September 24, 2016, at approximately 2:48 pm, a Respondent called the Grundy County Sheriff's office regarding two Petitioners kayaking

on the Mazon River in front of his property. C128. Grundy County Sheriffs responded to the call and informed the Petitioners that they were trespassing by kayaking, even if they remained in the kayaks and never went on land. C129.

B. Proceedings in the Trial Court.

The dispute led to Petitioners filing a Verified Complaint for Declaratory, Injunctive, and Other Relief (“Complaint”). C10. The Complaint asked the trial court to declare that Petitioners, as riparian owners, have a right of access to the portion of the Mazon River flowing over Respondents’ property. C10. Petitioners later filed a First Amended Verified Complaint for Declaratory, Injunctive, and Other Relief (“Amended Complaint”) on December 21, 2018. C123. The Amended Complaint made several additions and clarifications to the Complaint but requested the same relief. C130.

With the pleadings finalized, all parties filed cross-motions for summary judgment. C209, C284. On October 9, 2019, the trial court granted Petitioners’ motion for summary judgment, holding that *Beacham* applied and that the civil law rule gave respondents the right to access the entire surface of the Mazon River. C361, R17. Respondents subsequently filed several pleadings requesting the trial court reconsider its ruling. C365, C408, C453. On March 10, 2020, after reviewing caselaw provided by Respondents, the trial court concluded that *Beacham* did not control, and

instead applied common law precedent to hold that Respondents had an absolute right to exclude Petitioners from accessing the portions of the Mazon located on their property. R71, R66-67.

Petitioners filed a timely Notice of Appeal on March 31, 2020. C544.

C. The Appellate Court's Decision

The appellate court stated that this "narrow issue of first impression can be decided by applying the rationale that has been employed for over a century with respect to riparian rights and the navigability of Illinois rivers and streams." *Holm v. Kodat*, 2021 IL App (3d) 200164 ¶ 17. The appellate court affirmed the trial court's entry of summary judgment in favor of Respondents, holding that "the riparian owner of each individual parcel of private property, situated along the Mazon River, may lawfully bar access, within their easily ascertainable property lines, to any person, including their riparian neighbor." *Id.* ¶¶ 32, 33. The appellate court declined to apply the civil law rule adopted in *Beacham* because unlike a natural lake, there were no issues establishing definite property lines on the Mazon River. *Id.* ¶ 27. The appellate court also noted, without elaboration, that *Beacham's* rationale of allowing riparian owners to enjoy the entire surface of a lake does not necessarily apply to a narrow, nonnavigable river, like the Mazon. *Id.* ¶ 27. The appellate court did not address Petitioner's argument that Illinois common law supports a rule allowing riparian owners access portions of a non-navigable waterway over other riparian owners' property for navigation.

This Court allowed Petitioner’s petition for leave to appeal on September 29, 2021.

STANDARD OF REVIEW

When cross-motions for summary judgment are filed, the parties “mutually concede that there are no genuine issues of material fact and that only a question of law is involved.” *Gurba v. Community High School District No. 155*, 2015 IL 118332 ¶ 10 (citing *Pielet v. Pielet*, 2012 IL 112064 ¶ 28).

The Court reviews decisions on motions for summary judgment *de novo*. *Id.*

ARGUMENT

I. Applying the Civil Law Rule to the Mazon River Protects Respondents’ Property Rights While Ensuring Petitioners’ Right to Enjoy the River in a Reasonable Manner.

Applied to this case, the civil law rule adopted in *Beacham* would allow Petitioners and their licensees to access the portions of the Mazon River located on Respondents’ properties in a reasonable manner. Petitioners’ specific request for relief in the trial court asked for the opportunity to briefly kayak over the portions of the Mazon River located on Respondents’ property while traveling towards the Pine Bluff Road Bridge. In the event Petitioners’ use of this right of access became unreasonable, the civil law rule provides Respondents with an avenue to end that right of access by requesting a court to declare the use unreasonable. Applying the civil law rule adopted in *Beacham* protects the rights of both parties and allows the full enjoyment of

the Mazon River by all riparian owners, and embraces *Beacham*'s goal of promoting the recreational use of valuable natural resources.

In *Beacham*, this Court held that allowing riparian owners the full use of the surface of a natural lake fostered “the cooperative and mutually beneficial use of that important resource.” *Beacham*, 123 Ill. 2d at 232. Lake Zurich, the subject of the dispute in *Beacham*, is a private, nonnavigable body of water covering about 240 acres in Lake County. *Id.* at 228. The plaintiff owned a business which rented boats to the public for use on Lake Zurich. *Id.* The plaintiff sought a declaration that, as a riparian owner of part of the lake bed of Lake Zurich, she and her licensees were entitled to reasonable use of the entire lake, including the waters above other riparian owners' portion of the lake bed. *Id.* The defendants, a property owners association, engaged in efforts to prevent plaintiff and her licensees from using the entire lake, including attempting to have the plaintiff prosecuted for trespass. *Id.*

After noting the issue before it was a matter of first impression, this Court turned to the decisions of other States on the issue for guidance. *Id.* It reviewed the two rules applied by other States – the common law rule and the civil law rule – to determine whether a riparian landowner and their licensees could access the entirety of a nonnavigable, natural lake. *Beacham*, 123 Ill. 2d at 228. The Court noted that the more restrictive common law rule holds “the owner of a part of a lake bed has the right to the exclusive use and control of the waters above that property.” *Id.* at 230-31. It observed

that “[t]his rule is a corollary of the traditional common law view that the ownership of a parcel of land entitles the owner to the exclusive use and enjoyment of anything above or below the property.” *Id.* at 231.

This Court then examined the civil law rule, which provides that “the owner of a part of a lake bed has a right to the reasonable use and enjoyment of the entire lake surface.” *Id.* at 231. This Court noted that the adoption of the civil law rule promotes rather than hinders the recreational use and enjoyment of lakes. *Id.* at 232. The civil law rule also prevented the erection of “booms, fences, or barriers” which it characterized as “impractical.” *Id.* at 231-32. Finally, it noted the difficulty presented by attempts to establish and obey property lines on lakes. *Id.* at 231. It concluded that “[r]estricting the use of a lake to the water overlying the owner's lake bed property can only frustrate the cooperative and mutually beneficial use of that important resource.” *Id.* at 232.

