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COURT OF APPEALS

STATE OF NEW YORK

JAMES AND LINDA KNAPP,

Respondents,

-against-

No. 175

JAMES R. HUGHES, ET AL.,

Appellants.

20 Eagle Street
Albany, New York 12207
September 12, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Jessica B. Cahill
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 175.

2 Counselor, would you like any rebuttal time?

3 MR. SHOOT: Yes, Your Honor. I'd like to
4 reserve two minutes, please.

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
6 go ahead.

7 MR. SHOOT: My colleague to my left is
8 Robert Jones, who's lived with this case a lot longer
9 than I have.

10 Your Honors, we have three basic points,
11 the defendants do, in this case.

12 Point one, and I'm quoting from this
13 court's decision in White v. Knickerbocker Ice.
14 "Where a grant is so framed as to touch the water of
15 a river and the parties do not expressly accept the
16 river, one-half of the bed of the stream is included
17 by construction of law."

18 CHIEF JUDGE LIPPMAN: So it's basically our
19 law is inclusive unless what? Unless it's - - -

20 MR. SHOOT: Unless it's excluded, it's
21 included. And more than that, Your Honor - - -

22 CHIEF JUDGE LIPPMAN: So the normal course,
23 if you have property that goes to the water, what do
24 you have - - -

25 MR. SHOOT: In the normal course - - -

1 CHIEF JUDGE LIPPMAN: - - - in term of
2 rights?

3 MR. SHOOT: - - - where nothing is said
4 either way, and you have a property that's abutting
5 water, nonnavigable water, so it doesn't belong to
6 the public - - -

7 CHIEF JUDGE LIPPMAN: Right.

8 MR. SHOOT: - - - in that it's included
9 unless it's excluded.

10 CHIEF JUDGE LIPPMAN: You have littoral
11 rights - - -

12 MR. SHOOT: And more than that - - -

13 CHIEF JUDGE LIPPMAN: - - - unless it's
14 specifically excluded.

15 MR. SHOOT: - - - unless it's - - -

16 CHIEF JUDGE LIPPMAN: That's the general
17 proposition?

18 MR. SHOOT: Not only specifically excluded,
19 but per this court's language in White - - -

20 JUDGE PIGOTT: Well, then who made the
21 mistake that got us here? I mean the Furlano deed
22 seems to include the lake, doesn't it?

23 MR. SHOOT: Which Furlano deed, Your Honor?
24 I'm sorry.

25 JUDGE PIGOTT: The one from which all of

1 this springs from.

2 MR. SHOOT: The one that Furlano acquired
3 the land. That one you mean?

4 JUDGE PIGOTT: Right.

5 MR. SHOOT: Yes, it does.

6 JUDGE PIGOTT: It has that extra. So we
7 know that that deed has the pond, and you're saying
8 that everybody else that took from that, even though
9 it doesn't have that language, nevertheless, got
10 their appropriate part of the pond?

11 MR. SHOOT: Well, two points, Your Honor,
12 about the - - - I know this is a big point of the
13 plaintiffs' that the Furlano deed had that belt and
14 suspenders. I think if that paragraph weren't there
15 it would have still included the water rights unless
16 it exempted the water rights. That it had a belt and
17 suspenders may have been good lawyering.

18 JUDGE CIPARICK: But it says - - - oh, I'm
19 sorry.

20 JUDGE READ: Well, Mr. Shoot, I guess I
21 have a question that - - - nobody's mentioned a case
22 that I will confess my clerk found for me called
23 Matter of Brookfield, a 1903 case which seems to say
24 exactly the opposite of what you have - - - how
25 you've portrayed our law.

1 It says that "when the boundary lines along
2 the side, the edge, the border, or the margin, the
3 parties will be held to have intended to limit the
4 lands conveyed within such boundary and not that
5 which constitutes the bed of such highway, stream, or
6 pond."

