IN THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. 2D2024-1282

KEVIN BROWN and
DAVID LEBLANC-SIMARD,

Appellants,

v.

TRAJANA NOEL THOMAS and
JOYCE J. THOMAS,

Appellees.

On appeal from the Circuit Court of the Twelfth Judicial Circuit
in and for Manatee County, Florida, Case No. 2021-CA-3054

INITIAL BRIEF OF APPELLANTS

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PREFACE

The Appellants, Kevin Brown and David Leblanc-Simard will collectively be referred to herein as "Appellants." The Appellees, Trajana Noel Thomas and Joyce J. Thomas, will collectively be referred to herein as "Appellees" or "Thomas." The Final Judgment entered by Hon. Judge Edward Nicholas will be referred to as "Final Judgment." Citations to the Record will be referenced by (R. at __). Trial Transcript citations will be referenced by (Tr. at __, Ln. __).

I. STATEMENT OF CASE AND FACTS

Appellants Brown and Leblanc-Simard appeal from an Order of Final Judgment (R. at 393-401) rendered partially in favor of Appellees on Appellants' claims in Count II of the operative Complaint, seeking declaratory relief to equitably apportion the Parties' riparian rights and to eject that portion of Appellees' dock that ultimately encroaches into Appellants' riparian area and violates Appellants' riparian rights.

1. Appellant Kevin Brown's Property.

Appellant Brown owns the real property located at 612 Camellia Avenue, Ellenton, Florida 34222, bearing Parcel Control No. 972900005 (the "Brown Property"), by virtue of a Warranty Deed recorded March 27, 2020, and recorded under Instrument No. 2020033226 in the official public records of Manatee County, and is described as follows:

> Lot 26, of Tropical Harbor Section No. 1, as per the plat recorded in Plat Book 9, Page 92, of the official public records of Manatee County, Florida.

(R. at 102). Tropical Harbor Section No. 1 was platted and recorded in 1957. (R. at 110). Lot 26 fronts the eastern side of Camellia Avenue

and the Camellia Avenue Cul-De-Sac and extends to and partially abuts the mean-high water line of Manatee River. (R. at 359).

2. Appellant David Leblanc-Simard's Property.

Appellant Leblanc-Simard owns fee simple title to the real property located at 608 Camellia Avenue, Ellenton, Florida 34222. Leblanc-Simard owns fee simple title to both Lots 24 and 25 in Tropical Harbor Subdivision, Section No. 1. The relevant parcel for this litigation is the portion of Lot 25 bearing Instrument No. 201841063633 (the "Leblanc-Simard Property") acquired by virtue of a Warranty Deed recorded June 22, 2018, and recorded in Official Records Book 2734, Page 3775 in the official public records of Manatee County, and is described as:

> A portion of Lot 25, TROPICAL HARBOR SUBDIVISION, SECTION 1, according to the Plat thereof, recorded in Plat Book 9, Page 92, of the Public Records of Manatee County, Florida [subsequent metes and bounds description omitted due to length].

(R. at 335). The Brown Property and the Leblanc-Simard Property were created by the same plat in 1957, Tropical Harbor Section No. 1. Appellees' property, Lot 31, was created by a later plat, Tropical Harbor Section 3, recorded in 1981. (R. at 322-25).

3. Appellees Thomas' Property.

Appellees own the real property located at 616 Camellia Avenue, Ellenton, Florida 34222, by virtue of a general warranty deed executed August 12, 2008, with the following legal description:

> Lot 31, LESS the North 20 feet thereof, Block B, TROPICAL HARBOR, SECTION NO. 3, according to the plat thereof, as recorded in Plat Book 21, Pages 75 through 78, inclusive, of the Public Records of, Manatee County, Florida.

(R. at 327-28). The Brown Property (Lot 26) abuts the Thomas Property (Lot 31) on the north and the Leblanc-Simard Property (Lot 25) on the south. (R. at 401).

4. Accretion to all the Parties' Properties.

In the time since the Tropical Harbor Subdivision, Section No. 1 was platted in 1957 and the Tropical Harbor Subdivision Section No. 3 was platted in 1981, sediment has gradually and imperceptibly accumulated along the shorelines of all three properties. This gradual accumulation of alluvion formed a narrow strip of additional dry land waterward of the mean-high water line along all three lots. (R. at 401). Appellees claimed ownership of the entirety of this accreted land, denying that Appellants' lots were waterfront and "riparian." (R. at 170, 177). Appellee even built a fence across the waterfront portion

of Brown's Lot 26, blocking Lot 26's access to the accreted land and the water. (R. at 98-9). Appellants filed Count I of their Amended Complaint to establish their riparian rights and their rights to an apportionment of the new, accreted land. (R. at 91) and Count III to eject Appellees from said accreted land. (R. at 98-99). Ultimately, the accreted land was apportioned between the three lots by the Trial Court's Final Judgment entered on Count I:

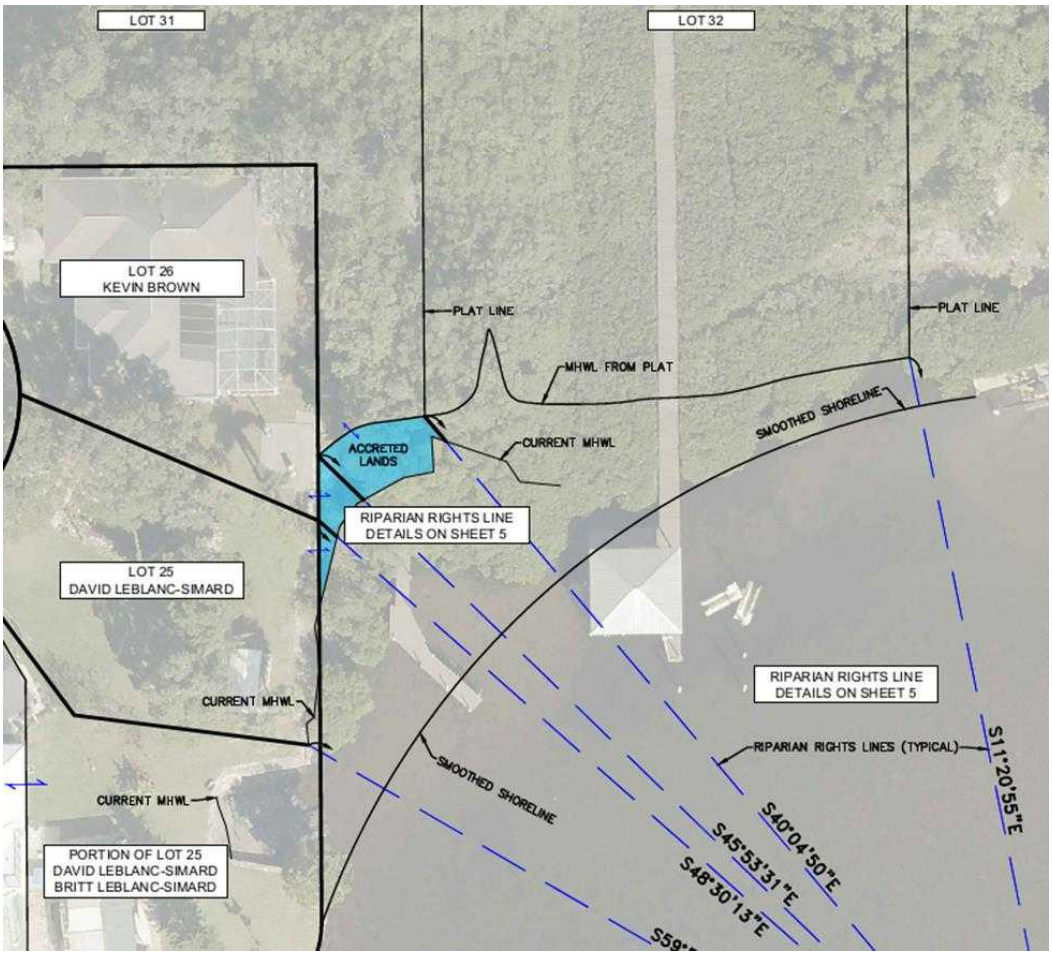
> Plaintiffs have proven that Lots 25, 26, and 31 all abut the mean high-water line of the Manatee River and have continuously abutted the mean high-water line since they were platted. As such, the Court quiets title to all accreted lands in favor of Plaintiffs and Defendant, and equitably apportions that accreted land among the three lots in the manner set forth in the attached *Court's Exhibit # 1*.

