IN THE SUPREME COURT OF FLORIDA

Case No. SC07-563

STEPHEN W. BOLDT, et al.,
Petitioners,

vs.

PATRICK W. BRANNON and
KATHRYN C. BRANNON,
Respondents.

On Discretionary Review Based on a Certified Question from
The Second District Court of Appeal

RESPONDENTS' ANSWER BRIEF ON THE MERITS

Marvin E. Barkin, Esq.
Florida Bar No. 3564
Marie Tomassi, Esq.
Florida Bar No. 772062
Richard M. Hanchett, Esq.
Florida Bar No. 709212
TRENAM, KEMKER, SCHARF, BARKIN,
FRYE, O'NEILL & MULLIS, P.A.
Bank of America Tower, Suite 1600
200 Central Avenue
St. Petersburg, FL 33701
(727) 896-7171 Phone
(727) 820-0835 Facsimile
mtomassi@trenam.com
Attorneys for Respondents

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

In this review proceeding of a question certified to be of great public importance regarding the scope and extent of riparian rights conveyed by an implied ingress-egress easement, the petitioners who are owners of some of the lots receiving the benefit of the easement are referred to herein as "petitioners." Respondents Patrick W. Brannon and Kathryn C. Brannon, the owners of the property subject to the easement, are referred to herein as "the Brannons." Record references are by volume and page number, or by descriptive term as appropriate.

The question posed by the Second District Court of Appeal's en banc opinion is:

> 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 v. Boldt, 32 Fla. L. Weekly D288 (Fla. 2d DCA Jan. 24, 2007).

STATEMENT OF THE CASE AND FACTS

Throughout their statement of the case and facts, petitioners use artful phrasing and selective editing to attempt to recast their situation into a more compelling position for this review. For example, in their opening sentence, petitioners refer to the easement at issue as "their waterfront easement" when plainly, as described in the en banc opinion of the Second District at issue herein and as reflected in the portion of the plat contained on page 10 of petitioners' Initial Brief, the easement is for ingress and egress and utilities and primarily runs down the side of two tracts of land with only a small opening onto Boca Ciega Bay at one end. Petitioners also explain in some detail the volume of evidence[1] heard and the effort made by the trial court, even though the question of great public importance before this Court is a pure legal issue, as determined by the en banc opinion from the Second District and indeed even by the original Second District panel and by the trial judge herself.

The relevant facts were succinctly and fairly stated in the Second District's en banc opinion. The Brannons therefore respectfully replicate those facts verbatim herein for this Court's convenience:

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[1] Petitioners also overstate and take out of context certain findings made by the trial court. The Brannons do not address those inaccuracies, however, because they are irrelevant to the determination of the certified question and even to the resolution of the instant case in which every judge who has reviewed the easement at issue has concluded that it is unambiguous.

I. THE BASIC LAYOUT OF BAY PARK GARDENS

This case involves a neighborhood that is west of Park Street on 37th Avenue North in St. Petersburg, Florida. Thirty-seventh Avenue essentially dead ends at Boca Ciega Bay. This neighborhood was platted as "Bay Park Gardens" in 1953. It was designed to include twenty-two lots along 37th Avenue North and four tracts of land near the water's edge. The four tracts were designated A, B, C, and D (Appendix A, Plat Map). The original developer was Chestley E. Davis. In 1958, he sold tracts A and B to William and Virginia Norris, who built a personal residence on the two lots. Thus, for all practical purposes, these two tracts have been a single lot since the late 1950s. As explained later, the Brannons now own the home built by the Norrises.

An examination of the original plat map reveals much about Mr. Davis's vision as a developer. None of the lots along 37th Avenue North had direct access to the water. The two most valuable tracts, C and D, each had approximately 100 feet of waterfront with the tracts extending down to the mean high-water mark. Without an easement, there would have been limited ability to have a driveway into tracts C and D, and no ability to reach tracts A and B. Thus the development was platted with a twenty-two-foot-wide easement running north and south at the eastern edge of tracts C and D, primarily to give automobile access to those lots. At the north end of this easement, Mr. Davis designated an easement running east and west. Mr. Davis placed the entire twenty-two-foot east/west easement on tracts A and B, the land he developed for himself (Appendix B, Detail from Plat Map). The entire grant of easement states: "22' easement for ingress & egress and utilities."