7 MR. SHOOT: Your Honor, I have to confess
8 I'm not familiar with that case, but it is not one
9 case that I'm referring to that - - -

10 JUDGE READ: You're relying on what?
11 You're relying on which cases?

12 MR. SHOOT: I'm re - - - Gouverneur v.
13 National Ice Company, 1892 this court; Stewart v.
14 Turney, 1923 this court; Seneca Nation v. Knight,
15 1861 this court; White v. Knickerbocker was 1930.

16 JUDGE SMITH: Don't a couple of those say,
17 though - - - I mean, they hold as you want them to
18 hold, but isn't there language in there that says,
19 well, if it said edge, or if it said bank, or if it
20 said something else that that would be a reservation?

21 MR. SHOOT: Let me get to that now. The
22 language that I quoted from White v. Knickerbocker of
23 this court's is that it must be excluded in very
24 plain and expressed words.

25 Now, as we note in our brief, for those

1 people who are familiar with this arcane sometimes
2 language, which I must confess I was not until this
3 case, very plain and expressed are, like so many
4 other things, words of art, Your Honor. And it is
5 true that when they set the water boundary as, for
6 example, by the shore, to the bank - - - Carlino v.
7 Baker (sic), one of the cases they rely upon, it was
8 by the shore. Halsey v. McCormick, one of the cases
9 they rely upon, to the "bank".

10 The ruling of many a courts, and I'm not
11 asking this court to change any law today, is that
12 bank and shore are deemed dry references and,
13 therefore, they are "expressed exclusions".

14 JUDGE SMITH: So you want us to draw a line
15 between the shore and the edge?

16 MR. SHOOT: It's a line that I'm not
17 drawing. It's a line that's been drawn way before.

18 JUDGE CIPARICK: What about low water lines
19 and high water lines?

20 MR. SHOOT: Well, let me give you some
21 examples. Those case - - -

22 CHIEF JUDGE LIPPMAN: Let me ask you - - -

23 MR. SHOOT: Those cases have been held to
24 be water, to be water. White v. Knickerbocker Ice,
25 the exact language of the deed there was "westerly

1 along the south side" of the Rockland Lake. So the
2 argument was, well, the south side - - - that could
3 mean the land.

4 CHIEF JUDGE LIPPMAN: Let me ask you a
5 question. Is there a common sense way to put all of
6 this together that's not hypertechnical and is easy
7 to follow, rather than - - -

8 MR. SHOOT: I think the - - -

9 CHIEF JUDGE LIPPMAN: We see the complex
10 way this - - - path this case has taken. What's the
11 simplest way to look - - - can you bring all of those
12 different terms together?

13 MR. SHOOT: I think there is a simple way,
14 and I would suggest it's twofold. One, if the
15 boundary, the water boundary, touches water, and
16 areas that have been deemed to touch water,
17 description the margin of the lake. That was the
18 United States Supreme Court decision in Hardin v.
19 Jordan, cited with approval in White v.
20 Knickerbocker. The margin of the lake, the boundary
21 was, that was deemed to touch water.

22 The Waters v. White Lake (sic) case, the
23 boundary went along the low watermark or along the -
24 - -

25 JUDGE GRAFFEO: I don't think you're

1 answering the Chief's question, which is basically
2 what's the rule that you're asking us - - -

3 MR. SHOOT: The rule is that - - -

4 JUDGE GRAFFEO: - - - to adopt that would
5 be easier to apply than relying on all this different
6 terminology?

7 MR. SHOOT: The easy way of stating the
8 rule is that if it touches water, it's presumed to
9 include the water rights unless they're excluded. The
10 reason - - -

11 JUDGE GRAFFEO: And what's the advantage to
12 that rule? Is there any - - -

13 MR. SHOOT: Yes.

14 JUDGE GRAFFEO: - - - practical advantage
15 to that rule?

16 MR. SHOOT: The reason for this rule, in
17 Stewart v. Turney, this court gave the reasons, why
18 do we have this rule.

