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
Peter Kodat, James Benson Benson Marian Family Trust, Mark A. Norton, Wilfred K. Robinson, and John Heath,	)	Circuit, Grundy County, Illinois No. 18 CH 90
Respondents.	)	The Honorable Eugene P. Daugherity Judge Presiding

REPLY BRIEF OF PETITIONERS-APPELLANTS

Pollack Law Group
Zachary Pollack
3601 McDonough St.
Joliet, IL 60431
zac@zacpollacklaw.com
(815) 641-7560
ARDC: 6287108

Counsel for Petitioners

E-FILED
3/9/2022 3:35 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS AND POINTS AND AUTHORITIES

ARGUMENT

Applying the civil law rule adopted in *Beacham v. Lake Zurich Property Owners Association,* 123 Ill. 2d 227 (1988), to non-navigable rivers, streams, and creeks grants access to a limited population for the limited purpose of reasonable navigation. Contrary to the concerns of Respondents and the Illinois Agricultural Association ("IAA"), application of the civil law rule in this case will not result in unfettered access to the general public. Respondents correctly argue that they have a right to "protect their property from access by the public at large," should "enjoy some measure of control over who has access to their private waterways," and "have the right to exclude persons who may become unruly, boisterous, deposit trash, or otherwise disrupt an owner's right to quiet enjoyment." *Respondents' Brief p. 6.* Granting Petitioners' request that this Court apply the civil law rule adopted in *Beacham* to non-navigable rivers, streams, and creeks addresses these concerns by limiting access to the Mazon River to riparian owners and their licenses for navigation purposes only and requiring the access be done reasonably. Accordingly, this Court should reverse the Third District's decision to apply the common law rule to rivers, lakes, and streams and apply the civil law rule.

It is important to note that both Respondents and the IAA misstate the facts of this case in their briefs. Both claim that Petitioners' fossil hunting business relies on trespassing onto Respondents' land and stealing

Respondents' property. *Respondents' Brief p. 3 n. 3; IAA Amicus Brief p. 1.* Respondents cite no authority in the record which establishes this allegation other than self-serving affidavits from each Respondent. In the course of their fossil hunting, Petitioners remove fossils from their property and only kayak on the portions of the Mazon River located on Respondents' property to reach a public access point via kayak. (C13, C127). Respondents' statement of facts agrees with this statement. *Respondents' Brief p. 2.* Petitioners were never arrested for removing property from Respondents' land, they were arrested for trespassing while kayaking. C129. Petitioners originally filed an injunctive action that requested the ability to kayak on the Mazon. C131. They do not seek permission to remove anything from Respondents' property, nor do they seek permission to set foot on Respondents' dry land. Presumably, if there were facts in the record establishing Petitioners trespassed onto Respondents' land to obtain fossils, the trial court would not have originally granted Petitioners' request for injunctive relief. The dispute between the parties is a contentious one with allegations of impropriety going both ways, but the issue in this case is limited to whether to allow Petitioners, as riparian owners, access to kayak over the portions of the Mazon located on Respondents' property.

I. Extending the Civil Law Rule to Non-Navigable Rivers, Streams, and Creeks Will Not Create Unfettered Access for the General Public.

Contrary to the contentions of Respondents and the IAA, extending the civil law rule will not create unfettered access to non-navigable rivers, creeks, and streams to the public – it will only open these waters up to other riparian owners and their licensees for navigational use in a reasonable manner. The IAA's brief argues that the adoption of the civil law rule for rivers will require farmers to "allow unfettered access to non-navigable waterways to trespassers under the guise of promoting recreation land use on private property," and that reversing the "Third District's decision will result in the grant of a completely new property right to the general public." *IAA Amicus Brief p. 4.* This completely ignores that the civil law rule only extends access to riparian owners and their licensees. The civil law rule also requires the access to be reasonable, so the claims of "unfettered access" for the general public are without merit.