If Mr. Davis had only been concerned about motor vehicle traffic, the east/west easement could have ended at the eastern property line of tract B. However, he extended the twenty-two-foot easement to the mean high-

water mark. By reference to the plat map in the deeds of all of the lots, the purchasers of those lots were given an easement by implication providing them with ingress and egress to the water at the mean high-water mark. Thus, the purchasers of the lots knew that although they would not own waterfront property, they were purchasing the right to reach the water in a convenient manner.

The vision of developers and the reality of development have often parted ways in Florida. In this case, Mr. Davis built a dock on the easement in 1957 or 1958. He reserved the north side of the dock for the owner of tract B, and he reserved the south side of the dock for the owners of the other lots. The dock was short-lived. It was destroyed by a hurricane in 1960 and was never rebuilt. The Norrises built their home on tracts A and B, positioned so the easement runs down the driveway, adjacent to the garage and very close to their living room and kitchen before it enters the backyard. Thus, at least psychologically, anyone who owns the home on tracts A and B will always have a sense that neighbors are invading their personal space when the neighbors use the easement.

The owners of tracts C and D, as well as Mr. Davis, also built a seawall on this property in 1957 or 1958. Like so many other seawalls, this wall kept the sea out, but it also tended to erode the beach available to the public below the mean high-water mark. Oysters built up adjacent to the seawall. At this time, there is little, if any, public beach below the mean high-water mark at the edge of the easement where any normal person would choose to fish or enjoy a sunset. Thus, the easement now runs to a location of little or no value to someone who holds only public riparian rights.

II. THE FIRST EASEMENT DISPUTE

This case is not the first dispute arising from this easement. When Mr. Davis and his wife conveyed tracts

A and B to William and Virginia Norris in 1958, tract C was owned by the Guillaumes. A dispute arose between the Norrises and the Guillaumes when the Norrises built a wall to separate tract C from tracts A and B. Tract C had been developed using a layout that provided no vehicular access to the Guillaumes' backyard except via the easement. Thus, the wall prevented them from accessing their backyard.

On December 5, 1958, a final decree was entered in a lawsuit styled Bernard G. Guillaume & Ethylle Guillaume, his wife, Plaintiffs v. William Norris & Virginia Norris, his wife, Defendants, Chancery No. 48,803, and recorded in the public records of Pinellas County. The Guillaume court stated:

> The Court further finds that the plat of Bay Park Gardens was not ambiguous in any respect and that the designation of the 22-foot east-west easement for ingress, egress and utilities created an easement for the benefit of Tract "C" as well as all of the other lots and tracts in the subdivision.

This final decree granted the owners of tract C access down the easement "as is reasonably necessary" to enter their backyard, and it ordered the Norrises to remove a twenty-foot segment of the wall to allow access to tract C. The Norrises and Guillaumes later entered into a stipulation that permitted the owners of tracts A and B to install a gate of their choosing in the twenty-foot opening; however, no owner of those lots has done so.

This earlier lawsuit did not name the other neighbors as parties and did not address what, if any, riparian rights the neighbors may have by virtue of the language on the plat map. Thus, while we agree that the brief phrase, "22' easement for ingress & egress and utilities," is not ambiguous, the earlier lawsuit did not discuss the Cartish test or resolve the nature of the "riparian rights necessary

and incidental to access and egress," 157 So. 2d at 153, that are at issue in this case.

III. THIS EASEMENT DISPUTE

The Brannons purchased tracts A and B in December 2000. By that time, tracts C and D were no longer owned by the Guillaumes but were owned by Mr. and Mrs. Henter. The Brannons installed two gates across the easement. They placed a security gate across their driveway at the front of the property and a second gate closer to the water that closed off their entire backyard. This gate is locked, rendering a portion of the easement inaccessible to the owners of the other lots in the neighborhood. As a result of these gates, a dispute over the easement erupted again and the entire neighborhood became interested in their rights to the easement.

The Henters and the other lot owners sued and sought a declaration that by virtue of the plat, the owners of the twenty-two lots in the subdivision had an easement by implication across the Brannons' property and that they "own[ed] the right to use the East-West Easement for the purposes of ingress to and egress from Boca Ciega Bay, together with all riparian rights appurtenant thereto." The lot owners' specific argument was that

> when the developers of the Subdivision conveyed property rights to create the East-West easement, they also implicitly and inherently conveyed the riparian rights associated with what is now the Brannons' property. Thus, under Florida law . . . they inherently and implicitly gave the landlocked property owners in the Subdivision a . . . wide range of riparian rights.