19 And the reason for the rule was that,
20 number one, those water rights most advantage the
21 landowner who is abutting the water body. For that
22 reason we expect that they probably expect, the
23 landowners, that when they're buying the property,
24 quote "at the water's edge", they're buying the right
25 to use the lake. Therefore, it's fair - - -

1 CHIEF JUDGE LIPPMAN: So there's
2 predictability. Is that your point?

3 MR. SHOOT: It's expectation and
4 predictability.

5 JUDGE READ: Aren't we then trying to - - -
6 I could see devising a rule going forward, but we're
7 talking about deeds and people who bought property
8 with certain expectations, people who sold property
9 with certain expectations. How can we - - - don't we
10 have to look at what, historically, people might have
11 had in mind or what the court said about this in the
12 past, technical it all may be?

13 MR. SHOOT: Judge, I'm not stating what I
14 think a new rule should be. I'm stating - - -

15 JUDGE READ: You think that's the rule - -
16 -

17 MR. SHOOT: I'm stating this is the rule,
18 and I believe - - -

19 JUDGE READ: - - - as long as something - -
20 - as long as there's indication that the land touches
21 water?

22 MR. SHOOT: This court has said so many
23 times it's included by operation of law unless it's
24 excluded.

25 JUDGE SMITH: In - - -

1 JUDGE CIPARICK: So there's a presumption
2 unless it's specifically retained by the grantor?

3 MR. SHOOT: Yes. And it's not a new rule,
4 and, Judge Read, I would agree with, I think, the
5 implication of your question that this is probably
6 not an area of law where you want to make new law,
7 because the deeds go back so many decades.

8 JUDGE SMITH: Doesn't the law - - - isn't
9 there a problem with the law as we have it where you
10 have to - - - you have opinions saying side means one
11 thing and edge meaning - - - in White it says if they
12 - - - if the grantor had intended to go no further,
13 in other words, not to convey the underwater land,
14 the most natural thing to say would have been to the
15 edge or margin of the lake. In other words, in White
16 we seem to think that edge didn't touch the water.
17 How do you know whether a word touches the water or
18 not?

19 MR. SHOOT: In White, the distinction I
20 think made was between the situation where you go up
21 to the water, and you touch it, and then you do not
22 go along the water course.

23 For example, in one of the cases cited by
24 my adversary, it goes up to the water, but then the
25 boundary went along the fence, which obviously is

1 dry.

2 JUDGE SMITH: Let me ask you this even
3 though you're - - - isn't it - - - I mean don't most
4 - - - when you come to expectations, most people who
5 buy a home by the lake think they can go swimming,
6 don't they? I mean, isn't that a - - -

7 MR. SHOOT: Yes. I think so, yes.

8 JUDGE SMITH: I mean, why - - - and there
9 are a lot of these cases which don't look totally
10 consistent to me, which draw these arcane
11 distinctions that I can't figure out. Why shouldn't
12 we just enforce the rule as it's stated that it's got
13 to be a really clear and expressed reservation,
14 something like I'm not giving you the underwater
15 land?

16 MR. SHOOT: I won't argue with the court if
17 it was to do that.

18 JUDGE SMITH: Well, then, I'm on your side.

19 MR. SHOOT: Obviously, it's certainly can
20 do and the case will come out my way, but I also
21 think that even if you do not go that far, and you
22 simply follow the cases as they come down, there are
23 cases dealing with the specific - - -

24 CHIEF JUDGE LIPPMAN: What about
25 Guilderland and the Third Department?

1 MR. SHOOT: Guilderland, that is the one
2 case that we found that - - - actually, the Appellate
3 Division, Third Department found it, and the court
4 here construed Town of Guilderland as meaning that
5 the setting of the boundary as along the water's edge
6 was a term of exclusion.

7 When you read the case, Your Honor - - -
8 and I included in the record the lower court
9 proceedings so you can get more of the facts - - - it
10 wasn't - - - the water rights were not exempted
11 because of that term.