This Court’s rationale in applying the civil law rule to Lake Zurich balanced the interests of the parties to ensure full enjoyment of the lake while protecting the private property interest of other riparian owners by requiring that enjoyment to be reasonable. The same rationale applies to the Mazon River, and this Court should overrule the appellate court and apply the civil law rule in this case to ensure all riparian owners on the Mazon River enjoy it in a reasonable manner. The following arguments provide additional support for application of the civil rule.

A. Applying the Civil Law Rule to the Mazon River Allows a Narrow Class of Individuals to Use the River in a Reasonable Manner.

The civil law rule results in a fair balance where riparian owners can fully enjoy a nonnavigable river while limiting the burden that use creates on other landowners. The civil law rule does not bestow any general rights to the public to access a nonnavigable body of water. It restricts the use of any nonnavigable body of water to riparian owners and their licensees. The rule restricts the use of the body of water to reasonable uses only.

No resources are consumed by other riparian landowners passing over the surface water of another riparian landowner's riverbed. The rule does not allow a riparian landowner to fish above the bed of another owner, nor does it allow him to remove sand, rock, or other resources from the bed. It does not allow a riparian owner to beach or dock a watercraft on another riparian owner's property. Briefly allowing a riparian landowner and his licensees to pass over the water above another riparian landowner's riverbed does nothing to diminish the latter's enjoyment of his property, other than having to observe the brief incursion.

If a riparian owner and his licensees are not exercising the right in a reasonable manner, the civil law rule allows a riparian owner to take them to court and obtain judicial relief to prevent the unreasonable use. The civil law rule makes sense because it allows a small class of individuals – other riparian owners and their licensees – to use of the Mazon River in a limited, reasonable way. The civil law rule's impact on other riparian owners'

property rights is *de minimus* and amounts to having to look at people kayaking over their property for a few minutes.

B. The Topographical Difference Between a Lake and a River is of Little Significance When Determining Whether to Apply the Civil or Common Law Rule.

The reasonable enjoyment of an entire river by one riparian owner has no greater impact on the rights of other riparian owners than the enjoyment of an entire lake. In both situations, the extent of the inconvenience experienced by one riparian owner when another riparian owner traverses over the portion of the water over his river or lakebed is having to see and hear that person and his licensees. Given that lakes are much wider and larger than rivers, it is more likely that motorized watercraft would be in use on a lake, creating a much bigger impact. Although the narrowness of a river could lead to the riparian owner and his licensees coming closer to the terra firma of the other riparian owner's parcel of property, the same issue can occur on a lake. The impact of a riparian owner's use of a lake or river is going to vary on a case-by-case basis and be informed by the unique topographical features of each body of water, and these concerns are protected by the civil law rule's requirement that the riparian owner's use be reasonable. Given this protection in the civil law rule, the topographical differences between a lake and a river are negligible when measuring the impact of allowing riparian owners to use the entire surface of each body of water.

C. The Appellate Court Erred in Focusing on the Topographical Differences Between a River and Lake in Applying the Common Law Rule.

The appellate court erred in focusing on the topographical difference between lakes and rivers rather than *Beacham*'s rationale of promoting the use of the important natural resources of Illinois for reasonable purposes. The appellate court held that the "physical characteristics of the Mazon River, unlike those of the private, nonnavigable lake at issue in *Beacham*, do not involve the difficulties or impracticalities related to establishing and obeying 'definite property lines.'" *Holm* ¶ 27 (citing *Beacham* 123 Ill. 2d at 231-22). It noted that because property lines can be easily established on a river, "centuries-old case law governing riparian rights" can be enforced. *Holm* ¶ 27. It also noted, without elaboration, that allowing riparian owners to enjoy the entire surface of a lake does not necessarily apply to a narrow, nonnavigable river, like the Mazon River. *Id.* ¶ 27.

These points by the appellate court demonstrate a misapprehension of the rationale of *Beacham*. *Beacham*'s focus was on "promoting rather than hinder[ing] the recreational use of enjoyment of lakes." *Beacham* 123 Ill.2d at 232. It explicitly noted that the restriction the recreational use of a lake "can only frustrate the cooperative and mutually beneficial use of that important resource." *Id.* Although *Beacham* mentioned the difficulty of establishing property lines on a lake, that is not the basis of this Court's ruling, rather the acknowledgement of one of several reasons other States favored applying the civil law rule to lakes. The appellate court also failed to

address how *Beacham's* concern about the erection of “booms, fences, or barriers” on a lake does not equally apply to a river. Given the ease of which property lines can be established on a river, it is much more likely such obstructions are erected on a river rather than a lake. There is no operational difference between a barrier on a river versus one on a lake.

The topographical differences between a lake and a river do not create a difference in how the civil law rule impacts riparian owners on either type of body of water, and the appellate court erred in ruling so.

D. Illinois Public Policy Favors the Creation of a Rule Which Allows a Landowner to Navigate a Body of Water he has Riparian Rights to in a Reasonable Manner.

Illinois public policy favors the recreational use of natural resources. The Illinois Legislature passed the Illinois' Recreational Use of Land and Water Areas Act to “encourage owners of land to make land and water areas available to any individual or members of the public for recreational or conservation purposes by limiting their liability toward persons entering thereon for such purposes.” *745 ILCS 65/1*. Although the Act does not apply to this case, it does show that the legislature recognizes that use of Illinois’ nonnavigable rivers, streams and creeks is a public benefit, and that riparian rights restricts that public benefit. The civil law rule promotes the use of those nonnavigable bodies of water by a limited class of riparian owners and their licensees, furthering Illinois public policy while limiting the burden on private property rights.

E. Application of the Common Law Allows One Riparian Owner to Unilaterally Prevent All Other Riparian Owners from Fully Enjoying a River.

The common law rule gives an inordinate amount of power to an individual riparian owner to prohibit other riparian owners on a nonnavigable river from fully enjoying it. The common law rule allows one riparian owner to bar other riparian owners from using a large portion of the river even if the proposed use is a reasonable one. The appellate court recognized this when it counseled “it behooves property owners along nonnavigable bodies of water to maintain good relationship with their neighbors. Those relationships could determine whether, by permission of contract, a right of access is granted.” *Holm* ¶ 29. This leads to an absurd result that conditions the use of a majority of Illinois’ rivers, creeks, and streams to the whims of individual property owners, and creates an untenable situation which could result in a majority of those unique natural resources being off-limits.