Thus the lot owners argued that

> the entire Subdivision enjoys riparian rights as a result of the easement, [and] all property owners in the Subdivision are permitted to enjoy the normal benefits of the waterfront within that 22-foot easement. Such landlocked "neighbors" may conduct activities such as fishing, boating, and even enjoying an unobstructed view of the water.

The Henters also claimed that they had the right to unobstructed access to their backyard via the easement and that the gate across the driveway constituted an unreasonable obstruction.

Following a lengthy evidentiary hearing, the trial court rejected the Brannons' various defenses and found that the easement was created for the benefit of the owners of tract C to provide vehicular access to and from their backyard and for the benefit of the entire subdivision to provide access to and from the waters of Boca Ciega Bay. The court also found that because the easement provided for ingress and egress over lands reaching navigable waters, it "necessarily conveys the riparian rights associated with those lands." The trial court concluded that these rights included the right to fish, to boat, "and most importantly, as this is the riparian right enjoyed most often by the plaintiff lot owners in this case, to enjoy a clear and unobstructed view over the waters." The trial court also found that the lot owners had the right "to build a properly permitted dock or observation platform," although it apparently is unlikely that such a permit could be obtained at this time in light of strengthened environmental regulations. Finally, the trial court found that the Brannons' driveway gate was an unreasonable obstruction to the Henters' right of passage and ordered it removed. It also placed some restrictions on the manner in which cars can be parked in the driveway.

> The Brannons appealed the final judgment. Initially, this court issued a divided opinion in which an associate judge participated in the majority. Brannon v. Boldt, 31 Fla. L. Weekly D1260 (Fla. 2d DCA May 5, 2006). The majority affirmed the trial court's final judgment in all respects.
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> As 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. Thus, 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.[2]

Brannon v. Boldt, 32 Fla. L. Weekly D288, 289-90 (Fla. 2d DCA Jan. 24, 2007).

The Second District, sitting en banc, concluded that "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 290. The en banc decision expressly determined that petitioners did not have "the right to fish from or remain on the Brannons' property for extended periods" and that the right to view the water "is not a right necessary to or consistent with the purpose of this implied easement." Id. All sitting judges of the Second District concurred in the en banc opinion, except for Judge Whatley

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> [2] 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.

(the author of the original panel opinion) and Judges Wallace and LaRose who recused themselves from the case. Id. at 291.

The en banc decision certified the following question as one of great public importance, providing the basis on which this Court has elected to review this matter:

> 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?[3]

[3] Throughout their Initial Brief, petitioners exaggerate the significance of the certified question's reference to the fact that an occupied family dwelling is on the residential lot, arguing that when the implied easement was created at the time of the platting, no house was built on that lot. Of course not, as the plat subdivided the property for the very purpose of building homes. The en banc opinion itself addresses the dissenting opinion's similar concerns about that fact being included in the certified question by explaining that the en banc Court was simply trying to keep "the issue on appeal as narrow as the facts of this case permit," recognizing that the existence of the home may have no bearing on the outcome of this legal issue.

STANDARD OF REVIEW

This Court has de novo review of the certified question and the determination of this matter because it presents an issue of law. See, e.g., Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 130-31 (Fla. 2000).

SUMMARY OF THE ARGUMENT

The Second District correctly decided that the only riparian rights conveyed by an implied easement are those necessary to and consistent with its purpose and that in this case, where the easement is expressly for ingress and egress, that those rights are to transverse the Brannons' property to enter and exit the water and to build a dock at the end of the easement if otherwise permitted by law. Longstanding Florida law clearly has limited the riparian rights conveyed by an easement to those necessary to and consistent with its purpose, particularly where the easement is implied. The words "ingress and egress" have meaning; no court ever has held that such words permit loitering in or occupation of an ingress-egress easement.

Petitioners' assertion that an implied easement for ingress and egress conveys all riparian rights except those expressly reserved is directly contrary to and unsupported by Florida law. It ignores the expressly stated purpose of the easement, essentially transforming it into a general easement for any purpose,

erasing the very words used by the grantor. It also ignores black letter law limiting the rights conveyed by such easements.

Petitioners' reliance on parol evidence is similarly unavailing. Every court that has considered this easement has found it to be unambiguous, a position petitioners themselves vigorously asserted until the en banc court correctly defined the scope of riparian rights more narrowly than the "full panoply" petitioners desire. The Second District's analysis follows existing Florida law limiting the riparian rights conveyed by implication to those necessary to the purpose of the easement, here specifically stated as ingress and egress.