(R. at 397). The Trial Court's Exhibit 1 was a reproduction of Plaintiffs' Exhibit 35. (R. at 376). In equitably apportioning the new, accreted land between all three lots, the Court adopted the apportionment presented by Appellants' expert surveyor, Mr. George C. Young, shown in Mr. Young's survey admitted in Plaintiffs' Exhibit 35. (R. at 374).

Testifying as to the specific methodology he employed, Mr. Young stated:

> In this case, I put a smooth line of a concentric arc, and that's where I made my measurements, along the concentric arc. And when I took that concentric arc towards the radius point of that point, out into the water of the of the river, Manatee River, then I used the direction of the intersection of the mean high-water line that I measured along that arc, and then I did a radial line to the intersection of the mean high-water line as measured to the allocation of the riparian -- of the accreted lands in the same fashion I did to divide the accreted lands, as well. That was the first step, obviously.

(Tr. at 216, Ln. 1-12). Mr. Young's allocation of the accreted land as adopted by the Trial Court is reproduced below with the accreted land highlighted in blue:



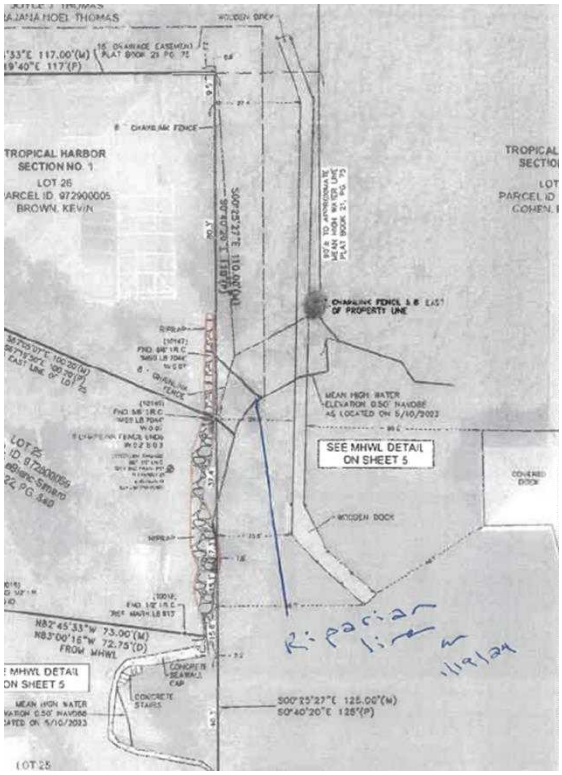
5. The Riparian Line.

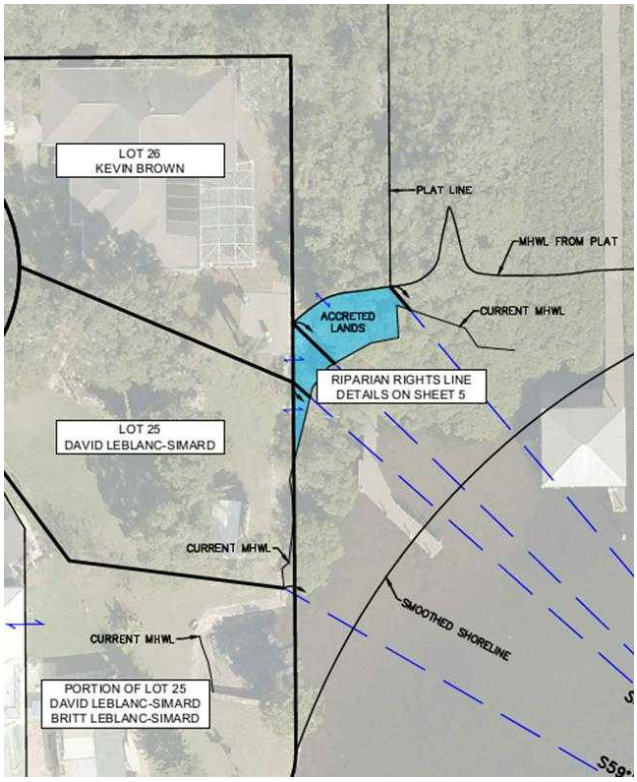
Having adopted Mr. Young's apportionment of accreted land, the Trial Court then rejected Mr. Young's very same methodology in setting the riparian lines of the properties (also shown in the exhibit reproduced above). The Trial Court did this despite Mr. Young's consistent application of the same methodology for his apportioning of accreted land and his apportionment of riparian lines. Regarding his survey method, Mr. Young testified:

> The first step is to identify on the shore the limits of properties that have the same geometry of shoreline. And as you see, the center point of my arc on this particular exhibit down here and you see a line running up to here, we go far beyond our property and we go out to a point right here on Lot 24, I believe it is. And that's the basis of my smoothing. I'm drawing an arc to smooth that area in there, which gives me, if you will surveyors have to get involved in math, but it's also a recommendation from Professor Gibson on how you do that.
>
> That's the basis for establishing a point out on the water which you draw to the original shoreline, the pre-shoreline before the accretion occurred, and where each property line had a common intersection with its neighbor. So that's what you see in here. I've drawn that line from the center point of that arc all the way back to the post-boundary, before the accretion. And then that becomes the basis, number one, of allocating the accretion to the individual lot owners all the way out to the current mean high-water line, which I measured, and from there all the way out to the radial point into the river, then becomes the riparian

> direction of each one of those individual accreted properties.