F. A Majority of Illinois Rivers, Creeks, and Streams are Nonnavigable and Governed by Riparian Law.

Most rivers, creeks, and streams in Illinois are nonnavigable, and applying the civil law rule could severely limit the enjoyment of those valuable natural resources. Illinois has 87,110 miles of rivers and streams within its borders. Illinois Department of Natural Resources, *Illinois Rivers and Streams*,

<https://www2.illinois.gov/dnr/education/Pages/ILRiversStreams.aspx> (visited

12/6/21). Only 32 river and creeks are classified as navigable which gives the public an easement for navigation. Section 3704. Appendix A of the ILL. ADM. CODE CH. I, SEC. 3704 (2014). The common law rule as applied to most Illinois rivers, creeks, and streams could result in a dramatic reduction in the recreational enjoyment of these valuable natural resources.

For the above reasons, this Court should reverse the appellate court's opinion in *Holm v. Kodat* and hold that the civil law rule for riparian rights applies to nonnavigable rivers.

II. Illinois Common Law Supports a Rule Allowing Petitioners to Access the Mazon River Over Respondents' Riverbeds for Reasonable Navigation Purposes.

Illinois common law supports a rule which allows a riparian owner to use the entirety of the surface of a nonnavigable river for navigation because such a use is reasonable and does not diminish other riparian owners use of the river. The appellate court, due to some unexplained reservations with the recreational value of rivers, declined to extend the civil law rule adopted in *Beacham* to rivers, lakes, and streams. Instead, it relied on "centuries old case law" to fashion an exclusionary rule that allows a riparian owner on a river the absolute right to bar access to the portion of that river on their property to everyone, including other riparian owners.

The case law relied upon by the appellate court almost universally deals with the relationship between riparian owners and the general public and ignores centuries old caselaw that establishes a unique relationship

between the riparian landowners on a river. Instead of requiring the exclusionary rule fashioned by the appellate court, the riparian caselaw supports a rule that allows all riparian owners on a river to access the entire surface of the waterway for reasonable navigation purposes.

A. The Common Law Relied Upon by the Appellate Court Governs the Relationship Between Riparian Owners and the General Public.

The common law cited by the appellate court is not helpful in determining the legal rights between riparian owners because it almost exclusively deals with the relationship between riparian owners and the general public. After establishing that both parties concede the Mazon River is not navigable and thus no public navigation easement exists, the appellate court concluded that Respondents own to the center of the bed of the river abutting their properties, including the water, and that this ownership is “absolutely free from any burdens in favor of the public.” *Holm* ¶ 22.

Petitioner does not quarrel with this assertion as far as it applies to the general public, but the common law does not support the maxim that a riparian owner owns his portion of a nonnavigable river free from burdens of other riparian owners on the same river.

In reaching its conclusion, the appellate court reviewed Illinois jurisprudence on riparian rights. *Holm* ¶¶ 18-22. It cited caselaw establishing that a riparian owner has “rights to the beds of all streams above the flow of the tide whether actually navigable or not.” *Holm* ¶ 20

(citing *Leitch v. Sanitary Dist. of Chicago*, 369 Ill. 469, 474(1938)). It reviewed the definition of “navigable in fact” and pointed out that it requires the river or stream to be “of sufficient depth to afford a channel for use for commerce.” *Holm* ¶ 21. It noted that if a body of water is not “navigable in fact,” a riparian owner “owns ‘the bed of the stream *** absolutely[] free from any burdens in favor of the public.’” *Holm* ¶ 22 (citing *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 318 (1909)). Finally, it cited several cases providing “examples of the exclusivity of riparian owner’s right” of exclusion over a nonnavigable body of water. *Id.* (citing *Schulte v. Warren*, 218 Ill. 108, 117 (1905); *Druley v. Adam*, 102 Ill. 177, 193 (1882); *Braxton v. Bressler*, 64 Ill. 488, 489 (1872); *Washington Ice Co. v. Shortall*, 101 Ill. 46 (1881); *Albany R.R. Bridge Co. v. People ex rel. Matthews*, 197 Ill. 199, 205 (1902); *Piper v. Connelly*, 108 Ill. 646, 651 (1884)).

The cases cited by the appellate court to support its ruling establishes that riparian owners have the absolute right to exclude nonriparian owners from nonnavigable rivers, but they do not establish that the same is true for riparian owners on the same river. *Schulte* established that the easement of navigation granted to the public on a navigable stream does not include the right to hunt or fish on that stream. *Schulte*, 218 Ill. at 120-21, 124. *Druley* dealt with the actual consumption of water by riparian owners and established that all riparian owners have the same rights when it comes to using the water while it is on their property. *Druley*, 102 Ill. at 193. *Braxton*,

prohibits the removal of rocks from a navigable river by a nonriparian owner without permission. *Braxton v. Bressler*, 64 Ill. 488 (1872). *Shortall* held that frozen ice is a commodity, and a riparian owner has an exclusive right to any ice that forms over his land. *Shortall*, 101 Ill. at 54-55. *Albany* dealt with establishing property lines for determining taxes owed on the sale of a bridge. *Albany*, 197 Ill. at 205. Finally, *Piper*, like *Shortall*, addressed a nonriparian owner harvesting ice without permission. *Piper*, 108 Ill. at 651. While these cases establish a riparian owner's legal relationship with the general public, they do not provide guidance when determining the legal relationship between riparian owners on the same river.

The appellate court incorrectly relied on these cases to hold that riparian owners have superior property rights to all other riparian owners. *Holm* ¶ 31. This statement is directly contradicted by the appellate court's warning that its decision:

should not be construed as providing riparian owners with unlimited authority on their private property. Riparian owners may not lawfully take any action, within the boundaries of their private property, that diverts, increases, diminishes, or pollutes the flow of the water on the Mazon River, as to interfere with the use of the Mazon River by other riparian owners on their own property.