12 CHIEF JUDGE LIPPMAN: It was a separate
13 exclusionary - - -

14 MR. SHOOT: It was exempted in spite of
15 that term. There was a clear paragraph excluding
16 water rights. That paragraph read - - -

17 JUDGE GRAFFEO: But was it the language
18 retains all rights to flow from his mill pond as
19 theretofore vested to him?

20 MR. SHOOT: That's part of the sentence.
21 And the preceding part of the sentence, the part that
22 comes before the "and", is the party of the first
23 part, Batterman, conveys no title rights of franchise
24 not conveyed to him by deed of Schubel Kelly and
25 White dated April 3, 1876. And that, as noted in the

1 Appellate Division decision, was an upland piece of
2 property. And at that time, the time of the 1876
3 deed, the affectionately named party of the first
4 part, Batterman, had a working mill, which is why it
5 was interesting.

6 CHIEF JUDGE LIPPMAN: Okay, counselor,
7 you'll have some rebuttal time.

8 MR. SHOOT: Thank you.

9 CHIEF JUDGE LIPPMAN: Thanks. Counsel.

10 MR. KILKER: Thank you, Your Honor. May it
11 please the court, Patrick J. Kilker for plaintiffs,
12 Knapps.

13 CHIEF JUDGE LIPPMAN: Counselor, why, if I
14 may, either a view of synthesizing the different
15 cases or just from a straight policy perspective, why
16 doesn't it make sense if essentially, putting aside
17 hypertechnical language that if the land touches the
18 water, unless there's some exclusionary language you
19 have the water rights - - -

20 MR. KILKER: That is - - -

21 CHIEF JUDGE LIPPMAN: - - - the littoral
22 rights.

23 MR. KILKER: That is the rule, Judge. And

24 - - -

25 CHIEF JUDGE LIPPMAN: So why - - - yeah.

1 MR. KILKER: And that was from, you know,
2 Gouverneur v. National Ice, and this court's case in
3 White v. Knickerbocker Ice.

4 CHIEF JUDGE LIPPMAN: So why doesn't it
5 apply from that perspective here?

6 MR. KILKER: It does.

7 CHIEF JUDGE LIPPMAN: Yeah.

8 MR. KILKER: And as a matter of fact, in
9 this particular case, White v. Knickerbocker Ice
10 recognized that the term edge is, by its simple
11 terms, dry land.

12 And as counsel indicated - - -

13 CHIEF JUDGE LIPPMAN: So - - - go ahead,
14 Judge Smith.

15 JUDGE SMITH: Edge is different from side?

16 MR. KILKER: Yes, in certain circumstances.
17 And you may be referring to Confer v. Pirman.

18 JUDGE SMITH: Do you really think any
19 ordinary homeowner who buys a lakefront property is
20 going to look at his deed and say, well, if it says
21 side, I get to swim, but if it says edge I only get
22 to look at the water and not touch it?

23 MR. KILKER: Well, cases that have preceded
24 this case certainly have decided that way and the
25 deeds have been variously construed. And again, you

1 look to the language of the deed.

2 JUDGE SMITH: Well, have we ever - - - -
3 has our court ever decided that way? I grant you you
4 can find language that sounds that way, but have we
5 ever really decided that?

6 MR. KILKER: That edge is - - -

7 JUDGE SMITH: Yeah.

8 MR. KILKER: - - - in fact dry land? Well,
9 this court has certainly indicated that the edge of
10 an inland nonnavigable pond is dry land. During its
11 discussion - - -

12 JUDGE SMITH: And one of those is in a case
13 in which there were great pains to show that side is
14 not dry land, but edge is dry land.

15 MR. KILKER: Right. And that case was
16 reconciled - - -

17 JUDGE SMITH: Doesn't that seem a rather
18 unsatisfying distinction?

19 MR. KILKER: Certainly it is, Your Honor,
20 but those cases were based upon the history of the
21 deeds that were involved there and that's simply the
22 language.

