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 No. 03-20-0164
Appellants,	)	
v.	)	There on Appeal from the Circuit Court of the 13th Judicial Circuit, Grundy County, Illinois No. 18 CH 90
PETER KODAT, JAMES BENSON, BENSON MARIAN FAMILY TRUST, MARK A. NORTON, WILFRED K. ROBINSON, and JOHN HEATH,	)	
Appellees.	)	The Honorable Eugene P. Daugherity Judge Presiding

BRIEF OF APPELLEES-DEFENDANTS

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POINTS AND AUTHORITIES

STATEMENT OF FACTS

This case arises out of a dispute concerning riparian rights and whether or not Plaintiffs should have the legal right to access the surface of a portion of the Mazon Creek[1] that flows over Defendants' properties. In essence, Plaintiffs are seeking an order allowing them to trespass over private property. Defendants, in turn, seek to protect their property interests and to uphold Illinois law that has existed for over a century.

I. THE PARTIES' PROPERTIES AND THE MAZON CREEK.

The Mazon Creek runs from south to north. (C 10 ¶ 1; C 123 ¶ 1). Plaintiffs own two parcels of property near the Mazon Creek in Grundy County: a "landlocked" parcel of property (the "Landlocked Property") and a separate parcel of property with access to the Mazon Creek and Oxbow Road (the "Access Property"). (C 11 ¶ 5–C 12 ¶ 6; C 124 ¶ 5–C 125 ¶ 6). Of the properties at issue in this litigation, the southernmost property is Plaintiffs' Access Property. (C 12 ¶ 6; C 125 ¶ 6). The Mazon Creek then briefly travels east, rounds a bend, and travels back west across Plaintiffs' Landlocked Property. (C 240–C 244). The Mazon Creek then resumes flowing to the north toward the Defendants' collective Properties.[2] A color map demarking the Landlocked Property and Access Property can be found at C 240–C 244.

Defendants own multiple parcels of property approximately 1.7 miles downstream (which is to the north) of the Plaintiffs' two properties. (C 13 ¶ 7–C 14 ¶ 11; C 126 ¶ 7–C

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[1] The National Park Service lists the Mazon Creek Fossil Beds as a Natural Historic Landmark. (www.nps.gov/subjects/nationalhistoriclandmarks/list-of-nhls-by-state.htm). Notably, the Defendants collectively own the entire portion of the Mazon Creek that is designated as a Natural Historic Landmark. (C 284–285 ¶ 4).

[2] Grundy County's Pine Bluff Road Bridge is located even further downstream, to the north. (C 15 ¶ 23; C 127 ¶ 19).

127 ¶ 11). Defendants collectively own all of the property on both sides of the section of the Mazon Creek that is at issue in this litigation and, accordingly, there is no right of public access to that section of the Mazon. (*Id.*; C 457–458). Plaintiffs do not own any property on this section of the Mazon Creek. (*Id.*) Accordingly, Defendants maintain complete ownership of a section of the Mazon Creek downstream from Plaintiffs' two parcels of property. (*Id.*)

Near its intersection with the Illinois River, the Mazon Creek contains exposed Francis Creek Shale, which includes well preserved fossils from the Pennsylvanian period of the Paleozoic era. (C 11 ¶ 2; C 123–124 ¶ 2). Plaintiffs hold themselves out to be "fossil hunters," who sift through the Francis Creek Shale on the Access Property and Landlocked Property in order to harvest fossils that Plaintiffs sell to paleontologists and collectors. (C 11 ¶¶ 2–4, 15–17; C 123 ¶ 2–124 ¶ 4, C 127 ¶¶ 14–16). Notably, these fossils are of national and international renown to collectors as well as paleontologists. (C 11 ¶¶ 2–4, 17; C 123 ¶ 2–124 ¶ 4, C 127 ¶ 16). Plaintiffs float their kayaks at the Access Property, harvest fossils at the Landlocked Property, and then kayak their way past Defendants' properties to a roadway access point in order to egress with their fossils. (C 13; C 127).

Importantly, all parties agree that the Mazon Creek is a non-navigable body of water. The Plaintiffs' Verified Complaints allege that the Mazon Creek is non-navigable, (C 16 ¶ 25; C 129 ¶ 35) and this fact is not disputed by any of the parties. (C 186 ¶ 35). In fact, Plaintiffs' counsel confirmed at the hearing on the Amended Motion to Reconsider that the Mason Creek is a non-navigable body of water. (R 46:7–17).

II. PLAINTIFFS' CLAIMS AND CONTENTIONS.

Plaintiffs' Amended Verified Complaint states a legal claim for declaratory relief against the Defendants, and seeks an order declaring that Plaintiffs have a right to access Defendants' portion of the Mazon Creek given Plaintiffs' status as riparian owners. (C 129–130).[3] Plaintiffs themselves agree that they "hunt for valuable and unique fossils on both the Landlocked Property and the Access Property." (Plaintiffs' Supreme Court Brief, pg. 3). Plaintiffs contend that Defendants are interfering with the operation of their fossil harvesting business and their purported right to access a portion of the Mazon Creek that runs over Defendants' property. (C 10–11; C 14–15; C 123–124; C 127–129).[4] In other words, Plaintiffs allege that Defendants are denying them access to the surface of a portion of the Mazon Creek that runs over property owned exclusively by the Defendants. (*Id.*)

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[3] Plaintiffs have routinely trespassed onto Defendants' property via the Mazon Creek and have removed rocks and fossils from the Defendants' property without permission or authorization, particularly rocks and fossils located in the Mazon Creek bed owned by the Defendants. (C 303–305; C 309–310; C 314–317). While Plaintiffs claim that the entire Mazon Creek is a National Historic Landmark due to its fossils and paleontological significance, only a one-quarter mile section of the Mazon Creek is a National Historic Landmark for fossils, and that section is owned exclusively by the Defendants. (C 184–185 ¶ 4). As such, Plaintiffs' fossil hunting business depends upon trespassing onto Defendants' land and stealing Defendants' property for resale to the highest bidder at market. Defendants provided Plaintiffs with written notices asking Plaintiffs to refrain from trespassing on their land. (C 310–320). Plaintiffs refused to comply, which resulted in the trespass arrests referenced in Plaintiffs' Brief. Of course, anyone stealing property owned by another would be subject to criminal prosecution as well as civil litigation.

