IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-563

STEVEN W. BOLDT, et al., DCA Case No: 2D03-4477

Petitioners,

vs.

PATRICK W. BRANNON, et al.,

Respondents. /

PETITIONERS' INITIAL BRIEF ON THE MERITS

On Discretionary Review from a
Decision of the District Court of Appeal,
Second District

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PRELIMINARY STATEMENT

Respondents, Patrick W. Brannon and Kathryn Brannon, are referred to as the "Defendants" or "Brannons." Petitioners, Steven W. Boldt, et. al., are collectively referred to as "Plaintiffs" or "the neighbors." Petitioners, Theodore and Mary Henter, are referred to as the "Henters."

The trial record is contained in 15 volumes plus 41 jointly submitted trial exhibits. Volumes 8 to 15 include the trial transcript. Pursuant to this Court's May 7, 2007 Order, the Clerk of the Second District has constructed an additional volume of materials from the district court proceedings.

References to the record are indicated as "Rx y-z," with "x" representing the volume number and "y-z" representing the page number(s). References to the trial transcript, contained in Volumes 8 to 15, are similarly indicated as "Rx y-z," where "x" is the record volume and "y-z" representing the page number(s). The trial exhibits are referenced as "Ex. __." The trial court's Final Judgment is designated "Judgment, p. __." It is in the record at page 1273, which record cite will not be repeated with every cite to the order. The Final Judgment is in the Appendix to this brief at Tab 3. Other references to the Appendix to this Brief are designated "App. ___."

All emphasis in quotations has been added, unless otherwise indicated.

STATEMENT OF THE CASE

The Plaintiffs filed a complaint for declaratory and injunctive relief with respect to their waterfront easement rights in St. Petersburg, Florida. (R1 57-66; Judgment, p. 1). The Defendants filed a counterclaim to extinguish those easement rights. (R2 204-234; Judgment, p. 1). At the final hearing, Pinellas County Circuit Judge Susan F. Schaeffer, sitting as the finder of fact, heard the testimony of 18 witnesses, and received over 90 pieces of evidence. (R7 1153-1272; 1273-1305; 1306-1437; Judgment, p. 1).

After receiving written closing arguments from the parties, the trial judge entered a 21 page Final Judgment Granting Plaintiffs' Declaratory and Injunctive Relief. (Judgment, p. 1-21). Although both parties submitted proposed findings of fact and conclusions of law after the final hearing, the Final Judgment entered below was prepared by the trial judge herself. (R3 543-552; R6 1096-1104). That judgment, which contains the trial judge's specific findings of fact, is included in the appendix to this brief. (App. 3; Judgment, p. 1-21).

In addition to hearing the testimony of numerous witnesses and other evidence, Judge Schaeffer physically walked the Easement, the Henters' backyard, and nearby Abercrombie Park. (R9 1519-20; R15 357; Judgment, p. 1). Based on her personal

view of the property and the evidence presented at trial, Judge Schaeffer found that:

- The Easement was created for the benefit of the owners of Tract C to provide vehicular access to their backyard, and for the benefit of the entire subdivision to provide private access to the waters of Boca Ciega Bay. (R7 1278; Judgment, p. 6).

- Since 1953, the owners of Tract C have regularly used the Easement for access to their backyard. Further, since approximately 1953, until the Defendants recently blocked the Easement by the use of locked gates, the subdivision lot owners used the Easement for various riparian activities, including boating, fishing, gigging, and enjoying an unobstructed view of the water, both before, during and after a dock was present at the end of the Easement. (R7 1277; R10 1652-53, 1756; R11 1866; R12 1907-1912, 1950; Rl5 344-45; Judgment, p. 5).

- While the subdivision neighbors may have additional access to the water by using the adjacent public Abercrombie Park, that park is used by the general public and is not exclusive to the subdivision. Moreover, they would have no right to either build a dock or an observation platform for their exclusive use at the park. (R7 1278; Judgment, p. 6).

- The Defendants were both constructively and actually aware of the Easement prior to purchasing their property. (R7 1279; Judgment, p. 7).

- The Defendants presented insufficient evidence to support their affirmative defenses and counterclaims. (R7 1281; Judgment, p. 9).

Based on these and other detailed factual findings, Judge Schaeffer concluded that:

- The Easement for ingress and egress to the water implicitly conveyed riparian rights to the lot owners, which includes the right to fish, boat, and enjoy an unobstructed view over the waters. The Plaintiffs also have the right to construct a dock or observation

platform, but the inability to do so (as a result, for example, of regulatory decisions) will not frustrate the other riparian rights of the Plaintiffs. The Plaintiffs may fish in the waters or simply observe the water, whether or not a dock or observation platform may be built. (R7 1281; Judgment, p. 9).

- The Easement is unambiguous and conveys riparian rights as a matter of law; further, the extrinsic evidence showed that the Easement must be interpreted to permit the Plaintiffs to enjoy their riparian rights. (R7 1281; Judgment, p. 9).

Finding that the Defendants' interference with the Plaintiffs' Easement rights constituted irreparable harm, Judge Schaeffer permanently enjoined the Defendants from obstructing the Plaintiffs' use and enjoyment of the Easement. (R7 1283-84; Judgment, p. 11-12). The Defendants were further ordered to remove the front gate and to remove any lock from the rear gate. (R7 1289; Judgment, p. 17). They were also prohibited from parking on the Easement in a manner that blocks the Henters from accessing their backyard. (R7 1284; Judgment, p. 12).

The Defendants took an appeal to the Second District Court of Appeal. (R8 1459). On May 5, 2006, a divided Second District panel affirmed the trial court in all respects. Brannon v. Boldt, 31 Fla. L. Weekly D1260 (Fla. 2d DCA May 5, 2006)(now withdrawn). The panel concluded: "The uses which the trial court found to exist are reasonable, contemplated, and such that the [Plaintiffs] have the full enjoyment of the easement and attendant riparian rights. The uses included the

right to fish, boat, and enjoy views of and over the waters. These rights, as the trial court noted, also include the right to build a properly permitted dock or observation platform. However, the lack of a dock or related structure will not defeat or frustrate the other rights of the [Plaintiffs]." Brannon, 31 Fla. L. Weekly at D1260 (now withdrawn).

In reaching its conclusion, the panel observed that "the Brannons were on ample notice of the easement at the time of their purchase in December 2000. They even required the sellers to escrow $7,500 at closing to fund their attempt to extinguish the easement." Id. Finally, the panel also observed that "even if the language of the easement had been found to be ambiguous, the historical testimony at the trial would have supported the same result." Id.

On May 22, 2006, the Defendants filed a motion for rehearing, rehearing en banc, and certification. On January 24, 2007, the Second District issued an en banc decision and withdrew the panel's May 5, 2006 opinion. Brannon v. Boldt, 2007 WL 162166, *1 (Fla. 2d DCA Jan. 24, 2007). The en banc court expressly stated that it chose to review only a "very narrow, but significant issue;" "we limit our en banc discussion to the nature and extent of the riparian rights transferred to the lot owners as an easement by implication." Brannon, 2007 WL 162166, at *1. It clarified that "[a]s to the dispute between

the Brannons and the Henters concerning access to the Henters' property and the interference of the gates, this court en banc now also affirms that portion of the trial court's judgment without further discussion." Brannon, 2007 WL 162166, at *4.