Respondents exaggerate the impact of extending the civil law rule to non-navigable rivers, streams, and creeks by stating:

> [p]roperty owners along any non-navigable stream, river, or creek would have the unlimited right to access surface waters anywhere, regardless of the distance from their own property and in disregard of the rights of private property owners, country clubs, private estates, private farmland, as well as federal and military facilities to protect their property.

Respondent's Brief p. 26. As noted above, the civil law rule allows a riparian owner on a body of water to access the water from their property or other

riparian property if they have the permission of the owner. It does not allow the riparian owner to access the water "anywhere, regardless of the distance from their own property." *Id.* The reasonable use requirement gives private property owners the right to protect their property. The civil law rule creates a very narrow right of access to a very narrow population and protects the property interests of other riparian owners by requiring that the access be reasonable and for navigation purposes only.

II. Illinois Law Squarely Supports the Application of the Civil Law Rule to Rivers, Streams, and Creeks.

Contrary to Respondents' assertion, Illinois law does not require the common law rule to be applied to non-navigable rivers, streams, and creeks. Illinois jurisprudence governing a riparian owner's ability to exclude the public from their property does not address their rights to exclude other riparian owners on the same natural body of water from accessing the water for navigation purposes. The only Illinois case dealing with that issue is *Beacham*, which chose to apply the civil law rule to non-navigable lakes despite being aware of the common law relied upon by Respondents and the Third District.

a. *Beacham*, the Only Illinois Case Addressing the Right of a Riparian Owner to Access the Entire Surface of a Non-Navigable Body of Water, Applied the Civil Law Rule.

If Illinois law required the application of the exclusionary common law to all non-navigable waterways, this Court could not have applied the civil law rule to a non-navigable lake in *Beacham*. *Beacham* is the only Illinois

case addressing the right of access of riparian owners to the entire surface of a natural body of water for navigation purposes. In *Beacham*, this Court recognized that Illinois waterways have an important recreational value and that "restricting the use of a lake to the water overlying the owner's lakebed property can only frustrate the cooperative and mutually beneficial use of that important resource." *Id.* at 232. When it decided *Beacham,* this Court was aware of the common law rule being "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 230-231 (citing *Smoulter v. Boyd*, 209 Pa. 146 (1904)). This Court previously had the choice of applying the common law rule – a corollary of the common law cited by Respondents and relied upon by the Third District – but instead chose to apply the civil law rule, favoring reasonable access and full enjoyment by all riparian owners of a non-navigable natural lake. The same rationale applies to a non-navigable natural river, stream, or creek.

Respondents argue Petitioners seek to create a legal right that never existed in Illinois, namely the right to trespass upon Respondents' property. *Respondents' Brief p. 9.* However, this is the exact right this Court created in *Beacham*. This Court examined the common law rule and civil law rule and decided to create a right of access to the entirety of the surface waters of natural lakes for each riparian owner and their licensees as long as the use is reasonable. Given each riparian owner on Lake Zurich owns the lake bed

and waters above it, presumably the other riparian owners are "trespassing" when they exercise the right to navigate over that portion of the lake bed. However, this Court recognized that Lake Zurich is an important resource that is the most valuable when all riparian owners can use the entire lake and decided to allow that "trespassing" to occur in a reasonable manner. Given the only difference between a river and a lake is the ability to easily draw property lines, this Court should follow *Beacham* and apply the civil rule to non-navigable rivers, streams, and creeks.

b. **The Cases Relied Upon by Respondents and the Third District Exclusively Govern with the Ability of Riparian Owners to Exclude Non-Riparian Owners.**