[4] Plaintiffs initially sought an injunction against Defendant Grundy County (C 16–17; C 130–131). However, Grundy County was dismissed with prejudice on April 8, 2019, and Plaintiffs did not appeal that dismissal. (C 207). As such, Plaintiffs' current appeal does not pertain to former Defendant Grundy County.

Plaintiffs are able to access the Mazon Creek and operate their fossil harvesting business from their own property without accessing the portion of the Mazon Creek that runs over Defendants' property. (R. 49–50). In other words, Defendants are not, in any way, attempting to prevent Plaintiffs from accessing Plaintiffs' own property. Moreover, Defendants have made no effort to preclude Plaintiffs from using any portion of the Mazon Creek other than that which runs over Defendants' property. (C 15 ¶¶ 23–24; C 126 ¶ 22–127 ¶ 32).

III. PROCEDURAL HISTORY.

Once the pleadings were in order, the parties proceeded directly to cross-motions for summary judgment without conducting any discovery. (C 209–253; C 284–293). On October 9, 2019, the Trial Court heard oral arguments from each party on their respective Motions for Summary Judgment. (R 2–18). Plaintiffs asserted a narrowly tailored argument, that Plaintiffs have a riparian right to access the water flowing over Defendants' property, relying primarily on the Illinois Supreme Court's opinion in *Beacham v. Lake Zurich Property Owners Assn.*, 123 Ill. 2d 227 (1988), a case which involved access to the surface of a lake. (R 4:11–R 5:6; R 5:7–11; R 5:22–R 6:2). In response, Defendants argued that *Beacham* was distinguishable because that case concerned the rights of access to a lake, and the instant case involves access to a creek. (R 9:9–R 11:3). Following the initial hearing, the Trial Court granted Plaintiffs' Motion for Summary Judgment finding that *Beacham* controlled. (R 17:11–22; C 361).

Defendants then moved for reconsideration, arguing that *Beacham* was not controlling. (C 453–468). After a full hearing, the Trial Court agreed with Defendants and reversed itself. (C 543). In granting the relief requested by Defendants, the Trial Court acknowledged that its original decision was based predominantly on *Beacham*, but

that it since had an opportunity to evaluate "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." (R. 65–66). The Trial Court continued by explained that "the riparian rights of access are not superior to the rights of private ownership" (R. 70–71) and expressly acknowledged that *Beacham* is inapplicable:

> 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 because of the *Shedd* versus *Fuller* case cited in the brief and the other cases which indicate that the creation of the property line in a lake is impossible to develop, whereas in a stream such also [*sic*] the Mazon River it is not impossible and, therefore, it can be done.

(R. 71). The Trial Court further acknowledged that Plaintiffs are, in fact, able to access their own property without trespassing on the portion of the Mazon Creek that flows over Defendants' properties. (R. 49–50).

On appeal, the Third District affirmed the Trial Court's entry of summary judgment in favor of the Defendants. *Holm v. Kodat*, 2021 IL App (3d) 200164, ¶ 33. The Third District held 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." *Id.*, ¶ 31. Accordingly, "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.*

ARGUMENT

Defendants are merely asking this Court to affirm the Trial Court and Third District's decisions that were each grounded in a body of law that has existed for decades. Defendants are interested in protecting their property from access by the public at large, including riparian owners who have no legal right to the limited section of the Mazon at issue, here. Illinois landowners should enjoy some measure of control over who has access to their private waterways, and should have the right to exclude persons who may become unruly, boisterous, deposit trash, or otherwise disrupt an owner's right to quiet enjoyment. Unlike other matters, there is no evidence here of a groundswell demand for public access to the Mazon Creek. Instead, Plaintiffs seek access – not for recreation – but in order to operate their fossil harvesting business. This hardly presents a compelling reason to undo a century of Illinois law.

Plaintiffs are essentially asking that this Court make a radical departure from long-standing legal precedent and create a new rule of law that will impact virtually every person who owns property adjacent to a creek, river, or stream in the state of Illinois. Such a far-reaching legal decision is better left to the state legislature. Accordingly, Defendants respectfully request that this Court affirm the Third District's ruling.

I. ILLINOIS LAW THAT HAS EXISTED FOR OVER A CENTURY SQUARELY SUPPORTS THE THIRD DISTRICT'S DECISION.

A. The Mazon Creek Is Indisputably a Non-Navigable Waterway.

In reaching its decision, the Third District observed there is no dispute that the Mazon Creek "is not navigable in fact" and that the Mazon Creek "is not, in its natural state, an avenue for commerce by the customary modes of water transportation." *Holm v. Kodat*, 2021 IL App (3d) 200164, ¶ 28. As a consequence, explained the Third District,

"a public easement does not exist to allow public navigation" on the Mazon Creek. *Id.*, ¶ 29.[5]

The Illinois Supreme Court long-ago distinguished between navigable and non-navigable waterways based upon their navigability-in-fact. In *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 332-33 (1909), the Supreme Court stated that "[a] stream, to be navigable, must in its ordinary, natural condition furnish a highway over which commerce is or may be carried on in the customary modes in which such commerce is conducted by water." *Id.* The court further explained: "[t]he fact that there is water enough in places for row boats or small launches . . . does not render the waters navigable." *Id.* at 332.