23 JUDGE GRAFFEO: What's the objective of
24 your client here? They don't want anyone else that
25 lives on land adjacent to the pond to use the pond?

1 MR. KILKER: Their objective here is to
2 identify the rights that have been conveyed pursuant
3 to the deed.

4 JUDGE GRAFFEO: Well, that's a legal, I'm
5 saying practically. What are they trying to do here?
6 They don't want anybody to use the pond?

7 MR. KILKER: No, they actually don't. They
8 have certain ideas about - - -

9 JUDGE GRAFFEO: They don't want anybody to
10 swim, to go in in a canoe.

11 MR. KILKER: Without permission or without
12 being able to control the pond.

13 CHIEF JUDGE LIPPMAN: Why is that? Does it
14 interfere - - -

15 JUDGE GRAFFEO: That's pretty drastic,
16 isn't it?

17 MR. KILKER: It is, but if you look at the
18 history of this pond, there was raucous and rowdy
19 behavior that had been going on for years without any
20 responsibility whatsoever. Not one landowner
21 surrounding the pond took any responsibility for the
22 bed of that pond. If somebody had gotten hurt or
23 killed in that pond, who was going to be responsible?

24 JUDGE PIGOTT: Now you want to be? You
25 want to be the one?

1 MR. KILKER: Well, my client certainly did
2 take responsibility. He bought the bed of the pond
3 along with lot 8. He also insured it. He's paying
4 taxes on it. And he is more than willing to take
5 responsibility for the cleanup of that pond.

6 He owns other property around the pond,
7 which clearly give him rights littorally to the pond
8 as well as exclusively.

9 CHIEF JUDGE LIPPMAN: So if we were to go
10 against your client the result would be that his
11 peaceful use of the pond would be disturbed, that's
12 what this is all about?

13 MR. KILKER: Well, it would be a
14 deprivation of his property.

15 CHIEF JUDGE LIPPMAN: Yeah, but, again, but
16 as Judge Graffeo said - - -

17 MR. KILKER: Sure.

18 CHIEF JUDGE LIPPMAN: - - - putting aside
19 the - - - you know, the particular terms, in the most
20 practical general way.

21 MR. KILKER: Yes, he would certainly not
22 have as much control over the use of the pond. He
23 wouldn't have control over those adjacent landowners
24 who may come on and swim or do whatever they're going
25 to do without him knowing they're even there.

1 JUDGE READ: You did lose some - - -

2 JUDGE SMITH: So - - -

3 JUDGE READ: You did lose some - - - the
4 judge did rule against your client on some of the
5 prescriptive rights, didn't he? So he doesn't have
6 complete - - -

7 MR. KILKER: That's - - -

8 JUDGE READ: Even if we found in your
9 favor, he wouldn't have complete control.

10 MR. KILKER: That's on appeal still, Your
11 Honor.

12 JUDGE READ: That's on appeal still, okay.

13 MR. KILKER: Yes, that's with the Appellate
14 Division.

15 JUDGE SMITH: If your client were to sell
16 his lot tomorrow and use the word "edge" - - - say,
17 "I hereby convey you my lot to the water's edge" and
18 move away, then he'd still own the pond, even though
19 he had no lakefront property, right?

20 MR. KILKER: Yes, there's still a parcel
21 there, 12.1 acres of land.

22 JUDGE SMITH: Isn't that kind of a bizarre
23 situation where there are all these properties around
24 the lake and there's some guy who lives in South
25 Florida who owns the water and won't let anybody swim

1 in it?

