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' REPLY BRIEF ON THE MERITS

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

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The neighbors seek a determination that the panoply of riparian rights they have been utilizing were conveyed incident to the implied ingress and egress Easement platted nearly fifty (50) years ago. Defendants argue that Florida law does not support the implied conveyance of all riparian rights not expressly reserved by the grantor, but rather limits the implied conveyance of riparian rights only to those appropriate to or consistent with the purpose of the Easement. That is precisely the point: in the case of an implied easement to navigable waters, all noncommercial riparian rights of the nature at issue in this case are appropriate to, or certainly consistent with, the purpose of the implied easement.

Nonetheless, the Second District Court of Appeal ruled, as a matter of law, that no riparian rights are appropriate to or consistent with the purpose of an ingress and egress easement to navigable waters; instead, the Easement exists strictly to allow entrance to and exit from the water. It made that decision, which will have far-reaching implications, without citing any authority supporting such a restrictive scope of an ingress and egress easement. It did not explain why the traditional riparian rights sought by the neighbors are inappropriate to or inconsistent with an ingress and egress easement. In the absence of such authority, the presumption should be that the

grantor was in the best position at the time of the grant to expressly reserve riparian rights, which otherwise generally run with the land.

Thus, all riparian rights appropriate to or consistent with the purpose of the implied Easement, and which were not expressly reserved, should be deemed conveyed as a matter of law. In any event, the determination of what riparian rights are appropriate to or consistent with any particular ingress and egress easement should at a minimum leave latitude to account for the facts surrounding the historical grant of the implied easement. In this case, the evidentiary record fully supports the scope of the Easement found by the trial court.

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.

There is no doubt that riparian rights are conveyed incident to an implied easement to navigable waters, unless expressly reserved by the grantor. See City of Tarpon Springs v. Smith, 88 So. 613 (Fla. 1921), Burkart v. City of Fort Lauderdale, 168 So. 2d 65 (Fla. 1964), Cartish v. Soper, 157 So. 2d 150 (Fla. 2d DCA 1963); Feig v. Graves, 100 So. 2d 192 (Fla.

2d DCA 1958).[1] Defendants do not dispute that settled proposition.

Instead, Defendants say that "only those rights that are 'appropriate to,' or consistent with the purpose of the easement are conveyed." An. Br. at 19. But Defendants ignore that, in the case of an implied easement to navigable waters, all noncommercial riparian rights are appropriate to, or certainly consistent with, the purpose of the implied ingress and egress Easement.

This makes for good law and policy because it is clear that the grantor is in the best position to expressly reserve riparian rights that are not intended to be conveyed. Accordingly, the presumption in the law should be that, absent an express reservation, all noncommercial riparian rights of the nature at issue in this case are appropriate to or consistent with such easements and are conveyed incident to them.

The Second District has gotten this backwards. It has determined, as a matter of law, that no riparian rights are appropriate to or consistent with an implied ingress and egress plat easement. It says that such an easement is limited to only providing entrance to and exit from the water. It is hard to fathom a rule of law that would say that fishing is not

[1] Feig was inadvertently miscited in the Initial Brief. Undersigned counsel corrects that citation here and apologizes for this error.

"consistent with" an ingress and egress easement to navigable waters. Defendants do not explain why this rule of law makes any sense at all. It does not.

In severely circumscribing the scope of an implied ingress and egress easement to navigable waters, the Second District cited no cases in support of its limited interpretation of "ingress and egress." The only case Defendants cite is Akers v. Canas, 601 So. 2d 305, 306 (Fla. 3d DCA 1992). That case, however, does not involve riparian rights or a broad, unrestricted easement grant as here. Rather, it involved an easement's explicit restriction, which was alleged to preclude the proposed dock on the easement property.

In Akers, the court examined an easement grant containing the following language:

> The sole purpose of this grant of easement is to assure Canas and Ezmirly of continued access to the rear of the building owned by Canas and Ezmirly, with the restriction that no structure or addition to any structure be placed on the property which is the subject of this grant of easement.

601 So. 2d at 306.

After the easement's creation, the Canas applied for, and were granted, a building permit to build a deck on the easement property. The trial court found that the deck was not a prohibited "structure" within the meaning of the easement. Id.

