No. 127511

IN THE
SUPREME COURT OF ILLINOIS

ADAM HOLM, DANIEL HOLM, LORETTA HOLM and NICK HOLM	)	On Petition for Leave to Appeal From the Appellate Court of Illinois, Third Judicial District
Petitioners,	)	No. 03-20-0164
v.	)	There on Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois
PETER KODAT, JAMES BENSON, BENSON MARIAN FAMILY TRUST, MARK A. NORTON, WILFRED K. ROBINSON, and JOHN HEATH,	)	No. 18 CH 90
Respondents.	)	The Honorable Eugene P. Daugherity Judge Presiding

BRIEF *AMICUS CURIAE* OF ILLINOIS AGRICULTURAL ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEES

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E-FILED
2/23/2022 2:59 PM
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SUPREME COURT CLERK

POINTS AND AUTHORITIES

ARGUMENT

The Illinois Agricultural Association a/k/a the Illinois Farm Bureau ("IFB") is a non-profit member organization that represents three out of four Illinois farmers. IFB and the thousands of members it represents have a vital and direct interest in the outcome of this case which will impact the private property rights of thousands of landowners with non-navigable creeks, streams, and rivers traversing their property, upon which they depend for economic survival. Indeed, many of these small creeks and rivers may only be ephemeral, filled with water only seasonally or during weather events. IFB, on behalf of its members, presents information and authority to this Court in this *amicus brief* to aid the Court in deciding this case. This additional information and authority is necessary due to the significant, and potentially negative impact on agriculture, agricultural land use, and private property rights if the Court adopts Plaintiffs' and *amici* Forest Preserve District of Will County's ("Forest Preserve") position.

I. REVERSAL OF THE THIRD DISTRICT'S DECISION WOULD CREATE A CONFLICT WITH ILLINOIS COMMON AND STATUTORY LAW

A. Longstanding and well-developed common law principles would be needlessly upended.

This dispute arose after Plaintiffs routinely trespassed and removed valuable fossils from Defendants' property while kayaking on the nonnavigable Mazon River which runs over land owned by the Defendants. The Third District ruled that the riparian owners of private property along the Mazon River, "may

lawfully bar access, within their easily ascertainable property lines, to any person, including their riparian neighbor." *Holm v. Kodat*, 2021 IL App (3d) 200164, ¶ 33. The Appellate Court followed longstanding precedent by acknowledging that riparian owners on nonnavigable waterways may bar trespassers from the water that abuts their property. *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 318 (1909) (owners of property adjacent to non-navigable bodies of water enjoy water rights that are "free from any burdens in favor of the public."); *Piper v. Connelly*, 108 Ill. 646, 651 (1884).

There is no dispute that the Mazon River is non-navigable and there is no easement for the public to navigate this River. Contrary to Plaintiffs assertion, this Court's decision in *Beecham v. Lake Zurich Property Owners Assoc.,* 123 Ill. 2d 227 (1988) does not warrant rejection of the common law rule because establishing and obeying property lines over non-navigable rivers, streams and creeks poses no challenges like "the difficulties presented by attempts to establish and obey definite property lines [on a lake]." In *Beecham* this Court recognized that it would be extremely difficult if not impossible to establish and enforce property lines and held that the owner of part of a lakebed enjoys the right to reasonable use and enjoyment of the entire lake surface.

The Third District properly found that this Court's decision in *Beacham* should not be extended to rivers or streams since the "physical characteristics of the Mazon River, unlike those of the private, non-navigable lake at issue in *Beacham*, do not involve the difficulties or impracticalities related to establishing

and obeying 'definite property lines.'" *Holm v. Kodat*, 2021 IL App (3d) 200164, ¶ 27. Indeed, Illinois Courts have previously recognized the marked differences in determining boundary lines to rivers and streams which is easy compared to determining the lines of a lakebed which is almost impossible. See *Fuller v. Shedd*, 161, Ill.462, 483 (1896); *Smith v. Greenville*, 115 Ill. App. 3d 39, 42 (5th Dist. 1983).

B. Illinois statutes have constructed a well-reasoned framework around Illinois common law principles.

Upending the common law principles related to the rights of riparian owners would also negate, upend, and overturn various statutes the General Assembly passed with the goal of working hand-in-hand with Illinois common law. The Illinois Fish and Aquatic Life Code requires the consent of the private property owner or tenant for any person fishing on a non-navigable waterway. 515 ICLS 5/5-20. *See also Beckman v Kreamer,* 43 Ill 447 (1867) ("[I]f the riparian proprietor owns upon both sides of such stream, no one but himself may come upon the limits of his land and take fish there; and the same rule applies so far as his land extends, to wit, to the thread of the stream, where he owns upon one side only."). This statute recognizes the rights of riparian landowners at common law, codifies them, and creates criminal penalties for those that choose to breach the law.