2 MR. KILKER: Certainly it is, but that's
3 the way the construction of the deed is.

4 JUDGE CIPARICK: His deed, the deed to him,
5 we're talking about Mr. Knapp, right?

6 MR. KILKER: Yeah.

7 JUDGE CIPARICK: Burdens and Knapps. "What
8 is intended to be conveyed to them herein are all
9 remaining lands of grantors as originally conveyed to
10 them in a deed from Furlano, to Furlano and his wife
11 by deed dated October 29, 1970," and you interpret
12 that to mean all the underwater land, et cetera - - -

13 MR. KILKER: Land under water, that's
14 correct.

15 JUDGE CIPARICK: - - - which you say was
16 not conveyed to the other people.

17 MR. KILKER: That's correct. It was - - -

18 JUDGE CIPARICK: Because all they had was
19 along the water's edge of Perch Pond.

20 MR. KILKER: Exactly.

21 JUDGE GRAFFEO: Why would Furlano have
22 restricted what he owned, because he reserved some
23 land for himself, right?

24 MR. KILKER: He did. I can't speak to his

25 - - -

1 JUDGE GRAFFEO: So why would he have given
2 up his ability to use the pond?

3 MR. KILKER: I can't answer that.

4 JUDGE GRAFFEO: That part doesn't make any
5 sense to me.

6 MR. KILKER: Well, he did retain lot 8,
7 which was also connected to the 12.1 acres under
8 land. So he did retain control over the bed of the
9 pond.

10 JUDGE GRAFFEO: Right. So he wouldn't want
11 to be able to use the pond any more?

12 MR. KILKER: Mr. Furlano moved out of the
13 state to California, so - - - but he retained that
14 valuable parcel, the 12.1 acres plus that lot.

15 JUDGE GRAFFEO: Well, his parcel would have
16 had - - - the parcel that he retained would have had
17 a lot less value if whoever he eventually sold it to
18 couldn't go swimming in the pond.

19 MR. KILKER: But he retained that lot.

20 JUDGE GRAFFEO: That's what I'm saying.
21 Why would he retain something and not retain the
22 ability to use the pond?

23 MR. KILKER: I can't answer for that. I
24 mean, I don't have any reason to - - -

25 JUDGE GRAFFEO: Well, maybe it wasn't his

1 intent for these provisions to be interpreted that
2 way?

3 MR. KILKER: Well, if you look at the
4 affidavits of Furlano they clearly indicate that he
5 didn't intend to convey the bed of the pond. Why he
6 didn't intend to convey the pond, I don't know, but
7 he didn't intend to convey the bed of the pond.

8 JUDGE SMITH: Well, why shouldn't the rule
9 be, as it seems to be - - - I mean the general rule
10 that's stated in some of those cases is you're
11 conveying the bed of the pond unless you say so by
12 very clear and express language.

13 My idea of clear and express language would
14 be something like I'm not conveying the bed of the
15 pond. Why shouldn't we insist on something that
16 clear?

17 MR. KILKER: Because at this point, many of
18 the deeds that have already been relying upon the
19 language that has been indicated in all of these
20 cases would have to be changed, because you're going
21 to have a - - -

22 JUDGE SMITH: You're saying that there are
23 - - - you're saying there are people sitting out
24 there relying on the fact that they have a deed that
25 says edge in it and, therefore, I guess this - - - so

1 the grantor under those deeds is relying on the fact
2 that he sold the land and kept the pond?

3 MR. KILKER: Well, you would invite
4 litigation, of course, because if you do have those
5 deeds, and then you say now any deed that doesn't
6 have an express - - - express saying I'm reserving
7 exactly within - - -

8 JUDGE SMITH: We have said that, then we
9 said other things to make it sound like we didn't
10 mean it, but we have said it must be clear and
11 express language.

12 MR. KILKER: Unless there's a description
13 which clearly defines a restriction and that
14 restriction has been interpreted by this court as
15 being along dry land, that being the edge of a pond.

16 And in this particular case, when the
17 conveyance from Furlano to Mallery was made it went
18 to, and at points at the water's edge. Then it ran
19 along that same dry course.