ARGUMENT

There are two broad categories of riparian rights under Florida law: the public right to use navigable waters for navigation, commerce, fishing, and bathing and the private rights enjoyed by owners of riparian land. Broward v. Mabry, 50 So. 826, 829 (Fla. 1909). As Judge Kelly noted in her dissent to the original panel opinion below, "[r]iparian [land] owners have additional rights that they do not share with the public. Those rights include, among other things, the exclusive right to access the water from their property, the right to wharf out to navigable waters, and the right to make their access to the water commercially available to the public." Brannon v. Boldt, 31 Fla. L. Weekly D1260a (Fla. 2d DCA 2006) (dissenting opinion at p. 10, internal citations omitted). Florida also has recognized that riparian owners have a right to an unobstructed view over the waters. See Thiesen v. Gulf, Florida & Alabama Railway Co., 78 So. 491 (Fla. 1917).

Florida law recognizes easements by express grant and by implication.[4] Express easements are founded on specific grants in the chain of title, usually deeds, with specific language. They arise from the agreement of the parties to create specified rights, usually for valuable consideration. See, e.g., Cohen v. Pan

[4] Florida law also recognizes easements by prescription, a concept not relevant to this case. Also, the Florida legislature has statutorily created an easement for ingress and egress by necessity. See Fla. Stat. §704.01(2) (2007).

American Aluminum Corp., 363 So. 2d 59 (Fla. 3d DCA 1978). By contrast, implied easements can arise from the purchase of lots in a subdivision governed by a plat bearing designations such as the one in the instant case indicating an easement for ingress and egress and utilities. See, e.g., Feig v. Graves, 100 So. 2d 192, 195 (Fla. 2d DCA 1958). Implied easements are disfavored because they are an exception to the Statute of Frauds. (25 Am. Jur. 2d, Easements and Licenses in Real Property, §23 ("Implied easements are not favored by the law or by the courts because they conflict with the rule that written instruments speak for themselves. Courts also tend to discourage implied grants of easements because the obvious result, especially in urban communities, is to fetter estates, retard building and improvements, and violate the policy of recording acts").

It is a "fundamental legal precept that an easement, like any other contract, when unambiguous, is to be construed in accordance with its plain meaning." City of Orlando v. MSD-Mattie, L.L.C., 895 So. 2d 1127, 1129 (Fla. 5th DCA 2005). See also Hobbs v. Kearney, 674 So. 2d 145, 147 (Fla. 2d DCA 1996) ("The provisions of the easement deed are clear and unambiguous and must be enforced according to this plain meaning."); Richardson v. The Deerwood Club, Inc., 589 So. 2d 937, 939 (Fla. 1st DCA 1991) (same). Where "the instrument specifically states the uses or purposes for which the easement was created, the use of an easement must be confined strictly to the purposes for which it was granted or

reserved… ." Walters v. McCall, 450 So. 2d 1139, 1142 (Fla. 1st DCA 1984). Nevertheless, petitioners ask this Court to conclude that an unambiguous implied ingress-egress easement conveys not just the right to pass over the servient estate to get to the water, but also the right to stand in and occupy the land to fish or simply to look at things over the water. Petitioners' argument would give them the right to occupy a private residential lot based on a plat that merely creates an implied easement for ingress and egress.

In an attempt to support this position, petitioners open their argument with their version of the alleged facts regarding the historical use of the easement, which is entirely irrelevant to the issue presented to this Court and indeed to an appropriate inquiry in any case involving an unambiguous easement, implied or expressed. Petitioners likely intended to influence this Court by suggesting that lot owners were losing rights they had long enjoyed and widely used, a suggestion unsupported by the evidence from the trial below that instead reflected that the easement was rarely used throughout its existence, and used even less in recent years.[5]

Petitioners also attack the Second District's alleged "focus" on the existence of a home on the lot in an effort to avoid the en banc decision's well-reasoned

[5] For example, Sally Saron, a prior owner of the Brannons' property, testified that she could recall no more than a "half-dozen" times that people came onto her property during the twenty-five years she lived there. (Vol. 11, p. 1810).

analysis. As the Second District made clear in responding to this point raised by Judge Whatley's dissenting opinion, however, the existence of a home on this lot well may be irrelevant for purposes of the legal inquiry regarding the nature of rights conveyed by the plat. Indeed, the Brannons do not quarrel with Florida law cited by petitioners for the proposition that easement rights are determined as of the time of the original conveyance, or in this case, at the time of the platting of the land when the implied easement arose.