Similarly, permission for boating or hunting is required from the landowner over whose land water flows. 520 ILCS 5/2.33; 625 ILCS 45/5-7. The

law creates penalties for those types of trespassers. *See* 625 ILCS 45/5-7. In addition to the consent required under these statutes, Illinois courts have consistently recognized a property owner's right to pursue legal claims against trespassers. *Sikes v. Moline Consumers,* 293 Ill. 112, 124-25 (1920) (establishing an action for trespass for those that remove sand and gravel from the bed of a navigable water).

In yet another example of common and statutory law going hand-in-hand, farmers with livestock have an obligation to fence in livestock and are subject to criminal and civil liability if they fail to provide the adequate fencing to prevent domestic animals from running at large. *See* Illinois Domestic Animals Running At Large Act, 510 ILCS 55 *et. seq.* Farms throughout the state of Illinois have non-navigable creeks, rivers and streams running along their property or within their parcels and those properties are fenced along boundary lines. If this Court adopts Plaintiffs' position, farmers with livestock will be forced to allow unfettered access to nonnavigable waterways on their land to trespassers under the guise of promoting recreational land use on private property, without just compensation while being at risk for civil and criminal liability for animals running at large under Illinois law.

Reversal of the Third District's decision will result in the grant of a completely new property right to the general public which is contrary to existing law and exceeds the authority of this Court. Plaintiffs' request ignores the fact that the Illinois General Assembly vested the Department of Natural Resources

("DNR") with the authority to determine whether a body of water is public or private and, any person may petition DNR to add a body of water to the list of navigable waters which are open to public use and/or dedicated to public use. 615 ILCS 5/5 (describing the DNR's duty to classify all waters of the state as navigable or nonnavigable); 17 Ill. Admin. Code § 3704.40 (specifying the procedure to add a water to the list of Illinois public waters). Plaintiffs' request to this Court usurps the DNR's jurisdiction and authority under Illinois law. In addition, the DNR recognizes the common law and statutory rights of property owners along nonnavigable bodies of water in Illinois.[1]

Plaintiffs complain that "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" and takes issue with the Third District's advice to property owners on nonnavigable waterways to "maintain good relationships with their neighboring riparian owners." (Plaintiffs' brief, p.13)

Of course, the facts and the procedural history of the case underly Plaintiffs' real concern: that losing the ability to trespass will lead to economic

[1] For example, with regard to public access to the Kishwaukee River, another nonnavigable river in Illinois, the DNR follows common law principles: "The Kishwaukee is NOT public, so it can only be accessed in areas where the landowner allows public access. In addition, there are many areas on the Kishwaukee that are owned by park districts and/or conservation districts. These entities DO allow boating, canoeing, and fishing on their portion of property. However, you need to be careful of where their boundary ends to avoid trespassing on private property where the owner does not allow the public". (https://www.ifishillinois.org/profiles/Kishwaukee.php) (emphasis in original).

loss due to the inability to remove valuable fossils from Defendants' property while kayaking. Rather than heeding the Courts advice to maintain good relationships, Plaintiffs now seek to fashion themselves as the champions public recreational kayaking. The moral of the story here is don't trespass upon your neighbor's property, remove valuable property and expect your neighbor to grant you access to nonnavigable waters running entirely within their property. Concerns raised by Plaintiffs about recreational public uses are nothing but a red herring.

II. CONCERNS ABOUT PUBLIC ACCESS ARE BOTH OVERBLOWN AND MOOT.

A. Cooperative efforts to improve recreational access to nonnavigable rivers have been successful.

Contrary to Plaintiffs and *amici's* assertion, Illinois common law has not created an untenable situation where the public does not have access to nonnavigable waterway. Municipalities, conservation districts, forest preserve districts and other units of local government have successfully purchased riparian property or obtained voluntary easements for navigation from landowners along nonnavigable rivers and streams in Illinois.

The successful cooperative efforts of landowners, recreationalists, and local governments have resulted in new recreational paddling opportunities on the Kishwaukee River in McHenry County and in other nonnavigable waters as well. The City of Marengo in McHenry County was awarded funding from the State of Illinois to improve public boat and canoe access areas on the nonnavigable

Kishwaukee River. https://thelansingjournal.com/2020/01/08/gov-pritzker-announces-653710-in-boat-access-grants/. The City and the McHenry County Conservation District had already owned some of the land along the Kishwaukee, and the City was able obtain easements from landowners allowing for additional recreational opportunities. A group of volunteers working to improve access to the Kishwaukee who called themselves "Paddle the Kish," has worked and continues to work with private landowners to secure permission to secure other recreational paddling opportunities on the Kishwaukee. According to the group's leader, "So far, all of the landowners have been agreeable." https://rms.memberclicks.net/assets/JournalsNewsletters/2021%20Summer.pdf

B. Assertions that upholding the current statutory and common law scheme would result in reduced recreational opportunities are exaggerated and misleading.