(Tr. at 217, Ln. 22 to 218, Ln. 20). By contrast, the Trial Court hand-drew its own, novel, riparian line. The Court's hand-drawn riparian line is shown below on the left, while Mr. Young's riparian lines on Plaintiffs' Exhibit 35 is shown below on the right:





(R. at 391-92).

Mr. Young's equitable apportionment (adopted in Count I and rejected in Count II) established that Appellee's dock completely bisects Lot 26's riparian area and significantly encroaches into Lot 25's riparian area:

> [T]here's his – there's Mr. Leblanc's common riparian line to Mr. Brown and Mr. Brown's riparian line I construct here, common to both defendants…So both of them show encroachments – in a surveyor's parlance, would be a significant encroachment – of the riparian rights by this dockage, presumably owned by the defendant.

(Tr. at 222, Ln. 8-15). When the Trial Court questioned Mr. Young as to his expert opinion in setting riparian lines and the principles he adhered to, Mr. Young testified:

> Equity is treating everybody with the same – in this case, frontage, with the same proportion of their frontage ownership to a proportion of the accreted ownership or to a proportion of the right to view on all the riparian rights. That's equity in my mind…My opinion is, when your rights are violated, you have the right to have them cured. I mean, we've got a person that, in this case, Mr. Brown, can't build a dock in his riparian boundary. What is equitable about that?

(Tr. at 228, Ln. 11 – 229, Ln. 13).

The Trial Court opted to apportion Mr. Leblanc-Simard's, Mr. Brown's, and Ms. Thomas' riparian rights based *solely* on the Trial Court's stated desire to avoid removing or relocating any portion of Appellees Thomas' existing dock. In its ruling the Trial Court made its rationale clear:

> The bottom line is that there is nothing equitable about forcing the removal of the nearly 30-year-old Thomas dock by Mr. Brown who purchased this property a few years ago based upon riparian lines that did not exist when the dock

> was built and certainly did not exist when Mr. Brown bought his home.

(Tr. at 549, Ln. 1-7). The hand-drawn riparian line established by the Trial Court is the sole basis of this appeal.

Following the Trial Court's issuance of the Final Judgment, Appellants/Plaintiffs moved the Court to rehear and/or alter its Final Judgment. (R. at 402-414). The Trial Court denied this motion. (R. at 415). This appeal followed.

II. SUMMARY OF THE ARGUMENT

The Trial Court committed reversable error by applying the wrong law to its apportionment of the Parties' riparian rights. First, the Trial Court erred by failing to apply the equitable principles and considerations *required* by *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957), to apportion riparian rights. Second, the Trial Court erred in failing to treat the Parties' respective riparian rights as "co-equal" or "co-relative." Instead, the Trial Court gave clear and obvious precedence to Appellees' riparian rights solely because Appellees' property was the first to install a dock. Third, due to misapplication of equitable principles, the Trial Court's allocation of the riparian line is patently unreasonable, depriving Appellants of their riparian

rights. Fourth and finally, to the extent that the Trial Court's order may be seen as an attempt to apply the principle of laches, the requirements for laches are not present in the Record, not satisfied by Appellees, and not fully or correctly applied here.

On this first point, the Trial Court failed to follow or ignored the equitable considerations that it *must* follow under the controlling standard of *Hayes v. Bowman*, 91 So. 2d 795 (Fla. 1957), and its progeny. *Hayes* is the seminal case in Florida concerning the apportionment of riparian rights, holding:

> [C]ommon law riparian rights… over the foreshore across the waters toward the Channel *must be recognized over an area as near 'as practicable' in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the channel*.

Id. at 801 (emphasis added).

The Trial Court's apportionment of the Parties' riparian rights was instead based on a completely different set of "equitable considerations." The sole equitable principle applied by the Trial Court, as stated in the Final Judgment, is the Court's reasoning that the riparian line: 1) must not cross Appellees' existing dock, 2) that Appellee's existing dock must not encroach upon any riparian line the Court would draw, and 3) Appellee would not be required to alter

or modify any portion of her existing dock as a result of establishing the Parties' riparian lines. (R. at 398). This is not the law when it comes to equitably apportioning riparian rights in Florida.

On the second point, the Trial Court erred by failing to treat the Parties' rights as co-equal or co-relative. Instead, riparian rights were apportioned on a first-come, first-served basis, with precedence given to the riparian rights of whichever property owner built their dock first. Appellants were essentially apportioned "whatever was left over" after protecting Appellees' pre-existing dock. Appellants' riparian rights should have been viewed as co-equal and co-relative to those of Appellees. However, they were not. Appellees' riparian rights were given clear precedence by the Trial Court of Appellant's rights in violation of Florida law and controlling legal precedent.

On the third point, the Trial Court's riparian line incorrectly applied inappropriate considerations in its allocation of the Parties' respective riparian rights. The sole equitable consideration used by the Trial Court was that Appellees' lot already featured a dock and Appellants' lots did not. Inappropriate reliance on this fact – to the exclusion of all others – led to a highly inequitable result. Appellees' lot was awarded virtually the entire riparian area offshore of the three

properties and left Appellants' lots with no unobstructed view to the channel and with no real ability to wharf out to navigability. This inequitable result is the product of the Trial Court's misapplication of inappropriate equitable principles.

Fourth and finally, to the extent that the Trial Court's Final Judgment was an attempt to apply the principle of laches, the effort was incomplete, and the requirements for laches were not satisfied. The Trial Court did not find, and Appellees did not prove by a preponderance of the evidence, any of the elements necessary to establish laches. Losing the underlying lawsuit and moving a portion of a dock does not constitute "legal prejudice" under laches and does not justify the violation of Appellants' riparian rights.

For all of these reasons, and as further set forth in the following sections, the riparian line established by the Trial Court ought not to be upheld by this Court and the judgment of the Trial Court as to it should be reversed.

III. ARGUMENT

1. Introduction and Issue on Appeal.

Appellants file this, their initial appellate brief, and respectfully request that this Court enter an order reversing the Trial Court's

Final Judgment (R. at 393-401) entered on April 16, 2024, as to Count II (seeking declaratory relief to equitably apportion the Parties' riparian rights and to eject a portion of Appellees' dock), ask this Court to remand for further proceedings if necessary, and seek any other relief as this Court may deem just and proper.

2. Statement of Appellate Jurisdiction.

This Court has appellate jurisdiction pursuant to Fla. R. App. P. Rules 9.030 and 9.110. Final Judgment was entered by Hon. Judge Edward Nicholas of the Circuit Court of the Twelfth Judicial Circuit in and for Manatee County, Florida, for this matter, under Case No. 2021-CA-3054, on April 16, 2024. Plaintiffs filed a Motion for Rehearing and/or to Alter Final Judgment on May 1, 2024 which was denied on May 14, 2024.