Holm ¶ 32, (Citing *Alderson v. Fatlan*, 231 Ill. 2d 311, 318-19; *Leitch*, 369 Ill. at 473; *Druley*, 102 Ill. at 193). With this proclamation, the appellate court recognized that the common law does not grant riparian owners superior property rights to all other riparian owners, and that the relationship

between riparian owners is nuanced and interdependent and requires sharing the water resources of a river.

B. Illinois Common Law Allows Riparian Owners the Reasonable Use of the Waters of a Nonnavigable River.

Illinois common law establishes a unique relationship between riparian owners on a nonnavigable body of water, and that relationship includes the reasonable use of an entire river for reasonable navigation purposes by all riparian owners on that river. Under the Illinois common law on riparian rights, a riparian owner is allowed the reasonable use of the water in a natural waterway *Evans v. Merriweather*, 4 Ill. 492, 496 (1842), Margrit Livingston, *Public Recreational Rights in Illinois River and Streams*, Vol. 29, Dep. L.R, 353, 358 (1980). The measure of reasonableness depends on whether the use is natural or artificial. *Id.* The use of water by a riparian owner is divided into two categories: natural and artificial. *Evans*, 4 Ill. at 495. Natural uses are those “absolutely necessary to be supplied, in order to his existence.” *Id.* These include drinking water, household purposes, and hydrating livestock. *Id.* Artificial uses include those not essential to survival, including irrigation and manufacturing. *Id.* When the riparian owner consumes water for artificial means, the amount of water he can use is to be decided on a case-by-case basis. *Evans* at 496. The appropriate amount a riparian owner can use for artificial purposes is his “just proportion.” *Id.*

While there are no Illinois cases that examine the right of a riparian owner use the entire surface of a nonnavigable river for navigation purposes,

such a use is an artificial use, as it is not necessary to support existence. Livingston, *supra* at 359. Artificial uses are governed by the reasonableness standard, and the use of the Mazon River over Respondents' properties for navigation purposes by Petitioners is a reasonable one.

C. A Riparian Owner's Use of the Entire Surface of a River is a Reasonable Artificial Use Under the Common Law.

The artificial use of the entire surface of a river for navigation by a riparian owner is reasonable one that does not consume any resources and places a minimal burden on other riparian owners. In *Thompson v. Enz*, 379 Mich. 667 (1967), the Supreme Court of Michigan provided a roadmap on how to evaluate whether a riparian owner's artificial use of the entirety of a nonnavigable waterway for navigation purposes is reasonable. *Thompson* involved a defendant riparian owner constructing a canal that linked a housing development to a natural lake. *Id.* at 677. The housing development's only access to the lake was through the canal. *Id.* The plaintiffs, other riparian owners on the lake, sued to prevent the owners of the individual units in the housing development from having riparian rights to the lake as well as access through the canal. *Id.* *Thompson* held that the owners of the individual units did not have riparian rights. *Id.* at 682. It also held that, because the defendant could grant the owners of individual units easements for rights of way to access the lake via the canal, it had to determine whether the owners of the individual units had the right to use

that right of way, which required an analysis of the riparian rights of the plaintiffs and defendant. *Id.* at 686.

While reviewing the common law on riparian rights, *Thompson* characterized the recreational use of a waterway as “artificial,” and held that the reasonableness standard applied to artificial uses. *Id.* at 686-87.

Thompson then enumerated a list of factors to determine the reasonableness of the use. *Id.* at 688. *Thompson* noted consideration should first be given to the attributes of the waterway including size, character, and natural state. *Id.* Second, consideration should be given to the use itself as to its “type, extent, necessity, effect on the quantity, quality and level of the water, and the purposes of the users.” *Id.* Finally, consideration must be given to the proposed artificial use in relation to its effects, “including the benefits obtained and the detriment suffered, on the correlative rights and interests of other riparian proprietors and also on the interests of the State, including fishing, navigation, and conservation.” *Id.* at 689

Given the similarities between Illinois and Michigan common law on riparian rights, *Thompson* provides a structural framework to evaluate Petitioners’ claim that they have the right to kayak over Respondents’ properties on the Mazon River. When the *Thompson* factors are applied to this case, it is clear the Petitioners’ use of the Mazon River for kayaking is a reasonable artificial use. The Mazon River is a natural waterway with sufficient water to kayak on. It is approximately 28 miles in length. C229.

It has the added quality of containing numerous fossils and a portion of it was declared a National Historic Landmark in 1997. C284-85. The Petitioners put their kayaks in the Mazon River on riparian property they own and kayak to another property they own. C127. When on the second property, they dig up fossils, load them in their kayaks, and transport them to the underpass of the Pine Bluff Road Bridge, which is maintained by Grundy County. C127. Petitioners' use of the water over Respondents' properties does not affect the quantity, quality, or level of the water. The only negative impact of Petitioners' use of the Mazon River on Respondents' property is a brief annoyance to when Petitioners pass by on their kayaks. When the factors enumerated in *Thompson* are applied to this case, it is clear Petitioners' use of the surface waters of the Mazon River for kayaking is reasonable.

For the above reasons, even if the Court declines to apply the civil law rule adopted in *Beacham* to this case, this Court should reverse the appellate court's opinion in *Holm v. Kodat* and hold that Illinois common law allows Petitioners to of the Mazon River on Respondents' property for reasonable navigational purposes.

CONCLUSION

For the above reasons, this Court should reverse the appellate court's opinion in *Holm v. Kodat* and hold that Petitioners have the right to access the portions of the Mazon River over Respondents' properties for reasonable navigation purposes.

Respectfully submitted,

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12/08/2021

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b).

The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 22 pages or words.

/s/ Zachary Pollack
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PROOF OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On December 8, 2021, the foregoing **Petitioners-Appellants' Brief** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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APPENDIX

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2021 IL App (3d) 200164

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Appellate Court of Illinois, Third District.

Adam HOLM, Daniel Holm, Loretta Holm,
and Nick Holm, Plaintiffs-Appellants,

v.

Peter KODAT, James Benson, Benson
Marian Family Trust, Mark A. Norton,
Wilfred K. Robinson, and Grundy
County, Defendants-Appellees.

Appeal No. 3-20-0164

Opinion filed June 28, 2021

Synopsis

Background: Upstream landowners filed for declaratory relief, requesting an order declaring their right to access and kayak the whole river free of trespass claims by downstream landowners. Upstream and downstream landowners filed cross-motions for summary judgment. The Circuit Court, Grundy County, Eugene P. Daugherty, J., initially granted summary judgment for upstream landowners, but after downstream landowners' motion for reconsideration, granted summary judgment in favor of downstream landowners. Upstream landowners appealed.