Amici Forest Preserve's assertion that the Third District's ruling "calls into question the Forest Preserve's continued ability to provide such recreational opportunities" from its canoe and kayak launches for the public from its forest preserves onto the non-navigable DuPage River is simply false. *See* Forest Preserve of Will County's Motion for Leave to File an *Amicus* Brief in Support of Petitioners, pg. 2). As stated above, the current application of common and statutory law in Illinois has fostered cooperation between landowners, members of the public, and local governments that has resulted in more recreational opportunities, not less.

To be sure, most would agree that simply being given a property right that one does not possess is much easier than working cooperatively to obtain that same right. But *amici* Forest Preserve's suggestion that just because they want such a right means that naturally it should be given to them is offensive both to landowners and to other groups that have successfully and legally obtained those rights. Rather than lament about the trial and appellate court's unwillingness to give them a property right for nothing, cooperative efforts with landowners and volunteer groups have proven to be the more fruitful avenue to achieve the goal of enhanced public recreational opportunities.

C. Giving away a private property right in the name of recreation has practical negative consequences for landowners.

A common misconception is that landowners limit the recreational uses of their properties only because they are curmudgeonly or simply "anti-fun." To the contrary, many landowners in this state would have no issue with recreational uses that do not take away from their own economic or personal benefits of property ownership. But the fact is that with ownership of property comes legal responsibility. Landowners can be held liable for injuries that occur on their property. *See Hall v. Henn,* 208 Ill. 2d 325, 802 N.E.2d 797 (2003). And contrary to popular belief, trespass is, more often than not, not just simply access to property, but that unauthorized access is accompanied by litter and vandalism.

Amici Forest Preserve correctly and astutely states that, in Illinois, littering is illegal. In furtherance of their point, it states that both the DNR and the Illinois

Environmental Protection Agency ("EPA") are tasked with protecting and preserving Illinois' waters. But sad experience has taught us that a law may criminalize an action, but it very rarely eliminates that action entirely. One need only travel on almost any highway in this state to see that anti-littering laws have not stopped littering. If the DNR or EPA had the authority or the funding to station conservation officers at every nonnavigable stream or river, ephemeral or otherwise, to enforce littering and vandalism laws, then it is conceivable that *Amici's* argument could at least be viewed without chortling. But the hard reality is that littering and vandalism laws don't curb littering or vandalism because they are incredibly difficult to enforce. And at the end of the day, a clean trespass does not excuse the trespass violation itself.

III. PLAINTIFFS' POSITION WOULD RESULT IN AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY.

The Illinois Constitution's takings clause states that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law." Ill. Const. 1970, art , § 15. An unconstitutional taking includes "a physical invasion of private property," almost exactly the type of access that Plaintiffs are seeking here. A "taking" occurs "where there is even the slightest physical intrusion onto property by the government, and despite any legitimate public purpose, a taking requiring just compensation has occurred." *Forest Preserve Dist. v. West Suburban Bank,* 161 Ill. 2d 448, 456, 641 N.E.2d 493 (Ill. 1994). The United States Constitution also protects against the taking of private

property without appropriate compensation. *Cedar Point Nursery v. Hassid*, 141 S.Ct. 2063 (2021). "The right to exclude is 'one of the most treasured' rights of property ownership," recognized by the Courts at 2072 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

Long ago, this Court found that an unconstitutional taking can also apply to the rights of riparian owners. *Barrington Hills Country Club v. Barrington*, 357 Ill. 11, 20, 191 N.E. 239, 243 (1934). And in the *Cedar Point* case cited above, the U.S. Supreme Court reiterated that the appropriation of an easement is also a physical taking that would require the payment of just compensation. *Cedar Point*, 141 S.Ct. at 2073-2074. Adopting Plaintiffs' argument would result in the appropriation of an easement in favor of the public, and would require due process and ultimately, the payment of just compensation in order to comply with *Cedar Point* and its predecessor cases.

Granting Plaintiffs the right to navigate the section of the Mazon River owned by Defendants is tantamount to the grant of an easement to trespass by this Court. Landowners of nonnavigable waterways have the right to exclude persons who may trespass, steal, litter, urinate, or otherwise disregard the rights of property owners.

This Court should affirm the Third District's decision which recognized the rights of riparian owners of nonnavigable waterways, which includes the right to exclude others from navigating upon such waters adjacent to or bounded on both sides of the owner's property. An injustice would result from adopting Plaintiffs'

and *amici* Forest Preserve's position and would result in a taking of private property without due process or compensation. Accordingly, Defendants respectfully request that this Court affirm the Third District's ruling.

CONCLUSION

The judgment of the Third District Appellate Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Laura A. Harmon, hereby certify that this **BRIEF OF *AMICUS CURIAE* OF ILLINOIS AGRICULTURAL ASSOCIATION a/k/a ILLINOIS FARM BUREAU IN SUPPORT OF APPELLEES** conforms to the requirements of Illinois Supreme Court Rule 341(a) and (b). The length of this Brief, excluding the pages containing the Rule 341(d) cover the Rule 341(h)(1) table of contents and statement of points and authorities, and the Rule 341(c) certificate of compliance, is 12 pages.

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