Here, there is no evidence that the section of the Mazon Creek at issue serves as a water-highway for commerce. The Trial Court correctly acknowledged the parties' agreement that "this stream is non-navigable in the sense that it is not open to the public for use and in the sense that it is not open to shipping and/or canal and barge traffic and what have you." (R 16). Accordingly, the section of the Mazon Creek at issue in this litigation is a non-navigable waterway, and there is no public easement or right of access.

B. The Trial Court and Third District Correctly Followed Long Established Legal Precedent That Controls Disputes Concerning Non-Navigable Waterways.

Illinois has long recognized that the property interest in a non-navigable waterway is private, and the owner of land along a non-navigable waterway maintains a private property interest in all property to the center of that non-navigable waterway. *Middleton*

[5] All parties as well as the Trial Court agree that the Mazon Creek is not navigable. (C 16 ¶ 25; C 129 ¶35; C 186 ¶35; R4; R9-R10).

v. Pritchard, 4 Ill. 509 (1842).[6] In *Middleton*, the defendant was cutting timber on a river island adjacent to land owned by the plaintiff. 4 Ill. at 518. Plaintiff claimed that the island and its timber belonged to him, as he owned all land from his shoreline to the center of the river. *Id.* In deciding this issue, the Illinois Supreme Court considered common law riparian rights, holding that such rights are affected by whether a waterway is navigable or non-navigable. *Id.* at 519. According to the Illinois Supreme Court, owners of the shores that meander navigable waterways have a common law right to all land above the high-water line to the middle of the stream, with the public maintaining an easement to use the water for navigation, fishing, and similar activities. *Id.* However, the Illinois Supreme Court also found that "*the water*, and the soil under it, to the centre of the current, as well as the right to fish there, are exclusively in the riparian owner" of non-navigable waterways. *Id.* (emphasis added). In other words, owners of property adjacent to a non-navigable river enjoy exclusive surface rights over that river.

Under the common law, the ownership of the bed of a stream carries with it the exclusive right to go upon the water over the section of the bed so owned. *Braxon v. Bressler,* 64 Ill. 488 (1872). *See also Sikes v. Moline Consumers,* 293 Ill. 112, 124–25 (1920) (acknowledging that where a plat of land is bound by a stream, the owner enjoys property rights that extend to the center of that stream and can maintain a legal action against trespassers); *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290,

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[6] The *Middleton* decision has not been overturned or abrogated by any statute or constitutional amendment nor has it been overruled by any subsequent Illinois Supreme Court opinion. *See Fuller v. Shedd*, 161 Ill. 462, 481–83 (1896) (citing *Middleton's* assessment of riparian rights and analyzing the differences between non-navigable lakes and non-navigable streams); *Chicago v. Laflin*, 49 Ill. 172, 175 (1868) (reaffirming *Middleton's* analysis of non-navigable waterways).

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) (the Illinois Supreme Court recognized that an owner of property that sits adjacent to a stream owns the "exclusive right" to the center of the current, and that this doctrine "has been too long established, and too firmly adhered to by this court, to now be questioned."); Fred L. Mann, Harold H. Ellis, Norman George, & Phillip Krausz, *Water-Use Law in Illinois* 49 (University of Illinois Agriculture Experiment Station, 1964) (stating that "[t]he ownership of the bed of the stream, without more, carries with it the *exclusive* right to go upon the water over the portion of the bed owned. . . .") (emphasis added).

Under controlling Illinois law – which has existed for over a century – the Defendant property owners on each side of the Mazon Creek hold exclusive surface rights that extend to the center of the section of the Mazon Creek that runs over their respective properties. *Id.*; *Piper,* 108 Ill. at 651. Despite this long-standing legal precedent, Plaintiffs seek to create a legal right that has never existed in Illinois. With respect to the section of the Mazon Creek at issue, Plaintiffs are simply members of the public and have no easement or right of access. Nonetheless, Plaintiffs contend they should have the right to trespass on Defendants' property simply because Plaintiffs own land abutting a different section of that same creek. Yet there is no legal basis to support the relief requested by Plaintiffs. The fact that Plaintiffs own physical property in the area does not afford Plaintiffs the right to trespass on Defendants' land. Likewise, Plaintiffs have no legal right to trespass over the Defendants' section of the Mazon Creek simply because Plaintiffs' property is located adjacent to the Mazon.

C. Plaintiffs' Critique Of The Case Law Cited By The Third District Is Unpersuasive.

The Third District relied on a body of case law that, when viewed collectively, squarely supports its decision to affirm the Trial Court's ruling. As discussed, above, Illinois law supports the protection of Defendants' private property rights. Moreover, to support the point of law that "[i]f a riparian owner's land extends to and bounds on a river, then the center of the river is the property line," the Third District cited to *Schulte v. Warren*, 218 Ill. 108 (1905); *Fuller v. Shedd*, 161 Ill. 462 (1896) (dispute between property owners); and *Braxon v. Bressler*, 64 Ill. 488 (1872) (dispute between the owner of the bed of the stream to its center and those who took rock therefrom). The Third District further cited to many cases with explanatory parentheticals to support the point that Illinois law protects exclusive ownership rights of riparian owners, including *Druley v. Adam*, 102 Ill. 177 (1882) (dispute between property owners); *Braxon*, 64 Ill. 488; *Washington Ice. Co. v. Shortall*, 101 Ill. 46 (1881) (dispute between property owners); *Albany R. Bridge Co. v. People*, 197 Ill. 199 (1902) (dispute over boundary of town); and *Piper v. Connelly*, 108 Ill. 646 (1884) (dispute over property ownership).

Plaintiffs argue that the cited cases fail to evaluate the rights of riparian owners as compared to other riparian owners (opposed to the public at large). Plaintiffs' contention simply presents a distinction without a difference. First, there is no legal support for Plaintiffs' argument that this distinction should have any legal meaning, here. Second, Plaintiffs are essentially arguing that they should have the right to trespass across Defendants' surface water simply because Plaintiffs are riparian owners. Again, there is no case law support for Plaintiffs' argument, which seeks to contravene a vast body of Illinois law that has existed for over a century.