20 JUDGE SMITH: Talk a little bit more about
21 the rule, because we are - - - obviously, nobody
22 wants to disturb something that people have been
23 relying on for decades and centuries, but tell me a
24 little more about this person who has been relying on
25 all these cases. A hypothetical person who has been

1 relying on the law and would be disturbed relying on
2 the law, as you say it is, and would be upset if it
3 went the other way.

4 MR. KILKER: Assuming that you acquired a
5 piece of property, and you obtain counsel who told
6 you that you have now obtained exclusive rights to a
7 particular lot, and he tells you that, and you base
8 your layperson's reliance upon that not knowing what
9 this language actually means, now you're taking that
10 away.

11 JUDGE SMITH: Well, this hypothetical
12 person he says, okay, now I've got - - - this is the
13 guy who says I've got both the land and the water.

14 MR. KILKER: Yes.

15 JUDGE SMITH: But isn't the person - - -
16 you're concerned with protecting is somebody who's
17 relying on the fact that he can sell the land and
18 keep the water?

19 MR. KILKER: Yes.

20 JUDGE SMITH: Is any - - - how many people
21 are there who really think they can do that, who
22 actually intend to sell the land and keep the water?

23 MR. KILKER: Well, if you're going to have
24 conveyance of that nature, then obviously there's
25 going to be discussions that surround it, and that

1 would include parol evidence of the grantor's intent.

2 JUDGE SMITH: But if you're focused on it,
3 if you really do want to sell the land and keep the
4 water, then it's easy; you say, hey, I'm selling the
5 land, but I'm keeping the water.

6 MR. KILKER: Certainly that would be very
7 precise and clear.

8 JUDGE GRAFFEO: I could understand if maybe
9 you retained an access easement, but how do you
10 expect to get to the water if you've sold the land?

11 MR. KILKER: If you sold the land, how do
12 you expect to get to the water?

13 JUDGE GRAFFEO: Yeah.

14 MR. KILKER: In what instance?

15 JUDGE GRAFFEO: Well, you're saying that
16 this language would upset individuals who think
17 they've retained their water rights, but not the
18 land.

19 MR. KILKER: Um-hum.

20 JUDGE GRAFFEO: So how are they going to
21 get to the water?

22 MR. KILKER: No, they would have retained
23 their land with water rights. For example, in this
24 particular case, the grantor, who was the Furlanos,
25 retained the water under the land or the land under

1 the water in connection with that one excepted
2 parcel, as well.

3 JUDGE GRAFFEO: I understand, but I thought
4 in response to Judge Smith's question you said that
5 there could be a class of individuals who sold their
6 property, but believe they've retained their water
7 rights.

8 MR. KILKER: Well, the grantees is what I'm
9 referring to, not the grantors.

10 JUDGE PIGOTT: Mr. Kilker, before you go
11 and have to leave because your red light's on - - -

12 MR. KILKER: Thank you, Your Honor.

13 JUDGE PIGOTT: - - - you were talking about
14 rowdiness and all of, you know whatever's going - - -
15 beer parties and everything else that's going on
16 there, and there were meetings at your client's
17 house.

18 MR. KILKER: At Mr. Hughes' house, yes.

19 JUDGE PIGOTT: Right. And at that time did
20 anybody say, and by the way, you know, this land is -
21 - - this pond isn't yours or - - - it looked like
22 what they were doing is they were getting together,
23 because they all felt they owned an obligation to try
24 to calm this down, because it was their pond.

25 MR. KILKER: No, nobody knew who owned the

1 land. That was the problem. So my client - - -

2 JUDGE SMITH: Despite all those clear and
3 expressed deeds nobody knew who owned the land?

4 MR. KILKER: That's the case. I mean they
5 were really concerned about who owned the bed of the
6 pond, and their examinations, and their inquiry into
7 the past indicates clearly that the plaintiffs own
8 the bed.

9 JUDGE PIGOTT: So really what happens,
10 everybody is assuming that they all own the pond.
11 They had talked to, I think somebody said to the
12 troopers and to the local constabulary, the town
13 board, and no one seemed to be responsive.