None of the cases relied upon by Respondents and the Third District to support the application of the common law rule to the Mazon River address the legal relationship between riparian owners. Each case establishes a riparian owner's ability to prevent the public from removing tangible objects from a body of water. Respondents cite the seminal case of *Middleton v. Pritchard,* 4 Ill. 510 (1842) for the proposition that "the owner of land along a non-navigable waterway maintains a private property interest in all property to the middle of that non-navigable waterway." *Respondents' Brief p. 7.* However, *Middleton* dealt with the removal of timber from an island by non-riparian owners who cut the trees down without the permission of the owner. *Middleton* at 510. Respondents cite *Braxton v. Bressler,* 64 Ill. 488 (1872), but that case involved the removal of rocks from a navigable river by a non-

riparian owner without permission. *Respondents' Brief p. 8.* Respondents cite *Sikes v. Moline Consumers,* 293 Ill. 112, 124-25 (1920), but that case dealt with the removal of sand and gravel from the bed of the Mississippi River without permission. *Respondents' Brief p. 8.* Respondents cite *Piper v. Connelly,* 108 Ill. 646 (1884), but that case addressed a non-riparian owner harvesting ice without permission. *Respondents' Brief p. 9.* Finally, Respondents cite *People ex rel. Deneen v. Economy Light & Power Company*, 241 Ill. 290 (1909), for the proposition that the "owners of property adjacent to non-navigable bodies of water enjoy water rights that are 'free from any burdens in favor of the public.'" *Respondents' Brief p. 8-9.* However, that case dealt with the State of Illinois attempting to prevent a power company from building a dam across the Des Plaines River. *Deneen* at 309. Respondents also cite the treatise *Water Use Law in Illinois* for the proposition that the ownership of the bed of a stream carries with it the exclusive right to go upon the water over the portion of the bed owned, but that treatise fails to provide a citation to a case establishing that right while providing citations to cases establishing other rights mentioned including hunting; fishing; and removing sand, stone, gravel, and ice from a non-navigable river. Fredd L. Mann, Harold, H. Ellis, Norman George, & Phillip Krausz, *Water-Use Law in Illinois* 49 (University of Illinois Agriculture Experiment Station, 1964). None of the cases cited apply to the legal relationship between riparian owners. Notably,

all the cases and the treatise were available to this Court when it decided *Beacham*, and none of them persuaded it to adopt the common law rule.

c. Decisions Since *Beacham* Do Not Require the Common Law Rule to be Applied in this Case.

Contrary to Respondents' claim, Illinois courts have not limited the application of *Beacham* to lakes, rather they have declined to extend *Beacham* to manmade bodies of water where riparian rights do not apply. Since *Beacham*, Illinois courts have examined whether the civil law rule applies to other bodies of water, but both cases dealt with manmade bodies of water. *In Nottolini v. LaSalle National Bank*, 335 Ill. App. 3d 1015, 1019 (2d Dist. 2003), the Second District addressed whether adjoining landowners on a man-made quarry that had filled with water had rights to the entire surface of the newly created lake. The court held that a man-made quarry that filled with water was not a lake because it was not naturally created. *Id.* The court denied relief to the plaintiffs because riparian rights do not apply to man-made bodies of water. *Id. Alderson v. Fatlan*, 231 Ill. 2d 311, 320 (2008), examined the same set of facts and this Court reached the same conclusion: riparian rights do not apply to manmade bodies of water. The Mazon River is a natural body of water to which riparian rights apply, so *Nottolini* and *Alderson* provide no guidance in this case. *Hasselbring v. Lizzio*, 332 Ill. App. 3d 700 (3d Dist. 2002) dealt with rights of accretion and likewise provides no insight.

Respondents argue *Alderson* demonstrates a "general policy favoring recreation [is] insufficient to override private property interests," *Respondents' Brief p. 16,* but this ignores this Court's approval of the reasoning behind the *Beacham* decision:

> After discussing the cases from other jurisdictions, we 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" and, therefore, that the civil law rule was the better approach. (citation). Accordingly, we held that "where there are multiple owners of the bed of a private, nonnavigable lake, such owners and their licensees have the right to the reasonable use and enjoyment of the surface waters of the entire lake provided they do not unduly interfere with the reasonable use of the waters by other owners and their licensees. (citation)."