3. Standard of Review.

This Court's review of the Trial Court is conducted d*e novo.* "After a nonjury trial, review of trial court decisions based on legal questions are reviewed *de novo* and those based on findings of fact from disputed evidence are reviewed for competent, substantial evidence." *Ottone v. Williamson Investments, LLC*, 373 So. 3d 686, 688 (Fla. 2d DCA 2023) quoting *Corya v. Sanders*, 155 So. 3d 1279,

1283 (Fla. 4th DCA 2015); *see also*, *Florida Dep't of Transp. v. Lauderdale Boat Yard, LLC*, 336 So. 3d 28, 32 (Fla. 4th DCA 2022) ("On review of a declaratory judgment, we defer to the trial court's factual findings if supported by competent, substantial evidence…To the extent a decision rests on a question of law, however, an order is subject to *de novo* review." (internal citations omitted)). The issues raised on appeal regarding the proper standard that the Trial Court should have applied to equitably apportion the Parties' riparian rights are legal questions and therefore subject to *de novo* review by the Court.

Although riparian rights involve specific factual determinations unique to the circumstances of the case, the ultimate conclusions concerning riparian rights are legal conclusions and, therefore, are subject to *de novo* review. *See, e.g., Briggs v. Jupiter Hills Lighthouse Marina*, 9 So. 3d 29, 32 (Fla. 4th DCA 2009) ("Although the issue of navigability requires resolving some factual questions based on the particular circumstances of each case, the ultimate conclusion as to navigability is a question of law inseparable from the particular facts to which they are applied."); *see also*, *Florida Dep't of Transp. v. Lauderdale Boat Yard, LLC*, 336 So. 3d 28, 32 (Fla. 4th DCA 2022).

Thus, the Trial Court's failure to apply the required equitable principles and failure to treat the Parties' riparian rights as co-equal or co-relative are matters of law that this Court reviews *de novo.*

Regarding the inequity of the Trial Court's actual decision, although "[t]he judge possesses broad discretionary authority to do equity between the parties… Where a trial judge fails to apply the correct legal rule… This is not an abuse of discretion. The appellate court in reviewing such a situation is correcting an erroneous application of a known rule of law." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1202 (Fla. 1980).

It is Appellants' position that the Trial Court erroneously applied the rule of law and its decision is subject to *de novo* review; however, should this Court review the apportionment made by the Trial Court under an abuse of discretion standard, it should do so mindful that:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to "the primordial

> necessity of order in the social life." Wide enough in all conscience is the field of discretion that remains.

Canakaris 382 So. 2d at 1203 *quoting* B. Cardozo, *The Nature of the Judicial Process* 141 (1921). Adopting the standard eloquently described by Mr. Justice Cardozo, Florida's Supreme Court recognized that a trial court judge is not free to disregard established principles of equity.

Florida's Supreme Court applied the same understanding of equitable principles in *Hayes,* holding that the rule therein established for apportioning riparian rights:

> like many others in equity, invokes the conscience of the Chancellor in the *application of board principles to the factual situation presented* by the particular case. Unlike John Seldon, however, we cannot agree that the standard for the exercise of the Chancellor's conscience is the length of 'the Chancellor's foot.' It is a judicial determination that he must make in each instance consistent with the rights of the parties presented by the record.

Hayes v. Bowman, 91 So. 2d 795, 802 (Fla. 1957)(emphasis added). Providing a list of considerations that "must" be given due consideration, discussed in the following sections, provides those "board principles" that the trial court must apply to the facts of a given case. The Trial Court, thus, is not free to completely substitute

its own principles for those handed down by the many learned jurists that have come before.

4. The Trial Court Erred by Failing to Apply the Equitable Principles and Considerations Required by *Hayes v. Bowman*.

The Trial Court erred as a matter of law by failing to follow Florida's well-settled standard for equitably apportioning riparian rights among the three Parties to this case. It is now blackletter law that "riparian rights… must be recognized over an area as near 'as practicable' in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel." *Hayes v. Bowman*, 91 So. 2d 795, 801 (Fla. 1957). The Trial Court did not follow this mandate. Riparian rights include "(1) general use of the water adjacent to the property, (2) to wharf out to navigability, (3) to have access to navigable waters, and (4) the right to accretions." *Florida Dep't of Transp. v. Lauderdale Boat Yard, LLC*, 336 So. 3d 28, 33 (Fla. 4th DCA 2022). The Trial Court's ruling has inequitably curtailed the first three of Appellants' riparian rights[1].

[1] Appellants do not challenge the Trial Court's apportionment of accretions and the Final Judgment as it pertains to Count I of the Amended Complaint.

It has long been the established law in Florida that these special rights, riparian rights, are affirmative easements incident to riparian holdings: property rights that may be regulated by law and may not be taken without just compensation and due process of law. *See Broward v. Mabry*, 50 So. 826, 830 (Fla. 1909); *see also*, *BB Inlet Prop., LLC v. 920 N. Stanley Partners, LLC*, 293 So. 3d 538, 543 (Fla. 4th DCA 2020). During the early twentieth century, former Chief Justice Whitfield authored many of the Florida Supreme Court's landmark opinions regarding the rights of riparian and littoral[2] property owners. *See, for example, Freed v. Miami Beach Pier Corp.* 112 So. 841, 845 (Fla. 1927); *Brickell v. Trammell*, 82 So. 221, 230 (Fla. 1919); *Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n*, 48 So. 643, 645 (Fla. 1909). This line of cases contained the equitable principles that the Florida Supreme Court would reaffirm in *Hayes*. Depriving a riparian owner of these rights entitles that owner to relief and compensation for their loss.

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[2] "'Riparian' technically refers to rights appurtenant to ownership of property abutting a river or stream, while 'littoral' refers to rights appurtenant to ownership of property abutting an ocean, sea, or lake. Nevertheless, Florida case law and the Florida Statutes often use the terms interchangeably." *Marlowe v. City of St. Augustine*, 369 So. 3d 356, 367 (Fla. 5th DCA 2023).

See TLC Properties, Inc. v. Dep't of Transp., 292 So. 3d 10, 16 (Fla. 1st DCA 2020).

The special position of riparian rights in Florida's jurisprudence is found within the public trust doctrine ensconced in Florida's Constitution:

> The title to lands under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state, by virtue of its sovereignty, in trust for all the people. Sale of such lands may be authorized by law, but only when in the public interest. Private use of portions of such lands may be authorized by law, but only when not contrary to the public interest.

Art. X, § 11, Fla. Const. Concerning submerged lands, Florida's Supreme Court stated, "[b]asically it is trust property and should be devoted to the fulfillment of the purposes of the trust, to wit: the service of the people." *Hayes v. Bowman*, 91 So. 2d 795, 799 (Fla. 1957).