When petitioners finally address the certified question, they take the improbable and unsupportable position that "the full panoply of riparian rights running with the land burdened by an easement" were conveyed by this implied easement from a plat that expressly states "easement for ingress and egress" because the grantor "failed to reserve riparian rights for the exclusive use of the fee owner." (Initial Brief, p. 20). Petitioners morph the ingress and egress easement into one for use and enjoyment and then, incredibly, argue in the alternative that if the law is not as they prefer it, then the determination of what riparian rights were conveyed by an unambiguous implied easement must be determined on a case by case basis considering the grantor's intent and a factual inquiry. Petitioners' position is untenable on all bases.

I. THE ONLY RIPARIAN RIGHTS CONVEYED BY AN UNAMBIGUOUS IMPLIED EASEMENT FOR INGRESS AND EGRESS CREATED BY DENOTATION ON A PLAT MAP ARE THOSE NECESSARY TO AND CONSISTENT WITH THE EASEMENT'S PURPOSE TO PROVIDE ACCESS TO THE WATER.

The Second District correctly determined that the easement granted petitioners "the right to cross the Brannons' property in a reasonable amount of time, but they do not receive the right to fish from or remain on the Brannons' property for extended periods. The 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." Brannon v. Boldt, 32 Fla. L. Weekly at D290. In short, the Second District determined that petitioners have the right to build a dock at the water's edge of the easement if otherwise permitted by law and to cross the Brannons' property to reach the water for purposes of entering or exiting the water. Petitioners do not have the right to stay on the Brannons' property for extended periods to enjoy the view, fireworks, or the sunset. Id. The Second District's conclusion turned in part on the fact that this is an easement implied from a recorded plat map, as opposed to an express easement "where the rights are explained in detail in a recorded document." Id. In cases involving implied easements, courts must determine which riparian rights are to be transferred as a matter of law.

The Second District en banc opinion is absolutely consistent with controlling Florida law. In Cartish v. Soper, 157 So. 2d 150, 153 (Fla. 2d DCA 1963) the Court held that "[p]roceeding 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." The Cartish opinion further held that "insofar as riparian rights are necessary to or consistent with the purposes of the easement, they are impliedly granted to appellees . . . ." Id. at 154.

In Cartish the easement holders sought to enjoin the owner of the servient estate from objecting to their efforts to rebuild a dock from the end of the easement into the water. Id. at 150. The easement at issue also was one arising by implication from a plat that showed a strip of land, only the plat in Cartish labeled the area at issue "Private Parkway" and stated that the Parkway was reserved as "a private parkway or passageway for all purchasers of lots in said subdivision . . . each owner having an easement of passage for ingress to and egress from the waters of Boca Ciega Bay." Id. at 152.

The Second District accepted the argument that some riparian rights may attach to an easement, then determined that only those riparian rights necessary to or consistent with the purposes of the easement were impliedly granted and that because the purpose of the easement was ingress and egress to the water, the right

to build a dock "to facilitate access" was implied. Id. at 153-154. Thus, petitioners' argument here that the absence of an express reservation of riparian rights compels the conclusion that all riparian rights were conveyed without regard to purpose is contrary to the Cartish decision, both its analysis and holding.

In City of Orlando, 895 So. 2d at 1130, the Court rejected a similar argument when the dominant estate holders argued that an easement for electric transmission lines could be used for telecommunications because the easement did not expressly exclude that use.

> Appellants [dominant estate holders] ignore a fundamental tenet of the law of property ownership – that property is a bundle of rights analogous to a bundle of sticks… . Thus, 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.

Id.

The Second District's en banc opinion in the instant case also is consistent with its precedent in Feig v. Graves, 100 So. 2d 192 (Fla. 2d DCA 1958). In Feig, the plaintiffs claimed the right to use land that surfaced between a lake and an implied easement over a platted walkway formerly bordered by the shoreline of the lake that had receded over time. The defendants, owners of the land burdened by the walkway, claimed the exclusive right to use the land that had been exposed by the receding waters of the lake, which would effectively cut off the plaintiffs'

access to the lake. Plaintiffs asserted that riparian rights attached to the walkway so that the walkway was enlarged by accretion. Id.