The Appellate Court, Wright, J., held that downstream landowners could lawfully bar upstream landowners from kayaking on segments of river that abutted their respective parcels of property.

Affirmed.

Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois, Circuit No. 18-CH-90, Honorable Eugene P. Daugherty, Judge, Presiding.

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No brief filed for other appellees.

JUSTICE WRIGHT delivered the judgment of the court, with opinion.

OPINION

*1 ¶ 1 Plaintiffs and the individual defendants own separate parcels of property situated along the Mazon River in Grundy County, Illinois. Collectively, the individual defendants object to plaintiffs' use of kayaks on the portions of the Mazon River that abut their parcels of property. Plaintiffs filed a declaratory action, seeking an order recognizing their right, as riparian owners, to kayak along the entire Mazon River. The trial court initially granted summary judgment for plaintiffs, then, on reconsideration, granted summary judgment for defendants. Plaintiffs appeal.

¶ 2 I. BACKGROUND

¶ 3 Plaintiffs own parcels of property situated along the Mazon River in Grundy County, Illinois. Plaintiffs' parcels consist of 33 acres of unimproved, landlocked property (landlocked property) and 9.2 acres of unimproved, road-accessible property (accessible property). Plaintiffs use their parcels of property to operate a fossil hunting business. Plaintiffs routinely commute by kayak from the accessible property to the landlocked property, then from the landlocked property, past the individual defendants' parcels of property, to the Pine Bluff Road Bridge. Once at the Pine Bluff Road Bridge, plaintiffs remove their kayaks from the Mazon River.

¶ 4 Defendant, Peter Kodat, "operates a competing fossil [hunting] business" on his parcel of property. Kodat allegedly organized the other individual defendants—James Benson,

Benson Marian Family Trust, Mark A. Norton, and Wilfred K. Robinson—to sign written trespass notices” for their parcels of property. Kodat, Benson, Benson Marian Family Trust, Norton, and Robinson (defendants) objected to plaintiffs kayaking on the portions of the Mazon River that abut their parcels of property. On one occasion, Kodat complained to the Grundy County Sheriff’s Department about plaintiffs’ kayaking on the Mazon River past his property, resulting in the arrest of plaintiffs, Adam and Daniel Holm, for trespass.¹

¶ 5 On December 21, 2018, plaintiffs filed a first amended verified complaint for declaratory relief, requesting an order declaring plaintiffs’ “right of access to the whole of the Mazon River, including the right to kayak from the Access[ible] Property to the Landlocked Property and from the Landlocked Property to the Pine Bluff Road Bridge,” free of trespass claims by defendants.²

¶ 6 A. Cross-Motions for Summary Judgment

¶ 7 On June 24, 2019, plaintiffs filed a motion for summary judgment relating to the declaratory relief requested in their verified complaint. On August 28, 2019, defendants filed a cross-motion for summary judgment.

¶ 8 In support of their cross-motion for summary judgment, plaintiffs asserted that they are riparian owners of property abutting the Mazon River. Therefore, as a matter of law, defendants are prohibited from restricting plaintiffs’ reasonable use and enjoyment of the entire Mazon River. In response, defendants agreed plaintiffs have the right “to access waters adjoining and within and upon [plaintiffs’] property.” Defendants disputed that plaintiffs’ riparian rights allowed the unrestricted privilege of “navigating [the] waterways of adjoining landowners.”

*2 ¶ 9 In addition, defendants’ cross-motion for summary judgment alleged it was undisputed that, together, certain defendants own property on both sides of the portions of the Mazon River, a nonnavigable waterway, that plaintiffs use for kayaking. Based on their undisputed status as riparian owners on the Mazon River, defendants argued that they could exclusively control the water and the property underneath the water that abutted their parcels of private property.³ By extension, since each defendant refused to grant plaintiffs permission to use those portions of the Mazon River, defendants argued they were entitled to summary judgment.

¶ 10 B. Decisions of the Trial Court

¶ 11 On October 9, 2019, the trial court held a hearing on the parties’ cross-motions for summary judgment. At the conclusion of the hearing, the trial court found summary judgment for plaintiffs was proper under *Beacham v. Lake Zurich Property Owners Ass’n*, 123 Ill. 2d 227, 122 Ill.Dec. 14, 526 N.E.2d 154 (1988). Consequently, the trial court declared plaintiffs’ right to the “use of the surface water only.” The trial court found this right did not allow plaintiffs to leave their kayaks while en route for purposes of “digging and scrambling around for fossils or whatever it be.”

¶ 12 On January 6, 2020, defendants timely filed an amended motion to reconsider and vacate the trial court’s entry of summary judgment for plaintiffs. Relying on the uncontested fact that the Mazon River is a nonnavigable waterway, defendants argued the trial court’s ruling, in reliance on *Beacham*, was contrary to longstanding common law precedent establishing defendants’ exclusive right to refuse access to the portions of the Mazon River that abut their parcels of property. The trial court held a hearing on the amended motion to reconsider and vacate on March 5, 2020. After receiving arguments, the trial court found as follows:

“This court originally had before it the *** *Beacham* case ***.

And I applied the reasoning in *Beacham* even though it was *** putting a square peg into a round hole *** because of the similarities that were involved.

* * *

And, therefore, I felt that [*Beacham*] being the Supreme Court of Illinois’ most recent expression on the rights of a landowner of the bed of the non-navigable body of water, that *Beacham* should control here ***.

Now it has been presented to me that there’s an entire body of case law that has not been overruled and that establishes that the private ownership of a non-navigable body of water, like the parties have here, permits the parties who own that property to have the exclusive rights to the water in front of the property which they own.

That means that here [plaintiffs] have the exclusive rights to use and keep people from using the surface from their property that abuts their ownership of land, and the

defendants *** would also enjoy those same rights and privileges.

* * *

I'm going to vacate the summary judgment that I granted for the plaintiffs and vacate the order that denied the defendants' cross motion for summary judgment.