Judge Altenbernd, for the en banc court, wrote that "[t]he issue in this case arises directly from a dispute over the interpretation of this court's opinion in Cartish v. Soper, 157 So. 2d 150 (Fla. 2d DCA 1963)." Brannon, 2007 WL 162166, at *1. He explained that, "[i]n Cartish, this court considered whether the dominant estate holders of a similar easement received riparian rights that could allow them to rebuild a dock at the water's edge of the servient estate." Id. In Cartish, the Second District answered that question as follows:

> Proceeding from the premise, admitted by appellants, that easement rights may be created by implication, it is clear that such riparian rights necessary and incidental to access and egress from the Bay were implicit in the reservation of the Parkway. Just as accreted land would necessarily be burdened by the easement as a necessary implication of the reservation, so too the right to build a dock to facilitate access to the waters is implied.
>
> Accordingly, insofar as riparian rights are necessary to or consistent with the purposes of the easement, they are impliedly granted to appellees and, as a corollary, reserved from the appellant fee owners.

157 So. 2d at 153-54 (citations omitted).

In applying Cartish, the en banc majority concluded that "it is clear that the lot owners have the legal right by virtue of the easement to apply for a permit to place a dock on the edge of the Brannons' property, giving them access to the water . . . [and] the lot owners do have a right of access to cross the Brannons' property with a canoe, a small boat, or a floatation device that could be launched over the seawall." Brannon, 2007 WL 162166, at *6.

The en banc majority then explained that "the primary right that the lot owners wish to possess is the right to view the water from the land within the easement." Id. It acknowledged that, "[i]f the easement by implication gives them all of the riparian rights of the Brannons," then "there is a good argument that they can view the water" from the edge of the Easement. Id.

Nevertheless, the en banc majority concluded that, "in the absence of a more elaborate written easement, the purpose of this implied easement is merely to give the lot owners access, i.e., ingress and egress, to the water and to the public riparian rights possessed by all people below the high-water mark." Id. At bottom, it held that "[t]he right to view the water, albeit a private riparian right, is not a right necessary to or consistent with the purpose of this implied easement." Id. By holding as a matter of law as to all implied ingress and

egress easements, the en banc majority avoided any consideration of the grantor's intent or the actual usage of this particular easement over the years, as found by the trial court.

Based upon these conclusions, the Second District certified the following question as a question of great public importance, which the court passed upon in resolving the appeal:

> What rights do the residents in a neighborhood receive, as dominant estate holders under an implied easement created by a denotation on a plat map of an "easement for ingress and egress" to a body of water, when the servient estate is part of a residential lot on which there exists an occupied family dwelling?

Brannon, 2007 WL 162166, at *1.

Judge Whatley dissented in the part relevant to this review proceeding. He wrote that, in his opinion, "Cartish is the controlling case. It involved an easement in the same subdivision and to the same body of water as in this case. In addition, the language of the easement was virtually identical." Brannon, 2007 WL 162166, at *7 (Whatley, J., concurring in part and dissenting in part). In his view of the Cartish case, "[t]he lot owners . . . were seeking more than simply the right to construct a dock . . . . [and] Cartish did not limit the riparian rights of the lot owners seeking use of the easement." Id. He would "affirm the trial court in all respects." Brannon, 2007 WL 162166, at *7-*8.

Judge Whatley also emphasized that "[i]t is of no bearing whether the fee owner has erected a dwelling on the land or whether that dwelling is occupied." Brannon, 2007 WL 162166, at *7. The majority acknowledged that Judge Whatley's dissent could be correct in this respect and that the dwelling was included simply to frame the narrowest set of facts: "The dissent suggests that it is of 'no bearing' whether the owner of the servient estate has erected a dwelling on the parcel. While Judge Whatley may be entirely correct on this point, we have kept the issue on appeal as narrow as the facts of this case permit." Brannon, 2007 WL 162166, at *8 n.2.

Plaintiffs timely sought review of the certified question in this Court. On May 7, 2007, this Court accepted jurisdiction and set a briefing schedule and oral argument.

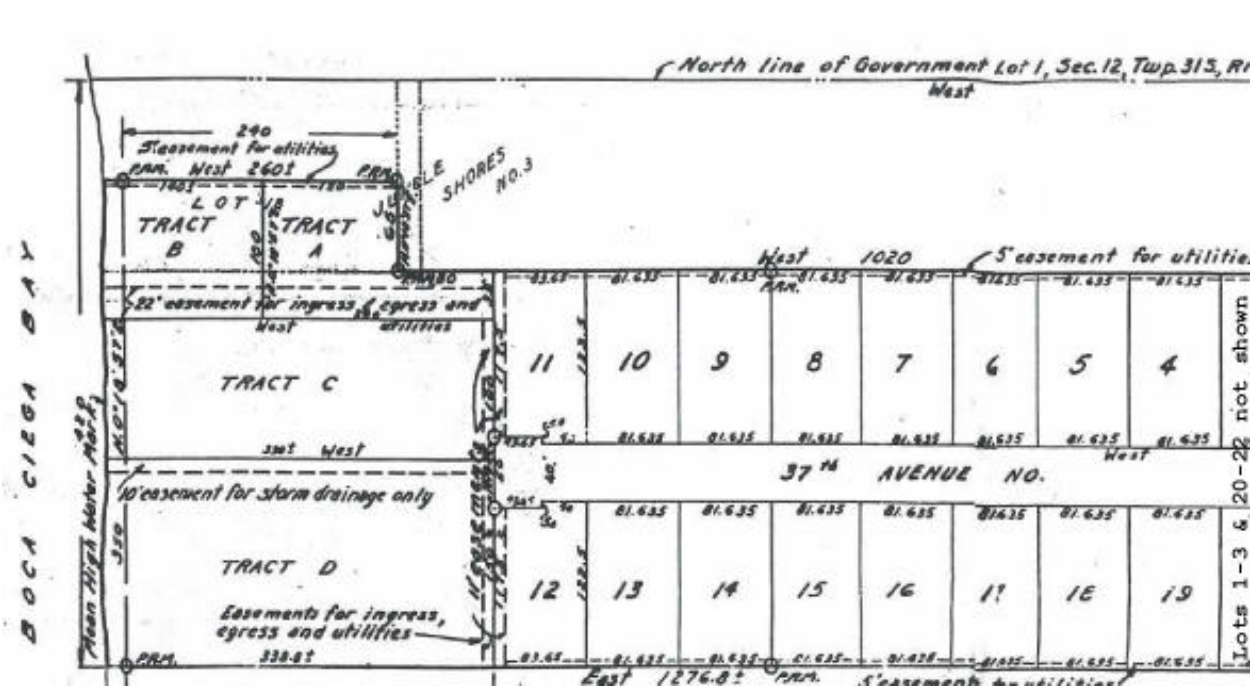
STATEMENT OF THE FACTS

A. The Easement

The easement at issue ("the Easement"), called the East/West easement during the course of the trial, arises from a plat recorded in 1953 in the Pinellas County Public Records. (R7 1295, 1307; Judgment, p. 2). The plat shows the various easements in the Bay Park subdivision, which is a small subdivision comprising one street (37th Avenue North), four Tracts (A, B, C, and D), and 22 Lots. Tracts A and B are owned by Brannons. (R7 1295, 1307; Judgment, p. 2). Tract C is owned

by the Henters, two of the Plaintiffs. (R10 1689-90; Judgment, p. 2-3). All of the 22 lots within the subdivision either are or were owned by the other Plaintiffs. (R1 59; Judgment, p. 3).