In describing the comparative rights of the public as well as private riparian owners, this Court previously held, "[t]he public's right to use navigable waters or the shore derives from the public trust doctrine." *Brannon v. Boldt*, 958 So. 2d 367, 372 (Fla. 2d DCA 2007). Private riparian rights are not superior to the rights of the

public "in regard to bathing, fishing, and navigation." *Walton Cnty. v. Stop Beach Renourishment, Inc.*, 998 So. 2d 1102, 1111 (Fla. 2008), *aff'd sub nom. Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702 (2010). Further, private riparian rights, "[t]hough subject to regulation… are private property rights that cannot be taken from upland owners without just compensation." *BB Inlet Prop., LLC v. 920 N. Stanley Partners, LLC*, 293 So. 3d 538, 543 (Fla. 4th DCA 2020).

Concerning apportionment of riparian rights, *Hayes v. Bowman* is generally considered the "landmark" case. *Hayes* condenses decades of prior jurisprudence and definitively outlines how a court ought to equitably apportion riparian rights between competing waterfront owners. In *Hayes*, the Florida Supreme Court rejected the use of a "one size fits all" test and set out the equitable principles that a court must apply to apportion riparian rights:

> It is absolutely impossible to formulate a mathematical or geometric rule that can be applied to all situations of this nature. The angles (direction) of side lines of lots bordering navigable waters are limited only by the numbers of points on a compass rose. Seldom, if ever, is the thread of a channel exactly or even approximately parallel to the shoreline of the mainland. These two conditions make the mathematical or geometric certainty implicit in the rules

> recommended by the contesting parties literally impossible.

Hayes v. Bowman, 91 So. 2d at 801. The *Hayes* Court explained that "[t]his rule means that each case must necessarily turn on the factual circumstances there presented, and no geometric theorem can be formulated to govern all cases. *Id.* This is similar to the approach taken by many other states. *See, for example, Mut. Chem. Co. of Am. v. Mayor & City Council of Baltimore*, 33 F. Supp. 881, 887 (D. Md. 1940), *decree modified sub nom. Mayor & City Council of Baltimore v. Crown Cork & Seal Co.*, 122 F.2d 385 (4th Cir. 1941) (collecting cases).

At the same time, the Florida Supreme Court was careful to provide limits and guidelines explaining how courts were to approach the "factual circumstances" of each case:

> We therefore prescribe the *rule* that *in any given case* the riparian rights of an upland owner must be preserved over an area 'as near as practicable' in the direction of the Channel so as to distribute equitably the submerged lands between the upland and the Channel. *In making such 'equitable distribution' the Court necessarily must give due consideration to the lay of the upland shoreline, the direction of the Channel and the co-relative rights of the neighboring upland owners.*

Id. at 802 (emphasis added). *Hayes* dictates that when making the "equitable distribution" of riparian rights the trial court "*necessarily must* give due consideration" to three enumerated factors. *Id.* (emphasis added). Under *Hayes*, the three factors the trial court must give due consideration to are:

(1) the lay of the upland shoreline;

(2) the direction of the channel; and

(3) the co-relative rights of the neighboring riparian owners.

Id. The Trial Court gave little or no consideration to these factors. Instead, the Trial Court focused exclusively on its concern that Appellees' existing dock should remain intact. The *Hayes* factors are certainly not exclusive. However, they must be considered in apportioning riparian rights, and they cannot be disregarded or substituted in favor of a new consideration based on who's dock was built first.

The three *Hayes* factors have a unifying theme: they are largely focused on the physical geography of the site. The first factor requires the court to consider the "lay of the upland shoreline" – clearly a geographic consideration. In this instance, the upland shoreline of the three properties forms a nearly 90-degree pocket or corner, with

Appellees' property and dock both facing south, while the shorelines of Appellants' properties generally face east at a near right angle. (R. at 374). The geometric shape of the shoreline obviously affects the equities or inequities in most cases – but does so in dramatic fashion in this case. Thus, while *Hayes* necessitates that the trial court must give due consideration to the shape of the shoreline, it is clear from the Record that no such consideration was given.

The second *Hayes* factor requires the court give due consideration to the direction of the channel: another purely geographic feature. However, the channel's direction relative to the properties was not identified or analyzed in the Trial Court's consideration and is absent from the Court's Final Judgment. The Trial Court is not free to disregard this consideration in its entirety.

The third *Hayes* factor requires the Court to consider the co-relative rights of the neighboring upland owners in conjunction with the first two factors. Taken together, a trial court must consider the geometry of the shoreline, the direction of the navigable water, and treat the neighboring upland owner's rights as "co-relative" or equal. These requirements were not applied by the Trial Court. The Record clearly demonstrates that Appellants' riparian rights were not

considered or treated co-equal with Appellees' rights. The Trial Court placed Appellees' riparian rights in a superior position solely because of the pre-existence of Appellees' dock. It is a fundamental error of law to apportion riparian rights based solely on such a consideration to the exclusion of the *Hayes* factors.

The factors that the Trial Court "necessarily must give due consideration" to were not considered. *Hayes*, 91 So. 2d at 801. The shape of the shoreline and the location of the channel are not reflected by the Trial Court's announced reasoning or its hand-drawn riparian line exhibit. The Trial Court's complete omission of the three *Hayes* factors constitutes a fundamental error of law. As such, Appellants seek relief from this Court to protect and restore their riparian rights, rights that the Trial Court inequitably awarded almost entirely to Appellees through the incorrect application of law.

5. <u>The Trial Court Erred in Failing to Treat the Parties' Respective Riparian Rights as "Co-Equal" or "Co-Relative."</u>

Riparian rights of upland owners are considered co-equal or co-relative. One upland owner is not given precedence over another upland owner based on the first exercise of their rights. *See Bay Shore v. Steckloff*, 107 So. 2d 171, 175 (Fla. 3d DCA 1958) ("Being

equally entitled to fill, no such upland owner can be shut off, or have that right taken away from him by a neighbor first filling in that neighbor's own land."); *see also*, *Merrill-Stevens Co. v. Durkee*, 57 So. 428, 432 (Fla. 1912) (Whitfield, C.J.) ("each member of the designated classes may have the same exclusive rights in front of the shore line of his own lands, but that no one may have by virtue of the grant a right of the kind granted in submerged lands in front of the shore line of other riparian owners.") Following the principle set forth by Mr. Justice Whitfield and the century of jurisprudence following him, riparian rights are treated equally, with the rights of one property not being permitted to destroy the rights of another.