II. THE THIRD DISTRICT PROPERLY CONCLUDED THAT *BEACHAM* IS DISTINGUISHABLE AND NOT CONTROLLING HERE.

A. *Beacham* Does Not Apply To A Non-Navigable Creek.

Plaintiffs' legal argument before this Court rests primarily on the Illinois Supreme Court's decision in *Beacham v. Lake Zurich Property Owners Assoc.*, 123 Ill. 2d 227 (1988). In *Beacham*, this Court addressed the respective rights of property owners surrounding a non-navigable lake. The Illinois Supreme Court had not "previously determined the respective rights of lake bed owners in the use and enjoyment of the lake," and therefore considered the decisions of other states on the issue.[7] *Id.* at 230. Importantly, the cases reviewed and cited by the *Beacham* court all involved lakes and did not reference or consider non-navigable creeks, rivers, or streams.

The Supreme Court reviewed the common law rule, which provides that the owner of part of a lakebed has the right to exclusive use and control of the surface rights above his portion of the lakebed. Under the common law rule, the property owner can exclude others from using his surface rights, including others who own property adjacent to the lake. *Id.* at 230–31. However, for purposes of determining surface rights on a lake, the Illinois Supreme Court rejected the common law rule because of "the difficulties presented by attempts to establish and obey definite property lines [on a lake]." *Id.* at 231. In other words, given the physical properties of a lake, it would be extremely difficult if not impossible to establish and enforce property lines. Accordingly, the *Beacham* court applied the civil law rule, and held that the owner of part of a lakebed enjoys the right to reasonable use and enjoyment of the entire lake surface. *Id.*

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[7] The states are split on the application of the common law rule versus the civil law rule to the surface rights that an owner of part of a lakebed has. In *Beacham*, the Court cited to eight states that apply the common law rule and four states that apply the civil law rule.

Illinois courts have limited the application of *Beacham* to only cases involving a lake. For example, in *Nottolini v. LaSalle Nat'l Bank*, 335 Ill. App. 3d 1015 (2d Dist. 2003), the Second District held that a water-filled quarry was not a lake, and that *Beacham* was inapplicable. *See also Alderson v. Fatlan*, 231 Ill. 2d 311, 312 (Ill. 2008) (refusing to apply *Beacham* to a body of water that was not a lake); *Hasselbring v. Lizzio*, 332 Ill. App. 3d 700, 704 (3d Dist. 2002) (applying *Beacham* to a dispute over surface rights to a lake, which had receded and become a pond). The Mazon Creek is, clearly, not a lake[8] as that term is legally defined in Grundy County. As a consequence, *Beacham* is not controlling, here.[9]

Importantly, the Trial Court itself acknowledged that *Beacham* involved a lakebed that, for practical reasons, could not be partitioned with a boundary, and recognized that Defendants "own property on both side of this particular stream and therefore in their case they can boundary it off. . . ." (R 14–15.) The Trial Court ultimately concluded that

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[8] Plaintiffs do not even attempt to argue that the Mazon Creek is a lake because, of course, that argument would fail. The Mazon Creek is a creek with a current. The Mazon Creek is not substantially at rest and does not occupy a depression in the earth similar to that of a lake or pond. The Mazon Creek does not qualify as a "lake" as that term is defined by Illinois law. *Alderson v. Fatlan*, 372 Ill. App. 3d 300, 302 (3d Dist. 2007) (a lake is "a reasonably permanent body of water substantially at rest in a depression in the surface of the earth, if both depression and body of water are of natural origin or a part of a watercourse.") Moreover, the Grundy County ordinance expressly defines a "lake" as "[a] body of water two (2) or more acres in size which retains water throughout the year." Grundy County Ordinance 8-4-5-6 (March 8, 2016).

[9] In *Beacham*, the Illinois Supreme Court remanded the case to determine whether "plaintiffs' use of the lake, including the renting of boats to members of the general public, is a reasonable one that does not unduly interfere with the reasonable use of the lake by other owners and their licensees." *Id.* at 232. For the reasons discussed herein, the Defendants maintain that *Beacham* is inapplicable, here. However, should this Court determine that *Beacham* is applicable, then summary judgment for Plaintiffs is still improper due to the lack of evidence that Plaintiffs' use of the creek is reasonable and does not unduly interfere with Defendants' use.

Beacham was inapplicable because it is "impossible" to develop property lines in a lake whereas on a stream "it can be done." (R 71). The Third District similarly recognized that *Beacham* is inapplicable, explaining 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.'" *Id.* at ¶ 27. *Holm v. Kodat*, 2021 IL App (3d) 200164, ¶¶ 24, 27. (*citing Fuller v. Shedd*, 161 Ill. 462, 483 (1896)[10] (stating that "[t]he determination of boundary lines to the center of the river is not attendant with any serious difficulty, but the irregular borders of a lake would render the determination of lines in the bed of the lake between riparian proprietors of almost impossible solution."); *Smith v. Greenville*, 115 Ill. App. 3d 39, 42 (5th Dist. 1983) (explaining that "[i]n Illinois the rule for determining a riparian proprietor's title to land bounded by a stream or river differs markedly from the rule for determining a riparian proprietor's title to land bounded by a lake or a pond.").