And based on the law that's been provided to me, I'm going to grant the defendants' motion and deny the plaintiffs' motion upon reconsideration on the grounds that the fact that the Mazon River is factually non-navigable and the fact that there is private ownership of the bed of the river, *** [which] carries with it the exclusivity of ownership in the water above the property owned by the abutting owners.

And that is supported by the case law that was cited in the brief requesting this court to reconsider its previous decision.

*3 And I think that the riparian rights of access are not superior to the rights of private ownership.

And I don't believe that the *Beacham* case is controlling of the issue before the court as I did originally because of the variables that are in the *Beacham* case [and] because of *** the other cases which indicate that the creation of the property line in a lake is impossible to develop, whereas in a stream such [as] the Mazon River it is not impossible and, therefore, it can be done."

¶ 13 On March 10, 2020, the trial court signed an order granting defendants' motion to reconsider, vacating its October 9, 2019, order, and granting defendants' cross-motion for summary judgment while denying plaintiffs' cross-motion for summary judgment. The trial court found defendants had "exclusive rights to all property owned by them, including the land, water, surface of the water, and any and all substance *** both upon the land and beneath the surface of the Mazon River." The trial court declared plaintiffs were "excluded from using or accessing, in any way, the surface of the Mazon River on the portion *** that runs adjacent to any property that is owned by" defendants. Plaintiffs were also "precluded from removing fossils or any other property that is located on the portion of the Mazon River that runs adjacent to any property that is owned by" defendants. Plaintiffs filed a timely notice of appeal on March 31, 2020.

¶ 14 II. ANALYSIS

¶ 15 On appeal, we must decide whether the trial court correctly granted summary judgment for defendants. In doing so, our court must determine whether downstream riparian owners of property on a nonnavigable river, in this case defendants, may lawfully bar other upstream riparian owners of property on that same river, in this case plaintiffs, from traversing the various segments of the river that comprise defendants' private property. Based on well-established case law governing riparian rights and the navigability of Illinois rivers and streams, we conclude this question must be answered in the affirmative. As a result, the trial court's grant of summary judgment for defendants was correct and must be affirmed.

¶ 16 Under section 2-1005(c) of the Code of Civil Procedure (Code), summary judgment "shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2018). When cross-motions for summary judgment are filed, as they were here, the parties "mutually concede that there are no genuine issues of material fact and that only a question of law is involved." *Gurba v. Community High School District No. 155*, 2015 IL 118332, ¶ 10, 396 Ill.Dec. 348, 40 N.E.3d 1 (citing *Pielet v. Pielet*, 2012 IL 112064, ¶ 28, 365 Ill.Dec. 497, 978 N.E.2d 1000). Our court reviews decisions on motions for summary judgment *de novo*. *Id.*

¶ 17 Initially, the parties suggest that the issue subject to our review is one of first impression. This might, to some extent, be true. However, the narrow issue of first impression can be decided by applying the rationale that has been employed for over a century with respect to riparian rights and the navigability of Illinois rivers and streams.

*4 ¶ 18 Generally, riparian rights are "the rights of an owner of land that borders on a body of water or watercourse to the use of the water." *Alderson v. Fatlan*, 231 Ill. 2d 311, 318, 325 Ill.Dec. 548, 898 N.E.2d 595 (2008). These rights originate by operation of law, "solely because the land abuts the body of water." *Id.* The riparian rights of property owners, abutting the same body of water, are equal, such that no "property owner may exercise its riparian rights in such a manner so as to prevent the exercise of the same rights by

other similarly situated property owners.’ [Citation].” *Id.* at 318-19, 325 Ill.Dec. 548, 898 N.E.2d 595.

¶ 19 For rivers and streams, a riparian owner “has the right to the flow of [the river’s] water as a natural incident of his estate.” *Leitch v. Sanitary District of Chicago*, 369 Ill. 469, 473, 17 N.E.2d 34 (1938). This right “cannot lawfully be diverted, increased, diminished or polluted” without consent or due process. *Id.*; see also *Druley v. Adam*, 102 Ill. 177, 193 (1882) (“[R]iparian proprietors have precisely the same rights in regard to [water while it passes their property], and, apart from the right of consumption for supplying natural wants, neither can, to the injury of the other, abstract the water, or divert or arrest its flow.”). If a riparian owner’s land extends to and bounds on a river, then the center of the river is the property line. *Schulte v. Warren*, 218 Ill. 108, 117, 75 N.E. 783 (1905); accord *Fuller v. Shedd*, 161 Ill. 462, 474-75, 44 N.E. 286 (1896); *Braxton v. Bressler*, 64 Ill. 488, 489 (1872). If a riparian owner owns land on both sides of a river, then he owns “the whole of the bed of the stream to the extent of the length of his lands upon it.” *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 318, 89 N.E. 760 (1909); accord *Albany R.R. Bridge Co. v. People ex rel. Matthews*, 197 Ill. 199, 205-06, 64 N.E. 350 (1902) (*per curiam*).

¶ 20 A riparian owner has “rights to the beds of all streams above the flow of the tide whether actually navigable or not.” *Leitch*, 369 Ill. at 474, 17 N.E.2d 34. For rivers or streams, navigable in fact, the right “is subject to a public easement to use the river for navigation.” *Id.* at 475, 17 N.E.2d 34; accord *Trustees of Schools v. Schroll*, 120 Ill. 509, 518-19, 12 N.E. 243 (1887) (“[G]rants of land bounded on streams or rivers above tide water, carry the exclusive right and title of the grantee to the centre of the stream *** subject to the easement of navigation in streams navigable in fact ***.”); *Smith v. City of Greenville*, 115 Ill. App. 3d 39, 42, 70 Ill.Dec. 916, 450 N.E.2d 389 (1983). That is, “the public have an easement for purpose[s] of navigation in waters which are navigable in fact, regardless of the ownership of the soil.” *Du Pont v. Miller*, 310 Ill. 140, 145, 141 N.E. 423 (1923); accord *Schulte*, 218 Ill. at 119, 75 N.E. 783; see also *Braxton*, 64 Ill. at 489 (“Where the river is navigable, the public have an easement, or a right of passage, upon it as a highway, but not the right to remove the rock, gravel or soil, except as necessary to the enjoyment of the easement.”); *Ensminger v. People ex rel. Trover*, 47 Ill. 384, 390 (1868) (supreme court stating, when a river or stream is navigable, as to provide the public with an easement, that easement “extend[s] alone to the bed of the river”).