This principle was well established in the common law by the time Florida joined the union; in *Tyler v. Wilkinson,* 24 F. Cas. 472 (C.C.D.R.I.1827), a fundamental case in defining the American rights doctrine, Mr. Justice Story summarized the doctrine:

> Prima facie every proprietor upon each bank of a river is entitled to the land, covered with water, in front of his bank, to the middle thread of the stream, or, as it is commonly expressed, *usque ad filum aquae.* In virtue of this ownership he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself; but a simple use of it, while it passes along. **The consequence of this principle is, that no**

> **proprietor has a right to use the water to the prejudice of another**… The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not… Mere priority of appropriation of running water, without such consent or grant, confers no exclusive right.

Id. at 474. (emphasis added).

However, the Trial Court viewed Appellees' riparian rights as superior to Appellants' rights solely because Appellees had an existing dock while Appellants properties have no docks. It is legal error to establish riparian rights of upland owners such that the riparian rights of one upland owner are deemed superior to and allowed to impede the riparian rights of other upland owners. The Trial Court's apportionment of riparian rights based solely upon the location of the first dock to be built, rather than the equitable principles set forth in *Hayes*, is legal error.

Here, the Trial Court erred in failing to follow this well-established precedent. Riparian rights are not apportioned based on which party first exercised them. Instead, riparian rights are treated equally among the Parties. The equitable path the Trial Court should have followed in setting the riparian line between Lots 26 and 31 is set forth by Florida's Supreme Court in *Hayes v. Bowman*, 91 So. 2d

795, 801 (Fla. 1957). The Trial Court's failure to follow *Hayes* as controlling precedent as to the applicable equitable principles is legal error that this court reviews *de novo* and should be reversed.

Instead of following *Hayes*, the Trial Court followed a different, legally unsupportable rule – that the first riparian owner to build a dock on their property subordinates the neighbor's riparian rights such that subsequent riparian apportionment will shift to conform to the first dock built on the shoreline. This "first in time/first in right" approach is not the law in Florida and never has been. No reported case has elevated one owner's riparian rights over his neighbors, due to the fact that one owner built their dock first. Florida's Supreme Court in *Hayes* specifically included the term "co-relative" to make clear that in apportioning the riparian rights equitably, each owner's riparian rights were to be considered equally important and worthy of protection as the others. *See Hayes v. Bowman*, 91 So. 2d 795, 801 (Fla. 1957).

The Trial Court's statement from the bench during trial showed that the Trial Court considered Appellees' riparian rights as more important and more worthy for the sole reason that theirs was the first dock to be built on this shoreline:

> The bottom line is that there is nothing equitable about forcing the removal of the nearly 30-year-old Thomas dock by Mr. Brown who purchased this property a few years ago based upon riparian lines that did not exist when the dock was built and certainly did not exist when Mr. Brown bought his home.

(Tr. at 549, Ln. 1-7). Compounding its error, the Trial Court appeared to rely on the "personal opinion" (as opposed to an expert opinion) (Tr. at 550) of Appellees' witness, Mr. Leo Mills, stating:

> **[the Court]** I'm going to read Mr. Mills' personal opinion that the court reporter was so kind to copy and transcribe so quickly because I think it is spot on.

(Tr. at 550, Ln. 13-15). The Trial Court then continued to read in the following portion of Mr. Mills' testimony:

> **[Mr. Mills to the Court]**: [C]an I offer you a personal opinion…Based on testimony that I have heard, that dock was permitted and I assume constructed in 1995. The house that Mr. Brown lived in preceded Mr. Brown's purchase of it and I believe I heard was constructed in 2006. I may be wrong there, but I'm thinking it was somewhere in that timeline, which means that that house was constructed with full knowledge of that dock being there. And when Mr. Brown purchased the property in 2018, I believe, the dock was still in the same place and it was obvious, or it should have been obvious to anyone purchasing that property that that dock was there and it had been a longstanding dock there. So is it equitable to ask Mr. -- Dr. Thomas to remove that dock? I don't think it's equitable. I think, again, in my opinion, that's -- that an equitable solution, if that is the case, would be for the Court to find a way to establish riparian lines that preserve the integrity of that dock and still allow other upland

> owners with waterfront property to be able to exercise their riparian rights.

(Tr. at 550, Ln. 16 to 551, Ln. 15). Mr. Mill's non-expert "personal opinion" that the Trial Court called "spot on" misstates the equitable principles that must be given consideration in setting riparian lines. Mr. Mills' personal opinion and, subsequently, the Trial Court's, was solely concerned over a dock - a dock that violates Appellants' riparian rights. Ironically, the Trial Court overlooked Mr. Mills' "personal opinion" concerning broader equitable principles used in the apportionment of riparian lines, as Mr. Mills also testified:

> **[Q. to Mr. Mills]** And do you agree with Mr. Young that in determining riparian lines that the court is to look to equity and do equity to those owners?
>
> **[Mr. Mills]**. That is the principle in establishing riparian limits is the equitable distribution of those rights, yes.

(Tr. at 428, Ln. 25 to 429, Ln. 5). The Trial Court disregarded both Mr. Mills' and Mr. Young's testimony that riparian lines, or limits, should be equitably distributed to preserve the rights of *all* upland owners possessing riparian rights. The Trial Court's riparian line protects Appellees' dock and ignores its obligation to do equity to the *co-relative* rights of Appellants.

The riparian line set by the Trial Court in the Final Judgment ignores *Hayes'* equitable principles by compressing Lot 26 (Brown's) riparian area and Lot 25 (Leblanc-Simard's) riparian area into a narrow, 25-foot-wide corridor running parallel to Appellants' own shoreline. The narrow riparian area relegated to Appellants by the Trial Court is effectively blocked from the Manatee River by Appellees' existing dock which runs parallel to Appellants' shoreline. Appellants' riparian area barely extends beyond the mangrove trees before meeting the Thomas' dock.

Making matters worse, the Final Judgment would even allow Appellees to enlarge their dock, to extend even further along the shoreline, and to encroach even further in front of Appellants' lots. (R. at 392). Thus, not only is the Trial Court's current apportionment of riparian rights patently inequitable, it permits further inequities to be inflicted upon the Appellants.

The Final Judgment also conflicts with governing law by denying Appellants a fair and reasonable opportunity of access to and enjoyment of an unobstructed view of the waters of the Manatee River, a well-established and important aspect of the special bundle of riparian rights. *See Gillilan v. Knighton*, 420 So. 2d 924, 926 (Fla.

2d DCA 1982). The right to an unobstructed view of the water is black letter law in Florida. *See 5F, LLC v. Dresing*, 142 So. 3d 936, 943 (Fla. 2d DCA 2014); *Brannon v. Boldt*, 958 So. 2d 367, 373 (Fla. 2d DCA 2007) ("Most notably and apparently unique to Florida, riparian owners have the right to an unobstructed view over the waters.") This Court has understood the right to an unobstructed view as, "more than a mere annoyance. It must substantially and materially obstruct the landowner's view to the channel." *Lee Cnty. v. Kiesel*, 705 So. 2d 1013, 1016 (Fla. 2d DCA 1998).