The practical, common sense conclusion reached in *Beacham* was driven by the obvious differences in the physical characteristics of a lake as compared to a creek or stream. A review of the applicable law, discussed herein, reveals that the general rule is to protect private interests in non-navigable creeks and that *Beacham* represents a narrow exception in light of the physical characteristics of a lake. The fact that Illinois courts

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[10] In *Fuller*, the Illinois Supreme Court completed an extensive analysis of Illinois legal precedent concerning rights related to navigable and non-navigable waterways, and recognized the *Middleton* precedent that riparian owners take to the center of the stream. *Fuller v. Shedd*, 161 Ill. 462, 473–75 (1896). In *Fuller,* this Court also acknowledged the important differences between applying *Middleton* to a non-navigable lake versus a non-navigable creek or stream, explaining that it is much easier to determine the boundary lines to the center of the river versus the irregular boundary lines to the center of a lake. *Id.* at 482–83, 490.

have never applied *Beacham* to bodies of water that resemble rivers confirms that the *Beacham* exception is to be narrowly applied. Neither the law nor the facts of this case justify application of *Beacham* here.

B. Numerous Courts Across The Country Have Rejected *Beacham* Or Adopted The *Middleton* Rationale.

Illinois, of course, is not the only state that has adopted the legal principles discussed in the *Middleton* decision. Numerous other states[11] have adopted *Middleton* or rejected the *Beacham* decision: *Rock-Koshkonong Lake District v. State Dep't of Natural Resources*, 833 N.W.2d 800 (2013) (recognizing that Wisconsin allows access to navigable waters via public trust but does not extend similar protections to non-navigable bodies of water); *Orr v. Mortvedt*, 735 N.W.2d 610, 617–18 (2007) (Iowa considers and rejects *Beacham* in favor of a common law rule of riparian ownership in non-navigable water, finding that protecting common law property rights outweighs a state policy favoring recreation); *Wehby v. Turpin*, 710 So.2d 1243 (1998) (Alabama recognizes property-owner's common law right to water in non-navigable body of water); *People v. Emmert*, 198 Colo. 137, 141 (1979) (Colorado refuses to overturn common law rule granting exclusive property rights in non-navigable rivers to property owners, citing importance of common law rule); *Ross v. Faust*, 54 Ind. 471, 474 (1876) (recognizing

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[11] To the extent this Court determines that this case presents a matter of first impression in Illinois, the law authorizes the Court to consider legal authority from other states. *Cooper v. Hinrichs*, 10 Ill. 2d 269, 273 (1957). "It is well settled that in the absence of an Illinois determination on a point of law, the courts of this state will look to other jurisdictions as persuasive authority." *Johnson v. Target Stores, Inc.*, 341 Ill. App. 3d 56, 78 (1st Dist. 2003) (*quoting Hawthorne v. Vill. Of Olympia Fields,* 328 Ill. App. 3d 301, 316 (1st Dist. 2002)).

that owners of non-navigable rivers in Indiana maintain exclusive property right to the surface water and *riverbed*).[12]

III. PLAINTIFFS' "RECREATIONAL USE" ARGUMENT FAILS.

Despite the well-settled body of law discussed above, Plaintiffs contend that they should have the right to access the entirety of the Mazon Creek simply because Illinois law supports recreational use of some waterways. Plaintiffs' argument, however, fails.

First, this Court has already rejected the notion that the general interest in supporting recreation will always defeat privacy interests. In *Alderson v. Fatlan,* 231 Ill. 2d 311, 312, 898 N.E.2d 595 (Ill. 2008), plaintiffs filed suit seeking a declaration that they had a right to use, for recreational purposes, the surface of a water-filled quarry. Plaintiffs owned a portion of the quarry and argued that they were entitled to the use and enjoyment of the surface water of the entire quarry. Notably, for more than 30 years prior to this Court's opinion in *Alderson*, the quarry was used exclusively for recreation. *Id.* at 314. Plaintiffs relied on the *Beacham* decision in support of their argument that they were entitled to use of the surface water in its entirety. *Id.* at 316. While the Supreme Court discussed the common law and civil law rules, this Court declined to extend the *Beacham* decision to the quarry, which was considered to be a man-made lake.

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[12] See additional persuasive authority from states outside of Illinois. *Wickouski v. Swift*, 124 S.E.2d 892, 894 (Va. 1962) (explaining that "each owner has exclusive rights to the use of the surface of the water over his land"); *Sanders v. De Rose*, 191 N.E. 331, 333 (Ind. 1934) (stating that "each owner has the right to the free and unmolested use and control of his portion of the" waterway); *Decker v. Baylor*, 19 A. 351, 351 (Pa. 1890) (stating that "[t]he fact that a man is owner of an adjoining piece of property, be it land or water, does not confer a right to trespass on the land or water of his neighbor"); *Chapman v. Kimball*, 9 Conn. 38, 40 (1831) (holding owners of land abutting non-navigable water the same exclusive property rights as over other real estate).

Id. at 319–20. In reaching its conclusion, the *Alderson* court found meaningful the fact that plaintiffs' interest in using the man-made lake was always contested. *Id.* at 323.

The *Alderson* opinion is relevant, here, because it demonstrates that a general policy favoring recreation was insufficient to override private property interests. The fact that the man-made lake was used recreationally for years was an insufficient reason to disregard private property rights. In fact, the Supreme Court reached its decision even though the topographical characteristics of the man-made lake in *Alderson* were similar to the lake at issue in *Beacham*. Indeed, the *Alderson* opinion confirms that the *Beacham* decision is simply an exception to the general rule favoring the protection of private property rights.

Second, Illinois law long ago embraced a policy of protecting private ownership interests in non-navigable bodies of water. *Nottolini v. LaSalle Nat'l Bank*, 335 Ill.App.3d 1015, 1019 (2d Dist. 2003) (stating that a property owner has exclusive private property rights to a non-navigable artificial lake); *People ex. Rel. Deneen v. Econ. Light & Power Co.,* 241 Ill. 290, 327 (1909) (explaining that the State cannot change the status of a non-navigable river to a navigable river without effecting private property rights of land owners and effectuating an unconstitutional taking); *Board of Trustees v. Haven*, 10 Ill. 548, 556 (1849) (explaining that "[t]he general rule, that rivers not navigable belong to the owners of the adjoining land . . . to the thread or middle of the stream, is not disputed."). A general interest in recreation is simply insufficient to override this long-standing protection of private water rights.