The plat includes, and describes, a 22 foot easement running east and west along the southern boundary of Tracts A and B, which is indicated on the plat as follows: "22' easement for ingress and egress and utilities." (R7 1295, 1307; Judgment, p. 2). The plat shows the western terminus of that easement as the water of Boca Ciega Bay. (R7 1295, 1307; Judgment, p 2). This is the relevant portion of the plat:



(R1 11; R7 1295, 1307). (Lots 1, 2, 3, 20, 21, and 22 are the lots to the far right and are not shown on the reproduction above).

The Henters, who are the present owners of Tract C, claimed that the Easement provides them with a vehicular right of access to their backyard. (R7 1275; Judgment, p.3). The other Plaintiffs claimed that the Easement provides them with access to and from the waters of Boca Ciega Bay, including riparian rights. (R7 1275; Judgment, p.3). Plaintiffs sought declaratory and injunctive relief as to their easement rights. (R1 57-71; R7 1275; Judgment, p. 3).

Defendants raised various affirmative defenses, including abandonment, impossibility/frustration of purpose, estoppel, and adverse possession. (R2 204-34; R7 1275; Judgment, p. 3). They also asserted a counterclaim seeking to extinguish the easement rights of Plaintiffs who are lot owners. (R2 204-34; R7 1275; Judgment, p. 3). At the time the trial court made its findings, Defendants no longer disputed that the Henters have an easement right for vehicular access in and out of their backyard. (R14 84; R7 1275; Judgment, p. 3). A dispute remained, however, regarding the alleged obstruction of the Easement by Defendants' front gate, and obstruction of access to the Henters' backyard by vehicles parked by Defendants in the Easement. (R7 1275; Judgment, p. 3).

B. <u>The Prior Lawsuit and 1958 Final Decree</u>

This is the second lawsuit concerning the Easement as it relates to access to Tract C's backyard. (R7 1275; R7 1320-

1323; Judgment, p. 3). Around 1957-1958, the owners of Tracts A and B built a concrete wall blocking access from the Easement to Tract C's backyard. (R7 1275-76; R7 1322; Judgment, p. 3-4). This led to a lawsuit styled Bernard G. Guillaume and Ethylle Guillaume, his wife, Plaintiffs v. William Norris and Virginia Norris, his wife, Defendants, Chancery No. 48,803, Pinellas County Circuit Court. (R1 16-22; R7 1276; R7 1320-30; Judgment, p. 4).

In a 1958 Final Decree entered in that lawsuit and recorded in the public records, the Circuit Court judge expressly found that the Easement was "plain and unambiguous" and was created for the benefit of the owner of Tract C, as well as for the benefit of all of the other owners of the Lots and Tracts within the platted subdivision. (R7 1276; R7 1338; Judgment, P. 4).

Accordingly, the Norris judge entered injunctive relief requiring the owners of Tract A and B to open a 20-foot gap in the concrete wall to allow the owners of Tract C to gain access from the Easement into their backyard. The location of the gap was to be "filed in this cause." (R7 1276; R7 1339; Judgment, p. 4). Thereafter, the parties stipulated to the location of the 20-foot gap and to a gate across the gap, which stipulation was filed in that case. (R7 1276; R7 1304-05; Judgment, p. 4).

The defendants in that prior case were "permanently enjoined from in any way obstructing the above-mentioned 20-foot

access from Tract "C" to the 22-foot east and west easement." (R7 1276; R7 1339; Judgment, p. 4). The recorded Final Decree expressly binds future owners of Tracts A and B. (R7 1339).

C. Plaintiffs' Use of the Easement

Since 1953, the owners of Tract C have regularly used the Easement for access to their backyard. (R7 1277; Judgment, p. 5). Further, until Defendants recently blocked the Easement by the use of locked gates, the subdivision lot owners used, albeit not often, the easement to enjoy a variety of riparian uses, including boating and fishing. (R7 1277; R10 1652-53, 1756; R11 1866; R12 1907-12, 1950; Rl5 344-45; Judgment, p. 5). Most often, and for a period of over forty years, they used it to enjoy an unobstructed view over the waterfront, including watching sunsets and fireworks, both before, during and after a dock was built at the end of the Easement. (R7 1277; R10 1652-53, 1756; R11 1866; R12 1907-12, 1950; Rl5 344-45; Judgment, p. 5). Of note, the Easement was created before a dwelling was constructed on Tracts A & B. (R12 1905).

D. Defendants Purchase Tracts A and B

In 2000, Defendants purchased Tracts A and B. (R7 1279; R12 1972, 1976; Judgment, p. 7). They admittedly knew of the existence of the Easement, although they dispute what part of the Easement they believed was still in use when they purchased their property. (R7 1279; R12 1978; Judgment, p. 7). They were

persuaded by the sellers' realtor and Mr. Brannon's investigation that the Easement might be vacated. (R14 22, 36-40, 55, 94, 105). Nonetheless, Defendants required the sellers to escrow $7,500 at closing to fund their attempt to extinguish the Easement. (R7 1279; R12 2008; Judgment, p. 7).

Defendants did not talk with any of the many neighbors who they understood would claim an interest in the Easement. (R14 99-100). Instead, the sellers simply provided Defendants with affidavits of two prior owners of Tracts A & B, which asserted that the Easement was not used by the neighbors. (R2 244-45; R7 1346-47). Defendants, however, did not talk with these persons and, as the trial court found, those affidavits of prior owners conflicted with their trial testimony. (R14 36).

SUMMARY OF ARGUMENT

This review proceeding comes before the Court on the following certified question:

> What rights do the residents in a neighborhood receive, as dominant estate holders under an implied easement created by a denotation on a plat map of an "easement for ingress and egress" to a body of water, when the servient estate is part of a residential lot on which there exists an occupied family dwelling?

See Brannon v. Boldt, 2007 WL 162166, *1 (Fla. 2d DCA 2007)(en banc). The answer to the certified question should be that, unless specifically reserved by the grantor, the bundle of riparian rights running with the land are implicitly conveyed by an easement for access to the water.

The Second District answered the question in exactly the opposite way. Instead of favoring a rule of law that presumes, in the absence of an express reservation, that the riparian rights run with the land on an ingress and egress easement to a body of water, it framed the rule as being "what riparian rights must be transferred to the lot owner because they are necessary to or consistent with the purposes of the implied easement." Brannon, 2007 WL 162166, at *5.

This rule is unprecedented in Florida law. The Second District has created a rule of law that all ingress and egress easements to bodies of water in Florida are vastly restricted to only a handful of riparian uses, unless the easement expressly

grants specific riparian rights. The court understood the reach of its bright-line rule when it explained why it reviewed the case en banc: "[T]here are many neighborhoods in Florida affected by similar plat maps . . . ." Brannon, 2007 WL 162166, at *1.