The Third District reversed, finding that the grantees' only rights were those of "ingress and egress, which is the power to use the easement property to go to, and return from, the grantee's own land." Id. Given this fact and the express prohibition in the easement of new structures, the court held that the proposed deck violated the proscriptions of the easement grant.

Simply stated, the easement in Akers expressly prohibited structures. The Easement here does not prohibit fishing or viewing. Further, the easement in Akers was limited on its face to the "sole purpose" of access to the building, whereas the Easement here does not say that the "sole purpose" is to assure entrance to and exit from to the water. Perhaps most importantly, Akers did not involve an easement to a navigable body of water, with incident riparian rights, where the Easement holders need to stand on a small portion of the Easement to facilitate their use of the water, consistent with the whole purpose of the Easement.

Thus, the Akers decision is inapplicable. Certainly, that decision does not hold that the terms "ingress and egress" cannot, as a matter of law, encompass appropriate and consistent riparian rights such as fishing and viewing the water from a small portion of the Easement land.

Moreover, the Second District's holding directly conflicts with the legal principle that "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." See Crutchfield v. F.A. Sebring Realty Co., 69 So. 2d 328, 330 (Fla. 1954) (citing 28 C.J.S., Easements, §76(b)). Defendants wholly fail to discuss this principle in their Answer Brief. But "full enjoyment" of this Easement includes use of the water itself, and its shoreline, for normal water activities. Such uses have been enjoyed by the neighbors since the grant of this Easement and are fully appropriate to, and certainly consistent with, the ingress and egress easement and the grantor's intent (as found by the trial court below).

Defendants incorrectly cite the decision in City of Orlando v. MSD-Mattie, L.L.C., 895 So. 2d 1127 (Fla. 5th DCA 2005), as supposed support for the Second District's holding. In MSD-Mattie, the Fifth District held that the City's use of fiber optics cables for general telecommunications was beyond the scope of an easement granted for the purpose of transmitting electric power. In so holding, the Fifth District stated that "the scope of an easement is defined by what is granted, not by what is excluded, and all rights not granted are retained by the grantor." 895 So. 2d at 1130. Defendants suggest that this statement shows that riparian rights could not be implicitly

conveyed with an easement grant running to a body of water. Defendants are mistaken.

MSD-Mattie did not involve the conveyance of riparian rights, which run with the riparian land by implication of law, regardless of whether they are expressly conveyed. Further, the easement in MSD-Mattie, unlike the Easement here, was an express easement that explicitly set forth the only uses permitted under the easement grant. The MSD-Mattie court merely held that, since the easement there expressly provided that the City only could use the easement for the transmission of electricity and the selling of excess telecommunication capacity did not facilitate that purpose, the City could not use the easement for general telecommunications, even if such use was not expressly excluded from the easement grant. Id. at 1130-31. That case is entirely different from this case.

Defendants also assert the Easement is an implied easement disfavored under Florida law because such easements are an exception to the Statute of Frauds. An. Br. at 12-13. Defendants are mistaken.

Defendants cite to 25 American Jurisprudence 2d, Easements and Licenses § 23 as support for their contention that implied easements are disfavored. In fact, the cited section does not contain the quoted language set forth in the parenthetical in Defendants' Answer Brief. An. Br. at 13. Moreover, section 23

addresses implied easements arising from preexisting uses, not easements implied from reference to a plat, as here.

Easements implied from reference to a plat have long been recognized under Florida law. Indeed, this Court has declared that easements contained in recorded plats represent enforceable promises by a developer, which can be relied upon by the homebuyers in purchasing their property. See McCorquodale v. Keyton, 63 So. 2d 906, 910 (Fla. 1953). Since such easements are expressly identified in the written plat as referenced in the homebuyer's deed, they satisfy the Statute of Frauds. See Tortoise Island Communities, Inc. v. Moorings Ass'n, Inc., 489 So. 2d 22 (Fla. 1986). There is no reason to disfavor the Easement here.

Indeed, if the Second District concluded that this Easement should be disfavored, as it appears from the certified question's reference to the subsequent construction of a residence on the servient estate, that ruling was contrary to Florida law. This Easement, which has been enjoyed for fifty years, cannot be limited now simply because the Easement runs across the Brannons' residential lot.