Third, Plaintiffs mistakenly argue that their request for relief is supported by the Recreational Use of Land and Waters Act (the "Act"), 745 ILCS 65 (West 2002). This

Court has already recognized that the Act exists to limit liability for property owners and "applies only to those landowners who open their property to the public." *Hall v. Henn*, 208 Ill. 2d 325, 330 (2003) (recognizing that the Act does not apply unless a landowner specifically opens the land to the public for general public access and use). The Act does not create a right of public access to non-navigable waterways nor does it provide recreators with unfettered access to the state's waterways. *Id.* at 330–31. The Act is only applicable in circumstances involving a landowner who voluntarily opened his or her land for use by the general public. The Defendants, here, have made no such decision and the Act is not controlling.

Fourth, the body of water at issue, here, is a small creek and not a large, flowing river. A small creek that can dry up does not present the same opportunities for recreation that are available on large rivers, that permanently flow. Plaintiffs' "recreational use" argument is hardly compelling with respect to this non-navigable creek that runs along privately owned properties.

Fifth, Plaintiffs intend to use the Mazon Creek for *commercial* and not *recreational* purposes in order to market and sell fossils to collectors and paleontologists. (C 10–11; C 14–15; C 123–124; C 127–129; Brief of Plaintiffs-Appellants, p. 3). Accordingly, the Act is inapplicable and Plaintiffs' commercial interest fails to provide a sufficient legal reason to strip Defendants of their private right to exclusive use of their section of the Mazon.

Finally, the Forest Preserve District of Will County ("Forest Preserve"), in its *Amicus* brief, seeks to protect the general public's interest in recreation on the DuPage River. In contrast, here, Plaintiffs are the only citizens who have expressed any interest

in accessing a small section of the Mazon Creek. Unlike the DuPage River, this case does not involve a large public demand to access the Mazon. Accordingly, the arguments advanced in the *Amicus* brief are not relevant to the specific issues before this Court, especially given that Plaintiffs are interested in commerce and not recreation.

IV. PUBLIC POLICY DOES NOT FAVOR A RULE ALLOWING UNFETTERED ACCESS TO PRIVATE, NON-NAVIGABLE CREEKS EVEN IF SUCH USE IS "REASONABLE".

Illinois public policy has long favored the protection of the private property rights advanced by Defendants *Hubbard v. Bell,* 54 Ill. 110, 121 (1870) (explaining that where the bed of a non-navigable stream and the land adjoining it are in private ownership, the public has no right to have access to it or use it for any purpose). In fact, for more than a century, this Court has recognized a property owner's right to protect the surface rights over a stream as well as the right to pursue legal claims against trespassers. *Sikes v. Moline Consumers,* 293 Ill. 112, 124–25 (1920) (acknowledging that where a plat of land is bound by a river, the owner enjoys property rights that extend to the center of that river and can maintain a legal action against trespassers); *People ex rel. Deneen v. Economy Light & Power Co.*, 241 Ill. 290, 318 (1909) (property owners can prevent the public from gaining access to non-navigable bodies of water); *Middleton*, 4 Ill. at 519 (recognizing private ownership of "soil, water, and fishery" to the center of the current of rivers). Nonetheless, Plaintiffs argued for the first time on appeal before the Third District that a policy favoring "reasonable use" supports their request for relief. Plaintiffs' argument, however, fails for several reasons.

First, Plaintiffs improperly raised a new argument for the first time on appeal. Illinois has long recognized that "[i]t is axiomatic that questions not raised in the trial court are deemed waived and may not be raised for the first time on appeal." *Western*

Casualty & Surety Co. v. Brochu, 105 Ill. 2d 486, 500 (1985). *See also Zoleske v. Estate of Tait* (*In re Estate of Tait*), 2017 IL App (3d) 150384, ¶ 14; *People ex. rel. Wilcox v. Equity Funding Life Ins. Co.*, 61 Ill. 2d 303, 313 (1975) (recognizing that an appellate court should not consider new arguments on appeal when those arguments could have readily been offered at the trial level). Plaintiffs' "reasonable use" argument was not raised before the Trial Court and should not be considered, here.

Second, the "reasonable use" authority cited by Plaintiffs predominantly addresses whether the *consumption* of water by a riparian owner unreasonably interferes with another owner's *consumption* rights. *See e.g., Evans v. Merriweather*, 4 Ill. 492 (1842); Margrit Livingston, *Public Recreational Rights in Illinois River and Streams*, Vol. 29, Dep. L.R. 353 (1980) (explaining that "[u]nder the Illinois common law, the 'reasonable use' doctrine governs consumptive and diversionary uses of water."). This case does not involve water consumption, and Plaintiffs' argument misses the mark.

Plaintiffs' argument is based on the faulty premise that, because the law recognizes reasonable consumption rights, it should also allow for reasonable access. However, in order to exercise consumption rights, a riparian owner does not need to physically encroach on the private property of another riparian owner. Here, Plaintiffs want to physically encroach on Defendants' private property yet fail to cite any legal authority to support the notion that they should be allowed to trespass so long as their trespassing is "reasonable."

Moreover, Plaintiffs' reliance on the Michigan opinion in *Thompson v. Enz*, 154 N.W.2d 473, 480 (Mich. 1967) is misplaced. The rights at issue in *Thompson* emerge from lakefront not creekfront property, and the Michigan court also evaluated prospective

easements for non-riparian property owners not a riparian owner's rights to access a waterway in its entirety.