The district court establishes this new limitation on the riparian rights that are conveyed with an ingress and egress easement in the face of other Florida cases that recognize fishing and viewing of the water as riparian rights that attach to an ingress and egress easement. It also did so without regard to the grantor's intent, historical usage of the easement, geographical context, or the surrounding circumstances of the easement grant. This determination, long after the fact, promises to upset settled expectations in both this case and in cases around Florida.

In answering the certified question, this Court should keep the burden on the grantor to expressly reserve individual sticks in the riparian rights bundle at the outset, at which point in time the grantor has full power to do so. Short of that, these cases must be examined on their particular facts to determine the intent, context, and usage surrounding an individual ingress and egress easement. The Second District completely eschewed such an important factual examination, in favor of a novel, but

legally erroneous, division of riparian rights as a rule of law applicable to all cases involving similar easements.

The Second District's certified question rests on the fact that the Easement now runs across a residential lot containing an occupied dwelling, although it was vacant land at the time this particular Easement was granted. The issue as to which riparian rights were conveyed must be determined based on the grantor's intent at the time of the conveyance, not the character of the burdened land years later. And, it cannot be that these riparian rights can be enjoyed if the easement land remains vacant, but not if a residence is later constructed on the burdened land.

The district court decision must be quashed.

STANDARD OF REVIEW

The question of whether an easement for ingress and egress to water, which does not contain any reservation of riparian rights, implicitly conveys to the easement holders the private riparian rights running with the land is a question of law to be reviewed by this Court de novo. See City of Gainesville v. State, 863 So. 2d 138, 143 (Fla. 2003) (a trial court's conclusions of law are reviewed de novo).

ARGUMENT

Since its creation in 1953, the neighbors have peaceably used the Easement for access to Boca Ceiga Bay to fish and

generally view the water. Consistent with the intent of the grantor as found by the trial court below, the neighbors have historically enjoyed these uses while standing on a small portion of the Easement. Notwithstanding this long history of use, which began while the grantor was still living in the neighborhood, the Second District has now held, as a matter of law, that the neighbors can no longer enjoy their Easement in this manner and that their riparian rights instead are vastly restricted. Indeed, its ruling extends to all implied ingress and egress easements running to water in this State.

In so holding, the Second District submitted this certified question to this Court:

> What rights do the residents in a neighborhood receive, as dominant estate holders under an implied easement created by a denotation on a plat map of an "easement for ingress and egress" to a body of water, when the servient estate is part of a residential lot on which there exists an occupied family dwelling?

See Brannon, 2007 WL 162166, *1. The Second District's focus on the fact the Easement runs across land that now has a residential dwelling on it highlights the error in its holding.

The Easement was granted before a dwelling was constructed on the land. (R12 1905). The original owners of the servient estate built their residence with full notice of the Easement. (R12 1905; 1910). The construction of that residence cannot alter the legal effect of the pre-existing Easement. See Fields

v. Nichols, 482 So. 2d 410, 414 (Fla. 5th DCA 1985) ("[E]asements, once granted and fixed, are not subject to the whims of either the dominant or servient owners of land, and can only be changed by mutual consent of the parties.").

Under Florida law, the easement rights are determined as of the time of the original conveyance. See Crutchfield v. F.A. Sebring Realty Co., 69 So. 2d 328, 330 (Fla. 1954) (recognizing that scope of easement rights and uses is ascertained from the intention of the parties at the time the right was created); see also Easton v. Appler, 548 So. 2d 691, 694-95 (Fla. 3d DCA 1989) (noting that the extent of an easement implied by a plat depends on the intent of the parties; it is determined by the language of the granting instrument, the situation of the property, and the surrounding circumstances at the time of the grant). Thus, a servient estate owner's subsequent construction on property already burdened by an easement cannot alter the scope of the pre-existing easement rights.

Manifestly, the scope of this Easement cannot depend on whether, fifty years after its creation, its historic use now is viewed as an inconvenience by the current servient estate owners, even though those owners had notice of the Easement

before purchasing the property. Any contrary view would stand property law on its head.[1]

The certified question posed to this Court asks what riparian rights are conveyed by an "easement for ingress and egress" to a body of water, when the servient estate is now a residence. The neighbors submit the answer is that, because riparian rights run with the land, when the grantor failed to reserve riparian rights for the exclusive use of the fee owner, the full panoply of riparian rights running with the land burdened by an easement for access to the water are implicitly conveyed to the easement holders. As discussed below, riparian rights are rights to use and enjoy the water. Such rights are, by definition, completely consistent with an ingress and egress easement, the purpose of which is to allow access to the water so it can be used and enjoyed. Absent such a rule of law, the determination of what specific rights were conveyed is a factual question based upon the grantor's intent at the time of the easement grant.

I. THE GRANTOR'S CONVEYANCE OF AN EASEMENT TO NAVIGABLE WATERS, WITHOUT RESERVING ANY RIPARIAN RIGHTS FOR HIS EXCLUSIVE USE, CONVEYED THE NONCOMMERCIAL RIPARIAN RIGHTS RUNNING WITH THE LAND.

[1] Even the majority acknowledged that the fact an occupied dwelling now sits on the residential lot burdened by the Easement, may be of "no bearing." See Brannon v. Boldt, 2007 WL 162166, *8, n.2 (Fla. 2d DCA 2007). Yet this specific fact is included in the certified question, suggesting that it is important to the resolution of the question.

1. Riparian Rights Run With The Land and Include Use of the Water

An easement is a right, without profit, to unfettered use of the property of another for a special purpose. See Burdine v. Sewell, 109 So. 648, 652 (1926). Under Florida law, easements, such as the one at issue here, may be created by implication from reference to a plat. See McCorquodale v. Keyton, 63 So. 2d 906, 910 (Fla. 1953). Such easements constitute promises by a developer, which can be relied upon and enforced by the lot purchasers. See McCorquodale, 63 So. 2d at 910; see also Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc., 489 So. 2d 22, 22 (Fla. 1986) (adopting dissenting opinion in Moorings Association v. Tortoise Island Communities, Inc., 460 So. 2d 961 (Fla. 5th DCA 1984), and recognizing that deed describing a lot by reference to a plat showing servient lands held for the use and benefit of the subdivided lots, include an easement in the servient lands in favor of the grantees of the dominant lots).

Riparian rights are rights related to the access and use of bodies of water adjacent to land. See Belvedere Dev. Corp. v. Department of Transp., Div. of Admin., 476 So. 2d 649, 651 (Fla. 1985). In Florida, these rights include: (1) general use of the water adjacent to the property for fishing and other uses; (2) right to wharf out to navigability; (3) right to have access to

navigable waters; and (4) the right to accretions.[2] See Belvedere Dev. Corp., 476 So. 2d at 651.

