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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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SCHALLER, J., dissenting. In determining that the trial court properly rendered summary judgment in favor of the defendants, Thomas Buccino and Irma Buccino, the majority concludes that the ownership of the subaqueous land was not a material fact. To reach that conclusion, in the absence of definitive appellate case law in Connecticut concerning recreational use of private bodies of water, the majority adopts as the law of Connecticut a doctrine known as *civil law rule* that has been applied by several state courts, in particular, the courts of Minnesota and Michigan. Although I agree that, given the dearth of pertinent appellate case law in Connecticut, we must look to other sources, I respectfully disagree with the majority's choice of doctrine. I believe that, under the circumstances of this case, the appropriate doctrine is the *common-law rule*, which has been adopted by numerous other state appellate courts, including courts in New Jersey, Pennsylvania and Florida, and which is acknowledged in at least one state as the majority rule. See *Wehby* v. *Turpin*, 710 So. 2d 1243, 1247–50 (Ala. 1998). I believe that the common-law rule is more widely used and produces a more sensible and fair result in situations like the present one. In addition, it is fully consistent with a well reasoned Superior Court decision, *Peck* v. *Edelman*, Superior Court, judicial district of Windham at Putnam, Docket No. 56833 (July 21, 2000) (27 Conn. L. Rptr. 633) (adopting view that subaqueous land ownership necessary to obtain riparian rights).

In *Baker* v. *Normanoch Assn., Inc.*, 25 N.J. 407, 136 A.2d 645 (1957), the New Jersey Supreme Court held that "[t]he rule in this jurisdiction is that the general public [has] no rights to the recreational use of a private lake, such rights being exclusive in the owner of the bed. . . . And while the test for distinguishing between public and private bodies of water is varied in the several states (the majority using the test of navigability in fact) the great weight of authority supports the proposition that small inland lakes are susceptible of private ownership, at least to the extent that the owner or owners of the bed have the sole rights to the recreational uses of the waters. *Lembeck* v. *Nye*, 47 Ohio St. 336, 24 N.E. 686, 8 L.R.A. 579 (Sup. Ct. 1890); *Beckman* v. *Kreamer*, 43 Ill. 447, 92 Am. Dec. 146 (Sup. Ct. 1867); *Marsh* v. *Colby*, 39 Mich. 626, 33 Am. Rep. 439 (Sup. Ct. 1878); *Decker* v. *Baylor*, 133 Pa. St. 168, 19 A. 351 (Sup. Ct. 1890); *Turner* v. *Selectmen of Hebron*, 61 Conn. 175, 22 A. 951, 14 A.L.R. 386 (Sup. Ct. Err. 1891); *Tripp* v. *Richter*, 158 App. Div. 136, 142 N.Y.S. 563 (App. Div. 1913); *Miller* v. *Lutheran Conference & Camp Ass'n.*, 331 Pa. St. 241, 200 A. 646, 130 A.L.R. 1245 (Sup. Ct. [1938]); *Akron Canal & Hydraulic Co.* v. *Fontaine*, 72 Ohio App. 93, 50 N.E.2d 897 (Ct. App. 1943); *Patton*

*Park* v. *Pollack*, 115 Ind. App. 32, 55 N.E.2d 328 (Sup. Ct. 1944); Annotation, 'Inland Lakes—Boating and Fishing,' 5 A.L.R. 1056 (1920); 2 American Law of Property, § 9.49, p. 481 (1952); 1 Thompson on Real Property, § 78, p. 93 (1939); Note, 'Extent of Private Rights in Non-navigable Lakes,' 5 U. of Fla. L. Rev. 166 (1952).

"There have been a few recent departures from the general rule in some of the western states. *Elder* v. *Delcour*, 364 Mo. 835, 269 S.W.2d 17, 47 A.L.R.2d 370 (Sup. Ct. 1954); Wash. U.L. Quarter., 1955, pp. 97–99; 35 Ore. L. Rev. 137 (1956), 40 Minn. L. Rev. 88 (1955); *Coleman* v. *Schaeffer*, 163 Ohio St. 202, 126 N.E.2d 444 (Sup. Ct. 1955); 30 Tul. L. Rev. 332 (1956). See also *Lamprey* v. *Metcalf*, 52 Minn. 181, 53 N.W. 1139, 18 L.R.A. 670 (Sup. Ct. 1893) (dicta).

"The minority view stems from jurisdictions with great numbers of inland waterways where hunting and fishing have become major industries. See 28 Ore. L. Rev. 267, 281 (1949); Note, supra, 5 U. of Fla. L. Rev. Whatever its merit under local circumstances of those jurisdictions, as previously indicated the settled proposition in this State is that the general public has no rights to the recreational use of private lakes." (Citations omitted.) *Baker* v. *Normanoch Assn., Inc.*, supra, 25 N.J. 415–16.