Affirming the trial court's decision agreeing with the plaintiffs, the Second District noted that where riparian rights are not reserved, "whether these 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. at 195. Thus, Feig is another example of the settled principle that the purpose of the easement determines the nature and extent of the riparian rights conveyed. Clearly the purpose of the walkway when the lake reached its edge was to provide access to the lake waters so plaintiffs' position was consistent with the purpose of the easement.

Curiously, petitioners rely on case law that stands for the opposite of the position they assert. According to petitioners, an unambiguous implied ingress-egress easement conveys all riparian rights, except those expressly reserved by the document giving rise to the implied easement, in this case a plat. Yet petitioners rely on cases expressly holding that only those rights that are "appropriate to," or consistent with the purpose of the easement are conveyed.

For example, petitioners assert that this Court's analysis "should begin with" City of Tarpon Springs v. Smith, 88 So. 613 (Fla. 1921). (Initial Brief, p. 24). In City of Tarpon Springs, however, this Court expressly stated that "the riparian

rights that are appropriate to a street easement were also impliedly dedicated" as part of a grantor's dedication of a certain street easement to the public because there was no express or implied reservation. Id. at 621, emphasis added. Thus, City of Tarpon Springs stands for the proposition that those riparian rights "that are appropriate to" the nature of the easement are all that is transferred by implication.

Inexplicably, petitioners also rely on Feig, which as discussed above held that the riparian rights included within the scope of a plat depended "upon the purpose for which the easement was granted and the location of the property burdened with the easement." Feig, 100 So. 2d at 195. Thus, Feig stands for the proposition that the riparian rights conveyed by an implied easement arising from a plat are those that are determined by the purpose of the easement.

Petitioners also rely on Hume v. Royal, 619 So. 2d 12 (Fla. 5th DCA 1993), another case confirming that the purpose of an easement determines which riparian rights are conveyed. The easement in Hume was express, not implied, and contained far more descriptive and restrictive language regarding the nature and scope of the easement. The easement at issue was for pedestrian access to the water and expressly stated that it was not to serve as access for boats. In deciding that a dock was not permitted, the Fifth District looked to the "express language of the easement," finding that it clearly did not contemplate a dock because of the very narrow purpose of the easement. Id. at 14.

Petitioners' true disagreement with the Second District en banc decision is actually with its correct characterization of the easement's purpose. Petitioners claim that the purpose of this unambiguous easement expressly identified as being for ingress and egress is instead for use and enjoyment, leading petitioners to the conclusion that the "full panoply of riparian rights must have been conveyed absent a reservation." (Initial Brief, pp. 25-26) In fact, petitioners boldly assert that "[t]he 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." (Initial Brief, p. 26).

Petitioners cite no case law for this proposition because there is none. Such a construction is illogical and renders the terms ingress and egress mere surplussage, causing one to wonder why any developer would even jot them down on a plat. It also is contrary to case law regarding the meaning of these words. For example, in Akers v. Canas, 601 So. 2d 305, 306 (Fla. 3d DCA 1992) the court found an express easement for the purpose of access to be unambiguous, holding that

> it is clear that "access" means the grantees' rights are those of simple ingress and egress, which is the power to use the easement property to go to, and return from, the grantee's own land.

Id.

Petitioners assert that the Second District en banc opinion is in conflict with prior decisions of this Court, citing as an example Cartish, a case from the Second District. Although petitioners contend that the en banc decision conflicts with Cartish, in fact, petitioners merely disagree with the Second District's assessment of what riparian rights were conveyed by implication as necessary to or consistent with the purpose of the instant easement. Petitioners assert that the Second District misconstrued the purpose of an easement expressly stated to be for ingress and egress to be limited to the purpose of getting into and out of the water. Instead, petitioners would have this Court determine that the purpose of an easement expressly stated as one for ingress and egress is to provide for the "general use of" and to "enjoy the waters of Boca Ciega Bay" by including activities such as viewing the water and fishing from the easement land. (Initial Brief at p. 30). As the Second District noted, "unlike the dominant estate holders in Cartish, the lot owners in the neighborhood involved in this case are not primarily seeking to build a dock. Instead, they are seeking the right to sit and stand on the lands within the easement to fish, watch fireworks, watch the sunset, and generally enjoy the view of Boca Ciega Bay." Brannon, 32 Fla. L. Weekly at 288.