These legal errors by the Trial Court warrant appeal and reversal. By disregarding the established equitable principles to be considered in establishing riparian rights, the Trial Court failed to ensure that the co-equal or co-relative riparian rights of *all* waterfront owners are equitably apportioned as clearly required by Florida law.

6. Due to Misapplication of Equitable Principles, the Trial Court's Allocation of the Riparian Line is Unreasonable and Abuse of Its Equitable Authority.

The Trial Court's sole concern underlying the riparian line it drew was, "this line does not cross [Appellees'] existing dock[.]" (R. at 398). This is not an equitable consideration following the equitable principles set forth in *Hayes* and is a misapplication of the Trial

Court's equitable authority. The Trial Court's judgment essentially applied a first-in-time principle, reasoning that because Appellees' dock was the first to be built, its riparian rights had priority over the riparian rights of Appellants.

Florida has well-established considerations for equitably apportioning riparian rights. At best, these equitable considerations were misapplied. At worst they were ignored or even substituted for conflicting considerations. In either scenario, the Trial Court abused its equitable powers in how it apportioned the Parties' riparian rights. The case cited by the Trial Court as guiding its decision, *Lake Conway Shores Homeowners Ass'n, Inc. v. Driscoll*, 476 So. 2d 1306 (Fla. 5th DCA 1985) quotes *Johnson v. McCowen*, 348 So. 2d 357, 360 (Fla. 1st DCA 1977) concerning the equitable distribution of riparian rights. *Johnson*, in turn, quotes *Hayes v. Bowman*, referring to it as "Florida's landmark case dealing with littoral or riparian rights." *Id.* Despite referring to these cases, the Trial Court did not apply these cases to the portion of its ruling subject to this appeal.

First, the Trial Court abused its equitable powers in only considering whether the riparian line it drew crossed Appellees' dock.

In rendering its decision concerning the riparian line between Lots 26 and 31, the Trial Court stated:

> Let me explain. The bottom line is that there is nothing equitable about forcing the removal of the nearly 30-year-old Thomas dock by Mr. Brown who purchased this property a few years ago based upon riparian lines that did not exist when the dock was built and certainly did not exist when Mr. Brown bought his home. Mr. Young, to his credit, seemed to struggle with that outcome, at least in my opinion. This may be hyperbolic, but I cannot imagine a circuit court judge that would think that a removal of a 30-year-old dock under these circumstances is equitable and fair.

Tr. at 549, Ln. 1-13.

The Trial Court is incorrect both as a matter law and with regard to its exercise of equitable powers. However, the Trial Court is correct to the extent that riparian lines were not determined at these properties when the Appellees' dock was built. Riparian lines were not previously established because it is ultimately for the judiciary to determine riparian boundaries. *See Bd. of Trustees of Internal Imp. Tr. Fund of State of Fla. v. Bd. of Prof'l Land Surveyors*, 566 So. 2d 1358, 1361 (Fla. 1st DCA 1990) ("The determination of rights of parties to a riparian boundary dispute is instead a matter subject ultimately to judicial resolution under all applicable law.").

Further, contrary to the Trial Court's recounting quoted above, Mr. Young, Appellants' expert, explained the principle he applied in forming his opinion as to the appropriate riparian line between Appellees and Appellants:

> The dock is not in the accreted area. The dock is in the sovereign submerged land area owned by the State of Florida. But, as you know, riparian rights are appurtenant to the uplands. The uplands, if you accept the fact that I've got those uplands, the accreted lands, properly allocated, then the accretion -- I mean, then the riparian lines start from this point and proceed on the same basis, the same equitable allocation of riparian rights applied also to that allocation of the accreted lands, the same logic.

(Tr. at 226, Ln. 19 to 227, Ln. 4). The Trial Court continued to question Mr. Young regarding equity in possibly removing Appellees' dock, and Mr. Young simply provided the Trial Court with examples of instances where that precise result occurred:

> **THE COURT:** Okay. Is it equitable to compel the removal of a dock that's been there since 1995?
>
> **[Mr. Young]:** I can tell you, your Honor, that I've have been in cases, two cases -- one, a commercial dockage where multiple slips were required to be removed in Martin County, Florida. Another place up in the panhandle, in Fort Walton Beach, where it went to an appellate hearing and interestingly enough, as an expert -- you might think I'm not telling truth here, but I was asked by the appellate judge to come in and tell him more about riparian rights. But nevertheless, we sustained the lower court's opinion that it had to be removed.

(Tr. at 228, Ln. 17 to 229, Ln. 5). Despite Mr. Young's expert testimony and the substantial case law concerning equitable principles in apportioning the riparian rights of upland owners, the Trial Court stated what it considered to be the controlling, equitable issue as follows:

> Mr. Brown's right to build a dock on a property that's never had a dock versus Mrs. Thomas' right to maintain her dock on piece of property that's had it there for -- since 1995.

(Tr. at 230, Ln. 11-14). In the Trial Court's opinion, this is "largely what this whole case is about." (Tr. at 230, Ln. 8-9). This is an incorrect statement of law and abuse of the Trial Court's equitable powers. Mr. Young was clear in his testimony concerning the appropriateness and equity of removing an existing dock when it violated the riparian rights of another:

> **THE COURT:** -- having been in the business a long time, having studied this area now extensively, what your thought process is with regard to – now that you've made that conclusion and now that you've established the accreted lands and the riparian rights, whether it's ultimately equitable to remove the Thomas dock.
>
> **[Mr. Young]:** I think it's absolutely equitable.
>
> **THE COURT**: Okay.
>
> **[Mr. Young]:** I really do. I've represented a lot of people who have had their rights violated by construction of docks that may exist for a long time and some that were newly -

> - or planned to be existing. They had no right to obstruct an individual's upland property rights, which are the rights of riparian rights when they're on the waterfront. That's my opinion.

(Tr. at 231, Ln. 8 to 25). As shown in both the Final Judgment issued by the Trial Court (R. at 393-401) and the testimony cited above, the dominant equitable concern of the Trial Court was that Appellees 'got there first.'

By implication, the Trial Court acknowledged that if the riparian line did cross the Appellees' dock, removal of that portion of Appellees' dock would have been appropriate. (R. at 398). It is an appropriate exercise of a trial court's equitable powers to order removal of a dock, or other structure, when that structure impermissibly crosses the riparian line and encroaches into the riparian area of another. *See Johnson v. Tlush*, 468 So. 2d 1023, 1025 (Fla. 4th DCA 1985)(Affirming trial court's issuance of mandatory injunction and ordering of removal of encroaching dock). In this instance, the Trial Court could and should have done so and ordered the portion of Appellees' dock that crosses an equitably drawn riparian line removed.

7. To the Extent That the Trial Court's Order Applied the Principle of Laches, the Requirements for Laches to Apply are Not Satisfied.