The Supreme Court of Pennsylvania considered the rights of abutting owners of lakes and ponds in *Miller* v. *Lutheran Conference & Camp Assn.*, 331 Pa. 241, 247, 200 A.2d 646 (1938). In that case, the defendant "was the owner of a tract of ground abutting on the lake for a distance of about 100 feet . . . ." Id., 243–44. The plaintiffs had sought an injunction to prevent the defendant from trespassing on the lands covered by the water. Id., 244. The court, applying the common-law rule, held that "[o]rdinarily, title to land bordering on a navigable stream extends to low water mark subject to the rights of the public to navigation and fishery between high and low water, and in the case of land abutting on creeks and non-navigable rivers to the middle of the stream, but in the case of a non-navigable lake or pond where the land under the water is owned by others, no riparian rights attach to the property bordering on the water, and an attempt to exercise any such rights by invading the water is as much a trespass as if an unauthorized entry were made upon the dry land of another." Id., 247.

In applying the common-law rule to a similar situation, the Alabama Supreme Court determined: "We are bound to follow the majority common law rule . . . as the rule of law governing decisions in this state. . . . [W]e apply the common law rule and hold that the owners of land extending beneath artificial or man-made lakes, not navigable as a matter of law, have surface-water rights only in the surface waters above their land. We conclude that the [plaintiffs], in the

absence of some covenant, agreement, or statute to the contrary, have no right to use that portion of the lake beyond the boundaries of their own land.''[1] (Citation omitted.) *Wehby* v. *Turpin,* supra, 710 So. 2d 1249; see also *Black* v. *Williams,* 417 So. 2d 911, 912 (Miss. 1982) (holding that owners of subaqueous lands only have right to use portions of lake above their land).

Similarly, in *Anderson* v. *Bell,* 433 So. 2d 1202, 1204 (Fla. 1983), the Supreme Court of Florida stated that ''we now hold that the owner of property that lies adjacent to or beneath a man-made, non-navigable water body is not entitled to the beneficial use of the surface waters of the entire water body by sole virtue of the fact that he/she owns contiguous lands.'' The court went on to explain the policy considerations behind the rule it adopted. ''Because the construction of a man-made water body often involves the expenditure of substantial sums of money and the expense is not, as a rule, divided proportionately among the various abutting owners, the individual making the expenditure is justified in expecting that superior privileges will inure to him in return for his investment. In contrast, the abutting owners to a natural water body probably invest proportionally equal amounts for the increased value of the water front property. While there are certainly exceptions to this general scenario, we believe that the [civil law] rule will more often result in an injustice, than in a correct decision.'' Id., 1205. The court also explained that ''[a]nother concern of ours involves the difficulty in limiting [the civil rule]: Does an adjoining landowner to a drainage ditch have the right to follow the water surface and use all adjacent waters? Of equal concern would be the application of this rule to artificial alterations to water-courses. . . . Further, we are concerned that a contrary rule would place the owners of adjacent land in an unequal bargaining position with respect to flowage rights sought by the person constructing the lake. Adjacent landowners would be in a position to set exorbitant prices for the flowage rights on their land knowing that they would receive full beneficial use of the lake irrespective of the price. This, we believe, may also frustrate the development of these waters, which is capital improvement we should not discourage.'' Id., 1206.

The majority relies, in part, on 4 Restatement (Second) of Torts, Riparian Rights § 843, comment (e) (1991), which addresses the impact of ownership of subaqueous lands on water use. Notably, although the Restatement would allow the use, the use would be severely restricted because it *could not* ''involve a trespass on the land underlying the water.'' Id. That would, seemingly, make ingress and egress from the water very difficult. In addition, one commentator has explained that courts ''must be careful in relying on the Restatement (Second) of Torts to resolve the uncertainties that abound in most states under riparian rights

theory . . . [because] the Restatement (Second) substantially departs in significant ways from established riparian rights law.'' 1 R. Beck, Waters and Water Rights, (1991 Ed.) § 6.01 (c), pp. 6-85–6-86. Beck explains that this deviation is attributable to the reporter's predilection to ''make water more available for different kinds and places of use than was possible under traditional riparian rights.'' Id., § 6.01 (c), p. 6-88. The Restatement (Second) thus deviates from the established law to ''enlarge the areas that qualify as riparian in order to allow the use of water over the widest possible range of lands and uses.'' Id., § 6.01 (c), p. 6-89. We, therefore, should not rely on the Restatement (Second) of Torts in this case.

I believe that the common-law rule, as adopted in the previously discussed cases and the policy considerations explained therein, best fits the needs of the citizens of Connecticut. Further, one of the leading commentators on Connecticut water rights has interpreted our case law to indicate that we have adopted the common-law rule. See R. Reis, Connecticut Water Law: Judicial Allocation of Water Resources (1967) pp. 88–89. Reis states that ''[w]here bed ownership has been severed from the upland, the bed owner may control the use of both the bed and the surface of a pond or lake. . . . Ownership of a lake bed has also been held in Connecticut to include exclusive control over surface water use.'' Id., 89. By virtue of the policy change announced by the majority today, we sweep away the reliance by property owners on the concept that ownership of the all subaqueous lands conveys exclusive riparian rights. Accordingly, because ownership of the subaqueous land is a material fact, I conclude that summary judgment was inappropriate in this case, and I would remand it for further proceedings.

For the foregoing reasons, I respectfully dissent.

[1] Interestingly, Alabama is, by statutory pronouncement, a ''common law'' state. Ala. Code § 1-3-1 (1999) provides: ''The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the Legislature.''