¶ 21 Importantly, a river or stream is navigable in fact if it naturally, by customary modes of transportation, is “of sufficient depth to afford a channel for use for commerce.” *Du Pont*, 310 Ill. at 145, 141 N.E. 423 (citing *Schulte*, 218 Ill. at 119, 75 N.E. 783); *Economy Light*, 241 Ill. at 332-33, 89 N.E. 760; see also *Hubbard v. Bell*, 54 Ill. 110, 122 (1870) (supreme court stating “a stream, to be navigable, must furnish ‘a common passage for the king’s people,’ must be ‘of common or public use for the carriage of boats and lighters,’ [and] must be capable of bearing up and floating vessels for the transportation of property, conducted by the agency of man.”); *Central Illinois Public Service Co. v. Vollentine*, 319 Ill. 66, 67-68, 149 N.E. 580 (1925) (supreme court finding, “Sangamon river is a stream over which commerce cannot be carried on in the customary modes in which such commerce is conducted by water, and is therefore not a navigable stream”). Of vital importance here, “[t]he fact that there is water enough in places for rowboats or small launches *** does not render the waters navigable.” *Schulte*, 218 Ill. at 119, 75 N.E. 783; accord *Economy Light*, 241 Ill. at 332, 89 N.E. 760. When the river is navigable in fact, “[i]t has long been established ‘that the property of a riparian owner in the bed of the river *** is subservient to the use of the public as a highway.’ ” *Perona v. Illini Harbor Services, Inc.*, 130 Ill. App. 3d 984, 986, 86 Ill.Dec. 73, 474 N.E.2d 1270 (1985) (quoting *Ensminger*, 47 Ill. at 391).

*5 ¶ 22 However, if the river or stream cannot satisfy this definition of navigability, such that it is not navigable in fact, then the river or stream is not subject to an easement in the public for navigation and the riparian owner instead owns “the bed of the stream *** absolutely[] free from any burdens in favor of the public.” See *Economy Light*, 241 Ill. at 318, 89 N.E. 760 (citing *Washington Ice Co. v. Shortall*, 101 Ill. 46 (1881)); accord *Middleton v. Pritchard*, 4 Ill. 510, 520 (1842) (“If it were a stream not navigable [in fact], the rights of the riparian owner extended to the centre thread of the current,” meaning “the water, and the soil under it *** [were] exclusively in the riparian owner.”). In this situation, the case law provides various examples of the exclusivity of the riparian owner’s right. See *Schulte*, 218 Ill. at 119, 75 N.E. 783 (supreme court stating, at common law, “the riparian proprietor had the exclusive right to fish in the waters covering the soil owned by him, to the center of the stream”); *Druley*, 102 Ill. at 193 (supreme court stating, “[t]he owner of land over which a stream of water flows, has *** a property right in the flow of the water at that place for all the beneficial uses that may result from it ***[;] in other words, he has a usufruct in the water while it passes”); *Braxton*, 64 Ill. at 489

(“No individual can appropriate to his own use the bed of the stream, without the consent of the adjoining proprietor.”); *Shortall*, 101 Ill. at 52 (supreme court stating, unless clearly denoted, “grants of land bounded on rivers or upon their margins, above tide water, carry the exclusive right and title of the grantee to the centre of the stream, subject to the easement of navigation,” including “the water, the bed, and all islands”); accord *Albany*, 197 Ill. at 205, 64 N.E. 350; *Piper v. Connelly*, 108 Ill. 646, 651 (1884).

¶ 23 The trial court relied on the rationale set forth in *Beacham* when initially granting summary judgment for plaintiffs. Now, plaintiffs argue the trial court's original decision, applying *Beacham*, was correct. Consequently, a brief review of *Beacham* is in order.

¶ 24 *Beacham* involved a private, nonnavigable lake, rather than a nonnavigable river. See *Beacham*, 123 Ill. 2d at 228, 122 Ill.Dec. 14, 526 N.E.2d 154. The plaintiff, who owned 15% to 20% of the lakebed and operated a public boat rental business, sought “a declaration that *** [she] and her licensees were entitled to the reasonable use of the entire lake, including the waters overlying those parts of the lake bed owned by members of the defendant” homeowners’ association. *Id.* at 227-28, 122 Ill.Dec. 14, 526 N.E.2d 154.

¶ 25 In its analysis, our supreme court acknowledged a common law rule and a civil law rule, which represented “two conflicting views on the subject.” *Id.* at 229, 122 Ill.Dec. 14, 526 N.E.2d 154; see also *Alderson*, 231 Ill. 2d at 319, 325 Ill.Dec. 548, 898 N.E.2d 595 (supreme court discussing *Beacham*’s identification of the common law and civil law rules). Our supreme court observed, on the one hand, the common law rule states “the owner of a part of a lake bed has the right to the exclusive use and control of the waters above that property.” *Beacham*, 123 Ill. 2d at 230, 122 Ill.Dec. 14, 526 N.E.2d 154. This is a corollary of the view that “ownership of a parcel of land entitles the owner to the exclusive use and enjoyment of anything above or below the property.” *Id.* at 230-31, 122 Ill.Dec. 14, 526 N.E.2d 154. Our supreme court recognized, in other states, the common law rule allows “the owner of a part of a lake bed [to] exclude from the surface of the overlying water all other persons, including those who own other parts of the lake bed.” *Id.* at 231, 122 Ill.Dec. 14, 526 N.E.2d 154.