In setting the riparian line between Appellants and Appellees, the Trial Court did not consider whether the doctrine of laches could apply such that if the Trial Court had adopted Mr. Young's proposed riparian line, that the doctrine of laches would be the appropriate equitable consideration concerning whether Appellees' dock should be removed. As stated by Justice Whitfield:

> Where, under proper authority, structures or objects are put upon lands below high-water mark of the ocean or gulf or other navigable waters, the rights of adjoining riparian owners and other persons, as well as the rights of the public, must be observed in exercising the duly acquired privilege to so use the land below high-water mark, and any substantial encroachment upon the rights of others may be remedied by timely and appropriate procedure in due course of law at the instance of proper parties, but the rights of individuals to remedy may be waived by undue delay or laches in seeking a remedy.

Freed v. Miami Beach Pier Corp., 112 So. 841, 845 (Fla. 1927). As set forth in the sections above, the Appellees' dock encroaches upon the riparian rights of Appellants. As held by this court previously, "[t]he application of the doctrine of laches depends upon the circumstances of each particular case. It is the doctrine of stale demands. The test of laches is whether there has been a delay which has resulted in the

injury, embarrassment, or disadvantage of any person, but particularly the persons against whom relief is sought." *City of Eustis v. Firster*, 113 So. 2d 260, 263 (Fla. 2d DCA 1959) (internal citations omitted). As stated by the Florida Supreme Court:

> Laches is an affirmative defense. As such, the burden of proving it is on those who assert it, and it must be proved by very clear and positive evidence. This is particularly true where the application of the doctrine is to divest one of the ownership of land. We will not extend the doctrine too readily where it has this effect.

Van Meter v. Kelsey, 91 So. 2d 327, 332 (Fla. 1956). Divestiture of riparian rights are subject to the same, high standard as "private property rights that cannot be taken away without just compensation." *BB Inlet Prop., LLC v. 920 N. Stanley Partners, LLC*, 293 So. 3d 538, 543 (Fla. 4th DCA 2020).

In *Van Meter v. Kelsey,* 91 So.2d 327, 330–31 (Fla.1956), the Florida Supreme Court set forth the following necessary elements to establish the affirmative defense of laches: (1) "there must be conduct on the part of the defendant, or on the part of one under whom he claims, giving rise to the situation of which complaint is made"; (2) "the plaintiff, having had knowledge or notice of the defendants' conduct, and having been afforded the opportunity to institute suit,

is guilty of not asserting his rights by suit"; (3) "lack of knowledge on the part of the defendant that plaintiff will assert the right on which he bases his suit"; and (4) "injury or prejudice to the defendant in event relief is accorded to the plaintiff, or in event the suit is held not to be barred." Appellees failed to establish any of the necessary four elements at trial and the Trial Court made no evidentiary findings concerning laches.

Appellees did assert an affirmative defense of laches. (R. at 169). However, they failed to allege the factual elements of the doctrine of laches, failed to allege that they have suffered any injury or harm stemming from any alleged delay by Appellants in bringing the underlying action, and failed to produce any evidence at trial supporting their affirmative defense. Moreover, Appellees' laches affirmative defense solely references the extended presence of a dock while failing to set forth any avoidance of Appellants' underlying claims in the case concerning Appellants' riparian rights.

Instead, Appellees' affirmative defense of laches solely rests on the statement that their dock "has been in existence for more than 25 years." (R. at 169). Appellees' counsel in his closing argument to

the Trial Court argued the following was sufficient to prove laches applied:

> But [laches], when you look at [laches], we know that the dock was constructed in 1995. We know that Dr. Thomas purchased the property in 2008, a 13-year time frame, a weathered and old dock. She purchased the property because of that dock. So, quite frankly, waiting 13 years to raise the issue of the dock does prejudice Dr. Thomas. So, yes, equity should not require Dr. Thomas to remove that dock based on [laches].

(Tr. at 514, Ln. 6-18). This is not a legally sufficient basis of laches. It is blackletter law that "[d]elay alone in asserting a right does not constitute laches, and the burden is on the party who asserts the doctrine of laches to prove prejudice." *Ticktin v. Kearin*, 807 So. 2d 659, 663 (Fla. 3d DCA 2001). Further, the party asserting the defense of laches must prove legal prejudice which "results when there is a loss or injury to a person who relies on another person's voluntary failure to exercise a legal right." *Avelo Mortgage, LLC v. Vero Ventures, LLC*, 254 So. 3d 439, 443 (Fla. 4th DCA 2018) quoting *Pyne v. Black*, 650 So. 2d 1073, 1076 (Fla. 5th DCA 1995).

Losing the lawsuit and removing a portion of a dock does not constitute legal prejudice for laches purposes. Legal prejudice is the prejudice that stems from the alleged delay in filing suit. Further,

there have been no findings on the Record as to any legal prejudice that Appellees would suffer if Mr. Young's riparian line had been adopted by the Trial Court.

Appellants did not unreasonably delay in asserting their rights. Even assuming *arguendo* that Appellants had unreasonably delayed, such delay would preclude them from enforcing their rights, not having their riparian rights taken by the Trial Court. The Trial Court's Final Judgment makes no finding of fact concerning the construction of Appellees' dock or other facts that would support a finding that laches applied to Appellants' claims for declaratory relief or ejectment.

IV. CONCLUSION

Appellants, Kevin Brown and David Leblanc-Simard, respectfully request that this Court reverse the Final Judgment of the Trial Court as to Count II of their Amended Complaint, vacate the riparian line established by the Trial Court, establish the riparian line set forth by Mr. Young's survey and equitably apportion the riparian rights of the three adjoining riparian owners, to include ejectment of Appellees' dock in order to equitably apportion the riparian rights.

To hold otherwise would be grossly inequitable to Appellants. The Trial Court's apportionment inequitably, and contrary to the great weight of controlling precedent, appropriated Appellants' riparian rights and awarded them to Appellees based on the sole "equity" of Appellees having bought a house that already had a dock – regardless of whether that dock was correctly aligned according to the riparian rights of Appellees' property. The Trial Court's ruling turns the equitable apportionment of riparian rights on its ear and converts nearly a century of Florida law regarding equitable considerations into a race to be the first in the neighborhood to build a dock – in any location or configuration. For the reasons set forth above, the portion of the Trial Court's Final Judgment appealed must be reversed.

Respectfully submitted,

[Signature Page Follows]

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Court's E-Filing Portal to Fred E. Moore, Esq., Blalock Walters, P.A., 802 11th Street West, Bradenton, Florida 34205 (fmoore@blalockwalters.com), this October 7, 2024.

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CERTIFICATE OF COMPLIANCE FOR
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I hereby certify that this brief was prepared using Bookman Old Style 14-point font and that it complies with the word count requirements in the Florida Rules of Appellate Procedure and consists of 9,017 words.

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