14 MR. KILKER: Well, I can't say that they
15 all assumed they owned the pond, but - - -

16 JUDGE PIGOTT: Well, the only reason I'm
17 saying that is they're all meeting to discuss what
18 we're going to do with the pond. I mean they all
19 didn't say, well, it's your problem.

20 MR. KILKER: Nobody knew who owned the bed
21 of the pond.

22 JUDGE PIGOTT: Well, nobody talked about
23 it.

24 MR. KILKER: Right.

25 JUDGE PIGOTT: I mean they're all assuming

1 they do, because they want to calm this thing down,
2 and then at some point someone came up with the
3 bright idea saying, you know, well maybe only one of
4 us owns the pond. I mean, we can run it.

5 MR. KILKER: I can't answer that, Judge.

6 JUDGE PIGOTT: Okay.

7 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
8 you.

9 MR. KILKER: Thank you, Your Honor.

10 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

11 MR. SHOOT: Thank you, Your Honor. Three
12 quick points, one in terms of this language.

13 Obviously, I'm not going to agree or disagree with
14 Judge Smith's point, however, Hammel v. Camp Ranger,
15 where the barrier was, quote, "along the said
16 Pleasant pond", the court found that was a wet
17 boundary, because it was, quote, "synonymous" with
18 "margin", "edge", or "side".

19 In Confer v. Pirman in 1936, this court
20 then affirmed on the opinion of White in 1930, the
21 boundary running southerly along the water "edge" to
22 the outlet of said pond, the water edge.

23 Now, how, in the wake of those cases, can
24 one say that the description of the water's edge is
25 of itself a clear and expressed - - -

1 JUDGE SMITH: What's the name of the second
2 one you mentioned?

3 MR. SHOOT: Confer, C-O-N-F-E-R v. Pirman.

4 The second point is even if in some other
5 context - - - you could say words mean different
6 things in different contexts, but even in some other
7 context, here the water boundary of the 50 feet of
8 retained lake frontage is described exactly the same
9 way as the water boundary of the 1,500 feet of
10 conveyed frontage along the water's edge of Perch
11 Pond.

12 How could anyone looking at that, even
13 someone familiar with this law, say that's a clear
14 and expressed reservation of rights when the same
15 language is used as to both?

16 The last point, which gets to - - - we've
17 heard today a little about the noble efforts here on
18 behalf of the plaintiffs to protect the lake from
19 hooligans.

20 Let me put a bit of this in context, this
21 parol evidence, which I submit we don't get to. The
22 transaction in question occurred in October 1973.
23 There is no proof that dates from the '70s or the
24 '80s as to the Furlanos acting as if or claiming that
25 they own the lake bottom in that time.

1 We now skip to 1993. August of 1993, the
2 plaintiffs here, the Knapps, buy property insurance
3 on this land. What's so interesting about that?
4 They don't own the land yet. They also - - - in
5 fact, their predecessors in title don't own the land
6 yet. It sold in November 1993 from the Furlanos to
7 Burden for 2,000 dollars, and then flipped two months
8 later to the Knapps for 8,500 dollars, a more than
9 400 percent profit in two months.

10 This map that you have at A-11 of the
11 Appendix, the wonderful map - - - a very good map
12 showing the survey, that's done in September of 1993,
13 paid for by the Burdens and the Knapps. What's
14 interesting about that? Neither of them owns the
15 property yet. They're planning their battle for the
16 supremacy of the lake before either of them has
17 acquired title. My time is up.

18 CHIEF JUDGE LIPPMAN: Okay.

19 MR. SHOOT: And I thank the court.

20 CHIEF JUDGE LIPPMAN: Thank you, counsel.

21 Thank you both.

22 (Court is adjourned)

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C E R T I F I C A T I O N

I, Jessica B. Cahill, certify that the foregoing transcript of proceedings in the Court of Appeals of James and Linda Knapp, v. James R. Hughes, et al., No. 175 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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