¶ 26 On the other hand, our supreme court observed that, under the civil law rule, which was ultimately adopted in *Beacham*, the ownership of part of the bed of a private,

nonnavigable lake entitled the owner and the owner's licensees to the reasonable use and enjoyment of the entire lake surface, provided there was no undue interference with the reasonable use of the water by other owners and their licensees. *Id.* at 228-31, 122 Ill.Dec. 14, 526 N.E.2d 154. Our supreme court reasoned that the courts of other states, in the context of lakes, have “noted the difficulties presented by attempts to establish and obey definite property lines [citations] and certain other impractical consequences of [the common law rule], such as the erection of booms, fences, or barriers.” *Id.* at 231-32, 122 Ill.Dec. 14, 526 N.E.2d 154. Further, an application of the civil law rule promoted the recreational use and enjoyment of lakes. *Id.* at 232, 122 Ill.Dec. 14, 526 N.E.2d 154. Thus, “the arguments supporting the civil law rule warrant[ed] its adoption in Illinois” because “[r]estricting the use of a lake to the water overlying the owner's lake bed property [could] only frustrate the cooperative and mutually beneficial use of that important resource.”⁴ *Id.*

*6 ¶ 27 Initially, the physical characteristics of the Mazon River, unlike those of the private, nonnavigable lake at issue in *Beacham*, do not involve the difficulties or impracticalities related to establishing and obeying “definite property lines.” See *id.* at 231-32, 122 Ill.Dec. 14, 526 N.E.2d 154; *Smith*, 115 Ill. App. 3d at 42, 70 Ill.Dec. 916, 450 N.E.2d 389; *Fuller*, 161 Ill. at 483, 44 N.E. 286. To the contrary, here, the property lines can be established, verified, and enforced by public records and centuries-old case law governing riparian rights and navigability. Moreover, the public policy of promoting the recreational use and enjoyment of an entire lake, by each partial owner of a lakebed and his or her licensees, does not necessarily equally apply to a narrow, nonnavigable river, like the Mazon River. See *Beacham*, 123 Ill. 2d at 232, 122 Ill.Dec. 14, 526 N.E.2d 154. Therefore, we decline to extend the rationale in *Beacham* to resolve the dispute over the rights of the riparian owners along the Mazon River in this appeal.

¶ 28 Here, it is undisputed that both plaintiffs and all defendants have riparian rights attributable to their ownership of property along the Mazon River. It is also undisputed that the Mazon River is not navigable in fact. That is, the parties agree that the Mazon River is not, in its natural state, an avenue for commerce by the customary modes of water transportation. See *Du Pont*, 310 Ill. at 145, 141 N.E. 423 (citing *Schulte*, 218 Ill. at 119, 75 N.E. 783); *Economy Light*, 241 Ill. at 332-33, 89 N.E. 760; *Hubbard*, 54 Ill. at 122. Further, it is irrelevant, for purposes of determining navigability in fact, that the Mazon River can support kayaks.

See *Schulte*, 218 Ill. at 119, 75 N.E. 783; accord *Economy Light*, 241 Ill. at 332, 89 N.E. 760.

¶ 29 Since the Mazon River is not navigable in fact, a public easement does not exist to allow public navigation on the Mazon River. See *Leitch*, 369 Ill. at 475, 17 N.E.2d 34; *Schroll*, 120 Ill. at 518-19, 12 N.E. 243; *Smith*, 115 Ill. App. 3d at 42, 70 Ill.Dec. 916, 450 N.E.2d 389; *Du Pont*, 310 Ill. at 145, 141 N.E. 423; *Schulte*, 218 Ill. at 119, 75 N.E. 783; *Braxton*, 64 Ill. at 489; *Ensminger*, 47 Ill. at 390. Instead, defendants own to the center of the bed of the stream abutting their respective properties, including the water, “absolutely[] free from any burdens in favor of the public.” See *Economy Light*, 241 Ill. at 318, 89 N.E. 760 (citing *Shortall*, 101 Ill. 46); *Middleton*, 4 Ill. at 520; *Albany*, 197 Ill. at 205-06, 64 N.E. 350. Consequently, each defendant may lawfully bar any and all trespassers from the segment of the Mazon River that abuts his respective parcel of property. For this reason, it behooves property owners along nonnavigable bodies of water to maintain good relationships with their neighbors. Those relationships could determine whether, by permission or contract, a right of access is granted.

¶ 30 Although it is undisputed, it should be noted that plaintiffs own a landlocked parcel of private property situated on the Mazon River. It should also be noted that plaintiffs have not asserted the existence of an easement by necessity. Thus, we conclude the landlocked nature of this parcel of property will not play a role in the outcome of this particular appeal.

¶ 31 Based on the above-cited case law, we conclude that both plaintiffs and defendants have private property rights, attributable to their status as riparian owners, that are superior to the interests of the general public. Likewise, plaintiffs and defendants enjoy, based on their status as riparian owners, private property rights on their parcels that are superior to the rights of all other riparian owners. Therefore, the riparian

owner of each individual parcel of private property, situated along the Mazon River, may lawfully bar access, within their easily ascertainable property lines, to any person, including their riparian neighbor.

¶ 32 Applying these principles on appeal, plaintiffs may not kayak on the portions of the Mazon River that abut the property of their riparian neighbors, including defendants, without first obtaining the neighbors’ consent. However, this decision should not be construed as providing riparian owners with unlimited authority on their private property. Riparian owners may not lawfully take any action, within the boundaries of their private property, that diverts, increases, diminishes, or pollutes the flow of the water on the Mazon River, as to interfere with the use of the Mazon River by other riparian owners on their own property. See *Alderson*, 231 Ill. 2d at 318-19, 325 Ill.Dec. 548, 898 N.E.2d 595; *Leitch*, 369 Ill. at 473, 17 N.E.2d 34; *Druley*, 102 Ill. at 193.

*7 ¶ 33 For these reasons, we conclude that the trial court correctly entered summary judgment in favor of defendants.

¶ 34 III. CONCLUSION

¶ 35 The judgment of the circuit court of Grundy County is affirmed.

¶ 36 Affirmed.

Justices Holdridge and Lytton concurred in the judgment and opinion.

All Citations

--- N.E.3d ----, 2021 IL App (3d) 200164, 2021 WL 2714201

Footnotes

- 1 Adam and Daniel Holm were never formally charged with trespass.
- 2 The first amended verified complaint removed John and Douglas Heath as defendants in this lawsuit. Therefore, John and Douglas Heath are not parties to this appeal.
- 3 Plaintiffs have admitted “[t]he Mazon [River] is a non-navigable waterway.”
- 4 “The question remain[ed]” whether the plaintiff and her licensees’ use of the lake was reasonable and not an undue interference with the reasonable use of other owners and their licensees. *Beacham*, 123 Ill. 2d at 232, 122 Ill.Dec. 14, 526 N.E.2d 154. Our supreme court expressed no view on the answer to this question. *Id.*

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