Riparian rights also include an "unobstructed view over the waters." Thiesen v. Gulf, 78 So. 491, 507 (Fla. 1917); see also Hayes v. Bowman, 91 So. 2d 795, 801 (Fla. 1957) (precluding construction that compromised owner's riparian right to a "direct, unobstructed view" of the channel). See generally Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998)(holding that "owners of uplands along navigable waters enjoy common law riparian rights, one of which is the right to an unobstructed view over the water to the Channel."). And, riparian rights include the right to erect a dock over the water. See Shore Village Property Owners' Association, Inc. v. State, 824 So. 2d 208, 211 (Fla. 4th DCA 2002) (holding that an easement for road purposes extending to a river convey riparian rights, including the right to build a dock); see also Cartish v. Soper, 157 So. 2d 150, 152 (Fla. 2d DCA 1963) (holding that easement for ingress and egress conveyed the right to build a dock).

[2] Section 161.191(2), Florida Statutes, eliminates the common law riparian right of accretions in certain coastal lands. The First District recently held that the statute was unconstitutional. See Save Our Beaches, Inc. v. Florida Dept. of Environmental Protection, 2006 WL 1112700 (Fla. 1st DCA 2006). Since the right to accretions is not at issue here, the continued existence of that common-law right under Florida law need not be addressed in this review proceeding.

Of importance to the certified question, riparian rights run with lands contiguous to and bordering navigable waters. See Belvedere Dev. Corp., 476 So. 2d at 651-52. Indeed, this fundamental principle is now codified in the Florida Statutes. Section 253.141(1),[3] Florida Statutes, which states, in part, "[R]iparian rights are rights inuring to the owner of the riparian land but are not owned by him or her. They are appurtenant to and are inseparable from the riparian land."

As we shall show below, because riparian rights run with the land, such rights are implicitly conveyed with an access easement running to a body of water. See generally § 253.141(1), Fla. Stat. ("Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland."). Those rights then are shared by both the dominate and servient estate owners.

[3] In 1985, this Court, in Belvedere Dev. Corp. v. Dep't of Transp., 476 So. 2d 649 (Fla. 1985), held that section 197.228, Florida Statutes, the predecessor to current section 253.141, was a tax law and did not apply as property law to riparian rights. Id. at 653. Shortly after this Court's decision, the Florida Legislature renumbered the statute as section 253.141 and moved it to Chapter 253, which deals with "state lands." This action reflects the legislature's intent that the statute now apply to Florida property law. See Save Our Beaches, Inc. v. Florida Dept. of Environmental Protection, 2006 WL 1112700 (Fla. 1st DCA 2006) (relying on section 253.141 as statement of riparian rights under Florida property law).

2. Absent A Reservation of Riparian Rights to the Exclusive Use of the Fee Owners, An Easement for Access To a Body of Water Implicitly Conveys the Noncommercial Riparian Rights Incident to the Land.

The answer to the certified question should begin with this Court's decision in City of Tarpon Springs v. Smith, 88 So. 613 (Fla. 1921). In Smith, the grantor dedicated a certain street easement to the public. 88 So. 613. The street easement ran by a river, and the plat reflected that, at certain points, the street and river touched but at other points, there was a strip of marsh land between the street easement and the river. Id. at 620. The city asserted that the dedication of the street easement conveyed to the public the right to access the marsh lands lying between the easement and the river for purposes of gaining access to the river. Id. at 621.

This Court denied access rights over the marsh lands themselves, concluding those lands were not included in the dedication. At the same time, however, this Court held that "[w]herever the street [easement] . . . touches or approximately touches the body of the . . . river, the riparian rights that are appropriate to a street easement were also impliedly dedicated as an incident; there being no express or implied reservation by the dedicator of such riparian rights." Id. at 621. Thus, at the points where the easement ran to the water,

this Court concluded riparian rights were implicitly conveyed. Id.

The principle recognized in Smith was reaffirmed in Fieg v. Graves, 100 So. 2d 192 (Fla. 1958). In Fieg, this Court addressed whether a "walk" designated on a plat and bordering on a lake, conveyed riparian rights to the lot owners. It noted that "a dedicator may reserve all riparian rights appurtenant to the land encumbered by the easement dedicated." 100 So. 2d at 195. However, "[i]n the absence of such a reservation whether . . . [riparian] rights are included within the scope of a "dedication" depends upon the purpose for which the easement was granted and the location of the property burdened with the easement." Id. Because the easement's purpose was to provide access to the water and the grantor failed to reserve any riparian rights, the easement conveyed riparian rights to the easement holders. Id. at 196.

This Court's decisions in Smith and Fieg teach that, where an easement is delineated on a plat as running to water, and the grantor fails to reserve any riparian rights for the fee owner's exclusive use, the easement implicitly conveys the riparian rights appropriate to its purpose, to be shared equally with the servient and dominate estate holders. Where an easement's purpose, as here, is to provide access to a body of water for the use and enjoyment of the water, the full panoply of

noncommercial[4] riparian rights, such as viewing the water and fishing from the land, are appropriate to and consistent with that purpose, and hence, such rights are implicitly conveyed with the easement grant, absent an express reservation of riparian rights. See generally Belvedere Dev. Corp. v. Department of Transp., Div. of Admin., 476 So. 2d 649, 651 (Fla. 1985) (recognizing that riparian rights are rights related to the access and use of bodies of water adjacent to land).

Here, without any express reservation of any riparian rights, the Easement broadly provides for "ingress and egress" to Boca Ceiga Bay. The terms "ingress and egress" are not terms of reservation and the purpose of such an easement is not restricted to physically getting into and out of the water. Rather, those terms, when used in conjunction with an easement running to water, reflect a purpose to provide a means of access for easement holders to generally use and enjoy the water itself. See generally Hume v. Royal, 619 So. 2d 12 (Fla. 5th DCA 1993) (recognizing that an easement for "ingress and egress" allowed pedestrian traffic across easement to the seawall without entering water). Indeed, easements for access to a body

[4] Under Florida law, an easement is defined as "'a privilege without profit, which the owner of one tenement has a right to enjoy in respect to that tenement in or over the tenement of another person . . . .'" Burdine v. Sewell, 109 So. 648 (Fla. 1926). The neighbors made no claim that the Easement conveyed commercial riparian rights.

of water are often conveyed for purposes of enjoying and using the water, not merely entering the water. See, e.g., Klotz v. Horn, 558 N.E. 2d 1096, 1098 (Ind. 1990) (recognizing that, although easement holders sought to build a dock, the easement for access to water allowed pedestrian traffic to seawall for purposes other than entering the water even without a dock); see also Blazina v. Crane, 670 So. 2d 981, 982 (Fla. 2d DCA 1996) (recognizing that an easement for ingress and egress might grant an easement holder the right to stand or sit on the easement for the purpose of enjoying the nearby water).

In Hume v. Royal, 619 So. 2d 12, 13 (Fla. 5th DCA 1993), the Fifth District considered an easement for "ingress and egress" for "pedestrian access to the intercoastal waterway." The easement expressly provided that "it [was] not intended to serve as access for vehicular traffic, boats, trailers, automobiles and the like." Id. The easement holders, relying on the Second District's decision in Cartish v. Soper, 157 So. 2d 150, 152 (Fla. 2d DCA 1963), argued they had the right to maintain the dock they had built at the end of the easement, which they used for fishing, shrimping, crabbing, boating and sunning. Id. The trial court agreed.