There is no factual support for Plaintiffs' contention that their encroachment on to the Mazon Creek is, in fact, reasonable. Plaintiffs never raised this issue before the Trial Court, and the parties never had an opportunity to conduct discovery concerning whether or not Plaintiffs' use was, truly, "reasonable" as they now contend. Accordingly, arguing in the alternative, to the extent that this Court is inclined to consider Plaintiffs' "reasonable use" argument, Defendants request an order remanding this case to the Trial Court for the parties to conduct discovery concerning this new issue of fact.

Finally, the topographical properties of a lake are important for another reason. Unlike a creek or stream, there is only so much waterfront property on a lake, which presents a natural limitation to the number of riparian owners who can access a lake. However, as Plaintiffs note, Illinois has more than 87,000 miles of creeks, rivers and streams, many of which interconnect and spill into one another. Accordingly, a decision in Plaintiffs' favor would open the Mazon to access by a vast number of riparian owners throughout the state, thereby exposing Defendants to the potential risk of a significant and unreasonable use of a small creek. Moreover, the Defendants should not be burdened with the obligation of preventing access by non-riparian owners. Accordingly, the "reasonable use" contemplated in *Beacham* is a concept that simply does not fit the circumstances of this case.

V. IT IS UP TO THE ILLINOIS DEPARTMENT OF NATURAL RESOURCES TO DESIGNATE A BODY OF WATER AS PUBLIC AND NAVIGABLE.

The State of Illinois has vested the Department of Natural Resources ("DNR") with the authority to determine whether a body of water is public or private. More

specifically, the law provides that the DNR "shall upon behalf of the State of Illinois, have jurisdiction and supervision over all of the rivers and lakes . . . and shall make a list by counites of all the waters of Illinois, showing the water, both navigable and non-navigable, that are found in each county. . . ." 615 ILCS 5/5. Moreover, the DNR website itself provides that:

> The public waters of the State are listed in Section 3704. Appendix A of the ILL. ADM. CODE CH. I, SEC. 3704. When the Department obtains information sufficient to determine that a body of water is a public water, that body of water will be added to the list. Any person may petition for an order to add a body of water to the list when it can be shown that the candidate is or was navigable and is open or dedicated to public use.

(www2.illinois.gov/dnr/WaterResources/Pages/PublicWaters.aspx). The DNR further identifies bodies of water that are "primarily artificial navigable waters that were opened to public use" as well as "public bodies of water [that] are navigable waters that were dedicated to public use." (*Id.*)

The protection of the public's interest in navigable bodies of water is so important that Illinois has also vested the DNR with the authority to protect those rights. For example, when it comes to public bodies of water, the DNR shall "exercise a vigilant care to see that none of said bodies of water are encroached upon, or wrongfully seized or used by any private interest in any way. . . ." 615 ILCS 5/7. The DNR is also authorized by statute to investigate and take corrective action concerning any complaints concerning access to or egress from navigable bodies of water and to protect against the encroachment of public and navigable bodies of water. 615 ILCS 5/10; 615 ILCS 5/13.

Importantly, the DNR expressly recognizes that non-navigable bodies of water are private property that is subject to protection. The DNR's website states:

> *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).

Here, the Holms are essentially asking that this Court designate the Mazon as a navigable, public body of water and, therefore, are seeking to usurp the DNR's jurisdiction and authority. "The Department of Natural Resources shall, for the purpose of protecting the rights and interests of the State of Illinois, or the citizens of the State of Illinois, have full and complete jurisdiction of every public body of water in the State of Illinois . . . ." 615 ILCS 5/26. Indeed, Illinois law has enacted various statutes to protect the public interest in navigable waterways, given the importance of that interest. This Court should, similarly, ensure the protection of long-standing legal interests in private bodies of water, as those interests are equally important and compelling.[13]

VI. A DECISION IN PLAINTIFFS' FAVOR WOULD RESULT IN AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY.

In Illinois, the 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). An unconstitutional taking includes "a physical invasion of private property. . . ." *Id. See also Forest*

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[13] Defendants, as appellees, have properly raised this argument for the first time, here. *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 771 N.E.2d 357, 363 (Ill. 2002) (explaining that "[a]n appellee in the appellate court may raise a ground in this court which was not presented to the appellate court in order to sustain the judgment of the trial court, as along as there is a factual basis for it.")

Preserve Dist. v. West Suburban Bank, 161 Ill. 2d 448, 456, 641 N.E.2d 491 (Ill. 1994) (explaining that 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."). Importantly, both the Illinois state Constitution as well as the United States Constitution protect against the taking of private property without appropriate compensation. *Hampton v. Metro. Water Reclamation Dist.*, 2016 IL 119861, ¶ 11 (noting that the federal takings cause states that "nor shall private property be taken for public use, without just compensation.").

Illinois law has long recognized that, in order to be constitutional, a taking of private property must be for a public use or purpose. *Limits I. R. Co. v. Am. Spiral Pipe Works*, 321 Ill. 101, 105–06, 151 N.E. 567, 569 (1926) (explaining that "any attempt to grant the right to take private property for a use not public is unconstitutional and void."). "Public purpose" is a flexible term, but "flexibility does not equate to unfettered ability to exercise takings beyond constitutional boundaries." *Sw. Ill. Dev. Auth. v. Nat'l City Envtl., L.L.C.*, 199 Ill. 2d 225, 238, 263, 768 N.E.2d 1, 8–9 (2002). Under the law, a "public use" requires that all persons must have an equal right to the use and that it must be in common, upon the same terms, however few the number who avail themselves of it. *Dep't of Pub. Works & Bldgs. v. Farina*, 29 Ill. 2d 474, 478, 194 N.E.2d 209, 212 (1963). With that said, the public must, to some extent, be entitled to use or enjoy the property "not as a mere favor or by permission of the owner, but by right." *Sw. Ill. Dev. Auth.,* 199 Ill. 2d at 238.