Petitioners accuse the Second District of standing Florida law on its head by limiting the riparian rights conveyed by an implied easement to those necessary to and consistent with the easement's purpose, the exact test required by and under

existing and longstanding Florida law. Petitioners' argument that in the absence of express reservations, all riparian rights are conveyed by a designation on a plat that expressly states the easement is for ingress and egress is the argument that turns Florida law on its head and that repeatedly has been rejected by Florida courts. Petitioners attempt to rewrite the plat, in essence erasing the words ingress and egress to create a general easement without limitation by purpose. The potential havoc that would result from petitioners' position that all riparian rights are conveyed by an implied easement without regard to the express purpose of the easement is easily imagined and can be demonstrated by application of this argument to even just one of the cases discussed above.

For example, in City of Tarpon Springs, 88 So. at 613, this Court determined that the riparian rights appropriate to a street easement were impliedly dedicated to the public. Adopting petitioners' argument and applying it to City of Tarpon Springs would result in the public having all riparian rights (because none were expressly reserved), including the right to fish, enjoy the water view, and possibly

even to an unobstructed view.[6] Petitioners' theory would create standing for the entire general public to enforce all of these riparian rights when the original purpose of the easement was for a street.

The Brannons respectfully submit that the Second District's en banc decision properly answers the question certified in that opinion by holding that an implied easement for ingress and egress arising from a plat conveys those riparian rights necessary to and consistent with the purpose of the easement, including the right to build a dock at the edge of the easement to wharf out to navigable water and to otherwise traverse the easement to enter or exit the water. This holding is consistent with Cartish, and other Florida decisions limiting the conveyance of riparian rights to those required by the purposes of easement, honoring and giving meaning to the words used by the grantor, in this case "ingress and egress."

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[6] The right to an unobstructed view is even more problematic for petitioners' position. Case law has found this right to be held by owners of uplands along navigable waters. See, e.g., Thiesen v. Gulf, Florida & Alabama Railway Co., 78 So. 491 (Fla. 1917); Lee County v. Kiesel, 705 So. 2d 1013 (Fla. 2d DCA 1998). An unobstructed view is not consistent with or necessary to ingress and egress. As the en banc opinion recognizes, petitioners posit the right to view and occupy as a substitute for the right to enter or exit the water that they do not value or exercise. A finding that such a right nevertheless is conveyed by a limited purpose easement could create countless plaintiffs seeking to clear a view.

II. THE INTENT OF THE GRANTOR AT THE TIME OF THE CONVEYANCE AND OTHER EXTRINSIC EVIDENCE REGARDING THE HISTORICAL USE OF THE EASEMENT ARE IRRELEVANT TO A DETERMINATION OF THE RIPARIAN RIGHTS CONVEYED BY AN UNAMBIGUOUS IMPLIED EASEMENT ARISING FROM A PLAT.

Petitioners assert that if this Court rejects their proposition that all private riparian rights are conveyed by an implied easement expressly for ingress and egress to a body of water, then the determination of which riparian rights are conveyed "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." (Initial Brief at pp. 33-34). Petitioners carefully avoid asserting that the implied easement is ambiguous, but the case law on which they rely for the proposition that the grantor's intent and the historical uses of the easement are relevant considerations all involve ambiguous easements.

Every court that has considered this precise easement has found it to be unambiguous. In the 1958 case involving the issue of access to what is now the Henters' back yard, the trial court found the easement to be unambiguous. In this case, the trial court found the easement to be unambiguous. The panel decision from the Second District agreed, as did Judge Kelly in her dissenting opinion, and the en banc opinion from the Second District agreed that the easement was unambiguous. Indeed, even petitioners urged the Second District in their Answer

Brief that it need look at extrinsic evidence of the intent of the grantor only if the easement were ambiguous. (2d DCA Vol., Tab III, Answer Brief at p. 33).

Petitioners also made this same argument in the trial court when, in their trial memorandum, petitioners argued

> [m]uch focus has been made trying to determine what the developers meant in 1953 when using the terms "ingress and egress." This analysis is wholly unnecessary in light of Cartish and the related cases . . . it is clear that, as a matter of law, an easement for ingress and egress to navigable waters implicitly and inherently includes riparian rights.

(Vol. 3, p. 499 at p. 10 of original document). Petitioners further argued in the trial court that they "believe this case can be decided as a matter of law and parole [sic] evidence as the intent of the parties is immaterial." (Id. at p. 16).