The Fifth District reversed, concluding that the language of the easement limited it to pedestrian access only and that it was not intended for boat usage. In contrasting Cartish, the

Hume court stated: "The easement granted in Cartish simply did not contain the restrictive language which we find in this case." Id. at 14. Thus, the Hume Court did not consider the term “ingress and egress” to be restrictive language. Rather, the court recognized that this term reflected the grantor’s intent that the easement provide the lot owners with general access to the water. The restrictive language the Hume court relied upon were express provisions that the easement “[was] not intended to serve as access for vehicular traffic, boats, trailers, automobiles and the like.” Id. at 13-14.

Of note, the Hume easement for “ingress and egress” was implicitly used for riparian activities, such as fishing and viewing the water, without the lot owners actually entering the water. Id. at 13-14. As such, Hume fully supports the trial court’s determination that the same Easement language here—without the express prohibitions at issue in Hume--permitted these same uses.

Simply stated, the terms “ingress and egress” are not language of reservation or limitation. Rather, the terms, when used for an easement to a body of water, are commonly understood to reflect an intent to create a means for lot owners to enjoy and make general use of the water, as well as a means to enter the water. Since the Easement’s purpose is to provide access to Boca Ciega Bay for the neighbors to enjoy and use the water, and

the Easement language here did not reserve the riparian rights to the exclusive use of the servient estate holder, the Easement implicitly conveyed all noncommercial riparian rights incident to the riparian land. The Second District, however, held exactly the opposite.

The Second District held that the riparian rights conveyed to the neighbors by this access easement were vastly restricted in the absence of "a more elaborate written easement," even though the grantor did not reserve any riparian rights for the exclusive use of the fee owner. Brannon, 2007 WL 162166, at *6-*7. Rather than require a reservation of riparian rights in an Easement, it required the Easement itself to affirmatively identify all the riparian rights granted. That is exactly backwards. See generally § 253.141(1), Fla. Stat. ("Conveyance of title to or lease of the riparian land entitles the grantee to the riparian rights running therewith whether or not mentioned in the deed or lease of the upland.").

3. The Rule The Second District Applied Here Conflicts With the Prior Decisions of This Court

The Second District based its holding below on its decision in Cartish v. Soper, 157 So. 2d 150, 152 (Fla. 2d DCA 1963). In Cartish, the Court considered whether the riparian rights were conveyed through a plat that included an easement "for ingress to and egress from the water of Boca Ciega Bay." 157 So. 2d

150, 152 (Fla. 2d DCA 1963). The court concluded that "insofar as riparian rights are necessary to or consistent with the purposes of the easement, they are impliedly granted to appellees and, as a corollary, reserved from the appellant fee owners." Id. at 153-54.

The trial court below, and the neighbors throughout the case, read the Cartish decision to establish, consistent with settled Florida law, that an easement for ingress and egress to a navigable body of water, which is intended to provide a means for lot owners to access and enjoy the water, implicitly conveys riparian rights, such as viewing the water and fishing from the land, because those rights are consistent with the purpose of such an easement. (R7 1280, Judgment p. 8). In applying the Cartish test in this case, however, the Second District reached the contrary conclusion that the Easement did not grant all private riparian rights, notwithstanding the lack of an express reservation of any such rights. Instead, the court held, as a matter of law, the right to view the water or fish from the Easement land were not consistent with the purpose of an Easement allowing access to the water, and hence were not implicitly conveyed with the Easement.

That wrongly construed the purpose of the Easement, which provides a means for the lot owners to make general use of and enjoy the waters of Boca Ceiga Bay, not just to get into and out

of those waters. The right to view the water is part of enjoying the water. Fishing inherently involves entering the water with a fishing line and bait. Both are fully consistent with the purpose of the Easement.

Even more fundamentally, the Second District's test erroneously presumes that the dominate estate holders of an easement running to navigable water have strictly limited riparian rights in the absence of "a more elaborate written easement." See Brannon, 2007 WL 162166, at *6. That holding is inconsistent with the settled authorities discussed above, and it should not be the law of Florida.

Riparian rights run with the riparian land. As recognized in this Court's decisions in Smith and Fieg, an implied easement intended to provide access to a body of water conveys to the dominate estate holders the riparian rights incident to the land, to be enjoyed in conjunction with the fee owner, unless such rights are expressly reserved by the grantor for the exclusive use of the fee owner. See Smith, 88 So. at 621; see also Fieg, 100 So. 2d at 195-96.

Judge Whatley made this precise point in his dissent:

> The majority concluded that without a "more elaborate written easement," the rights of the lot owners are vastly restricted. The opposite is true. An easement such as this cannot arise without the participation of the fee owner. Here, that was Mr. Davis. Davis could have inserted limiting language in the easement, but he did not. Feig, 100 So. 2d at 195,

> confirmed this premise in stating: "A dedicator may reserve all riparian rights appurtenant to the land encumbered by the easement dedicated."

Brannon, 2007 WL 162166, at *7.

As Judge Whatley correctly recognized, the grantor here could have reserved all or some of the riparian rights to the exclusive use of the fee owner. The grantor did not do so. Instead, the grantor implicitly conveyed all private riparian rights, to be shared equally by the fee owner and the neighbors. The Second District's presumption that the neighbors' riparian rights are sharply limited in the absence of "a more elaborate written easement" stands Florida law on its head.

Because this Easement did not reserve any private riparian rights to the exclusive use of the fee owner, the noncommercial riparian rights running with the Easement land were implicitly conveyed, including the right to fish and enjoy a view of the water from the waters' edge. The Easement allows access to the Bay, not just to get into the water but to enjoy the water itself. Simply put, the Easement must be interpreted in a manner that allows the neighbors to "enjoy" those rights in the same manner as the servient estate owner.

The Second District itself recognized that "[i]f the easement by implication gives [the neighbors] . . . all of the riparian rights of the Brannons, including the right to a view, then there is a good argument that they can view the water,

subsets, and fireworks from this portion of the Brannons' backyard." Brannon, 2007 WL 162166, at *6. Contrary to the Second District's ultimate conclusion, the full panoply of noncommercial riparian rights, including the right to view the water and fish, are consistent with the Easement's purpose of providing access to the waters of Boca Ceiga Bay.

Accordingly, the answer to the certified question is that, in the absence of an express reservation, an easement for ingress and egress to a body of water implicitly conveys, as a matter of law, the noncommercial riparian rights running with the land, such rights being inherently consist with the easement's purpose.

II. IF ALL RIPARIAN RIGHTS WERE NOT IMPLICITLY CONVEYED AS A MATTER OF LAW, THE DETERMINATION OF WHAT RIGHTS WERE CONVEYED WAS A FACTUAL QUESTION DEPENDENT ON THE INTENT OF THE GRANTOR AT THE TIME OF THE CONVEYANCE.

As shown above, Florida law presumes, in the absence of an express reservation, that the private riparian rights running with the land are conveyed with an easement for ingress and egress to a body of water. Absent such a presumption, it certainly should not be presumed, as the Second District did, that only limited rights are conveyed. Rather, to the extent there is any doubt whether all riparian rights running with the land were implicitly conveyed with the easement grant, the determination of which riparian rights are conveyed and what

uses are appropriate for the neighbors' full enjoyment of the Easement then must be a factual question, dependent on a case-by-case examination of the intent of the grantor at the time of the easement's creation. See Wilson v. Dunlap, 101 So. 2d 801, 805 (Fla. 1958) ("This Court has long been committed to the doctrine that if a plat 'is complete in itself, and free from ambiguity, it will control; but, if ambiguous, extrinsic evidence may be received in its aid.'"); see also Blazina v. Crane, 670 So. 2d 981, 982 (Fla. 2d DCA 1996) (holding that the determination of which rights are conveyed for the full enjoyment of an easement for ingress and egress is a factual question to be resolved through the consideration of extrinsic evidence).