In *Southwestern* this Court concluded that the taking was unconstitutional because the taking was for the purpose of building a parking lot to benefit a private party by

helping it solve its parking problems. *Sw. Ill. Dev. Auth.*, 199 Ill. 2d at 233. The fact that the public would be allowed to park on the property in exchange for a fee did not change the character of the taking to "public" because it would not be open to the public "by right." *Id.* at 238–39.

Illinois has long recognized 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). In *Barrington Hills Country Club*, the Court held that the Village's use of a creek to carry off its sewage and wastewater constituted a taking because it encroached upon the private property rights of the riparian owners. *Id.* The Court reasoned that the riparian owners have a right to protection against invasion of their property rights. *Id.*

Here, a legal decision in favor of Plaintiffs would constitute a reversal of case law that has existed for over a century. Moreover, a decision allowing Plaintiffs to access the Mazon Creek owned by Defendants would essentially amount to a government authorized invasion of private property. Plaintiffs, however, argue that they only seek access for themselves and not the public at large. Accordingly, by Plaintiffs' own admission, the proposed taking, here, is unconstitutional given its lack of public purpose. Moreover, a decision allowing public access to the Mazon Creek would require just compensation under the law. Finally, any decision in favor of Plaintiffs would adversely impact the value of Defendants' property, which is also improper under the law. *See, e.g., N. Tr. Co. v. Chicago*, 4 Ill. 2d 432, 439 (1954) (holding that a change in the property's zoning that decreased the property's value constituted a taking for public use

without compensation and deprived the property owner of their liberty and property without due process and equal protection of the law).

VII. THE RELIEF REQUESTED BY PLAINTIFFS WOULD HAVE SUCH FAR-REACHING CONSEQUENCES THROUGHOUT THIS STATE THAT ANY SUCH DECISION SHOULD BE LEFT TO THE ILLINOIS LEGISLATURE.

In Illinois, the common law, when applicable, "shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority." 5 ILCS 50/1. *See also People v. Gersch*, 135 Ill. 2d 384, 395–97 (1990) (explaining that "[t]he legislature is formally recognized as having a superior position to that of the courts in establishing common law rules of decision."); *Cahill v. Plumbers, Gas & Steam Fitters' & Helpers' Local*, 238 Ill. App. 123, 130–31 (2d Dist. 1925) (stating that the common law cannot be replaced by a judicial decision).[14] Accordingly, where there is no specifically applicable legal provision, Illinois law requires a court to adhere to the rule of application under the common-law adoption statute.

Here, the common-law rights advanced by Defendants have been the law in Illinois for well over a century. *See Sikes v. Moline Consumers,* 293 Ill. 112, 124–25 (1920); *Piper v. Connelly*, 108 Ill. 646, 651 (1884); *Braxon v. Bressler,* 64 Ill. 488 (1872); *Middleton v. Pritchard*, 4 Ill. 509 (1842), discussed *supra*. In Illinois, there is not a statute or legal opinion from any court that applies or adopts "civil law" to non-navigable creeks, rivers, or streams. Accordingly, the specific matter before this Court is one of first impression, and Illinois law obligates a court to apply the "common law" in such circumstances.

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[14] *Cahill* was superseded by statue on other grounds by 735 ILCS 2-209.1 (1984) as recognized in *Brucato v. Edgar*, 128 Ill. App. 3d 260, 272 (1st Dist. 1984) (finding that the amended 735 ILCS 2-209.1 superseded the common law rules regarding lawsuits against unincorporated associations previously recognized in *Cahill*).

As discussed, the practical considerations at issue in *Beacham* are simply inapplicable here. Unlike *Beacham*, this Court is presented with a case in which property lines can easily be established along the Mazon Creek. Plaintiffs allege that this ease of establishing property lines make it "much more likely" that obstructions such as booms, fences, or barriers will be erected on a river rather than a lake if the civil law rule is not adopted. (Plaintiffs' Supreme Court Brief, pg. 12). However, Illinois has never applied the civil law rule to non-navigable rivers, streams, or creeks, and no such erection of barriers between property lines has become an issue. Applying *Beacham*, here, would be tantamount to a decision that creates new rule of law regarding an issue that is more appropriately left for legislative action, and which would violate the legal mandate that requiring courts to follow the common law under these circumstances.

If the newly created law advanced by Plaintiffs were allowed to prevail, property 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. This Court should uphold Illinois' long-standing policy of protecting private owners' property rights and deny Plaintiffs' request for relief.

CONCLUSION

WHEREFORE, Defendants PETER KODAT, JAMES BENSON, BENSON MARK A. NORTON, MARIAN FAMILY TRUST, and WILFRED K. ROBINSON request that this Honorable Court enter an order as follows:

1. Affirming the Third District's decision that affirmed the Trial Court's decision granting Defendants' Amended Motion to Reconsider;

2. Affirming the Third District decision that affirmed the Trial Court's decision granting Defendants' Motion for Summary Judgment;

3. Affirming the Third District's decision that affirmed the Trial Court's decision denying Plaintiffs' Motion for Summary Judgment;

4. In the alternative, remanding this lawsuit to the Trial Court in order to allow the parties to conduct discovery concerning Plaintiffs' alleged "reasonable use" of the Mazon Creek; and/or

5. Providing for any other just and appropriate relief.

Respectfully submitted,

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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 contained in the Rule 341(d) cover and the Rule 341(c) certificate of compliance, and the proof of service, is 31 pages.

Respectfully submitted,

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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 February 16, 2022, the foregoing **Brief of Appellees-Defendants** was filed with the Clerk of the Supreme Court of Illinois via File & Serve Illinois and served on the counsel below via File & Serve Illinois and by electronic mail:

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AMENDED 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 27 pages.

Respectfully submitted,

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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 February 17, 2022, the foregoing **Amended Certificate of Compliance** was filed with the Clerk of the Supreme Court of Illinois via File & Serve Illinois and served on the counsel below via File & Serve Illinois and by electronic mail:

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