Prior to the unfavorable outcome of the en banc decision herein, petitioners consistently asserted that cases interpreting easements to determine the drafters' intent were distinguishable because they involved ambiguous easements, expressly taking the position that the Second District decision in Blazina v. Crane, 670 So. 2d 981 (Fla. 2d DCA 1996) did not govern the outcome of the instant case. In Blazina, the Court allowed parol evidence to explain the parties' intent only because the easement was latently ambiguous. Ironically, petitioners now urge Blazina on this Court, overlooking the fact that the easement at issue in that case was an express easement with a latent ambiguity.

Petitioners' position is curious. In Blazina, the Court reversed and remanded, allowing parol evidence because the easement was ambiguous, to determine whether the easement was limited to ingress and egress or if it permitted the right to congregate in the easement. The trial court had determined that the easement did not include the right to congregate. In reversing, the Second District did not find that the easement included the right to congregate, but only that the trial court's determination may have been improperly influenced by some unsupported factual findings. Thus, the trial court on remand would have to consider whether the ambiguous easement was only for ingress-egress or whether it included the right to congregate. But if the position petitioners assert herein were correct, the Second District would not have remanded; it would have ruled that the right to congregate existed because it was not expressly reserved or excluded by the grantor. Blazina simply does not support petitioners' position.

Petitioners 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. The Brannons disagree with some of the statements and many of the characterizations petitioners make but do not address them herein because consideration of such matters clearly is inappropriate where the implied easement

is unambiguous.[7] See, e.g., Avery Development Corp v. Village by The Sea Condominium Apartments, Inc., 567 So. 2d 447 (Fla. 4th DCA 1990). The trial court, the panel opinion and the en banc opinion all found that the easement in this case is unambiguous and the panel opinion and the en banc opinion expressly found Cartish controlling, a result petitioners urged until the en banc opinion interpreted Cartish in a manner unfavorable to them. The rights conveyed by the unambiguous implied easement at issue cannot now be determined by purported extrinsic evidence simply because the petitioners are dissatisfied with the rights conveyed as a matter of law.[8]

[7] As just one example, petitioners fail to mention that when the primary developer of Bay Park Gardens, Mr. Davis, conveyed tracts A and B to Mr. and Mrs. Norris in 1958, Mr. Davis recorded an affidavit in the Official Records of Pinellas County at O. R. Book 496, page 502. (Vol. 2, p. 183; Vol. 7, pp. 1334-5). In that affidavit, Mr. Davis stated that the "purpose of said easement and the dock thereafter constructed adjacent to the west end of said easement was to provide access to the waters of Boca Ciega Bay over said easement and said dock." He further explained that the easement is "only for ingress and egress as aforesaid" and not to be used for parking or storage.

[8] If petitioners are correct that the riparian rights conveyed by an implied easement for ingress and egress always will turn on an individualized fact-based inquiry, then the issue before this Court no longer is one of great public importance.

CONCLUSION

For the reasons set forth herein, the Brannons respectfully request this Court affirm the Second District Court of Appeal's analysis set forth in the en banc opinion as the resolution of the certified question and thereby affirm the decision of that Court.

Respectfully submitted

Marvin E. Barkin, Esq.
Florida Bar No. 3564
Marie Tomassi, Esq.
Florida Bar No. 772062
Richard M. Hanchett, Esq.
Florida Bar No. 709212
TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS, P.A.
Bank of America Tower, Suite 1600
200 Central Avenue
St. Petersburg, FL 33701
(727) 896-7171 Phone
(727) 820-0835 Facsimile
mtomassi@trenam.com

Attorneys for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Answer Brief on the Merits has been furnished to **Gary M. Schaaf, Esq.,** Becker & Poliakoff, P.A., 2401 West Bay Drive, Suite 414, Largo, FL 33770, **John R. Blue, Esq., Sylvia H. Walbolt, Esq., Lee H. Rightmyer, Esq.,** and **Henry G. Gyden, Esq.,** Carlton Fields, P.A., 200 Central Avenue, Suite 2300, St. Petersburg, FL 33701, by United States Mail on this _____ day of July, 2007.

_____
Marie Tomassi, Esq.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY the type style and size used herein is Times New Roman 14-point and that this brief complies with the requirements of Florida Rule of Appellate Procedure 9.210(a).

_____
Marie Tomassi, Esq.