This Court has recognized that the scope of parties' rights for the full enjoyment of an easement often is a factual question that will vary from case to case. In Crutchfield v. F.A. Sebring Realty Co., 69 So. 2d 328 (Fla. 1954), this Court stated:

> Every easement carries with it by implication the right, sometimes called a secondary easement, of doing what is reasonably necessary for the full enjoyment of the easement itself . . . [but] the right is limited and must be exercised in such reasonable manner as not injuriously to increase the burden upon the servient tenement . . . . [T]he legal extent of the right . . . must, it seems, be ascertainable from the intention of the parties at the time when the right was created."

Id. at 330 (emphasis supplied and citations omitted).

Although the Crutchfield Court determined that the grantor could not have intended the uses asserted by the grantee there, since such uses did not exist at the time of the grant, the Court noted that it might be necessary in other cases to determine from extraneous evidence the intention of the parties regarding an implied easement. Id.; see also Gelfand v. Mortgage Investors of Washington, 453 So. 2d 897, 898-99 (Fla. 4th DCA 1984) ("In determining the scope of the easement, the court may, if it concludes the words of the instrument . . . ambiguous, resort to extraneous matters to arrive at the probable intent of the parties. Thus, the purpose of the easement, the location of the realty, the situation of the parties, and all surrounding circumstances may be considered."); Hillsborough County v. Kortum, 585 So. 2d 1029, 1031 (Fla. 2d DCA 1991)("To determine the scope of the easement, the court must attempt to ascertain the intent of the parties in light of the surrounding circumstances at the time the easement was created.").

Of note, the Second District acknowledged that "[t]he judges of this court have struggled to apply the Cartish tests – 'such riparian rights necessary and incidental to access and egress' and 'necessary to or consistent with the purposes of the easement' – in this case." Brannon, 2007 WL 162166, at *1. It thus recognized that those legal terms of "ingress and egress"

do not resolve what uses could be made of the easement in effecting its purpose of allowing access to Boca Ciega Bay. See Brannon, 2007 WL 162166 at *2. However, the district court did not then address the trial court's factual findings as to the grantor's intent, confirmed by the actual use of the Easement for nearly fifty years--while the grantor lived in the neighborhood--for the now challenged purposes. See Easton, 548 So. 2d at 694-95 (noting that scope of an easement implied by a plat depends on parties' intent and such intent is determined by the language of the granting instrument, the situation of the property, and the surrounding circumstances at the time of grant).

Instead, the court made its own determination that, as a matter of law, the uses of the Easement the neighbors had been enjoying for decades were neither "necessary to or consistent with" the purpose of the Easement. See Brannon, 2007 WL 162166 at *6. The word "intent" is not used anywhere in the opinion of the Second District. But rather than ignore the grantor's intent and the trial court's findings on that issue, the Second District should have granted deference to those factual findings in construing language the "judges of . . . [the Second District]" admittedly grappled with over the years it took to render a decision. Id.

Indeed, in determining the grantor's intent, Florida law

requires, as a threshold matter, that an easement be interpreted in the manner most favorable to the dominate estate holders. Reid v. Barry, 112 So. 846, 848 (Fla. 1927) ("Deeds are construed most strongly against grantor and most beneficially for grantee; deed is never void when its language may be applied to any lawful intent to make it good."). Where a easement grant permits more than one interpretation, the one most favorable to the dominate estate holders should be adopted. See Central & Southern Fla. Flood Control District v. Surrency, 302 So. 2d 488, 490 (Fla. 2d DCA 1974) ("Where a deed permits more than one interpretation, the one most favorable to the grantee should be adopted.").

Thus, an "ingress and egress" easement must be construed to grant full access to the water, including use and enjoyment of it, not merely the limited right to get into and out of the waters. The Second District's restricted construction violated that fundamental precept.

Additionally, the intent of the grantor as to the purpose of the Easement can be established from the actual uses of the Easement at the time of the grant and from other conduct of the parties. See Kotick v. Durrant, 196 So. 802, 804 (Fla. 1940) (recognizing that a court, in ascertaining the intention of the parties, may consider the situation of the property and of the parties, and the surrounding circumstances at the time the

instrument was executed, and the practical construction of the instrument given by the parties themselves by their conduct or admissions); see also Hynes v. City of Lakeland, 451 So. 2d 505, 511 (Fla. 2d DCA 1984); Corrigans v. Sebastian River Drainage Dist., 223 So. 2d 57, 58 (Fla. 4th DCA 1969) ("The trial court based its interpretation of the easement on evidence relating to the character of the dominant and servient land, its use, and the situation of the parties to the easement, at the time the easement was created. Such is an authorized means of interpreting easements which are ambiguous or expressed in general terms.").

Here, the trial court below concluded, as a matter of law, that the neighbors were entitled to their requested relief because those riparian rights were implicitly conveyed with this Easement. The court further found that the evidence at trial, including the judge's own personal view of the property, confirmed that the grantor intended, at the time of the grant of the Easement, to permit the neighbors to use a portion of the Easement for riparian activities, such as fishing and viewing the water. The neighbors enjoyed these uses while the grantor still lived in the area, and indeed for fifty years until the Brannons purchased their lot. There was substantial competent evidence to support the trial court's findings in this regard.

For instance, one original lot owner testified that she and neighbors used the Easement for a variety of purposes during the years before the dock was constructed, all while the original grantor, C.E. Davis, lived down the street. (R12 1904, 1908-09). Indeed, the Easement was in place for about four years before the dock was built, and at all times was used for purposes related to use of the water, without entering the water, including enjoying the view and fishing from the water's edge. In fact, throughout the fifty year history of this easement, the only parties ever to suggest such uses were improper or inconsistent with the Easement were the Brannons.

The trial court's reliance on extrinsic evidence to determine the grantor's intent is consistent with this Court's decision in Crutchfield. It also is consistent with the Second District's own decision in Blazina v. Crane, 670 So. 2d 981 (Fla. 2d DCA 1996), which the district court wholly failed to address in its opinion below.

In Blazina, the Second District examined an easement for "ingress and egress to the beach," which ran across a residential lot and terminated at a seawall. Id. at 982. As here, the parties disputed whether the "ingress and egress" easement conveyed to the servient estate owners the right to stop or stand on the easement land. Id. at 982-83. Recognizing that the dominant estate holder had the right to use the

easement, just as the Second District found here, the Blazina court then went on to address the additional issue as to "[t]he extent to which Blazina is entitled to enjoy the easement . . . ." Id. (emphasis added). The court determined that the easement for "ingress and egress" was ambiguous as to that question, requiring the consideration of parol evidence to determine the parties' original intent, consistent with settled Florida law. Id. at 983. In sharp contrast, in this case, the Second District made that decision as a matter of law, ignoring the trial court's findings as to the grantor's original intent as to uses to be enjoyed under the Easement.