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, the neighbors seek a rule that would recognize that all the riparian rights they have enjoyed since the grant of the Easement are appropriate to and consistent with an ingress and egress easement. The Second District concluded, as a matter of law, that those riparian rights (such as fishing) are never appropriate to or consistent with an implied ingress and ingress easement. The neighbors suggest, at a minimum, that the determination of what riparian rights are appropriate to or consistent with any particular ingress and egress easement should leave latitude to account for the facts surrounding the historical grant of the implied easement.

Defendants assert that extrinsic evidence as to the grantors' intent is irrelevant because "[e]very court that has considered this precise easement has found it to be unambiguous." An. Br. at 25. But the trial court and the panel held it unambiguously conveyed the riparian rights at issue, whereas the en banc Second District found to the contrary. Even in its en banc opinion, the Second District acknowledges 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 v. Boldt, 958 So. 2d 367, 369 (Fla. 2d DCA 2007)(en banc).

Given these diametrically opposite readings of the Easement and the struggle the judges of the Second District faced in applying the law to this case, it is entirely appropriate to look to the extrinsic evidence in the record of the grantor's intent in creating this Easement, at a time when the grantor himself lived in the neighborhood and enjoyed the benefits of the easement together with all the other neighbors.

Defendants also assert the neighbors have changed their position regarding the legal effect of the Easement. An. Br. at 25-26. That is not the case. The neighbors always have asserted, and continue to assert, that this Easement unambiguously conveys the full panoply of riparian rights appropriate to or consistent with the riparian land.

The neighbors never asserted that, if the full panoply of riparian rights were not conveyed under the Easement, the court should then determine on its own which particular riparian sticks it decides were granted. Rather, in that event, the scope of the Easement is controlled by the intent of the grantor at the time of the Easement's creation. That is why the neighbors presented, in the alternative, evidence of the grantor's intent and why the trial court made alternative

findings in that regard.[2]

The trial court specifically found that the grantor intended for the neighbors to enjoy such uses as fishing and viewing the water from a small portion of the Easement land. If a determination is to be made as to which riparian rights are included in an "ingress and egress" easement, the trial court properly considered extrinsic evidence as to the grantor's intent in that regard. As the Indiana Supreme Court recognized in Klotz:

> [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.

Klotz v. Horn, 558 N.E.2d 1096, 1098 (Ind. 1990).

The Second District should not have made its own choice of the particular uses now to be enjoyed under this long-standing Easement. Since the grantor intended that the neighbors could view the water or fish while standing on a dock, which neither the Second District nor Defendants dispute, it is not surprising that the grantor also intended, as the trial court found, that

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[2] Defendants also assert that the neighbors have been inconsistent in their use of Blazina v. Crane, 670 So. 2d 981, 982 (Fla. 2d DCA 1996). That is not the case. Blazina certainly supports the argument that this case should be decided based on a factual record, if there is any uncertainty surrounding the scope of the ingress and egress easement. Blazina does not run counter to the neighbors' argument that the Easement encompasses the riparian rights they seek, as a matter of law.

the neighbors could conduct these same activities from a small portion of the Easement in the absence of a dock, especially since no dock was present when the Easement was created.

Finally, Defendants assert the neighbors "spend many pages of their Initial Brief rehashing their view of the evidence at trial regarding the grantor's intent and the historical use of the easement." An. Br. at 27. The neighbors, however, have not provided this Court with their view of the evidence. Rather, they have presented the view of the trial court after its extensive examination of the evidence submitted at trial. The Second District did not hold that the trial court's factual findings were not supported by substantial competent evidence, which is the only inquiry appellate courts should undertake regarding such findings. See Markham v. Fogg, 458 So. 2d 1122, 1126 (Fla. 1984) (holding that as long as there is competent, substantial evidence to support a trial court's factual finding, an appeals court should not substitute its judgment for that of the trier of fact).

CONCLUSION

This Court should answer the certified question in the manner stated in the Initial Brief. In. Br. at 47. In accordance with that answer, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 10, 2007, a true and correct copy of the foregoing has been served by U.S. Mail to the following:

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CERTIFICATE OF TYPE SIZE AND STYLE

I HEREBY FURTHER CERTIFY that the type size and style used throughout this brief is 12-point Courier New double-spaced, and that this brief complies with all font requirements of Florida Rule of Appellate Procedure 9.200.

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