Alderson, 231 Ill. 2d at 319 (quoting *Beacham,* 123 Ill. 2d at 232). Notably, this Court did not mention concerns about the ease of establishing property lines on a lake rather it focused on the promotion of the mutual and full enjoyment of an important resource by all riparian owners. This Court did not make its decision in *Alderson* due to a rejection of *Beacham's* embrace of promoting the recreational use of lakes, it made its decision because riparian rights do not apply to man-made bodies of water. Given the Mazon River is a natural body of water where riparian rights apply, *Alderson* supports the extension of the civil law rule to non-navigable rivers, streams, and creeks.

Given this Court's willingness in *Beacham* to consider factors outside the established common law and adopt the civil law rule as applied to non-

navigable, natural lakes, it is clear Illinois law supports the application of the civil law rule to non-navigable rivers, streams, and creeks.

III. The Third District Erred in Not Applying the Civil Law Rule to Non-Navigable Rivers, Streams, and Creeks.

Respondents and the Third District both suggest that the ability to easily establish property lines on a river is the determinative factor in whether the civil law rule should be extended to a non-navigable river, *see Holm v. Kodat,* 2021 IL App (3d) 200164 ¶27, but this ignores *Beacham's* focus on the promotion of the recreational use of waterways and the cooperative and mutually beneficial enjoyment of important natural resources, which favors the extension of the civil law rule to rivers, streams, and creeks. It also ignores the fact that navigational access on a lake likely creates a larger burden than navigational access on a river, stream, or creek. Other than it being easier to establish property lines on a river, stream, or creak, neither Respondents nor the Third District provide any additional persuasive factors as to why these waters should be treated differently than a lake. The civil law rule can be applied to rivers, streams, and creeks in the same manner as a lake and foster the same mutual enjoyment of valuable resources *Beacham* sought to foster while protecting private property rights by requiring any navigational use to be reasonable.

a. The Ability to Easily Establish Property Lines on a River, Stream, or Creek Does Not Render *Beacham* Distinguishable.

The ability to identify property lines more easily on a river, stream, or creak than a lake is not a meaningful factor in deciding whether the civil or common law rule should be extended. In support of the proposition that *Beacham* does not apply to the Mazon River, Respondents cite the trial court's statement that *Beacham* was inapplicable because it is impossible to develop property lines on a lake whereas on a river in "can be done." *Respondents' Brief p. 12-13* (citing R71). Respondents also cite the Third District, which explained that the "physical characteristics of the Mazon Creek, 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.'" *Respondent's Brief p. 13* (citing *Holm v. Kodat*, 2021 IL App (3d) 200164, ¶¶ 24,27. The focus on boundary lines ignores *Beacham's* goal of limiting the segmentation of a body of water created by applying the common law rule and promoting the "cooperative and mutually beneficial use" of important resources. *Beacham,* 123 Ill. 2d at 232,

In *Beacham* this Court approvingly cited cases rejecting the common law rule which noted "difficulties presented by attempts to establish and obey definite property lines" and the "impractical consequence of the common law rule such as the erection of booms, fences, or barriers." *Beacham* 123 Ill. 2d at *230-31* (citing *Beach v. Hayner*, 207 Mich. 93, 95-96 (1919), *Duval v. Thomas,* 114 So.2d 791, 795 (Fla.1959)). These concerns are not alleviated

simply because it is easier to identify property lines on a river. *Beacham* viewed the erection of booms, fences, and barriers on a body of water as a negative. If the common law rule is applied to a river, presumably there is a greater chance of the erection of these items given the ability to easily establish property lines. The erection of boundaries is the exact type of impractical result the *Beacham* court sought to avoid. The erection of boundaries up-and-down a river, although easier to facilitate than on a lake, is impractical and potentially dangerous. The elimination of the ability to use the entirety of the Mazon River for reasonable navigational purposes is exactly what *Beacham* sought to avoid.

b. The Topographical Differences of a Lake and a River Do Not Render *Beacham* Distinguishable.