In doing so, the Second District also simply ignored its prior decision in Blazina. But under Blazina, the District Court concluded that the language of "ingress and egress" does not resolve what rights the grantor intended to convey for the full enjoyment of the Easement. Rather, this is a question of fact to be resolved by the use of extrinsic evidence, precisely as the trial judge did here, in the alternative to her legal conclusions. This exact point was made by the neighbors in their answer brief to the Second District, noting that the trial court's findings were supported by substantial competent evidence and were "completely consistent with Blazina." Ans. Br. at 34-35.

Blazina does not stand alone in allowing extrinsic evidence to construe an access easement. The Indiana Supreme Court reached this same conclusion in construing an easement, much like the one at issue here, for "access to Eagle Lake." Klotz, 558 N.E. 2d at 1097. Although the parties implicitly recognized that the easement granted the easement holders the right to walk to the edge of the easement and fish and view the water, the easement holders also desired to construct a dock to facilitate their use and enjoyment of the easement. The trial court ruled that, as a matter of law, the easement holders did not have the right to build a dock.

The Indiana Supreme Court reversed, recognizing that the sole issue was the grantors' intent in creating the easement for purpose of access to the lake. The court noted:

> [G]enerally, access to a body of water is sought for particular purposes beyond merely reaching the water, and where such purposes are not plainly indicated, a court may resort to extrinsic evidence to assist the court in ascertaining what they may have been.

Id. at 1098. The court held that the easement was ambiguous as to the grantor's intent and thus, the trial court should have considered extrinsic evidence as to the grantors' intent. Id.

As these authorities recognize, if full riparian rights are not implicitly conveyed as a matter of law, the issue of the grantor's intent in conveying an easement for "ingress and egress" to a body of water, is a question of fact to be resolved

through extrinsic evidence. The trial court here did exactly that, and the Second District made no determination that the trial court's factual findings were not supported by substantial competent evidence.

Nonetheless, rather than affirm the trial court's findings, the Second District instead concluded, as a matter of law, that every easement in this State providing for "ingress and egress" to a body of water cannot be interpreted as allowing the easement holder to stand on a small portion of the Easement land to use and enjoy the water for purposes such as fishing, regardless of the actual intent of the original grantor. This cannot be the law in Florida.

In holding that the riparian uses such as viewing the water and fishing were unnecessary to and inconsistent with the purpose of the Easement, the Second District necessarily concluded that the only reasonable interpretation of this Easement language is that the neighbors had to physically leave the Easement and enter the water to enjoy it. This same easement language, however, has been interpreted to convey the exact opposite meaning in other court decisions. See Hume, 619 So. 2d 12 (addressing an easement for "ingress and egress" that allowed pedestrian traffic across easement to the seawall without entering water); see also Klotz, 558 N.E. 2d at 1098 (recognizing that an easement for access to water allowed

pedestrian traffic across easement to water's edge for purposes other than entering the water).

Moreover, other Florida courts have recognized that an easement providing access to water is generally intended to convey more than a mere right to enter and exit the water from the easement. See Parlato v. Secret Oaks Owners Ass'n, 689 So. 2d 320 (Fla. 5th DCA 1997) (involving an easement providing pedestrian access to a river and allowing benches to be placed on the dock); see also Lewis v. S&T Anchorage, 616 So. 2d 478 (Fla. 3d DCA 1993) (recognizing that waterfront rights include passive uses such as sunning and viewing the water and that testimony can be taken on the issue of the intent of the grantor).

Consequently, the Second District should not have made its own choice of the particular uses now to be enjoyed under this long-standing Easement. And, it certainly should not have adopted a restrictive construction of the terms "ingress and egress," where its construction effectively invalidates pre-existing easements across this State, many of which have been used for purposes of viewing the water and fishing from the easement land for decades. Rather, it should have honored the grantor's intent as to uses allowed under this particular easement. The proper analysis was conducted by the trial judge below.

Ignoring the trial judge's findings as to the grantor's intent and as to the continuous use of the Easement for decades for the now challenged purposes, the Second District's certified question focuses on the fact that the Easement currently burdens a residential lot containing an occupied dwelling. However, that occupied dwelling did not exist at the time of the Easement grant; the subsequent construction of a residential dwelling does not control the judicial inquiry here, especially where the servient estate owner purchased the property with notice of the Easement. Rather, the intent of the grantor at the time of the easement's creation controls the Easement's interpretation.

The trial judge found, after consideration of extrinsic evidence and her personal view of the property, that the grantor intended the Easement be used in the manner the neighbors have peaceably enjoyed for the past fifty years. The Second District should have affirmed that ruling. See Shaw v. Shaw, 334 So. 2d 13, 16 (Fla. 1976) (recognizing that factual findings of the trial court should be affirmed so long as they are supported by substantial competent evidence).

Notably, the Second District itself acknowledged that the Easement granted the neighbors the right to permanently affix a dock to the edge of the seawall. Moreover, the Brannons conceded, and do not dispute, that the neighbors could fish and observe the water from the dock if one were still present.

Since it was the grantor's intent that the neighbors could permanently place a dock on the edge of the Easement, and fish and view the water from that dock, it could not be clearly erroneous to find that the grantor also intended that, in the absence of a dock, the neighbors could stand on a small portion of the easement at the water's edge if necessary to allow them to engage in these same uses of the adjacent water. Such a conclusion is not remarkable or unreasonable and is consistent with the historical use of this Easement since its creation.

It remains only to address the Second District's analogy that "[i]f the easement had been given as an ingress and egress easement to the public park, no one would argue that the lot owners received the right to linger in the easement. They would merely receive the right to cross the easement to reach and enjoy the public park." Brannon, 2007 WL 162166, *6. This analogy, however, ignores that if the easement was to a public park, the easement would also have not conveyed any riparian rights at all, such as the right to build a dock. Yet the Second District itself recognized that this particular riparian right was conveyed here.

Simply stated, as is true today as it was in 1953 when the Easement was created, human beings cannot stand on water and need land to effectuate their access to and use of the water. An easement to water is fundamentally different from an easement

to another piece of land. The grantor here understood this fact when he granted the Easement to the lot owners. The analogy that the Second District relies upon is simply inapplicable here.

CONCLUSION

The certified question posed to this Court broadly asks what riparian rights are conveyed by an "easement for ingress and egress" to a body of water, when the servient estate is now a residence. The trial court properly answered that question in concluding that an ingress and egress easement running to water conveys, as a matter of law, the full panoply of noncommercial riparian rights running with the land absent an express reservation of those rights. Absent such a rule of law, the trial court properly recognized that the scope of the riparian rights conveyed and the uses appropriate to those rights becomes a factual question as to the grantor's intent at the time of the Easement's creation. The trial court found that the uses historically enjoyed here are consistent with the grantor's intent based on competent, substantial evidence, including a personal view of the properties.

This Court should quash the Second District's decision under review, and remand with directions to affirm the trial court's final judgment.

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I HEREBY CERTIFY that on June 8, 2007, a true and correct copy of the foregoing has been served by U.S. Mail to the following:

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