Respondents argue that the limited amount of waterfront property on a lake naturally limits the number of riparian owners who can access a lake, but because rivers and streams are longer these bodies of water would be opened to "a vast number of riparian owners throughout the state, thereby exposing Respondents to the potential risk of a significant and unreasonable use of a small creek." *Respondents' Brief p. 20.* First, this ignores the fact that the civil law rule requires any use to be reasonable, so Respondents have recourse in the event another riparian owner or a licensee is using their right of access for navigation in an unreasonable manner. Second, the ability of a riparian owner to navigate on a river is much more constrained than on a lake. A lake is an open body of water with no current where the riparian

owner may enter and exit the water at their property. A river, stream, or stream has a current which makes it much more difficult to exit at the point of access. A riparian owner on any body of water with a current must have the right to enter the water at an access point and the right to exit the water at some point downstream. This is highlighted by Petitioners' reason for requesting the ability to kayak over Respondents' portions of the Mazon River. Petitioners enter the River on their Access Property, kayak to the landlocked property, then kayak over Respondents' land to a public access point. (C127). Petitioners do so because they are physically incapable of kayaking upstream due to the current. Due to the current present in a river, stream, or creek, the likelihood is that a given point on a river will experience less traffic than a given point on a lake, and that traffic will be there for a much shorter period on a river.

The topographical differences of a lake and river, stream, or creek make it likely that the burden created by the civil law rule is greater to the riparian owner on the lake.

c. Cases from Other Jurisdictions Cited by Respondents are Not Persuasive.

Respondents cite cases from other jurisdictions rejecting *Beacham* or adopting *Middleton* as persuasive authority that the common law rule should be adopted in this case, but none of the cases provide insight on the issue before this Court. *Rock-Koshkonong Lake District v. State Department of Natural Resources*, 350 Wis. 2d 45 (2013), is a Wisconsin case that denied the

Wisconsin Department of Natural Resources' ("WDNR") request to extend its public trust jurisdiction beyond navigable waters to non-navigable waters and land. The court recognized that the Wisconsin public trust doctrine allows public access to navigable waters but not to non-navigable ones. *Id.* at 81. *Rock-Koshkonong* provides no persuasive authority because it dealt with the ability of the WDNR to raise the water levels of an impounded lake, not the relationship between riparian owners on a body of water. *Orr v. Mortvedt*, 735 N.W.2d 610 (2007) is a case that declined to apply the civil law rule to a lake formed at an abandoned quarry. The Supreme Court of Iowa cited *Beacham* and declined to apply the civil law rule to the lake. *Id.* at 618. *Orr* is not persuasive because riparian rights do not apply to man-made bodies of water, as noted in *Nottolini* and *Alderson, supra p. 7*. *Wehby v. Turpin*, 710 So.2d 1243 (1998), is a similar case where the Alabama Supreme Court declined to apply the civil law rule to a man-made lake, and likewise provides no persuasive authority. *People v. Emmert*, 198 Colo. 137, 141 (1979), addressed the trespassing convictions of non-riparian owners that floated over private property. This case deals with riparian owners seeking access to a portion of the river held by other riparian owners, and thus *Emmert* is not persuasive. Finally, *Ross v. Faust*, 54 Ind. 471, 474 (1876) deals with non-riparian owners hauling away gravel from a private riverbed, a scenario vastly different from this case.

The cases cited by Respondents are different factually or address issues not before this Court and provide no persuasive authority.

IV. Petitioners are Not Asking this Court to Classify the Mazon River as a Navigable Waterway.

Respondents are correct that it is the purview of the Illinois Department of Natural Resources to determine whether a body of water is navigable, but this is not relevant to this case as Petitioners do not seek to have the Mazon declared a navigable waterway. The designation of the Mazon as a navigable waterway would result in a public easement of navigation, which Petitioners do not want. Petitioners only seek access to the Mazon by other riparian owners on the river and their licensees in a reasonable manner.

V. Applying the Civil Law Rule to Non-Navigable Rivers, Streams, and Creeks Will Not Result in an Unconstitutional Taking of Private Property.

Respondents and the IAA argue that applying the civil law rule to non-navigable rivers will result in an unconstitutional taking, but the application of the rule does not result in a taking at all. As Respondents note, the Illinois takings clause states that "[p]rivate property shall not be taken or damaged for public use without just compensation as provided by law." *Tzakis v. Me. Twp.*, 2020 IL 125017, ¶ 45 (quoting Ill. Const. 1970, art. I, § 15). For government action to be a taking, the government must physically intrude on private property or enact regulation that "radically curtails a property owner's right such that 'all economically beneficial or productive use of land

is denied." *Forest Preserve Dist. of DuPage County v. West Suburban Bank,* 161 Ill. 2d 448, 457 (1994). A finding in Petitioners' favor does not satisfy either criterion to establish a government taking, let alone an unconstitutional one.

Respondents argue that allowing Petitioners to access the portions of the Mazon River on their property "would essentially amount to a government authorization of private property." *Respondents' Brief p. 24.* However, there is no physical intrusion by the government nor is the government enacting a regulation that radically curtails Respondents' property rights. Respondents cite no case law that establishes a judicial decision establishing the rights of parties can create a situation where a government taking occurs. Finally, in *Beacham,* this Court was not concerned with sanctioning an unconstitutional taking when it approved the same kind of access requested in this case.

The common law establishing the relationship between riparian owners places much higher constraints on the use of private property than allowing access for navigation, and none of those cases resulted in a taking. The common law holds that "riparian rights of property owners abutting the same body of water are equal, and no such 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." *Anderson v. Fatlan*, 231 Ill.2d 311, 319-20 (2008). The common law restricts the ability of a riparian

owner to construct a dam upon his land if it negatively impacts the water flow to another riparian owner's property. *Tetherington v. Donk Bros. Coal & Coke Co.,* 232 Ill. 522, 525 (1908). No taking resulted in this case which created a much bigger curtailment of a riparian owner's use of their property than allowing another riparian owner to kayak on his land.

Respondents and the IAA cite the case of *Barrington Hills Country Club v. Barrington,* 357 Ill. 11 (1934), for the proposition that an unconstitutional taking can apply to the rights of riparian owners, but that case dealt with a physical government intrusion onto private property. This Court held that discharging pollution into a stream on the riparian owners' lands was an invasion of property rights. *Id.* at 20. *Barrington Hills* is distinguishable from this case because it involved an actual physical encroachment on private property by the government while this case involves no government encroachment at all.

VI. Petitioners' Reasonable Use Argument Does Not Raise a New Issue.

Petitioners' reasonable use argument does not raise a new issue and the record is sufficient for this Court to decide the issue. Respondents assert that Petitioners' reasonable use argument is new and may not be raised for the first time on appeal. *Respondents' Brief p. 18.* Respondents cite *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 500 (1985), in support of this proposition. *Respondents' Brief p. 18.* However, *Western Casualty* does not address raising a new argument for the first time on appeal, it addresses

raising a new question for the first time on appeal. *Western Casualty* at 105 Ill. 2d 500. While *People ex. rel. Wilcox v. Equity Funding Life Ins. Co.,* 61 Ill. 2d 303, 313 (1975), does mention it is inappropriate to raise a new "theory" on appeal, it acknowledges that the rule is not "unyielding." This Court has also stated that the rule regarding not raising new issues on appeal is "not unyielding," and it is appropriate to "consider an issue not raised in the circuit court if the record contains all the factual material necessary to decide the issue." *Bell v. Louisville & Nashville R. Co.,* 106 Ill. 2d 135, 141-42 (1985) (citing *Wilcox,* 61 Ill. 2d 303). In this case, the facts needed to rule on the issue are contained in the appellate record, since it is the same issue raised in the trial court. The record below included arguments regarding the common law on riparian rights.

It should be noted that Respondents presented a completely new set of cases to the trial court and raised new arguments in their Motion to Reconsider. R22. This caused the trial court to remark "none of the case law that [Respondents] cited in the motion to reconsider was cited in the original motion for summary judgment or in any of the memoranda nor in response to the [R]espondents' motion." R22. Respondents also raise their takings argument for the first time in front of this Court. *Respondents' Brief p. 22.*

VII. If This Court Chooses to Apply the Common Law, It Should Apply the Reasonable Use Doctrine.

Both parties agree this is a case of first impression, and if this Court chooses to apply the common law, it should apply the reasonable use doctrine

established in *Evans v. Merriweather*, 4 Ill. 492, 494 (1842). The Illinois common law established by *Middleton* and its progeny governs the ability of riparian owners to exclude individuals from their property but does not address the relationship between riparian owners on the same body of water. The common law governing the relationship between riparian owners was established in *Evans* and applies the reasonable use doctrine when adjudicating disputes between riparian landowners. Although no Illinois case applies the reasonable use doctrine in a case with a similar factual pattern as the one in this case, *Thompson v. Enz,* 379 Mich. 667 (1967), provides a roadmap for this Court to determine whether Petitioners' brief period of kayaking over Respondents' water is reasonable.

Respondents argue that the cases cited by Petitioner to advance their reasonable use argument predominantly deal with the consumption of water and do not apply to this case. *Respondents' Brief p. 26*. However, as noted above, the reasonable use doctrine is the only way the Illinois common law has addressed conflicts between riparian landowners in the past. Respondents also highlight the factual differences between this case and *Thompson* to suggest *Thompson* is inapplicable to this case. *Id.* While the *Thompson* case deals with access to a lake and is not directly on point, its reasoning provides a definitive roadmap to apply to this case to determine if Petitioners' kayaking. Respondents suggest *Thompson* provides "no substantive direction for the case at bar" to evaluate the reasonableness of

the Petitioners' kayaking. *Respondents' Brief p. 27.* However, *Thompson* provides a complete list of factors to determine reasonableness which Petitioners apply to this case in their Opening Brief. *Petitioners' Brief p. 19-20.* This is a case of first impression in Illinois, and if the Court chooses to apply the common law it should apply the reasonable use doctrine.

VIII. The Issue in this Case is Ideally Suited for Judicial Review.

While the implications of this case are far-reaching given the amount of non-navigable rivers, streams, and creeks in Illinois, the decision on whether to apply the civil or common law rule is well within this Court's purview. This Court decided *Beacham* as applied to natural, non-navigable lakes and it is appropriate to do the same in this case. Respondents argue that this is a matter of first impression and that there are no Illinois statutes or legal opinions that apply or adopt the civil law rule to non-navigable rivers, streams, or creaks. *Respondents' Brief p. 25.* However, at the time this Court decided *Beacham,* there were no Illinois statutes or legal opinions that applied or adopted the civil law rule to non-navigable natural lakes, and this Court saw fit to decide to apply the civil law rule. Respondents again assert that *Beacham* is distinguishable because property lines can easily be established along the Mazon River, *Respondents' Brief p. 25*, but this is an argument for not applying the civil law rule to non-navigable rivers, streams, and creeks and not a reason for this Court to leave the decision to the legislature.

CONCLUSION

For the above reasons, Petitioners request this Honorable Court:

A. Reverse the Third District's decision in *Holm v. Kodat* and hold the civil law rule applies to the Mazon River.

B. For any other relief, the Court deems just.

/s/Zachary Pollack 03/09/2022
Pollack Law Group
Zachary Pollack
3601 McDonough St.
Joliet, IL 60431
zac@zacpollacklaw.com
(815) 641-7560
ARDC: 6287108

CERTIFICATE OF COMPLIANCE

I, Zachary Pollack, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) 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 5482 words.

/s/ Zachary Pollack
ZACHARY POLLACK
ARDC No.6287108
Of Counsel

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 March 9, 2022, the foregoing **Petitioners-Appellants' Reply 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:

Chad J. Layton, Esq.,
Patrick F. Sullivan, Esq.,
Segal McCambridge Singer
& Mahoney, Ltd.
233 South Wacker Drive,
Suite 5500 Chicago, Illinois
60606
(312) 645-7800
clayton@smsm.com
psullivan@smsm.com

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.

/s/ Zachary Pollack

Zachary Pollack
Pollack Law Group
zac@zacpollacklaw.com